AMERICAN SAMOA
SLIP OPINIONS

2014 Decisions

Covering Certain Opinions
From the Divisions of the
High Court of American Samoa
From January to December 2014

Collected and Disseminated by the High Court of American Samoa
Pago Pago, American Samoa 96799

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As part of an ongoing effort to keep the local bar current with court decisions, the High Court of American Samoa selected and disseminated a number of decisions that it issued in 2014. The Court selected only those decisions that contributed to the development of law in the Territory.

The decisions selected for this slip opinion compilation are from the Appellate Division, Trial Division, Land and Titles Division, and Family Drug and Alcohol Division. However, the Court has also included a supplemental section containing five decisions filed in 2013 that are missing from the 2013 Slip Opinions.

Bear in mind, some of the lower court orders and opinions may yet be appealed. Consequently, attorneys cite the contained lower court decisions at their own peril.

The formatting style for the 2014 Slip Opinions follows the style used in the second set of the 2013 Slip Opinions. The format closely matches the American Samoa Reports. The purpose for such conformity is strictly internal—to simplify the process for editing and formatting the slip opinions when they are eventually published in the American Samoa Reports.

Considering that citing to slip opinions may be new for some members of the bar, there is a gray box preceding every slip opinion indicating how that slip opinion ought to be cited. Moreover, the headnotes are pin-cited. This should make the transition to slip opinion citation more endurable. More slip opinion compilations like these may appear in the near future while we wait on the publication of the American Samoa Reports.

The slip opinions are organized by court division and are listed in chronological order within the court division grouping. There are no page numbers in this volume. All of the page numbers on the individual slip opinions are indicated by bracketed and starred numbers, e.g., "[**2**]." The numbers in each individual slip opinion correspond to the numbers on the physical decisions filed with the Clerk of Courts.

Please take note, the slip opinions that appear herein are not official published versions of those decisions. Readers are directed to the American Samoa Reports for official published High Court and District Court decisions.

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SLIP OPINIONS

OF THE

APPELLATE DIVISION

OF THE

HIGH COURT OF AMERICAN SAMOA

(2014)

Cite As: *Viena v. Am. Samoa Gov't*, AP No. 07-11, slip op. at [page number] (App. Div. June 10, 2014) (op. & order)

SAITAUGA O. VIENA, Administrator of the Estate of August Viena, Petitioner,

v.

AMERICAN SAMOA GOVERNMENT, Respondent.

High Court of American Samoa
Appellate Division

AP No. 07-11

June 10, 2014

[1] The High Court may not substitute its judgment for that of an agency as to the weight of evidence on questions of fact, and must afford appropriate weight to the agency's experience, technical competence, and specialized knowledge when reviewing the agency's interpretation of evidence, factual inferences, and conclusions of law.

[2] The Court may reverse or modify an agency's decision or remand it back for further proceedings upon deciding the substantial rights of the petitioner have been prejudiced because the agency's decision: (1) violated applicable constitutional or statutory provisions; (2) was in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or (6) was arbitrary, capricious or characterized by abuse of discretion.

[3] Under the implementing administrative rules, A.S.A.C. § 4.0808 supplies an initial set of procedures to be followed when a position is abolished.

[4] Once placed on the reemployment register, the administrative rules require special treatment of the displaced employee by the Director of Human Services with respect to any open positions in the career service. These rules are designed to effect the prompt reemployment of such individuals.

[5] Pursuant to A.S.A.C. § 4.0902, an employee whose position was abolished may "appeal" his reduction-in-force status before the Personnel Advisory Board.

[6] A separated employee is afforded sufficient time to exhaust his alternative reemployment or reduction-in-force options before filing for a hearing with the Personnel Advisory Board under the rules and is not required to file within 10 calendar days from his notice of the reduction-in-force from the Director of Human Services.

[7] Under A.S.A.C. § 4.0808(d), consistent with the equitable treatment of employees affected by reductions in force required under A.S.C.A. § 7.0806, the Director of Human Resources must place terminated career service employees on the reemployment register and effect territory-wide R.I.F. procedures.

[8] Once an employee is placed on the reemployment register, the administrative rules impose a duty upon the Director and Department of Human Services to place that individual in the next available open career service position, non-competitively.

[9] Failing placement of a separated employee in the next available open noncompetitive career service position, the language of A.S.A.C. § 4.0808(d) strongly indicates the Director of Human Services must effect a "Territory-wide" reduction-in-force.

[10] Judicial review of final agency decisions under the Administrative Procedures Act are initiated by filing a petition with this court within 30 days from the issuance date of the agency decisions (initial or upon reconsideration).

[11] Pursuant to A.C.R. 15, a petition for review of a final agency decision shall specify the parties seeking review, naming the agency that issued the order as the respondent, and specify the agency order or part thereof to be reviewed. , and provide the Clerk of Courts with a copy of the petition for each named respondent, which the clerk shall serve. .

[12] Under A.C.R. 15, within 20 days after service, the respondent shall file an answer to the petition.

[13] Unless either party so requests the Court to further brief the issue or, by motion, seeks to supplement the record, the Court proceeds to the immediate review of the record after receiving respondent's answer.

[14] When plaintiff's counsel filed a "Notice of Appeal" instead of petition conforming to statute and rule, no answer had been filed, and both parties proceeded with briefs without notifying the Court, the briefs were stricken from the record and the Court confined its review to the administrative record filed in the case.

[15] The Court had no authority under its limited judicial review powers to direct the Executive Branch Departments, officers, or agencies involved with the termination and failure to timely rehire an individual who was in a career service position, to review and address the matter when the time limit for a contested case hearing and decision before the Personnel Advisory Board had expired 30 days after the individual filed his complaint. Instead, it could only remand the matter to the Personnel Advisory Board.

Before KRUSE, Chief Justice; RICHMOND, Associate Justice; WARD, Associate Justice; LOGOAI, Chief Associate Judge; and MAMEA, Associate Judge

Counsel: For Petitioner, Mark F. Ude
For Respondent, Masaya Uchino, Assistant Attorney General

OPINION AND ORDER

WARD, Associate Justice:

In this matter we review for legal sufficiency the Executive Branch actions and decisions concerning the abolishment of an encumbered position within the American Samoa Government ("A.S.G.") Career Service. Under the Administrative Procedures Act ("A.P.A."), A.S.C.A. §§ 4.1001-1044, the Appellate Division is authorized by the Legislature to review certain Executive Branch agency decisions. Strict construction of the statues providing for this review is required to avoid Judicial Branch encroachment upon Executive Branch powers and duties. **[**2**]**

Our review of the record filed in this matter reveals substantial non-compliance with the statutes and administrative rules which establish the personnel procedures to be followed when a career service employee, through no fault of his own, loses his position because of funding cuts or revenue short-falls. Although we hold that the decisions made by the Executive Branch officials in this matter were not in accordance with law, the continuing procedural errors engaged in by both counsel and the Administrative Law Judge ("A.L.J.") preclude this Court from fashioning any direct remedy.[1]

[1] We also note that during the pendency of this case, the Petitioner, August Viena, passed away, and, pursuant to A.C.R. 43(a), his widow, Saitauga O. Viena who has been appointed the Administrator of his estate, is now the Petitioner herein.

Standard of Review

[1-2] Pursuant to statute, we judicially review the record filed by the agency of government issuing the final decision in a contested case. A.S.C.A. §§ 4.1040 and 4.1043. This Court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact, and must afford appropriate weight to the agency's experience, technical competence, and specialized knowledge when reviewing the agency's interpretation of evidence, factual inferences, and conclusions of law. A.S.C.A. § 4.1043. Upon deciding the **[**3**]** substantial rights of the petitioner have been prejudiced because the agency's decision is:

(1) In violation of applicable constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Affected by other error of law;
(5) Clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or
(6) Arbitrary, capricious or characterized by abuse of discretion;

the court may reverse or modify the agency's decision or remand it back for further proceedings. A.S.C.A. § 4.1044.

Background

August Viena ("Viena") was a veteran career service employee of A.S.G. when he was selected from his former supervisory position with the Department of Public Works to serve as Deputy Director of Territorial Office of Homeland Security ("T.O.H.S.") in 2003. In early 2007, then Governor Tulafono issued an Executive Order combining several Executive branch Offices, including T.O.H.S., into a single Department of Homeland Security. Michael Sala was appointed as Acting Director of this new Department. Mr. Sala promptly learned that Federal funding for the old T.O.H.S. had been frozen and local funds for the new department and its employees were virtually non-existent. Federal funding ceased on 9 March 2007. The Director of Human Resources notified the department staff, **[**4**]** including Viena, on 19 March 2007 that their last working date was of even date, and they were being laid off immediately pursuant to "Lay-off-Reduction-in-force." In late August 2007, Acting Director Sala sent a letter to the Director of Human Services advising the Director that the federal funds remained frozen and that the career service employees of the D.H.S. who had been "furloughed" be "placed in the register or applicant supply file . . . in the manner specified and pursuant to the laws."

On 5 November 2007, Viena, through his former attorney, filed a "Complaint" with the A.L.J's Office naming the Office of the Governor, American Samoa Government, Governor Togiola T. Tulafono and Director of Human Resources as Defendants/Respondents. In response to a formal answer being filed, Viena's attorney filed his first set of interrogatories on 12 December 2007.

The matter appears to have languished until Viena's present attorney took over the case months later. A motion by the Assistant Attorney General to Quash Subpoenas issued to the Governor and others by Viena was filed on 20 October 2010. Hearings in this matter were conducted by the A.L.J. in November and December 2010, by which time Viena had been hired (in May 2010) by Congressman Faleomavaega at his local office. **[**5**]**

At the 16 December 2010 hearing, the then current Director of Human Resources testified that in reduction-in-force matters, "There's a notification, placement of individual within existing department affected by the reduction-in-force. The placement of that employee is not possible within that agency they are notified for termination and placed on a register for a period of one year to be considered for another employment within the government for vacancies that may exist." ALJ Hr'g Tr. 15-16. Further testimony by the Director stated "Once they are on the register, the Reduction In Force Register, if there are vacancies to where the applicant qualifies for that position, they can be considered, screened if they are eligible. And if they rank in the top five for the most qualified, their names are forwarded to that department for hiring during the interview. But the ultimate final selection is made by that department" and further, "The only requirement for the reduction-in-force register is that they are placed on the register for consideration for hiring for positions they are qualified for but there's no mention in the records." ALJ Hr'g Tr. 16, 22.

Viena also testified on 16 December 2010 hearing at the hearing stating that he had applied for various A.S.G. positions (including some appointive positions outside of career service employment in the Judiciary and with A.S.P.A.). Specifically, **[**6**]** he mentioned applying for an open position with the Coastal Zone Management that he had previously held from 1990-94. ALJ Hr'g Tr. 32- 33. But he was unable to secure employment until he was hired in May 2010 by the Congressman.

On 19 August 2011, the A.L.J. issued an Order Adopting Findings of Fact and Conclusions of Law and Decision holding that the reduction in force ("R.I.F.") was necessary because of lack of funding. Further, the A.L.J. held that A.S.G. complied with A.S.A.C. § 4.0808, "namely: that

the notification of the Reduction In Force to affected employees was done immediately because of the frozen federal funds and then their names were put on the Reemployment Registry." Viena was denied any relief by this Order.

An Order Denying Motion for Reconsideration was issued by the A.L.J. on 4 October 2011. A "Notice of Appeal" was filed by Viena's counsel with this Court on 13 October 2011.

Discussion

1. Statutory and Administrative Rule Overview

The statute governing the abolishment of career service employment positions is A.S.C.A. § 7.0806, which reads:

> 7.0806 Abolishment of positions.
> (a) Abolishment of an encumbered position in the career service due to the lack of work or funds, or reorganization, and separation of the incumbent from such, position, shall constitute a reduction in force. **[**7**]**
> (b) The Director of Manpower Resources shall establish and administer rules and regulations governing the disposition of employees affected by the reductions in force, which shall give due recognition to merit and fitness, length of service, tenure, and type of appointment, *thus insuring equitable treatment of the latter*." (Emphasis added).

[3] Under the implementing administrative rules, A.S.A.C. § 4.0808 supplies an initial set of procedures to be followed when a position is abolished, state in relevant part:

> (a) When there is an impending layoff because of lack of funds . . . the department head shall notify the director and the affected employee(s) in writing as soon as possible byt at least 60 days in advance of the layoff unless cutoff of funds requires a shorter notice period, in which case such requirement must be stated in writing.
> . . . .
> (c) The department head shall exhaust all possibilities in placing the employee within his department *before a territory-wide reduction-in-force is effectuated*.
> (1) When there is no appropriate vacant position in which the career service employee may be placed, the department shall follow the order below in determining which employee shall be displaced
> . . . .

(d) If the department head is unable to place the employee, he shall immediately notify the director [of human resources], who will issue the 2-week notice of termination, *place the employee on the reemployment register, and effect territory-wide RIF procedures*."[2] (Emphasis added). **[**8**]**

[4] Once placed on the reemployment register, the administrative rules require special treatment of the displaced employee by the Director of Human Services with respect to any open positions in the career service.[3]

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[2] Although separate administrative rules dictate the procedures for re-hiring the displaced employee from the reemployment register, the rules provide no further guidance as to how the territory-wide reduction-in-force is to be effectuated. (The term "Bumping," however, is defined under A.S.A.C. § 4.0220 to mean: ". . . the replacement of an incumbent subject to reduction-in-force by another employee who has greater seniority.").

[3] These rules appear to be designed to effect the prompt reemployment of such individuals in lieu of a territory-wide reduction-in-force. These rules read, in pertinent part:

4.0303 Competitive-noncompetitive procedures applicability.
Vacancies can either be filled competitively or noncompetitively.
. . . .
(b) Noncompetitive procedures apply to the following types of actions:
. . . .
(5) Reinstatement of a former ASG employee who has completed his probationary period in the career service to the same or similar class that he held previously in the government;

* * * * *

4.0309 Registers of eligible applicants.
The following types of registers shall be established and maintained by the office of man-power resources;
(a) Reduction-in-force Register.
(1) Composition: A reduction-in-force register will be prepared for each classification, listing the names of all employees who have permanent status and have been notified that they are scheduled for reduction-in-force, or who have held permanent status prior to separation due to a reduction-in-force, or who have accepted a voluntary demotion in a class in lieu of a reduction-in-force. The employee's name shall appear for all classifications in which he held permanent status and, where appropriate, the employee's geographic availability will be shown.
(2) Method of ranking: This register will be ranked according to seniority; those with the largest period of performance rated 4 or better on their final performance evaluation will be placed at the

These rules appear to be **[**9**]** designed to effect the prompt reemployment of such individuals in lieu of a territory-wide reduction-in-force.

[5-6] Pursuant to A.S.A.C. § 4.0902, an employee whose position was abolished may "appeal" his reduction-in-force status before the Personnel Advisory board ("P.A.B.") (the A.L.J. acting as a hearing s officer during that proceeding). As we held in *Solomuli v. Dept. of Health*, Ap. No. 06-08 (App. Div. May 14, 2009), in such cases the separated employee is not required to file with the P.A.B./A.L.J within 10 calendar days from his notice of the reduction-in-force from the Director of Human Services; the employee is afforded sufficient time to exhaust his alternative reemployment or reduction-in-force options before filing for a hearing under **[**10**]** this rule. That hearing is then conducted pursuant to the timelines and procedures set forth under this rule.

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top of the list, the balance of the names placed in descending order. Those with performance evaluations showing ratings of less than 4 will be placed at the bottom of the list, regardless of years of service.

(3) Life of register: An eligible's name will normally remain on this register for one year.

(4) Certification: Names from this list shall be certified first to the selecting authority before those from any open or promotional register.

* * * * *

4.0310 Certification of eligibles.

Requests for certification of eligibles to a position will be submitted by the selecting authority on form Per-35. Authorized position vacancies can only be filled from the list furnished by the office of manpower resources.

(a) Upon receipt of a request for certification, the director shall cause to be prepared an eligible list consisting of:

(1) names of eligible applicants from the reduction-in-force list, in any. The selection must be made from this list if one exists;

* * * * *

4.312 Reinstatement after separation.

(a) Any person who has satisfactorily completed a probationary period in the career service and who has separated therefore, may be reinstated to a position with the same or similar duties to those he previously performed, provided his reemployment is not prohibited by rules or laws relating to the reemployment of employees separated for cause or who have abandoned their positions.

(b) Reinstatement to the same class of work or grade previously held is noncompetitive.

2. Analysis

[7] It is clear from the record in this case and with the *Solomuli* case, *supra*, that the Department of Human Resources has failed to comply with either the statutory mandates of the *Fono* or with its own administrative rules in matters involving the abolishment of career services positions caused by loss of funding. Under A.S.A.C. § 4.0808(d), consistent with the equitable treatment of employees affected by reductions in force required under A.S.C.A. § 7.0806, the Director of Human Resources must place terminate career service employees "on the reemployment register and effect territory-wide R.I.F. procedures."

[8-9] Once the employee is placed on the reemployment register the administrative rules impose a duty upon the Director and Department of Human Services to place that individual in the next available open career service position, non-competitively. *See* A.S.A.C. §§ 4.0303, 4.0310, 4.0312. Failing such placement, the language of Rule 4.0808(d) strongly indicates the Director must effect a "Territory-wide" R.I.F. In the instant matter, the record reveals that Viena could, and under the applicable **[**11**]** administrative rules should, have been timely placed in the vacant position within the Coastal Zone Management Program which he had previously held as a career service employee.

The testimony of the then-current Director of Human Services at the A.L.J. hearing, and the resultant decision of the A.L.J. in this matter, stand for exactly the opposite approach: that all the statute and rules require are that the R.I.F. affected employee simply be placed on the reemployment registry and nothing else. This practice is not in accordance with the Career Service Statutes or administrative rules.

3. Procedural Errors

In *Louis Segi v. Am. Samoa Gov't*, AP No. 7-12 (App. Div. Aug. 22, 2013), we clearly set forth the procedures for petition this Court for review of final agency decisions under the A.P.A. *See Segi* at 5 n.1.

[10-13] To reiterate: Judicial review of final agency decisions under the A.P.A. are conducted pursuant to the A.S.C.A. §§ 4.1040-4.1044. Proceedings are initiated by filing a *petition* with this court within 30 days from the issuance date of the agency decisions (initial or upon reconsideration). A.S.C.A. § 4.1041. Pursuant to A.C.R. 15(a), the petition shall specific the parties seeking review and the agency order or part thereof **[**12**]** to be reviewed. The agency issuing the order is named as the respondent. Pursuant to A.C.R. 15(c), the petitioner, when filing, shall provide the Clerk of Courts with a copy of the petition for each named respondent, which the clerk shall serve. All other parties to the administrative hearings before the agency are required to be served

by the petition and a list thereof submitted to the clerk. Within 20 days after service, the respondent shall file an answer to the petition. A.C.R. 15(b). Unless either party so requests the Court to further brief the issue or, by motion, seek to supplement the record, the Court proceeds to the immediate review of the record (as specified in the petition and responded to in the answer). A.S.C.A. § 4.1043.

[14] In this matter, as in the *Segi* case, *supra*, Viena's counsel filed a "Notice of Appeal" instead of petition conforming to statute and rule. No answer has been filed. Both parties proceeded with briefs without notifying the Court. As we held in *Segi*, these briefs are therefore stricken from the record in this matter and we have confined our review to the administrative record filed in this case.[4] **[**13**]**

In addition to the foregoing pleading deficiencies in this matter on review, we are again confronted with a P.A.B./A.L.J. administrative hearing process and ruling that caused us concern in *Segi*. In that case, we held that under the statutory language used by the legislature in amending both the Personnel Advisory Board statute at A.S.C.A. § 7.0104 and the Administrative Law Judge Act of 1998 at A.S.C.A. § 4.0604(b), the A.L.J. was required to timely conduct an administrative contested case hearing and issue a ruling concerning the career service employee's pending removal for cause by the director of Human Resources. *See Segi* at 9-11. The applicable administrative rule which establishes how such career service cases are to be heard and administratively decided is A.S.A.C. § 4.0902, which includes in subsection (b), the requirement that the hearing be conducted and decided within 30 days after the career service employee files with the P.A.B./A.L.J. This is the rule under which the P.A.N. used to conduct such hearings before the statute was amended.[5] Instead of the timely administrative decision owed to Viena, he did not receive a hearing until December 2010 or a decision before August 2011 (by which time he had already secured employment outside of the A.S.G. Career Service). **[**14**]**

Reasoning further, and balancing the career service employee's right to a speedy administrative resolution and timely review by the Appellate Division of the High Court if the employee was aggrieved, we held that

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[4] Counsel appearing herein and the Bar in general are put on notice that any future filings with this court for judicial review under the A.P.A. shall conform to statute and rule. Failure to so comply may result in the dismissal of such cases for failure to properly file within the 30-day period established under A.S.C.A. § 4.1041.

[5] Under A.S.C.A. § 1.0108(b) when a law is repealed or superseded in the Code, existing regulations generally continue in effect until new regulations are issued.

the Legislature intended such hearings to be timely conducted by the A.L.J. pursuant to the Administrative Procedures Act, contested case provisions, rather than under the A.L.J.'s statutory authority to conduct a more formal, prolonged hearing pursuant to the A.L.J.'s general authority to review administrative rulings or decisions on appeal from other administrative agencies pursuant to A.S.C.A. § 4.0604(h) under the special rules, procedures, and standard for such administrative appellate review hearings set forth in A.S.C.A. § 4.0607 and 4.0608. *See Segi* at 7-9.

We reach the same limited interpretation of the statutes and administrative rules in this matter. Viena was entitled to hearing before the A.L.J. conducted pursuant to A.S.A.C. § 4.0902 within 30 days from filing his "complaint" on 5 November 2007.

Conclusion

[15] As we held in *Segi*, we are likewise left here with no clear authority under out limited judicial review powers to direct the Executive Branch Departments, officers, or agencies involved with Viena's career service position termination and their failure to timely rehire him, to review and address this **[**15**]** matter upon remand. The time limit for a contested case hearing and decision before the P.A.B./A.L.J. expired 30 days after Viena filed his "complaint" in 2007.

The only option available is, as in *Segi*, to remand this matter to the P.A.B. to exercise those statutory powers still remaining with the Board, which include, under A.S.C.A. § 7.0102(a)(3), the power to investigate personnel problems in the government and report to the Governor their findings and recommendations. (Pursuant to A.S.C.A. § 7.0110(5), the Director of Human Resources, as Executive Secretary of the P.A.B. assists the Board in such investigations).

We trust the P.A.B. will be able not only to further investigate the apparent failure of the Department of Human Resources to equitably address the re-hiring of Viena in 2007 pursuant to its administrative rules, and determine whether the Estate of Viena is entitled to any compensation, but also address and clarify employees' rights to "territory-wide reduction-in-force" opportunities in future abolishment of position cases. Further, this specific remand to the Board will afford it the opportunity to review its administrative rules governing employee hearings being conducted by the A.L.J. as its hearings officer to better ensure future hearings are conducted in accordance with law. **[**16**]**

Order

It is HEREBY ORDERED that this case is REMANDED to the Personnel Advisory Board for further investigation and review consistent with this opinion.

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Cite As: *Siaumau v. Am. Samoa Gov't*, AP No. 02-13, slip op. at [page number] (App. Div. June 23, 2014) (op. & order)

ELIOTA SIAUMAU, Sr., Appellant,

v.

AMERICAN SAMOA GOVERNMENT, Appellee.

High Court of American Samoa
Appellate Division

AP No. 2-13

June 23, 2014

[1] Pursuant to T.C.R.Cr.P. 46(e)(1), forfeiture is mandatory whenever a defendant breaches a condition of release on bond.

[2] Under T.C.R.Cr.P. 46(e)(2), a determination of whether to set aside forfeiture or whether justice requires enforcement is a matter of judicial discretion.

[3] While one purpose of bail bond is to secure a defendant's presence at trial, forfeiture is not limited only to situations where a defendant fails to appear.

[4] The defendant's violation of three conditions of release on bond by failing to remain a law abiding citizen, leaving the Territory, and failing to surrender his travel documents provided ample grounds for the trial court to revoke bail and forfeit bond under T.C.R.Cr.P. 46(e)(1) regardless of the defendant's ultimate appearance at trial.

[5] The plain text of T.C.R.Cr.P. 46(e)(2) vests the trial court with broad discretion to set aside a forfeiture if it appears that justice does not require enforcement of the forfeiture. But the rule does not require the trial court to set aside forfeiture, nor does it limit the trial court's discretion. Unlike its federal counterpart, T.C.R.Cr.P. 46(e)(2) does not list a defendant's appearance or surrender as a ground for setting aside a forfeiture. Such an omission is a clear indication that a defendant's appearance is not an independent ground, let alone a controlling factor, for setting aside forfeiture in this jurisdiction.

[6] If the Court were to adopt the premise that the court should set aside forfeiture whenever a defendant appears at trial, regardless of his or her failure to comply with other coequal bond conditions, then the Court

would be adding to T.C.R.Cr.P. 46(e)(2). This would usurp the trial court's discretion and dilute the potency of bond conditions beyond the self-evident requirement that the defendant appear at trial.

[7] Trial courts in this jurisdiction may consider all relevant factors for bail revocation and bond forfeiture determinations, including those set forth in *Frias-Ramirez*, when exercising their discretion under T.C.R.Cr.P. 46(e)(2).

Before RICHMOND, Associate Justice; TASHIMA,[*] Acting Associate Justice; PATEA,[**] Acting Associate Justice; FAAMAUSILI, Associate Judge; and SATELE, Associate Judge

Counsel: For Appellant, Sharron I. Rancourt
For Appellee, Jessica Bargman, Assistant Attorney General

OPINION AND ORDER

PATEA, Acting Associate Justice:

Background

In April, 2009, Appellee American Samoa Government ("ASG") filed a criminal complaint in the District Court charging Appellant Eliota Siaumau, Sr. ("Siaumau") with two counts of unlawful use of a weapon, two counts of possession of a firearm without a license, illegal discharge of a firearm, public peace disturbance, assault in the first degree, assault in the second **[**2**]** degree, and three counts of assault in the third degree.[1] The District Court admitted Siaumau to bail secured by a $100,000 bond with the following conditions: (1) remain a law-abiding citizen; (2) make all court appearances; (3) maintain contact with defense counsel; (4) do not leave or attempt to leave the Territory; (5) surrender certificate of identity; (6) do not contact complaining or government witnesses; and (7) do not possess any firearms or deadly weapons. Siaumau's release on bond and the accompanying conditions was maintained by the High Court after the matter was bound over from the

[*] The Honorable A. Wallace Tashima, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, serving by designation of the Secretary of the Interior.

[**] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

[1] Pursuant to A.S.C.A. § 3.0208(a), following Siaumau's initial appearance and a subsequent finding of probable cause to support the charges, the District Court bound over the case to the High Court. On May 8, 2009, ASG filed an 11-count information in the High Court (CR 53-09) identical to the complaint previously filed in the District Court.

District Court.

While trial was pending, Siaumau was arrested by vehicle, and a misdemeanor charge of driving under the influence of alcohol (CR 27-11). Siaumau ultimately pleaded guilty to misdemeanor charges in that case and was sentenced to a term of imprisonment of two years. The execution of sentence was suspended and Siaumau was placed on probation for a term of two years. Although Siaumau's arrest and conviction amounted to a violation of the conditions of his release on bond imposed in CR 53-09, ASG did not revoke bail. **[**3**]**

In March 2011, ASG learned that Siaumau had violated additional conditions of release when he obtained a new passport on September 9, 2009, and left the Territory (and returned) on six separate trips between October 2009 and March 2011. Based on these violations and his conviction in CR 27-11, ASG moved to revoke bail. Siaumau stipulated to all of the violations during a bail revocation hearing. The court granted ASG's motion, revoked bail, remanded Siaumau to custody pending trial, and ordered forfeiture of the $100,000 bail bond pursuant to T.C.R.Cr.P. 46(e)(1).

Following a five-day jury trial in May 2011, Siaumau was found not guilty on all counts.[2] One year later, in May 2012, Siaumau moved to set aside the forfeiture as provided by T.C.R.Cr.P. 46(e)(2). Initially, ASG had no objection to releasing the bond. However, at a subsequent hearing following written briefing, ASG took "no position" and did not offer any argument opposing Siaumau's motion. The court found that Siaumau's repeated and flagrant violations clearly demonstrated a disregard to comply with the conditions of his release on bond, and denied his motion to set aside forfeiture. The court denied subsequent Motion to Reconsider on similar grounds, and Siaumau timely filed notice of this appeal. **[**4**]**

For the reasons set forth below, we affirm the trial court's order declining to set aside forfeiture of the full $100,000 bail bond.

Standard of Review

A trial court has "virtually unbridled discretion in" deciding whether to set aside forfeiture. *United States v. Diaz*, 811 F.2d 1412, 1415 (11th Cir. 1987). Thus, a trial court's denial of a motion to set aside forfeiture is reviewed for abuse of discretion. *United States v. Nguyen*, 279 F.3d 1112, 1115 (9th Cir. 2002). "An abuse of discretion is a 'plain error,

[2] Siaumau was ultimately tried on five of the initial eleven charges: two counts of unlawful use of a weapon, discharge of a firearm, public peace disturbance, and assault in the first degree.

discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'" *Faifaiese v. Am. Samoa Gov't,* 6 A.S.R.3d 10, 19 (App. Div. 2002) (quoting *Wing v. Asarco Inc.,* 114 F.3d 986, 988 (9th Cir. 1997); *see also Agasiva v. Am. Samoa Gov't,* 8 A.S.R.3d 6, 12 (App. Div. 2004). An appellate court will not reverse under the abuse of discretion standard "unless it has a definite and firm conviction" that the trial court's judgment was clearly erroneous based on the weight of relevant factors. *See Faifaiese,* 6 A.S.R.3d at 19.

Discussion

[1-2] Pursuant to T.C.R.Cr.P. 46(e)(1), forfeiture is mandatory whenever a defendant breaches a condition of release on bond. *See Am. Samoa Gov't v. Togialeoli,* 30 A.S.R.3d 130, 131 (Trial **[**5**]** Div. 1996) (the rule "does not seem to provide any discretion whereby we may not order forfeiture of bail if a condition of the bond is violated").[3] In contrast, under Rule 46(e)(2), a determination of whether to set aside forfeiture or whether justice "require[s] . . . enforcement" is a matter of judicial discretion.[4] The sole issue in the instant appeal is whether the Trial Division abused its discretion in declining to set aside forfeiture after Siaumau violated three conditions of release—specifically, that he remain a law abiding citizen, not leave the Territory, and surrender his travel documents.

Siaumau's main argument is that the primary purpose of a bail bond is to secure a defendant's presence at trial. Siaumau maintains that because he voluntarily appeared at his bond revocation hearing and ultimately appeared at his scheduled trial date, the bail bond fulfilled its intended purpose and, therefore, the court should set aside forfeiture. This argument presents a myopic view of bail bonds and, in a veiled fashion, **[**6**]** hints that Siaumau's violations were not serious enough to warrant forfeiture in the first place.

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[3] There continues to be some confusion regarding the compulsory nature of bail forfeiture under Rule 46(e)(1). In both this case and *Am. Samoa Gov't v. Stephens,* 2 A.S.R.3d 116, 118 n.1 (Trial Div. 1998), the trial court "revoked [the] defendant's bail" for violation of a bond condition but "took under advisement the issue of bond forfeiture." These misapplications of Rule 46 warrant emphasizing that when a defendant violates a bond condition, the court *must* "declare a forfeiture of the bail." T.C.R.Cr.P. 46(e)(1).

[4] *Compare* T.C.R.Cr.P. 46(e)(1) ("If there is a breach of condition of a bond, the [court] *shall* declare a forfeiture of the bail.") (emphasis added) *with* T.C.R.Cr.P. 46(e)(2) ("The court *may* direct that a forfeiture be set aside . . . .") (emphasis added).

[3] While one purpose of bail bond is to secure a defendant's presence at trial, forfeiture is not limited only to situations where a defendant fails to appear. *United States v. Vaccaro,* 51 F.3d 189, 192 (9th Cir. 1995); *see also United States v. Gigante,* 85 F.3d 83, 85 (2d Cir. 1996) (citing precedent from the United States Courts of Appeal for First, Fifth, Seventh, Ninth, and Tenth circuits, that bail may be forfeited for violation of bond conditions other than a defendant's failure to appear). A number of federal courts have found forfeiture warranted based solely on a defendant's breach of the travel restrictions in his bond. *See United States v. Dunn,* 781 F.2d 447, 451 (5th Cir. 1986); *United States v. Stanley,* 601 F.2d 380, 382 (9th Cir. 1979) (per curiam); *Babb v. Untied States,* 414 F.2d 719, 723 (10th Cir. 1968). Similarly, "courts have specifically upheld forfeiture for violation of 'break no laws' conditions." *Vaccaro,* 51 F.3d at 192-93 (citing *United States v. Santiago,* 826 F.2d 499, 505 (7th Cir. 1987)); *Nebraska v. Hernandez,* 511 N.W.2d 535, 538 (Neb. Ct. App. 1993).

[4] Against the weight of federal cases and the undisputed facts of the case at bar, Siaumau's argument concerning the purpose of bail bonds cannot stand. Shortly after he was admitted to bail and continuing until two months before his **[**7**]** trial date, Siaumau violated three bond conditions on nine separate occasions. Federal courts have ordered forfeiture for far less, including a singular breach of each of the separate bond conditions violated by Siaumau. *See, e.g., Vaccaro,* 51 F.3d at 190 (affirming forfeiture for a single violation of "break no laws" condition); *Stanley,* 601 F.2d at 381-82 (affirming forfeiture for a single violation of a travel restriction); *United States v. Chapel,* 480 F. Supp. 588, 590-91 (D.P.R. 1979) (ordering forfeiture for failure to surrender passport). Regardless of Siaumau's ultimate appearance at trial, these violations provided ample grounds for the trial court to revoke bail and forfeit bond under T.C.R.Cr.p. 46(e)(1).

[5][6] However, forfeiture is not necessarily permanent. The plain text of T.C.R.Cr.P. 46(e)(2) vests the trial court with broad discretion to set aside a forfeiture if it appears that justice does not require enforcement of the forfeiture. But the rule does not require the trial court to set aside forfeiture, nor does it limit the trial court's discretion. Unlike its federal counterpart, T.C.R.Cr.P. 46(e)(2) does not list a defendant's appearance or surrender as a ground for setting **[**8**]** aside a forfeiture.[5] Such an omission is a clear indication that a defendant's appearance is not an

[5] Federal Rule of Criminal Procedure 46(f)(2) states

> The court may set aside in whole or in part a bail forfeiture upon any condition the court may impose if:
> (A) the surety later surrenders into custody the person released on the surety's appearance bond; or
> (B) it appears that justice does not require bail forfeiture.

independent ground, let alone a controlling factor, for setting aside forfeiture in this jurisdiction. If we adopt the underlying premise of Siaumau's argument here—that the court should set aside forfeiture whenever a defendant appears at trial, regardless of his or her failure to comply with other coequal bond conditions—then we would be inserting into the rule the very provision that has been omitted. Such a holding would usurp the trial court's discretion and dilute the potency of bond conditions beyond the self-evident requirement that the defendant appear at trial. We will not sanction such an imprudent approach.

Ancillary to his principal argument that the trial court discounted his appearance at trial, Siaumau also argues that the court abused its discretion by placing undue emphasis on the "deterrence value" of forfeiture. Siaumau concedes that deterrence is a permissible consideration but claims the trial court inappropriately "prioritize[d] deterrence over all other factors." *See generally Bandy v. United Sates*, 81 S. Ct. 197 **[**9**]** (Douglas, Circuit Justice 1960) ("It is assumed that the threat to forfeiture of one's goods will be an effective deterrent to the temptation to break the conditions of one's release."); *United States v. Gambino*, 17 F.3d 572, 575 (2d Cir. 1994) (holding that deterrence is a "factor to be considered").

Contrary to Siaumau's argument, a review of the record does not show that the trial court emphasized deterrence over any other consideration. Rather, in addition to deterrence, the trial court denied Siaumau's motion to set aside forfeiture based on his "lack of deference to the laws of this Territory," the "unambiguously willful" nature of his violations, the "inconvenience" to ASG, and the general "interest of justice." Thus, we hold that the trial court properly exercised its sound discretion by considering a broad range of factors when it declined to set aside forfeiture.

Finally, Siaumau argues that under a multi-factor analysis employed by many federal and state courts, but not adopted in American Samoa, the circumstances in this case warrant setting aside forfeiture. *See United States v. Frias-ramirez*, 670 F.2d 849, 852 (9th Cir. 1982); *Hernandez*, 511 N.W. at 539-40.[6] **[**10**]** Specifically, after conceding the

[6] In *Frias-Ramirez*, the Ninth Circuit compiled a number of factors adopted by various federal appellate courts into six overall considerations: (1) the willfulness the defendant's breach of the bond conditions; (2) the participation of the sureties in apprehending the defendant; (3) the cost, inconvenience, and prejudice suffered by the government as a result of the defendant's breach; (4) any mitigating factors; (5) whether the sureties were professionals or family and friends of the defendant; and (6) the appropriateness of the amount of the bond. 670 F.2d at 852 (citing *United States v. Mizani*, 605 F.2d 739, 740 (4th

willfulness of his bond violations, Siaumau addresses three additional factors: (1) the cost, inconvenience, and prejudice suffered by the government; (2) mitigating circumstances; and (3) the appropriateness of the bail amount.

[7] We neither adopt nor reject the *Frias-Ramirez* compilation of factors as the definitive standard in this jurisdiction. Trial courts in this jurisdiction may consider all relevant factors, including those set forth in *Frias-Ramirez*, when exercising their discretion under T.C.R.Cr.P. 46(e)(2). Reviewing the record below of the trial court's determination of the additional factors addressed by Siaumau, we are not left with the definite and firm conviction that the trial court's finding are clearly erroneous.

In sum, we hold that the trial court's exercise of its discretion to set aside forfeiture is not only justified by the evidence but also well within the logic and effect of the facts as are found. **[**11**]**

Order

We AFFIRM the Trial Division's order denying Siaumau's motion to set aside forfeiture of the full $100,000 bail bond. It is so ordered.

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Cir. 1979) (factor six); *Stanley*, 601 F.2d at 382 (factors one through four); *United States v. Bass*, 573 F.2d 258, 260 (5th Cir. 1978) (factor five)).

Cite As: *Progressive Ins. Co. Ltd. v. Estate of Jonathan Tagaloa*, AP No. 16-12, slip op. at [page number] (App. Div. Aug. 5, 2014) (op. & order)

PROGRESSIVE INSURANCE COMPANY (PAGO PAGO) LTD., Appellant,

v.

ESTATE OF JONATHAN TAGALOA, JEFFERY TAGALOA, ESTATE OF FA'ATUPUTALA IONA, MR. IONA, FA'ALOGOA'E TAGALOA, NIO SANELE FILO, TAMALIILEUPAIA TAGOA'I, ROCKY SAFITI, and NATIONAL PACIFIC INSURANCE AS WORKMEN'S COMPENSATION INSURER, Appellees.

High Court of American Samoa
Appellate Division

AP No. 16-12

August 5, 2014

[1] When a court's decision is one of statutory interpretation, it is purely a question of law.

[2] Rental car companies do not fall under the insurance mandate of A.S.C.A. § 22.2003(3) because the plain and ordinary meaning of "transportation of passengers for hire" does not encompass rental or leased vehicles, and "driver fare-paying passengers" does not encompass drivers and passengers of rental or leased vehicles.

Before: WARD, Associate Justice; TASHIMA,[*] Acting Associate Justice; PATEA,[**] Acting Associate Justice, LOGOAI, Chief Associate Judge, FA'AMAUSILI, Associate Judge

Counsel: For Appellant, Roy J. D. Hall, Jr.
For Appellees, Sharron I. Rancourt

[*] The Honorable A. Wallace Tashima, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, serving by designation of the Secretary of the Interior.

[**] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

OPINION AND ORDER

PATEA, Acting Associate Justice: **[**2**]**

Background

This action arose out of a vehicle accident. One of the vehicles involved was a leased van, owned by Pago Rental Services Company and insured by Appellant Progressive Insurance Company ("Progressive"). The driver of the leased van lost control and collided with a truck that was parked on the side of the road. The driver and a passenger in the leased van died as a result of the accident.

Pursuant to T.C.R.C.P. 22 and 57, Progressive filed a complaint for interpleader and declaratory judgment, seeking to have the Court determine what insurance benefits should be paid to whom. Progressive simultaneously filed a motion to deposit funds, seeking an order discharging it from further liability after depositing $20,000 in the Court's registry.

Two parties to the action filed a partial opposition to Progressive's motion to deposit funds, arguing that Progressive was statutorily required, under A.S.C.A. § 22.2003(3), to deposit $50,000 in the Court's registry. Progressive responded that A.S.C.A. § 22.2003(3) did not apply.

The Trial Division issued its Order to Deposit Funds into Court Registry, determining that "commercial enterprises deriving profits from the use of their automobiles, whether taxicabs, buses or vehicle rental agencies, are all subject to **[**3**]** the same levels of financial exposure" under A.S.C.A. § 22.2003(3). The Trial Division thus directed Progressive to deposit $50,000 in the Court's registry.

The parties eventually settled their respective claims and apportioned recovery awards. The parties did not wish to hold up the release of funds pending appeal so the parties stipulated to release the $20,000 of undisputed funds. The parties further agreed to let Progressive's appeal run its courses before disbursing, if at all, the remaining $30,000 of funds maintained in the Court Registry. The Trial Division accordingly entered Judgment, declaring that vehicle rental agencies are subject to the financial exposure mandate under A.S.C.A. § 22.2003(3).

Progressive filed its Motion for New Trial, arguing that the Trial Division erred as a matter of law in finding that A.S.C.A. § 22.2003(3) applied to rental car companies. The Trial Division denied the motion, and Progressive timely filed its Notice of Appeal. Only the Estate of Jonathan Tagaloa, Jeffrey Tagaloa, and Fa'alogoa'e Tagaloa (collectively

"Tagaloa") filed a responding brief in this appeal.

Standard of Review

[1] When a court's decision is one of statutory interpretation, it is purely a question of law. *United States v. Blue Cross* **[**4**]** *Blue Shield of Mich.*, 859 F.Supp. 283, 286 (E.D. Mich. 1994). The Appellate Division of the High Court reviews questions of law *de novo*. *Roman Catholic Diocese of Pago Pago v. Avegalio*, 20 A.S.R.2d 70, 73 (App. Div. 1992). In the judicial appeals context, de novo review acknowledges an appellate court owes no formal adherence or deference to the reasoning or conclusions of law a lower court proffers; indeed, de novo review allows the appellate court to entertain and determine an issue of law anew. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231-32 (1991).

Discussion

A.S.C.A. § 22.2003(3)[1] imposes an insurance mandate of $50,000 for

[1] A.S.C.A. § 22.2003(3) states in full:

> An owner's policy of liability insurance:
> (1) shall designate by explicit description or appropriate reference all vehicles with respect to which coverage is thereby to be granted;
> (2) shall insure the person named therein and any other person who uses the vehicle or vehicles with the express or implied permission of the named insured against loss from liability imposed by law for damages arising out of the ownership, maintenance or use of the vehicle or vehicles, subject to limits exclusive of interest and costs, with respect to each such vehicle as follows:
> (A) $10,000 for bodily injury to or death of one person in any one accident;
> (B) subject to said limit for one person, $20,000 for bodily injury to or death of 2 or more persons in any one accident;
> (C) $5,000 for injury to or destruction of property of others in any one accident;
> (3) shall, if the vehicle is being used in the transportation of passengers for hire, including taxicabs, insure the driver and all fare-paying passengers therein against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of the vehicle or vehicles, subject to limits exclusive of interest and costs, with respect to each vehicle as follows:
> (A) $10,000 for bodily injury or death of 1 person;
> (B) $50,000 for bodily injury to or death of 2 or more persons in any one accident;

bodily injury to or death of two or more persons in an **[**5**]** accident involving "the driver an all fare-paying passengers therein" if "the vehicle is being used in the transportation of passengers for hire." The Trial Division determined that "the intent of A.S.C.A. § 22.2003, is that commercial enterprises deriving profits from the use of their automobiles, whether taxicabs, buses or vehicle rental agencies, are all subject to the financial exposure under A.S.C.A. § 22.2003(3)(B) [sic] in sum of $50,000." *Progressive Ins. Co. Ltd. v. Estate of Jonathan Tagaloa*, CA Nos. 21-07, 43-05 & 06-04, slip op. at 2 (Trial Div. Aug. 3, 2012) (judgment). The Trial Division reiterated that because "a rental vehicle agency, just like taxicab and bus operators, derives its profits from a patron's use of their vehicles . . . . A.S.C.A. § 22.2003(3) applies to commercial enterprises that receive a profit from the transportation of passengers, including rental agencies." *Progressive Ins. Co. Ltd. v. Estate of Jonathan Tagaloa*, **[**6**]** CA Nos. 21-07, 43-05 & 06-04 at 5-6 (Trial Div. Nov. 29, 2012) (order denying pl.'s mot. new trial).

The two related issues on appeal are whether: 1) the leasing of vehicles by a commercial rental car company qualifies as "use[] in the transportation of passengers for hire" contemplated in A.S.C.A. § 22.2003(3); and 2) drivers and passengers of leased rental vehicles fall within the mandatory insurance prescriptions of A.S.C.A. § 22.2003(3). If rental car companies fall under A.S.C.A. § 22.2003(3), Progressive properly deposited $50,000 into the Court Registry and the remaining $30,000 may be disbursed in accordance with the Parties' settlement agreement. If, however, rental car companies do not fall under the insurance mandate of A.S.C.A. § 22.2003(3), then the $30,000 in the Court Registry must be returned to Progressive.

[2] We hold that rental car companies do not fall under the insurance mandate of A.S.C.A. § 22.2003(3) because the plain and ordinary meaning of "transportation of passengers for hire" does not encompass rental or leased vehicles, and "driver fare-paying passengers" does not encompass drivers and passengers of rental or leased vehicles.

The starting point for the interpretation of a statute is the language of the statute itself. *Kaiser Aluminum v.* **[**7**]** *Bonjorno*, 494 U.S. 827, 835; *see Nua v. Sunia*, 4 A.S.R.3d 208 (Trial Div. 2000). "Words are to be understood in their *ordinary* sense, except that words defined or explained are to be understood as so defined or explained." A.S.C.A. § 1.0106 (emphasis added). Thus, where the *Fono* has omitted a definition for a term or phrase in a statute, the Court is bound to interpret the term or phrase as having the definition of its ordinary and plain use. *See Letuli v. Gov't of Am. Samoa,* 4 A.S.R. 830, 832 (Trial Div. 1975).

(C) $10,000 for injury to or destruction of property of others in any one accident.

Absent a clearly expressed legislative intent to the contrary, the plain language of a statute must ordinarily be regarded as conclusive. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

The *Fono* did not define the terms within the phrases "the driver and all fare-paying passengers therein" and "transportation of passengers for hire" when it enacted A.S.C.A. Title 22, chapter 20 (Compulsory Insurance). The courts are therefore bound to interpret such terms according to their plain and ordinary use. The plain and ordinary meaning of "transport" is to carry or convey from one place to another, and "transportation" is the movement of goods or persons from one place to another, by a carrier. BLACK'S LAW DICTIONARY 1537 (8th ed. 2004); *see Carey v. Saffold*, 536 U.S. 214, 219-20 (2002) (using a dictionary to discover a phrase's plain **[**8**]** meaning). "Carrier" is one that contracts to transport passengers or goods for a fee. BLACK'S LAW DICTIONARY at 226. "Passenger" is one who gives compensation for a ride. BLACK'S LAW DICTIONARY 1012 (5th ed. 1979). "Hire" is to engage the labor or services of another for wages or other payment. BLACK'S LAW DICTIONARY 748 (8th ed.2004). When the ordinary meaning of the terms used in § 22.2003(3) are considered, it is clear to us that the provision only applies to vehicles which are engaged by a person to convey that person from one place to another for a fee, and the person being conveyed pays for the service. A rental car company ordinarily does not sell a transportation service, nor does it collect wages or payment for transporting persons. This type of commercial activity is more commonly conducted by taxis and buses. Rental car companies, on the other hand, lease vehicles that persons use privately. Thus, the plain and ordinary meaning of "transportation of passengers for hire" and "driver and fare-paying passengers" do not encompass rental vehicles.

In addition, under the doctrine of *in pari material*, a statute's meaning may be determined in light of other statutes on the same subject matter. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972). A.S.C.A. Title 19 (Transportation) comprehensively addresses commercial carriers (chapter 01) and **[**9**]** commercial vehicles (chapter 02).[2] A "commercial carrier" is defined as "a person operating a commercial means of conveyance on or between the islands of American Samoa, excluding aircraft, vessels, or tramway." A.S.C.A. § 19.0101(a). A "commercial vehicle" is defined as "an automobile, automobile truck, motorbus, or other means of overland conveyance including but not

[2] When Public Law 12-65 was enacted in 1972, it contained the bulk of the present A.S.C.A. Title 22, including the compulsory insurance language of A.S.C.A. § 22.2003. The same Public Law 12-65 also included nearly all of A.S.C.A. Title 19. Thus, the *Fono* considered the subsequently-codified A.S.C.A. Title 22 and Title 19 in a single bill when this comprehensive scheme was enacted.

limited to a trailer, semitrailer or other device used as a means of conveyance, not operated upon fixe rails or tracks and *used for the transportation of passengers for compensation*." A.S.C.A. § 19.0101(b) (emphasis added).

In enacting Title 19, the *Fono* also created the Commerce Commission (A.S.C.A. § 19.0102) and empowered the Commission to: "fix or approve the rates, fares, charges, classifications and rules pertaining thereto, of each commercial carrier" (A.S.C.A. § 10.0103(a)(1)); to "supervise and regulate commercial carriers in all other matters affecting the relationship between the carriers and the traveling and shipping public . . ." (A.S.C.A. § 19.0103(a)(5)); to prescribe "regulations applicable to any and all commercial carriers" (A.S.C.A. § 19.01013(b)); and to establish the rates for the amounts of public liability **[**10**]** insurance for commercial vehicles (A.S.C.A. §§ 19.0135(a)). The Commission in turn promulgated rules to fulfill its statutory duties to regulate commercial carriers and commercial vehicles: American Samoa Administrative Code ("A.S.A.C."), Title 19 – Commercial Vehicle Transportation. The regulations for vehicles "*used for the transportation of passengers for compensation*" deal comprehensively with everything from permitting for the commercial driver (A.S.A.C. § 19.0110), to issuance of a certificate of convenience and necessity for the commercial vehicle (A.S.A.C. § 19.0120), to the procedure to be followed in inspecting all commercial vehicles (A.S.A.C. § 19.0150), to requiring that the photo identification of the "operator of a commercial passenger vehicle" be displayed (A.S.A.C. § 19.0161). Throughout the regulations, the Commission specifically refers to the commercial activities of buses and taxis (defined in A.S.A.C. §§ 19.0105(a) and (i), respectively). The Commission even set the rates that buses and taxis may charge "passengers" – A.SA.C. § 19.0170 for taxis, and A.S.A.C. § 19.0180 for buses.

Missing from this extensive body of regulations is any reference to commercial rental vehicles. In short, even the agency that is statutorily tasked to regulate the activities of commercial carriers and commercial vehicles has not strayed from **[**11**]** the statutory definitions of "commercial carriers" and "commercial vehicles," and has not included rental or leased vehicles within the ambit of its regulatory authority.

In their responding brief, Tagaloa urges us to affirm the Trial Division's reasoning that public policy favors a liberal construction of A.S.C.A. § 22.2003(3), citing *Pu'u v. Leupule,* 8 A.S.R.2d 68 (Trial Div. 1988). While the *Pu'u* court's pronouncements with regard to the compulsory insurance statute may be deemed "liberal," any exercise involving the construction of a statute is only appropriate when the provision in

question reads ambiguously.[3] *See Watt v. Alaska*, 451 U.S. 259, 265-66 (1981) ("[The] starting point in every case involving construction of a statute is the language itself."); *see also Ron Pair Enters.*, 489 U.S.at 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."). As the foregoing discussion explicates, A.S.C.A. § 22.2003(3) is not ambiguous and the terms contained therein are to be given their plain and ordinary meaning.

In addition, Tagaloa urges us to uphold the Trial Division's reliance on cases from other jurisdictions that **[**12**]** subject rental car companies to the requirements of statutes that contain some similarity to A.S.C.A. § 22.2003(3). However, such cases are inapposite. Those cases deal with state statutes that specifically addressed how and where rental car companies should be included under that state's compulsory insurance scheme, as well as specific definitions of terms used in those statutes.[4] American Samoa law contains no similar statutorily delineated guidance. Therefore, we must rely upon our statute's plain and ordinary meaning.

In sum, while buses and taxis in this jurisdiction are ordinarily engaged in and regulated for transporting fare-paying passengers, the same cannot be said of rental cars. Accordingly, we hold that the insurance mandate under A.S.C.A. § 22.2003(3) does not apply to rental car companies. **[**13**]**

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[3] *Pu'u,* the court was faced with the ambiguity attached to the term "cancellation" in A.S.C.A. § 22.2013.

[4] In *Allstate Ins. Co. v. Shaw*, 52 N.Y.2d 818, 821 (N.Y. 1980), the New York court concluded that rental cars fall under the same category as taxis and buses for purposes of compulsory motor vehicle insurance. The New York statute requiring insurance, however, included a section which stated specifically that rental corporations "shall be subject to the provisions of this section in the same manner and to the same extent" as corporations engaged in transporting passengers for hire. American Samoa law contains no specific provision that subjects rental car companies to the same standards as corporations engaged in transporting passengers for hire. Furthermore, and more importantly, the New York statute did not state, nor did the *Shaw* decision hold, that rental car companies were actually engaged in the transportation of passengers for hire. In *Louisville Taxicab & Transfer Co. v. Blancon,* 305 Ky. 179 (Ky 1947), the court found that rental car companies qualified as "operators for hire" of vehicles which transport persons or property. Notably, the Kentucky statute expressly defined the term "operator of a motor vehicle for hire" to mean "any person who engages in the business of leasing motor vehicles for a compensation for the transportation of persons or property." This definition is absent in the American Samoa statute.

Order

The Trial Division's Order to Deposit Funds, and subsequent Judgment, are hereby REVERSED and the matter is REMANDED for disposition consistent with this Opinion and Order.

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Cite As: *Avamua v. Am. Samoa Gov't*, AP No. 06-13, slip op. at [page number] (App. Div. Aug. 26, 2014) (op. & order)

AVAMUA DAVID HALECK, Appellant,

v.

AMERICAN SAMOA GOVERNMENT, Appellee.

High Court of American Samoa
Appellate Division

AP No. 06-13

August 26, 2014

[1] Under the Coastal Zone Management Act, the Territory of American Samoa is defined as a coastal state.

[2] The Office of Development Planning is designated to receive and manage all related federal grants and funds and provide for the implementation and administration of the office known as the "American Samoa Coastal Management Program."

[3] The general goal of the American Samoa Coastal Management Program is to provide effective resource management by protecting, maintaining, restoring, and enhancing the resources of the coastal zone.

[4] The "coastal zone" includes the entire Territory and territorial sea limits.

[5] Under the land use permit process of the American Samoa Coastal Management Program, the Office of Development Planning is vested with exclusive authority to designate uses subject to land use permits and to approve (with conditions, if necessary) or disapprove permit applications according to permit review rules.

[6] Officials designated by the Director of Development Planning may issue stop orders upon reasonable cause to believe a violation of the American Samoa Coastal Management Act, or administrative rules adopted pursuant thereto, has occurred.

[7] A stop order under the American Samoa Coastal Management Act must detail the facts alleged to constitute a violation and may include an order that necessary corrective action be taken within a reasonable time.

[8] In the event of the failure of the person or persons to comply with the stop order, the Director of Development Planning may apply to the High Court for an injunction.

[9] A.S.C.A. § 24.0506 instructs the Director of Development Planning to promulgate rules that establish a streamlined land use permit system embracing all requirements of the various government agencies having environment management duties; a reasonable fee schedule; and procedures for the conduct of appeals by aggrieved parties on land use applications.

[10] Under A.S.C.A. § 24.0508, altering the natural shoreline is a class A misdemeanor and also punishable by civil fines.

[11] Under A.S.C.A. § 24.0509(c), making a false statement in a land use permit application, or tampering with orders or monitoring devices is a class B misdemeanor.

[12] The burden is on the land use permit applicant to obtain the proper permits prior to commencement of the work for any action which may cause or threaten an adverse impact to coastal resources.

[13] The regulations establish a penalty schedule for filing a land use permit application after work has commenced and if the application is not approved, the applicant may be required to remediate damage to the site or pay for the government's remediation efforts.

[14] The Manager of the PNRS Board may issue a stop work order, upon finding reasonable cause to believe that a project use or action violates one or more provisions of the American Samoa Coastal Management Program or the terms and conditions of a land use permit or that an imminent threat exists of adverse impact.

[15] An individual served with a stop order may contest it within five days of service and may also submit a land use permit within 10 days of service, which will then be considered pursuant to the established protocol.

[16] If an individual contests a stop order, they are entitled to a hearing before the Board with at least 24 hours notice of the hearing.

[17] Within 30 days of the hearing concerning a stop order, the Board may approve, with conditions, or overturn the stop work order by a unanimous vote.

[18] If an individual fails to comply with a stop work order after a hearing, the matter shall be referred to the Office of the Attorney General, which may then petition the High Court for injunctive relief to obtain compliance.

[19] An aggrieved party may file a motion for reconsideration within 10 days of an adverse decision concerning a stop order from the Board, and the Board must conduct a hearing on the motion within 10 to 30 days of filing.

[20] A party must file a motion for reconsideration before they may file an appeal, which then proceeds to the Office of the Administrative Law Judge.

[21] A controversy regarding a stop order is reviewable by the High Court only after the administrative law judge adopts findings based on the entire record and submits written conclusions of law.

[22] By prematurely filing in court for an injunction before issuing a valid stop order complying with the American Samoa Coastal Management Act. and the administrative rules, the government effectively denied appellant his due process administrative remedies to timely contest the stop order before the Board and to seek further review upon an unfavorable Board decision from an administrative law judge upon appeal.

[23] The use of the term "injunction" within a statute does not necessarily trigger the full application of A.S.C.A. Title 43 Civil Procedures, Chapter 13 Injunctions.

[24] The threshold question to be answered by the trial court in injunction actions brought under the American Samoa Coastal Management Act is whether and to what limited extent its extraordinary powers of injunctive relief should be wielded against a private individual in favor of the government pursuant to the dictates of a regulatory statute or administrative rule.

[25] Enforcement of the American Samoa Coastal Management Act is limited to the misdemeanor and civil infraction penalties set forth in the Act, actions for exemplary damages, and injunction actions to enforce stop orders.

[26] The trial court lacked subject matter jurisdiction to grant the government equitable relief in the form of an injunction when the government failed to follow the procedures laid out by the American Samoa Coastal Management Act for civil infractions of stop orders.

[27] The Trial Division of the High Court is a court of general jurisdiction with the power to hear any matter not otherwise provided by statute.

Before RICHMOND, Associate Justice; WARD, Associate Justice; PATEA, Acting Associate Justice;[*] FAAMAUSILI, Associate Judge; and SATELE, Associate Judge

Counsel: For Appellant, Roy J.D. Hall Jr.
For Appellee, Assistant Attorney General Mark Jespersen

OPINION AND ORDER

WARD, Associate Justice:

This matter involves the enforcement of the American Samoa Coastal Management Act ("A.S.C.M.A.") by the American Samoa Government, ("A.S.G."), against Appellant Avamua David Haleck ("Haleck"). This case is not a land title case. At issue are the government regulated uses of real property, the authorized use of the Judicial Branch's equitable relief powers, and the legislatively imposed restrictions placed upon the Executive Branch's enforcement powers under the A.S.C.M.A. **[**2**]**

We decide this matter on the issue of jurisdiction, which we raise *sua sponte*, as a matter of law. We therefore neither reach nor decide other issues raised on appeal from the trial court's opinion.

Standard of Review

The Appellate Division reviews questions of law *de novo*. *Roman Catholic Diocese of Pago Pago v. Avegalio*, 20 A.S.R.2d 70, 73 (App. Div. 1992). The factual findings of the Trial Division of the High Court may not be set aside by the Appellate Division unless clearly erroneous. A.S.C.A. 43.0801(b). A finding of fact is clearly erroneous when the entire record produces the definite and firm conviction that the court below committed a mistake according particular weight to the trial judge's assessment of conflicting and ambiguous facts." *TCW Special Credits v. F/V Kassandra Z*, 7 A.S.R. 3d 3, 7 (App. Div. 2003).

[*] Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

Case History and Background

In 1980 Haleck's father, Otto Haleck, registered an 80 acre parcel of land in Tafuna known as Naumati as his individually owned land. A 26.6 acre portion of this land, referred to by ASG as Ottoville Rainforest or Tafuna Lowland Rainforest was subdivided and conveyed by Otto to Haleck and six other family members.

During the early 1990s ASG and Haleck negotiated for the sale or lease of this parcel of pristine rainforest for **[**3**]** conservation purposes. Despite attempts by A.S.G. to secure federal funding for this project, adequate funding was never obtained and negotiations stalled.

At some point in mid-2005, Haleck decided to sell off some of this parcel to others and clear and develop other areas for sale. In late 2007, the Feagaiga Fou Church began clearing a parcel it had previously purchased in order to build a new church. The church had not first applied for a land use permit as required by statute. A stop order was filed by A.S.G. against the church to prevent any further clearing of the parcel.

In April 2008, A.S.G. gave notice of a public hearing to discuss a proposed moratorium on any further development of the Tafuna Lowland Rainforest area. In response, Haleck published a "notice" in the Samoa News and gave a radio interview in which he threatened to clear that area and warned A.S.G. not to interfere.

On April 11, 2008 A.S.G. filed a complaint For Permanent Injunction and "monetary fines" against Haleck in the Trial Division of the High Court. In the early stages of that litigation the case was transferred to the Land and Titles Division, which subsequently granted A.S.G. permanent injunctive relief against Haleck to enjoin all future development of the rainforest area. After the trial court rejected Haleck's motion **[**4**]** for a new trial or amended judgment on 22 July 2013, Haleck timely filed notice of the instant appeal.

Statutory Scheme and the Implementing Administrative Rules

[1] The Coastal Zone Management Act was enacted by the United States Congress in 1972 to assist the identified coastal states and territories with federal grants and assistance upon adopting conforming state or territorial legislation establishing coastal zone management areas. 16 U.S.C.A. §§ 1451 et seq. Under 16 U.S.C.A. § 1453(4) of the Act, the Territory of "American Samoa" is defined as a "coastal state."

[2-4] Through Public Law 21-35, the Territorial Legislature duly enacted the "American Samoa Coastal Management Act of 1990." A.S.C.A. §§ 24.0501 et seq. The Office of Development Planning (Department of

Commerce) is designated by this Act, pursuant to federal law, to receive and manage all related federal grants and funds and provide for the implementation and administration of the office known as the "American Samoa Coastal Management Program" ("A.S.C.M.P."). A.S.C.A. § 24.0502. Under A.S.C.A. § 24.0504, the general goal of the A.S.C.M.P. is "to provide effective resource management by protecting, maintaining, restoring, and enhancing the resources of the coastal zone." The "coastal zone" includes the entire Territory and territorial sea limits. *See* A.S.C.A. § 24.0503. **[**5**]**

[5-9] The crux of the implementation and enforcement of the A.S.C.M.P. is the land use permit process required for all uses, developments, or activities which impact the coastal zone. A.S.C.A. § 24.0505. Under this section the "Office of Development Planning is vested with exclusive authority to designate uses subject to land use permits" and to approve (with conditions, if necessary) or disapprove permit applications "according to permit review rules." Further, under subsection (c), officials designated by the Director of Development Planning may issue stop orders upon reasonable cause to believe a violation of the Act or administrative rules adopted pursuant thereto, "has occurred." "The stop order must detail the facts alleged to constitute a violation and may include an order that necessary corrective action be taken within a reasonable time. In the event of the failure of the person or persons to comply with the order, the Director of Development Planning may apply to the High Court for an injunction." A.S.C.A. § 24.0505 (c). The provision for the adoption of administrative rules "necessary for the efficient and effective administration" of the Act is found in A.S.C.A. § 24.0506. Specifically, paragraphs (a)(1) and (2) instruct the director to promulgate rules that establish a streamlined land use permit system embracing all requirements of the various government agencies having environment management **[**6**]** duties; a reasonable fee schedule; and "procedures for the conduct of appeals by aggrieved parties" on land use applications.

[10-11] The statutory scheme also established misdemeanor criminal offenses and penalties for certain violations of the Act. Under A.S.C.A. § 24.0508, altering the natural shoreline is a class A misdemeanor and also punishable by civil fines. Under A.S.C.A. § 24.0509(c), making a false statement in permit application, or tampering with orders or monitoring devices is a class B misdemeanor. Other penalties may also be pursued for violations of the Act or rules. Violations punishable as a "civil offense" under A.S.C.A. § 24.0509(a) may incur fines not to exceed $5,000.00 for individuals or $10,000.00 for corporations for each day the violation continues. Under A.S.C.A. § 24.0509(b), exemplary damages may also be sought to deter violations of the act or rules.

[12-13] In pertinent part, the administrative rules adopted pursuant to the

local act provide that "the burden is on the [land use permit] applicant to obtain the proper permits . . . prior to commencement of the work" for "any action which may cause or threaten an adverse impact to coastal resources." **[**7**]** A.S.A.C. § 26.0207(A), (B).[1] This includes, but is not limited to, "physical project work" such as "site preparation, filling, grading, dredging, excavation, and erection or siting of structures." *Id*. § 26.0207(A)(2). The regulations also establish a penalty schedule for "filing a land use permit application after work commenced." *Id*. § 26.0207(I)(2). If such an after-the-fact application is not approved, an applicant may be required to remediate damage to the site or pay for the government's remediation efforts. *Id*. § 26.0207(J).

[14-18] In addition, "[t]he Manager [of the PNRS Board] may issue a stop work order, upon finding reasonable cause to believe that a project, use or action violates one or more provisions of the [A.S.C.M.A.], the provisions of this chapter or the terms and conditions of a land use permit or that an imminent threat exists of adverse impact." *Id*. § 26.0214(A). An individual served with a stop order may contest it within five days of service and may also submit a land use permit within 10 days of service which will then be considered pursuant to the established protocol. *Id*. § 26.0214(D). In the event of contest, *Id*. § 26.0214(D)(2), provides for a hearing before the Board with at least 24 hours notice given to the affected individual. *Id*. Within 30 days of the hearing, "[t]he Board may approve, approve with **[**8**]** conditions, or overturn the stop work order by a unanimous vote." *Id*. If an individual fails to comply with a stop work order, "the matter shall be referred to the Office of the Attorney General" which may then petition the High Court "for injunctive relief to obtain compliance." *Id*. § 26.0214(E).

[19-21] Pursuant to A.S.A.C. §§ 26.0217-.0218, an aggrieved party may file a motion for reconsideration within 10 days of an adverse decision from the Board. The Board must conduct a hearing on the motion within 10 to 30 days of filing. *Id*. § 26.0218(A). The motion for reconsideration is required before the party may file an appeal, which then proceeds to the Office of the Administrative Law Judge ("ALJ"). *Id*. at § 26.0219. The controversy "shall be reviewable in the High Court" only after the ALJ "adopt[s] findings based on the entire record" and submits written conclusions of law. *Id*. at § 26.0219(B)-(C).

[1] The regulations also explicitly identify what must be included in the land use permit application package (§26.0207(F)-(G)) and what must ultimately be included in the land use permit itself (§ 26.0210(B)).

Discussion

This is a government regulated land use case. It is not a land ownership case. When filing this legally premature and otherwise deficient action, A.S.G. was attempting to enforce the A.S.C.M.A. mandatory land use permit requirements. A.S.G. failed, however, to comply with either the conditions precedent to seeking an injunction from the Court, as set forth by statute and administrative rules, or the sequence of enforcement options contemplated by the A.S.C.M.A. **[**9**]**

The purpose of the A.S.C.M.A. is to regulate the use and development of, and activities upon, land (including coastal shorelines and submerged lands) within the Territory which impact the coastal zone. All such regulated uses or activities require a land use permit duly approved by all government agencies having legal authority to regulate or protect environment, wildlife and marine habitat, air and water quality, historical sites, and construction within the Territory, under the streamlined land use permit system. Under A.S.C.A. § 24.0505(b), "The Office of Development Planning is vested with exclusive authority to designate uses subject to land use permit requirements . . . ."

Under A.S.C.A. § 24.0505(c) the Director of Development Planning may issue a stop order upon finding reasonable grounds to believe a violation of the A.S.C.M.A. or administrative rules has occurred. The stop order details the facts constituting the violation and may include corrective action to be taken. "In the event of the failure of the person or persons to comply with the order, the Director of Development Planning may apply to the High Court for an injunction." Under the implementing administrative rules, A.S.A.C. § 26.0214: a stop order may issue upon reasonable cause to believe a violation of the "Act," administrative rules, or land use permit conditions has occurred, or "*that an imminent threat exists of adverse* **[**10**]** *impact*." A.S.A.C. § 26.0214(A) (emphasis added). The rule continues in subsection (B) to set forth the required contents of the stop order, (details of the violation, corrective measures to be undertaken within a stated time period, the sanctions to be imposed for failure to comply, and, that the stop order "*may be contested as provided by this section*." (Emphasis added). In subsection (D) the procedures for the Board to hear and decide any contested stop order are also set forth. Under subsection (E), if the recipient of a stop order does not comply the matter is referred to the Attorney General, who is then authorized: "*to petition the High Court of American Samoa for injunctive relief to obtain compliance*." (Emphasis added).

The Board's decision, after a motion for reconsideration has been filed and decided may be timely appealed to an administrative law judge under A.S.C.A. § 22.0218 and 22.0219. (Under 22.0218 (B) an alternative, "special land use permits" process is also provided in the reconsideration

process which appears to address situations where the Board may relax the statutory and administrative rule provisions under special circumstances).

A.S.G.'s Complaint for Permanent Injunction, which also included a request for "monetary fines pursuant to **[**11**]** A.S.C.A. [sic] § 24.0509," was filed on 11 April 2008 in the Trial Division of the High Court. Although alleging an immediate threat of an adverse impact upon "Tafuna Lowland Rainforest" the complaint did not contain the requisite detailed, previously issued stop order contemplated by statute and rule to be presented to the High Court for enforcement by injunction. In addition, this civil complaint also ostensibly charged Haleck with a civil offense which if Haleck were found guilty of violating, would be punishable upon conviction with a fine not to exceed $5000. [2]

[22] By prematurely filing in court for an injunction before issuing a valid stop order complying with the A.S.C.M.A. and the administrative rules, A.S.G. effectively denied Haleck his due process administrative remedies to timely contest the stop order before the Board and to seek further review upon an unfavorable Board decision from an administrative law judge upon appeal. Haleck was entitled to receive a written stop order detailing: the anticipated violation; the sanctions to be applied for such a violation; and the provisions for administratively contesting the stop order. Instead, A.S.G. sought, and was ultimately **[**12**]** granted, a permanent injunction against Haleck without demonstrating the condition precedent to obtaining such relief—that Haleck had violated a duly issued stop order.

[23-24] The Legislature has established certain restrictions upon the exercise of the traditionally broad Judicial Branch equitable powers in cases involving litigation between A.S.G. and its citizens. The use of the term "injunction" within a statute does not necessarily trigger the full application of A.S.C.A. Title 43 Civil Procedures, Chapter 13 Injunctions, (A.S.C.A. §§ 43.1301 et seq.).[3] Our concern in this matter is

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[2] Generally, the statutes contemplate criminal prosecutions under the specific misdemeanor offenses contained in the A.S.C.M.A. or, a succession of prosecutions under the daily violations of the civil offense provisions. Conceivably, A.S.G., to avoid a multiplicity of daily prosecutions, might decide to seek an injunction, (and even exemplary damages), in lieu of such prosecutions, but neither the A.S.C.M.A. nor prevailing judicial practices provide for a combined "equitable relief – criminal prosecution" action as brought by A.S.G. in its original complaint.

[3] We note that under A.S.C.A. § 32.0652, Workmen's Compensation "compensation orders", if not in accordance with law, may be suspended, in whole or in part through injunctive proceedings. This process has not,

[13**]** prompted by the practical effects of shifting Executive Branch regulatory, law enforcement powers to the Judicial Branch via the issuance of broad injunctive relief. As this case reflects, the citizen so enjoined is then placed in jeopardy of incarceration or fines or both under the contempt powers of the Court for any further violation. Contempt proceedings do not provide for a trial by jury or proof beyond reasonable doubt of a violation and are conducted by the same court that issued the injunctive relief. The threshold question to be answered by the trial court in injunction actions brought under the A.S.C.M.A. is whether and to what limited extent its extraordinary powers of injunctive relief should be wielded against a private individual in favor of the government pursuant to the dictates of a regulatory statute or administrative rule.

At the first hearing on A.S.G.'s petition, the Trial Division of the High Court transferred this case to the Land and Titles Division of the High Court and subsequently proceeded to issue a preliminary and permanent

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however, been interpreted by the Court as requiring the detailed application of A.S.C.A. §§ 43.1301 et seq., (i.e. the issuance of Temporary restraining orders, preliminary injunctions, and permanent injunctions, all supported by claims of great or irreparable injury).

Other enactments by the Legislature also provide for injunctions to be issued by the Court other than as directed under Chapter 13, Title 43 A.S.C.A., Civil Remedies. Under A.S.C.A. § 46.4407, the Trial Division may, in a civil action initiated by the Attorney General, declare certain materials or performances as pornographic and enjoin their promotion, furnishing, or display. Under A.S.C.A. § 24.0152 (Environmental Quality Act), the Environmental Quality Commission may apply to the High Court for an injunction to temporarily enforce its orders prohibiting emissions or discharges by an offender, and the Court is mandated to issue an injunction unless it finds the Commission acted arbitrarily or capriciously. Upon securing the conformance with the statutorily requirements from the violator, the Commission is then required to immediately petition the Court to "lift such injunction." A.S.C.A. § 24.0152.

We question whether the civil injunctive relief provided by A.S.C.A. §§ 43.1301 et seq., as pleaded by A.S.G. and strictly applied by the trial court in this matter, is the equitable relief that the Legislature intended when authorizing the Director of Development Planning to apply for an injunction. Within the context of the statutes which grant the Office of Development Planning with "the exclusive authority to designate uses subject to land use permits" (A.S.C.A. § 24.0505), it appears that the trial court is limited to issuing an injunction tailored to enforce the Stop Order, and not to substitute the authority of the Court for that of the Office of Development Planning by issuing a permanent injunction. The Separation of Powers Doctrine requires a more constrained judicial approach under this statutory scheme.

injunction in this matter.[4] **[**14**]**

[25-26] The trial court then proceeded to adjudicate this matter consistent with the requirements of A.S.C.A. §§ 43.1301 et seq., eventually issuing a permanent injunction against Haleck and gratuitously casting a cloud upon the registration of ownership of the land in question. All of this was done in the absence of any stop order conforming with law and duly issued by the government. Under the A.S.C.M.A., the Executive Branch has been exclusively granted the authority to establish a streamlined, comprehensive land use permit process and to provide for administrative appeals therefrom for aggrieved parties. Enforcement of the A.S.C.M.A. is limited to the misdemeanor and civil infraction penalties set forth in the A.S.C.M.A., actions for exemplary damages, and injunction actions

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[4] We question this decision to transfer this matter to the Land and Titles Division. The law enforcement remedies provided under the A.S.C.M.A. do not appear consistent with the specialized jurisdiction and procedures of the Land and Titles Division and could, in cases involving stop orders applying to communal lands, lead to unnecessary delays due to statutorily mandated pre-litigation proceedings before the Office of Samoan Affairs. A.S.C.A. § 43.0302.

The general jurisdiction of the Trial Division under A.S.C.A § 3.0208(a) is more than broad enough to properly adjudicate stop order violations, civil penalties and actions for exemplary damages under the Act. These cases involve the government regulation of permitted uses of land, not controversies between parties over title to, or possession of real estate, which trigger resort to the specialized jurisdiction of the Land and Titles Division.

As an aside, we further note another jurisdictional issue set forth in the administrative rules. Under A.S.A.C. § 26.0215, "Citations" citing A.S.C.A. § 24.0509, this rule establishes a procedure for issuing citations for violating the A.S.C.M.A., providing for "civil or criminal penalty" therefore, and including within the citation remedial action to be taken by the person issued the citation. Detailed procedures for adjudicating such citations before the District Court, including the enforcement of the "Stop Order" included in the citation and ordering restoration of the site are also set forth in this rule.

We note that the statutes do not specifically authorize the issuance of citations for enforcing the A.S.C.M.A., nor does A.S.C.A. § 24.0509 authorize the District Court to enforce violations, (civil offenses) of the statute. The High Court is granted the exclusive jurisdiction to adjudicate such offenses under subsection (a) of A.S.C.A. § 24.0509. Although the specific misdemeanors enacted by the legislature in the A.S.C.M.A. (A.S.C.A. § 24.0508 and 24.0509 (c)) would fall within the limited jurisdiction of the District Court, the Legislature has designated the High Court as having the jurisdiction over the general enforcement of the A.S.C.M.A.

to enforce stop **[**15**]** orders. Although the Trial Division of the High Court would have had jurisdiction over the alleged civil infraction charge filed against Haleck in this matter, A.S.G.'s pleadings established no violation by Haleck, only his threat to do so. In the absence of a stop order issued by A.S.G. to prevent this imminent threat of violating the A.S.C.M.A., the trial court lacked subject matter jurisdiction to hear and ultimately grant the government equitable relief in the form of an injunction. See generally, *Tamaseu Distrib. v Am. Samoa Gov't* AP No. 3-12 (App. Div. Aug. 22, 2013) and *Am. Samoa Gov't v Samoa Shipping*, AP No. 9-09 (App. Div. Nov. 10, 2011).

Conclusion

[27] The Trial Division of the High Court is a court of general jurisdiction, "with the power to hear any matter not otherwise provided by statute." A.S.C.A. § 3.0208. Under the A.S.C.M.A., that court has clear jurisdiction to hear and decide criminal actions filed by A.S.G. charging civil infractions for violations of the A.S.C.M.A. and related administrative rules, as well as civil actions for exemplary damages. Separately, that court may grant A.S.G. equitable enforcement relief of stop orders in the form of an injunction consistent with the public policy objectives of the A.S.C.M.A., the grounds for which could **[**16**]** include an individual's consistent and continuous violation of a stop order. ASG may also demonstrate that an injunction would provide greater protection of the public's interest than a multitude of individual criminal prosecutions for each (daily) separate offense, or even more serious, immediate threats to the public welfare, safety, health, and other environmental public policy objectives set forth in the A.S.C.M.A.

In this matter, A.S.G. prematurely brought an action for injunctive relief without having first issued and served upon Haleck a stop order citing Haleck's violation (or threat thereof) of the A.S.C.M.A., the sanctions to be applied for any such violation, and notice of the administrative procedures by which Haleck could contest, and eventually appeal from if aggrieved, the stop order.

The exercise of the Judicial Branch's extraordinary equitable power to enjoin an individual's actions requires caution and restraint, and, when authorized by statute to be availed of by the government against an individual, strict compliance with statutorily imposed preconditions. For the reasons set forth above, we hold the trial court's assertion of jurisdiction and the exercise of equitable relief via a Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction exceeded its lawful authority pursuant to the A.S.C.M.A. **[**17**]**

Accordingly, we vacate all Orders and dissolve all Injunctions issued by the Trial Court, and *reverse* for lack of subject matter jurisdiction.

It is so ordered.

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Cite As: *Aiono v. Territorial Registrar*, AP No. 13-12, slip op. at [page number] (App. Div. Sept. 12, 2014) (op. & order)

AIONO WHITNEY MAGALEI, Appellant,

v.

TERRITORIAL REGISTRAR, AMERICAN SAMOA GOVERNMENT, TUIAANA COMMUNAL FAMILY, MA'ATAUA TE'O, LUELI U. TE'O, MELODY TE'O POLOA, KENESARETA MOI, and STEVEN SI'UFANUA representing the communal interests of HC LILI'I and HTC SIUFANUA COMMUNAL FAMILY, ALAIASA FILIFILI, LDS CHURCH, JONATHAN and MOLITA POUESI and ROY HALL, JR. , Appellees.

High Court of American Samoa
Appellate Division

AP No. 13-12

September 12, 2014

[1] An attempted registration of title to a parcel of land ten years after the initial registration of title to that parcel was inimical to the statutory registration process, which unambiguously admits only land not previously registered.

[2] The Appellate Division declined to consider matters that were neither taken up nor decided by the court below. Such discussion might venture into the potentially confusing realm of *dicta*, if not the troublesome notion of the "advisory" and the "case or controversy" limitation on jurisdiction found in article III, section 2 of the U.S. Constitution and the replicative language conferring jurisdiction on the High Court of American Samoa.

[3] At the appellate level, the Court's review of the findings of the Land and Titles Division is limited in scope to "clear error."

[4] The Appellate Division does not review factual matters *de novo*.

[5] The test for clear error is whether there is substantial evidence on the record to support the Land and Titles Division's findings - not whether a dissatisfied litigant himself presented substantial evidence.

[6] A.S.C.A. § 43.0302 does not mandate any sort of certificate of irreconcilable dispute "format" as the predicate for the assertion of

jurisdiction by the Land and Titles Division. Rather, the statute's clear substantive import is merely the requirement that parties to any inter/intra Samoan family dispute must first submit to an extrajudicial settlement proceeding, at the neutral setting of the Office of Samoan Affairs, to see if they can iron out their differences before the courthouse doors will be opened to them.

[7] A.S.C.A. § 43.0302 contemplates more than a merely perfunctory proceeding; rather a serious attempt to resolve the controversy is needed to satisfy the aims of the statute.

[8] While compliance with the requirements of A.S.C.A. § 43.0302 would ordinarily be expected to be detailed in the certificate of irreconcilable dispute, a certificate found wanting in detail so as to sufficiently evince compliance with the requirements of § 43.0302, may otherwise be supplemented by documentation tending to confirm that compliance.

[9] The Model Rules of Professional Conduct, adopted by the Court pursuant to H.C.R. 104, obligate counsel to exercise diligence, only present meritorious claims, and to practice candor toward the tribunal.

[10] A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law *and fact* for doing so that is not frivolous.

Before KRUSE, Chief Justice; WARD, Associate Justice; PATEA,[*] Acting Associate Justice; SU`APAIA, Associate Judge; and SATELE, Associate Judge

Counsel: For Appellant, Charles V. Ala`ilima
For Appellee American Samoa Government, Mark Jespersen, Assistant Attorney General
For Appellees Ma`ataua Te`o, Lueli U. Te`o, Melody Te`o-Poloa, and Miriama I. Te`o, Fiti A. Sunia

[*] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

OPINION AND ORDER

KRUSE, Chief Justice:

In 1993, the Tuiaana family of Faleniu (collectively "Tuiaana") procured title registration to a certain parcel of land located in Faleniu pursuant to the registration process set out in A.S.C.A. §§ 37.0101-04. After title was registered, the property was subsequently transferred to Appellee Ma`ataua Te`o, **[**2**]** a member of the Tuiaana family, pursuant to the alienation of communal land process set out under A.S.C.A. §§ 37.0210 et seq.

[1] Ten years later, in 2003, the Aiono family (collectively "Aiono"), also of Faleniu, sought to invoke the same statutory registration process to register title to essentially the same parcel of land.[1] This attempted registration was inimical to the statutory registration process which unambiguously admits only land "not previously registered." A.S.C.A. § 37.0101(a).

In their pursuit, Aiono were thus confronted with two threshold barriers: 1) the ambit of § 37.0101(a), coupled with the fact of Tuiaana's prior registered title; and, 2) their lost sixty-(60)-day window of opportunity under § 37.0103 to challenge Tuiaana's initial 1993 registration application, long processed and concluded ten (10) years beforehand.[2] In order to surmount these barriers, Aiono filed suit to collaterally attack the validity of the Tuiaana's registered title (all with the aim of getting a foot into the Territorial Registrar's door and the **[**3**]** A.S.C.A. §§ 37.0101-04 registration process).

[2] The Land and Titles Division bifurcated the proceedings and conducted trial "solely upon the bifurcated issue of the validity of the [1992] Tuia`ana registration." *Magalei v. Am. Samoa Gov't*, LT No. 06-06 at 2 (Land & Titles Div. Mar. 9, 2012) (order validating land title

[1] While Tuiaana calls the land "Tuamauga," Aiono refers to it as "Gautamauga." The terms are actually synonymous. They both denote a location to the rear of or beyond the *mauga* (mountain ridge).

[2] Section 37.0103 provides in pertinent part:

> (a) Notice of the proposed registration shall be [publicly] posted for 60 days . . . .
>
> (b) During such 60-day period anyone claiming an interest adverse to applicant . . . for registration may file notice of adverse claim with the Territorial Registrar. . . .
>
> (c) If no notice of adverse claim is filed within the 60-day period, and all the requirements of this chapter have been complied with, the Territorial Registrar shall register title to such land in the name . . . of the applicant.

registration). The subsequent registration attempt by Aiono was not addressed. Ultimately, the trial court determined that there was no merit to Aiono's collateral attack against Tuia`ana's 1992 registration effort, upholding its validity. That decision alone is the subject of this appeal by Aiono. The subsequent alienation exercise by Tuia`ana pursuant to A.S.C.A. §§ 37.0210 et seq., to give individualized title to Te`o, was neither at issue nor addressed by the Land and Titles Division.[3]

Discussion

1. Tuiaana's Registered Interest

With regard to the sixty-day limitation period of § 37.0103, we previously noted in *Ifopo v. Siatu`u*, 12 A.S.R.2d 24, 27 (App. Div. 1989):

> **[**4**]** The purpose of requiring . . . an objection to be made within sixty days of the proposed registration was precisely to relieve the registrant of the burden which appellant now wishes the Court to impose: the burden of disproving the objection by affirmatively proving every fact necessary to establish title after the passage of many years, during which witnesses would tend to die and documents would tend to be lost or destroyed.

Moreover, with regard to the registration process, A.S.C.A. §§ 37.0101-04, *Ifopo* also stated:

> The Territorial Registrar, however, is charged with registering title only when all the statutory procedures have been met, and the Court should not assume that he did not comply with this obligation. . . . The registration statute cannot have the intended effect of affording finality to disputes and security to titles if the Court is prepared to conduct its own de novo review of whether there was compliance with the statute in every case where non-

[3] While the concurring and dissenting opinion discusses these issues, we decline to consider matters that were neither taken up nor decided by the court below. Such discussion might venture into the potentially confusing realm of *dicta*, *see, e.g.*, *Fairchild v. Norris*, 5 F.3d 1124, 1125 n.1 (8th Cir. 1993) ("judges would be better advised to avoid dicta"); *Melville v. Am. Home Assurance Co.*, 584 F.2d 1306, 1311 n.7 (3d Cir. 1978) (noting "the dangers of dicta" and finding "little guidance" in opinions on questions not at issue), if not the troublesome notion of the "advisory" and the "case or controversy" limitation on jurisdiction found in Article III, section 2 of the U.S. Constitution and the replicative language conferring jurisdiction on the High Court of American Samoa. A.S.C.A. § 3.0208.

> compliance is alleged. Rather, the Court must assume—and, absent *compelling* proof to the contrary, must conclude—that the Registrar recorded a title only after complying with his obligations under the law.

Emphasis added. *Id*. at 28.

The record below reveals that the Land and Titles Division considered Aiono's proofs and quite obviously found the same to be less than compelling. In its findings, the trial court said:

> None of the issues and supporting evidence that [Aiono] has presented convince us that the registration of Tuamauga was fraudulently obtained or that the registration documents contained fatal irregularities.

Aiono v. Tuiaana et al., LT No. 27-03 at 12 (Mar. 9, 2012) (order validating land title registration).

[3-5] At the appellate level, our review of the findings of the Land and Titles Division is limited in scope to "clear error." A.S.C.A. § 43.0801(b). The Appellate Division does not review factual matters *de novo*. *Afoa v. Asi*, 20 A.S.R.2d 81, 83 (App. **[***5**]** Div. 1991). The test for clear error is whether there is substantial evidence on the record to support the Land and Titles Division's findings - not whether a dissatisfied litigant himself presented substantial evidence. *Id*. (citing *Moea`i v. Ala`ia*, 12 A.S.R.2d 91 (App. Div. 1991)).

On the record below, we are satisfied that the findings of the trial court are substantially based on the evidence, or, indeed, the lack thereof. *See Ifopo*. Absent "clear error," A.S.C.A. § 43.0801(b), the Land and Titles Division's findings may not, therefore, be set aside nor disturbed by the appellate court. *See also Leituala v. Faleafine*, 9 A.S.R.2d 16, 19 (App. Div. 1988).

2. Subject Matter Jurisdiction

Finally, Aiono, citing to our recent decision in *Fagaima ex rel Fagaima Family v. Am.Samoa Gov't*, AP No. 01-10 (App. Div. Nov. 15, 2012) (order vacating order dismissing appeal for lack of subj. matter juris. & order den. petition for reh'g), submits that the Land and Titles Division lacked subject matter jurisdiction, owing to non compliance with the pre-requisite requirements of A.S.C.A. § 43.0302.[4] Since **[***6**]** *Fagaima*

[4] Section 43.0302 provides in pertinent part:

> (a) Before any action relating to controversies over communal land or matai titles may be commenced in the Land and Titles

was handed down November 15, 2012, some eight (8) months after the Land and Titles Division had already issued its Opinion and Order on March 9, 2012, Aiono's lack of jurisdiction argument was thus first raised on appeal.[5] Aiono's principal ground advanced herewith is that the CID at issue "is in the same format" (Brief for Appellant at 3) as the CID which this court questioned in *Fagaima*, and before that in *Puletu v. Kneubuhl*, AP No. 11-09, (App. Div. Nov. 30, 2011) (op. & order).

[6-8] We view this argument as myopic treatment of *Fagaima*, as the argument seems to canvass the mindless elevation of form over substance. We do not read § 43.0302 as mandating any sort of CID "format" as the predicate for the assertion of jurisdiction by the Land and Titles Division. Rather, the statute's clear *substantive* import is merely the requirement that parties to any inter/intra Samoan family dispute must first submit to an extrajudicial settlement proceeding, at the neutral setting of the Office of Samoan Affairs ("OSA"), to see if they can iron out **[**7**]** their differences before the courthouse doors will be opened to them. Moreover, the statute contemplates more than a merely perfunctory proceeding; rather "a serious exercise to satisfy the aims of A.S.C.A. § 43.0302; viz, 'an attempt . . . to resolve the controversy." *In re Matai Title Papalauena*, MT No. 02-02 at 4 (Land & Titles Div. May 12, 2006) (order on mot. to dismiss).[6] While compliance with the requirements of § 43.0302 would ordinarily be expected to be detailed in

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> Division, each party shall file with his complaint a certificate signed and attested by the Secretary of Samoan Affairs or his deputy, in which the Secretary or his deputy affirms and states:
> (1) that on at least 2 occasions, the parties have appeared personally before him and 2 persons designated by him, without an attorney or counsel, and that an attempt was made to resolve the controversy;
> (2) that all parties to the controversy received at least 20 days notice for each of the 2 required appearances;
> (3) the date and hour of the beginning and conclusion of each appearance;
> (4) the findings and conclusions of the Secretary or his deputy and the 2 designees with respect to the controversy heard before them, including a statement of the reason why the controversy could not be resolved.

[5] Notwithstanding, *Fagaima's* ruling has retroactive effect here, since the matter before us here remained open on appeal and thus still subject to direct review. *See Harper v. Dep't of Taxation*, 509 U.S. 86 (1993).

[6] In *Papalauena*, the Land and Titles Division would not assert jurisdiction where the facts revealed that the Secretary of Samoan Affairs was not only an interested party in the dispute, but that as an interested §43.0302 facilitator he "had pressed for the matter to be referred hurriedly to court, without further ado." *Id*. at 4.

the CID, we have also stated that a CID found wanting in detail so as to sufficiently evince compliance with the requirements of § 43.0302, may otherwise be supplemented by documentation tending to confirm that compliance. *Fagaima ex rel Fagaima Family v. Am. Samoa Gov't*, AP No. 01-10, slip op. at 7-8 (App. Div. Aug. 10, 2012) (order dismissing appeal for lack of subj. matter juris.); *Puletu v. Kneubuhl*, AP No. 11-09 at 9 (App. Div. Nov. 30, 2011) (order den. appellants' mot. postpone pending final j. of outstanding issues).

[9-10] Our review of the record below not only revealed a "Certificate of Irreconcilable Dispute" ("CID"), dated and filed with the Clerk of Courts on March 31, 2006, but also two separate **[**8**]** addenda under OSA letterhead, filed concomitantly with the CID.[7] These addenda, while written in Samoan, actually elaborate on the CID in the way of minutes of each of the two mandated A.S.C.A. § 43.0302 OSA meetings held in connection herewith. The addenda noted the named party representatives of each side convened before the then Secretary of Samoan Affairs, Paramount Chief Mauga, his deputy, Orator Nanai Afuola, and Lalolama Areta, recording secretary, as well as unspecified "staff." On each occasion, a ranking orator formally opened the meeting with recital of honorifics in accordance with culture as well as an introduction as to the purpose of the occasion. In the first meeting of March 9, 2009, Orator Nanai presided while at the second meeting of March 29, 2009, Orator A`au Malauulu opened with Paramount Chief Mauga, Orator Nanai, recording secretary Lalolama Areta and unspecified staff in attendance. Both sides were given the opportunity to and did speak on each occasion, with each adamantly unprepared to yield vis a vis the other. This being the only consensus arrived at by the parties, even **[**9**]** after two meetings, the conclusion of the meetings was, as minuted, announced by Orator Nanai consistent with cultural protocol. And it was so written.

Rejecting Aiono's "format" submission as a substantive requirement of A.S.C.A. § 43.0302, and seeing nothing on the CID and addenda to suggest other than substantial compliance with the mandates of

[7] The fact that these Addenda were conspicuously maintained on file below together with the CID and not brought to our attention by counsel is most disturbing. The Model Rules of Professional Conduct, adopted by the Court pursuant to H.C.R. 104, obligate counsel to exercise diligence, only present "meritorious claims" and to practice "candor toward the tribunal." MODEL RULES OF PROF'L CONDUCT, R. 1.3, 3.1, 3.3. As such, "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law *and fact* for doing so that is not frivolous." *Id.* at R. 3.1 (emphasis added). Appellant counsel's seemingly willful ignorance of the addenda in the trial record constitutes either a lack of diligence or an attempt to obfuscate the factual basis of the Appellant's claim regarding the validity of the CID.

applicable statutes, we dismiss Aiono's claim of want of subject matter jurisdiction.

Order

For reasons given, we AFFIRM. It is so ordered.

WARD, concurring in part and dissenting in part:

Insofar as the majority's Opinion holds that Aiono failed to prove any actionable fraud or the failure to provide the statutorily required public notice in the 1993 registration of the land "Tuamauga" by the Tuiaana family, I concur in the result of that Opinion. Likewise, I generally concur in the majority's Opinion addressing the substantial compliance with A.S.C.A. § 43.0302.

I dissent from the balance of the majority's Opinion insofar as it fails to raise and address the apparent lack of subject matter jurisdiction of the trial court.

A brief review of the facts and case history in these matters reveals that some ten years after Tuiaana registered a portion of his family's communal land and promptly conveyed it to Te'o as individually owned land after a hearing before the Land Commission and approval by the Governor, Aiono filed a complaint in the Land and Titles Division (LT 27-03) naming the Territorial Registrar, Tuiaana Family and Te'o as defendants. The complaint prayed for a preliminary and permanent injunction enjoining Te'o from obstructing the survey onto Te'o's individually owned land that Aiono claimed as his family's **[**2**]** communal lands, and for the court to declare the registration by Tuiaana invalid, declare the subsequent, Governor approved, transfer by deed of the property to Te'o invalid, declare all subsequent conveyances of parcels of this property by Te'o to be invalid and to declare the lands to be surveyed by Aiono as the communal land of the Aiono family. The allegations in support of the prayers were that Aiono had found a "defective" original registration and a "defective" deed to Te'o. Further, that the land conveyed to Te'o significantly overlapped Aiono communal land.

After filing the complaint in 2003, Aiono was granted a "preliminary injunction" preventing Te'o from blocking the survey.[8] Aiono then

[8] Under Public Law 12-59 (1972), the Legislature established a jurisdictional precondition to actions being commenced in the Land and

Titles Division requiring each party to file a certificate of irreconcilable dispute ("C.I.D.") issued by the Secretary of Samoan Affairs, before: "any action relating to controversies over communal land or *matai* titles may be commenced." A.S.C.A. § 43.0302(a). Preexisting statutes within Title 43, Chapter 03, PROCEDURE IN LANDS AND TITLES DIVISION, (first enacted as PL 11-54 in 1969), had specifically authorized the Chief Justice or Associate Justice to issue restraining orders in disputes among Samoans even before the commencement of proceedings and interlocutory orders once proceedings had been commenced. A.S.C.A. §§ 43.0303-.0304. Less than one year later the Legislature amended A.S.C.A. § 43.0302 by enacting Public Law 13-39 in 1973 that added a new subsection (b) to that statute, specifically allowing the Chief Justice or Associate Justice to issue a temporary restraining order to prevent irreparable damage prior to a C.I.D. being filed. A.S.C.A. §43.0302(b). No further amendments to Title 43, Chapter 03 have been enacted since 1973.

In 1981, however, the Legislature enacted Title 43, Chapter 13, INJUNCTIONS, under Public Law 17-06. A.S.C.A. §§ 43.1301 et seq. This chapter sets out generally the procedures and grounds for the issuance of temporary restraining orders, preliminary injunctions and permanent injunctions.

Although the Land and Titles Division has traditionally heard and decided applications for preliminary injunctions under the language of Title 43, Chapter 13 in disputes where no C.I.D. has been filed, the only clear statutory authority for exercising this pre-jurisdictional judicial power has been granted exclusively to the Chief Justice and Associate Justice pursuant to the special procedures, grounds, and limited application set forth under Title 43, Chapter 03.

The more general language of Title 43, Chapter 13 contemplates action taken by a court of competent jurisdiction after the civil action has been preliminary commenced by a party filing an action. The trial court's issuance of a preliminary injunction enjoining Te'o from interfering with the survey of land previously registered and transferred to Te'o was issued before the trial court acquired subject matter jurisdiction by the filing of a complaint with a C.I.D. attached. Although Aiono would not necessarily be precluded from filing a complaint seeking injunctive relief pursuant to Title 43, Chapter 13 if a C.I.D. were attached to that action, prior to the legal commencement of his action pending a C.I.D., the only authority for equitable relief in this matter was pursuant to Title 43, Chapter 03.

One final notation in this regard. Neither the record herein, nor the annotations in A.S.C.A., indicate if A.S.C.A. § 43.0302(a), Pub. L. No. 12-59 (1972), was, or was required to be, submitted to the Secretary of the Interior prior to promulgation pursuant to Secretary's Order No. 2657 Sec. 4 (August 29, 1951), as amended 1972.

attempted to register the land identified **[**3**]** in that survey (including Te'o's individually owned land) which resulted in the publication, notice by several objectors (including neighboring landowners), referral to the Samoan Affairs and ultimately, upon receipt of a C.I.D. by the Registrar, to the Registrar referring this matter to the Court for resolution of the claims pursuant to A.S.C.A. § 37.0104, on April 4, 2006. The Clerk of Courts assigned a separate case number, LT 06-06, to this matter and notice was sent out to the nine objectors to file their pleadings within 20 days. These two cases were then consolidated and the bifurcated proceedings commenced on the validity of the 1992 registration of the land by Tuia'ana. **[**4**]**

In *Ifopo*, this court held at page 26: "[T]he registration statute gives anyone who believes himself the owner of land the fair opportunity to present his claim to the Court; it then conclusively presumes that anyone who did not avail himself of this opportunity was not the true owner of the land."

At page 27, this Court also held: "Since the statutory scheme effects its own reconciliation of the competing policies, there is no need for the Court to fashion a new and different one by refusing to enforce the registration statute."

The only exceptions to the strict enforcement of the registration statute noted by this Court were set forth on page 28: "Courts can and do disregard registrations that are clearly proved to have been procured by fraud, or in which the failure to afford the required notice affirmatively appears in the record of the registration itself."

As recognized by the majority, the land registration statutes provide for the orderly registration of land not previously registered. A.S.C.A. § 37.0101(a). The trial court's authority to hear and decide cases under the land registration laws is therefore limited to those matters in which a party attempts to register land not previously registered and **[**5**]** objectors to that proposed registration timely file objections with the Registrar. A.S.C.A. §§ 37.0103, -.0104. Under these statutes, the only subject matter jurisdiction the trial court possesses is to resolve the conflicting claims to the previously un registered land and then order the Registrar to (lawfully) register the land to the prevailing party or parties.

This procedure is similar to the statutory scheme for the registration of *matai* titles pursuant to A.S.C.A. §§ 1.0401 et seq. Under A.S.C.A. § 1.0405(b), a person claiming succession to a *matai* title must file with the registrar a petition which, *inter-alia* must contain a statement "that a family meeting was called and held for the purpose of selecting a successor to the title in question, according to the traditions of the family." As this Court recently held in *Vaeao v. Thompson*, AP No. 11-

11, slip op. at 9, (App. Div. Aug. 7, 2013), the trial court may only perform its statutorily defined role to hear and determine any disputed claims to a *matai* title in those cases where the family meeting had been properly conducted. In the instant matter, consistent reasoning would likewise conclude that the trial court's subject matter jurisdiction as defined by the land registration statutes is **[**6**]** limited to adjudicating conflicting claims to land not previously registered.[9]

A separate legal issue concerning the trial court's subject matter jurisdiction is also presented in these matters. A few months after Tuia'ana registered this land as communal land, he sought and received the approval of the Governor to alienate this parcel to Te'o pursuant to A.S.C.A. §§ 37.0201 et seq. The land alienation statutes are separate from the land registration statutes set forth in A.S.C.A. §§ 37.0101 et seq. Under A.S.C.A. § 37.0204(a): "It is prohibited for any matai of a Samoan family *who is, as such, in control of the communal family lands or any part thereof*, to alienate such family lands or any part thereof to any person without the written approval of the Governor of American Samoa." (Emphasis added). The land Commission reviews all requests for the Governor's approval consistent with its statutory duty: "to endeavor to prevent the monopolistic ownership of land and improvident alienations of communal lands by those charged with the management and control thereof." A.S.C.A. § 37.0203(c).

The Land Commission hearings and the Governor's decision approving or disapproving the proposed alienation of **[**7**]** communal lands are reviewable by the Appellate Division of High Court pursuant to the Administrative Procedure Act ("APA"). A.S.C.A. §§ 4.1001 et seq.; *Wall v. Am. Samoa Gov't*, AP No. 09-08 (App. Div. Jan. 18, 2013). Unlike the land registration statutory scheme which expressly authorizes the trial court to hear and decide conflicting claims to a land title offered for registration, the Legislature has not enacted similar, specific language in the land alienation statutes providing for any other form of judicial relief than by judicial review under the APA. A.S.C.A. § 4.1040(b).

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[9] Nothing prevented Aiono from lawfully exercising his statutory land registration rights by surveying his family's lands up to the registered boundaries of the "Tuia'ana-Te'o" registered parcel, and pursuing registration of such previously unregistered land. Once completed, Aiono could then, consistent with *Ifopo*, collaterally attack the registration process through an action in trespass or eviction and affirmatively plead actionable fraud or failure of statutory notice with respect to the adjacent land previously registered by Tuia'ana. Although the majority holds that the instant cases on appeal were a "collateral attack" it is difficult to imagine a more direct attack on title to registered land than what Aiono undertook herein.

In the absence of any specific statutory authority granted to the trial court to hear and decide controversies involving title to land alienated with the Governor's approval, the Appellate Division becomes the only court with jurisdiction to review that Executive Branch decision.

Conclusion

The majority's Opinion reflects a strong desire to provide ready access to the Court to resolve Samoan land and title issues. Indeed, that access must be provided so that disputes may be peaceably resolved in court rather than through force or self-help.

The unintended consequences of the majority's Opinion appear, however, to put the finality of the land registration and alienation statutes at risk. By ignoring the trial court's **[**8**]** lack of jurisdiction to hear and decide these cases, the majority Opinion appears to legitimize the unlawful use of the land registration statutes engaged in by Aiono. There can be little finality in the land registration process if, as herein, a person may at any time, obtain injunctive relief to survey lands previously registered to another and then attempt to register such lands for himself or his family.

For the reasons set forth above I would vacate all Orders and dissolve all Injunctions issued by the Trial Court and *Reverse* for lack of subject matter jurisdiction.

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Cite As: *Bartley v. Fruean*, AP No. 12-14, slip op. at [page number] (App. Div. Oct. 6, 2014) (op. & order)

In the matter of the claim of LUCIA SU'A BARTLEY, Petitioner,

v.

TUALOLO M. FRUEAN, Chief Election Officer, Respondent.

FLORENCE TUAMU SAULO, Real Party in Interest/Intervenor.

The High Court of American Samoa
Appellate Division

AP No. 12-14

October 6, 2014

[1] A.S.C.A. § 6.0302 allows a qualified elector to challenge the right of a person to be a candidate within 3 days after the Chief Election Officer issues an official determination of nominated candidates eligible for election.

[2] Once the Chief Election Officer rules on a challenge, either the challenger or the candidate may appeal the decision directly to the Appellate Division of the High Court no later than 4:30 p.m. on the 5th day thereafter for expedited judicial review of the administrative decision.

[3] Review of the Chief Election Officer's decision by the Appellate Division is expedited due to the need to print ballots for the impending election and occurs under the standards and rules set forth by the Administrative Procedures Act (A.S.C.A. §§ 4.1001 et seq.).

[4] United States nationality is exclusively defined by the U.S. Congress, s*ee* 8 U.S.C. § 1408, and determination of who qualifies as a United States National is an exclusive function of the federal government.

[5] Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the U.S. Constitution, laws made pursuant thereto and treaties made under the authority of the United States shall be the supreme law of the land.

[6] The U.S. Congress has duly enacted laws specifying persons who are nationals and citizens of the United States at birth, 8 U.S.C. § 1401, and nationals but not citizens of the United States at birth, 8 U.S.C. § 1408.

[7] Qualified individuals, both citizens who are nationals and nationals who are not citizens, can be issued United States passports upon application to and verification by the United States Department of State. 22 U.S.C. §§ 211a et seq. However, passports for individuals who are only nationals contain specific language indicating that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

[8] Petitioner's contention that the Chief Election Officer was required by her challenge to conduct a detailed and exhaustive investigation into Saulo's birth records or any other local records that may have been used in her application for a U.S. passport as a U.S. national but not a citizen is not supported by law.

[9] The Chief Election Officer's authority as an Officer of the Executive Branch of the American Samoa Government is limited to the powers and duties conferred under A.S.C.A. §§ 6.0103.1 et seq.

[10] Upon receiving a challenge to a candidate's eligibility, the Chief Election Officer is required to investigate and rule on the challenge as soon as possible.

[11] United States nationality does not require birth in a possession of the United States. *See* 8 U.S.C. § 1408. Birth records alone, therefore, may not be determinative of U.S. nationality.

[12] The Chief Election Officer's decision that a candidate was a United States National after reviewing files containing copies of a facially valid U.S. passport was not unlawful, in excess of his authority, clearly erroneous, or arbitrary, capricious, or an abuse of discretion pursuant to A.S.C.A. § 4.1044.

Before KRUSE, Chief Justice; WARD, Associate Justice; MAMEA, Associate Judge; and FA'AMAUSILI, Associate Judge

Counsel: For Petitioner, Richard deSaulles
For Respondent, Gwen Tauiliili-Langkilde
For Intervenor, T. Marcellus Uiagalelei and Toetasi Tuiteleleapaga

WARD, Associate Justice:

OPINION AND ORDER

Before the Court are challenger Lucia Su'a Bartley's ("Bartley") petition for review of the Respondent Chief Election Officer's ("CEO") ruling on the candidacy of Real Party in Interest and Intervenor Vui Florence Tuaumu Saulo ("Saulo") for election to the House of Representatives of American Samoa representing Tualauta District No. 15 and the CEO's motion to dismiss said petition. On October 2, 2014, the Court heard these matters along with Bartley's motion to supplement the **[**2**]** record. For the reasons set forth below, we deny the motion to dismiss and ratify the CEO's ruling on this challenge to Saulo's candidacy.

Jurisdiction

[1-3] A.S.C.A. § 6.0302 allows a qualified elector to challenge the right of a person to be a candidate within 3 days after the CEO issues an official determination of nominated candidates eligible for election. Once the CEO rules on that challenge, either the challenger or the candidate may appeal the CEO's decision directly to the Appellate Division of the High Court no later than 4:30 p.m. on the 5th day thereafter for expedited judicial review of the administrative decision. A.S.C.A. § 6.0303. Review by the Appellate Division is expedited due to the need to print ballots for the impending election and occurs under the standards and rules set forth by the Administrative Procedures Act ("APA"), A.S.C.A. §§ 4.1001 et seq.

Standard of Review

Under the APA, the High Court must, in most cases, confine its review to the record and decision as developed and issued by the agency. A.S.C.A. § 4.1043(a); *Nat'l Pac. Ins. Co. Ltd. v. Comm'r*, 5 A.S.R.3d 183, 189 (Trial Div. 2001). Furthermore, "[t]he Court may not substitute its judgment on the weight of the facts for that of the agency and the Court shall give appropriate weight to the agency's experience, technical **[**3**]** competence and specialized knowledge." *Nat'l Pac. Ins.*, 5 A.S.R.3d at 189; A.S.C.A. § 4.1043(b); *Nat'l Pac. Ins. Co., Ltd., v. Comm'r of the Am. Samoa Gov't's Workmen's Comp. Comm.*, 22 A.S.R.2d 15, 16-17 (Trial Div. 1992) ("courts have given considerable deference to administrative decisions involving an agency's construction of its governing statutes and regulations").

The Court may, however, reverse or modify the agency decision or remand the case for further proceedings:

> if substantial rights of the petitioner have been prejudiced because the decision of the agency is;
> (1) in violation of applicable constitutional or statutory provisions;
> (2) in excess of the statutory authority of the agency;
> (3) made upon unlawful procedure;
> (4) affected by other error of law;
> (5) clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or
> (6) arbitrary, capricious or characterized by abuse of discretion.

A.S.C.A. § 4.1044; *Nat'l Pac. Ins.*, 5 A.S.R.3d at 189.

Administrative Background

On September 2, 2014, Respondent CEO determined Saulo was eligible to run in the November 4, 2014 election. Ex. 1. On September 5, 2014 at 2:24 p.m., Bartley filed a challenge to this determination, raising concerns about Saulo's **[**4**]** birth records and certificate.[1] Ex. 2. The CEO issued a ruling that same day indicating that he concluded that Saulo is a United States National within the meaning of Article II, Section 3 of the Revised Constitution of American Samoa. Ex. 3. In later correspondence, the CEO stated that this determination "was based upon [his] review of the documents in [Saulo]'s candidate file as well as her voter registration file" and invited Bartley's counsel to inspect these files. Ex. 5. Bartley's counsel performed such an inspection and noted these files did not contain a birth certificate for Saulo. (*See* Ex.'s 6-7. Accordingly, on September 10, 2014 at 12:16 p.m. Bartley filed the instant petition for review in the Appellate Division. This petition was timely filed pursuant to A.S.C.A. §§ 6.0302-.0303.

Case History

On September 19, 2014, a single justice of the Court heard Saulo's motion to intervene as a real party in interest. No objections were raised and the justice granted the motion that same day.

On September 29, 2014, Bartley moved the Court to supplement the record pursuant to A.S.C.A. § 4.1043(a) and **[**5**]** A.C.R. 10. Bartley noted that a birth certificate was absent from Saulo's voter registration file despite a hand-written reference to a birth certificate on a list of documents utilized for verification on Saulo's 1994 application in the

[1] Petitioner previously raised these concerns in *Bartley v. Soliai*, AP No. 14-12, slip op. at 1 (App. Div. Dec. 12, 2012). The Court lacked subject matter jurisdiction to address the merits of this claim at that time because the election had already occurred. *Id.* at 7.

form of an affidavit. Ex. 10 at 10. Bartley argued that the record was, therefore, incomplete and sought to supplement the record with documents relevant to a determination of Saulo's place of birth.

On October 2, 2014, the Court heard oral argument on Bartley's motion to supplement the record.[2] The Court denied Bartley's motion at the hearing. The Court based this denial on A.S.C.A. § 4.1043(a)'s requirement that review be confined to the final agency decision and the materials reviewed by the agency when making that decision and A.S.C.A. § 4.1043(b)'s prohibition on the Court substituting its judgment on factual matters for that of the agency. The materials reviewed by the CEO when investigating Bartley's challenge to Saulo's candidacy, namely the candidate file and voter registration file, as well as the final ruling from the CEO were already included in the record. *See* Ex.'s 3, 6-7.

At the October 2, 2014 hearing, the Court also heard oral argument on The CEO's motion to dismiss the petition and the **[**6**]** merits of the petition itself. We took both matters under advisement. Our opinion and order are discussed below.

Discussion

The Court denies the CEO's motion to dismiss in favor of resolution of this petition on the merits. The procedural arguments advanced by the CEO for dismissing Bartley's petition are so interwoven with his arguments on the merits of the issues presented for judicial review as to make them indistinguishable. We review a final agency decision pursuant to the requirements set forth in the APA.

[4-5] Article II, Section 3 of the Revised Constitution of American Samoa requires that a Representative in the House of Representatives of American Samoa must "be a United States National."[3] United States nationality is defined by the federal government, s*ee* 8 U.S.C. § 1408, and determination of who qualifies as a United States National is an exclusive function of the federal government. Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the U.S. Constitution, laws made pursuant thereto and treaties made under the authority of the United States shall be the supreme law of the land. Further, the expressed power of naturalization in **[**7**]** art. I, § 8, cl. 4 grants the U.S. Congress exclusive authority to establish a uniform rule of naturalization.

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[2] Associate Justice Lyle L. Richmond recused himself from participation in this appeal.

[3] We note that this term, "United States National," is not further qualified or limited by the language in the Revised Constitution.

[6-7] The U.S. Congress has duly enacted laws specifying persons who are nationals and citizens of the United States at birth, 8 U.S.C. § 1401, and nationals but not citizens of the United States at birth, 8 U.S.C. § 1408. In both of the above categories (citizens and nationals and nationals but not citizens), qualified individuals are, upon application to and verification by the United States Department of State, issued United States passports. *See* 22 U.S.C. §§ 211a et seq. The only distinction is that for the second category the passport contains specific language indicating that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN."

[8-11] Bartley's contention that the CEO was required by her challenge to conduct a detailed and exhaustive investigation into Saulo's birth records or any other local records that may have been used in her application for a U.S. passport as a U.S. national but not a citizen is not supported by law.[4] The CEO's authority as an Officer of the Executive Branch of the American Samoa Government is limited to the powers and duties conferred under A.S.C.A. §§ 6.0103.1 et seq. Upon receiving a challenge **[**8**]** to a candidate's eligibility, he or she is required to "as soon as possible, investigate and rule on the challenge." A.S.C.A. § 6.0302.

Considering the election schedule's time restraints, the applicable statutes, and the pre-emption of U.S. nationality issues by the United States Government, we cannot ascertain any legal basis for the CEO to have proceeded any further than he did in this matter. Bartley advised the Court at oral argument that she continues to pursue federal administrative remedies with respect to Saulo's birth certificate. As of the date of the hearing, no response had been received by Barley from the U.S. Department of State.[5]

[12] Based on the foregoing, we hold Bartley has provided no grounds for this Court to reverse or modify the CEO's decision or to remand this case for further proceedings. The CEO's decision that Saulo was a United States National after reviewing files containing copies of a facially valid U.S. passport was not unlawful, in excess of his authority, clearly erroneous, or arbitrary, capricious, or an abuse of discretion pursuant to A.S.C.A. § 4.1044. Accordingly, we uphold the CEO's decision on

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[4] It is important to note that United States nationality does not require birth in a possession of the United States. *See* 8 U.S.C. § 1408. Birth records alone, therefore, may not be determinative of U.S. nationality.

[5] Nothing in this Opinion is intended to discourage Petitioner from reporting any valid allegations she has or providing any proof she obtains regarding her claim that Saulo's passport may have been obtained on the basis of fraud or misinformation to the appropriate federal agencies. Passport fraud is a serious crime. *See, e.g.*, 18 U.S.C. §§ 1541 et seq., 18 U.S.C. § 911, 18 U.S.C. § 1028.

[9**]** Bartley's challenge to Saulo's eligibility as a candidate. Bartley's petition is denied. Pursuant to A.S.C.A. § 6.0303(b), this determination is final. The CEO may print ballots for Tualauta District No. 15. A.S.C.A. § 6.0302(b).

In conclusion, we note that the High "Court's powers over elections and campaigns are, for the most part, limited, leaving to the qualified electors of this Territory their fundamental constitutional right to select by secret ballot their candidate of choice." *Bartley v. Soliai*, AP No. 14-12, slip op. at 9 (App. Div. Dec. 12, 2012).

Order

The CEO's motion to dismiss is denied.

Bartley's petition is denied and the CEO may print ballots for Tualauta District No. 15.

It is so ordered.

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Cite As: *Puletu v. Kneubuhl*, AP No. 11-09, slip op. at [page number] (App. Div. Oct. 17, 2014) (op. & order)

PULETU D. KOKO, On Behalf Of Himself And The PULETU FAMILY, TALAMATAVAO MORU MANE TUIAGAMOA, and Intervenors VAILU'U MANAIMA LANG, On Behalf Of Himself And The VAILUU FAMILY, Appellants,

v.

DOUGLAS CRANE KNEUBUHL a.k.a. MIKE KNEUBUHL, IULI A. GODINET, MOLIO'O FRANK GODINET, KISHON PRITCHARD LUA, FA'ATAMALI'I PRITCHARD, On Behalf Of Herself And As Administrator Of The ESTATE OF FUIAVAILI'ILI WILLIAM PRITCHARD, ELIONAI PRITCHARD, AZIZA PRITCHARD, BENIAH PRITCHARD, EL SHADDAI PRITCHARD, SHILOH PRITCHARD, and SHECHINA PRITCHARD, Appellees.

High Court of American Samoa
Appellate Division

AP No. 11-09

October 17, 2014

[1] Questions of law are reviewed de novo by the appellate division.

[2] The appellate division reviews findings of fact by the trial court under the clearly erroneous standard.

[3] A finding of fact is erroneous when the entire record produces the definite and firm conviction that the court below committed a mistake, according particular weight to the trial judge's assessment of conflicting and ambiguous facts.

[4] A trial court judge may use all of his senses in evaluating a witness's testimony and is free to believe, or disbelieve, the testimony.

[5] Where each party has presented evidence to the trial court that supports his or her claim to land ownership, the trial division's findings will not be disturbed on appeal unless clearly erroneous.

[6] The test for clear error is whether there is substantial evidence on the record to support the lower court's findings – not whether a dissatisfied litigant himself presented substantial evidence.

[7] The appellate division declined to engage in further analysis of Appellants' assertions when the trial court had clearly assessed the conflicting and ambiguous facts that the parts had presented in a 56-page opinion.

[8] It has been long established that in American Samoa, co-owners of non-communal land holding an undivided interest are tenants in common.

[9] A tenant in common is equally entitled to the use and possession of the common property and has an interest in the possession of every part of the property.

[10] It was not reversible error for the trial court to conclude Appellees could legally act on their own behalf and on behalf of one another regarding certain land parcels that they held as tenants in common.

[11] No lease exists when the individuals who signed the lease documents did not have authority to do so.

[12] The trial court may award attorney fees to the prevailing party when an opposing party has acted in bad faith, wantonly, oppressively, or when it is required by statute.

[13] The trial court did not commit reversible error when it imposed the payment of a portion of Appellees' attorney fees on several of the Appellants after finding that they had deliberately and antagonistically interfered with the Appellees' useful enjoyment of their land by, among other things, polluting a stream in a way that caused flooding, commencing unauthorized development, and obstructing construction.

Before WARD, Associate Justice; PATEA,[*] Acting Associate Justice; and FA'AMAUSILI, Associate Judge

Counsel: For Appellants, Marie A. Ala'ilima.
For Appellees Lua and Pritchards and Estate of Fuiavaili'ili Pritchard, Charles V. Ala'ilima.
For Appellees Douglas C. Kneubuhl and Iuli A. Godinet and Molio'o F. Godinet, Roy J.D. Hall, Jr.

[*] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

OPINION AND ORDER

Per curiam. **[**2**]**

Before the Court is Appellants' appeal from a June 10, 2009 Opinion and order in five consolidated Land and Titles Division cases, *Kneubuhl v. Puletu*, LT Nos. 23-03, 26-03, 40-04, 23-04, & 19-06 (Land & Titles Div. June 10, 2009), and a November 24, 2009 order denying a motion for reconsideration or a new trial. *Kneubuhl v. Puletu*, LT Nos. 23-03, 26-03, 40-04, 23-04, & 19-06 (Land & Titles Div. Nov. 24, 2009). For the reasons set forth below, we affirm the trial court's decision.

Background

This consolidated action arose out of disputed activities on a substantial portion of land in the village of Leone generally known as "Fuamete." The disputes spiraled into a complicated mix of competing ownership claims over distinct areas of Fuamete.

On November 30, 2011, we denied Appellants' motion to postpone the appellate proceedings pending final judgment of outstanding issues still before the trial court. However, while still maintaining appellate jurisdiction, we ordered a limited remand to the Land and Titles Division to determine whether the Intervenors presented their grievances to the Office of Samoan Affairs before intervening, whether the Office of Samoan Affairs issued a CID for their grievances, and whether the Intervenors' interests and claims are so interrelated with Appellants' **[**3**]** interests and claims that they are, in all practicality, indistinguishable under A.S.C.A. § 43.0302. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Nov. 30, 2011) (order den. mot. postpone pending final judgment of outstanding issues).

On August 1, 2012, the Land and Titles Division issued an order stating its findings and conclusions on these issues. *Kneubuhl v. Puletu*, LT Nos. 23-03, 26-03, 40-04, 23-04, & 19-06 (Land & Titles Div. Aug. 1, 2012) (order stating findings & conclusions on remand issues & directing transmittal to the App. Div.). On May 29, 2014, we ordered the parties to submit supplemental briefing on the trial court's order. *Puletu v. Kneubuhl*, AP 11-09 (App. Div. June 17, 2014) (mem. order).

On August 28, 2014, we heard final oral arguments on all issues raised on appeal and took the submitted matter under advisement. Our Opinion and Order are discussed below.

Standard of Review

[1-6] Questions of law are reviewed de novo by the appellate division. *Roman Catholic Diocese of Samoa Pago Pago v. Avegalio*, 20 A.S.R.2d 70, 73 (App. Div. 1992). Findings of fact are reviewed under the clearly erroneous standard. *Id.*; A.S.C.A. § 43.0801(b). A finding of fact is erroneous when "the entire record produces the definite and firm conviction that the **[**4**]** court below committed a mistake, according particular weight to the trial judge's assessment of conflicting and ambiguous facts." *TCW Special Credits v. K/V Kassandra Z*, 7 A.S.R.3d 3, 7 (App. Div. 2003) (internal quotations omitted). "[A]t the trial level, the judge may use all of his senses in the evaluation of a witness's testimony." *Nat'l Pac. Ins. Co. v. Oto*, 3 A.S.R.2d 94, 95 (App. Div. 1986). The trial court is free to believe, or disbelieve, the testimony of witnesses. *Afatia v. Aufata*, 3 A.S.R.2d 112, 112 (App. Div. 1986). Where each party has presented evidence to the trial court that supports his or her claim to land ownership, the trial division's findings will not be disturbed on appeal unless clearly erroneous. A.S.C.A. § 43.0801(b); *Suapilimai v. Faleafine*, 9 A.S.R.2d 16, 19 (App. Div. 1988). The Appellate Division does not review factual matters *de novo*. *Afoa v. Asi*, 20 A.S.R.2d 81, 83 (App. Div. 1991). The test for clear error is whether there is substantial evidence on the record to support the Land and Titles Division's findings – not whether a dissatisfied litigant himself presented substantial evidence. *Id.* (citing *Moea'i v. Ala'ia*, 12 A.S.R.2d 91 (App. Div. 1991)).

Discussion

I. Jurisdiction of the Land and Titles Division

We first review whether the Land and Titles Division had jurisdiction over these controversies. In its August 1, 2012 **[**5**]** order, the trial court found that the parties, or those with interests indistinguishable from the parties, had an adequate opportunity to pursue resolution of this dispute before the Office of Samoan Affairs but instead chose to litigate. We agree. Upon review of the entire record in these cases, the record strongly supports compliance with A.S.C.A. § 43.0302.

II. Substantive Issues Raised on Appeal

As to the substantive issues raised on appeal, they may be briefly summarized as follows:

1. Whether the trial court erred by finding that the heirs of the children of Alfred and Lemusu Pritchard could legally act on their own behalf and on behalf of other heirs with respect to those land parcels claimed by the heirs as co-owners.
2. Whether the trial court erred by finding that Appellants did not

have a claim to Fuamete by adverse possession.

3. Whether the trial court erred in invalidating a 1991 lease of a portion of the land Fuamete executed by Vailuu Failautusi Avegalio.
4. Whether the trial court erred by finding that Appellants failed to acquire ownership of a parcel of the land Fuamete by adverse possession and erred in its division of such property among the Pritchard heirs. **[**6**]**
5. Whether there was sufficient evidence for the trial court to find one or more of the Appellants altered the course of, or filled, a stream on the land Fuamete and had tacitly acknowledged the ownership of that parcel by the Pritchard heirs.
6. Whether there was sufficient evidence to support the trial court's award of partial attorney fees to the Appellees and certain sanctions against one or more of the Appellants.
7. Whether generally the trial courts' findings of fact were insufficiently supported by the evidence upon viewing the record as a whole.

III. Discussion of Substantive Issues

The common theme in each of the above summarized issues raised by Appellants is Appellants' assertion that the evidence presented at trial favored their claims of ownership of the various parcels of the land Fuamete, rather than those of the Appellees. As we have set forth in our Standard of Review, *supra*, and as required by statute, A.S.C.A. § 43.0801(b), this Court may not set aside the factual findings of the trial court unless such findings are clearly erroneous.

[7] The trial court, in its 56-page Opinion and order in these consolidated matters, clearly assessed the conflicting and ambiguous facts that the parties presented. *Kneubuhl v. Puletu*, LT Nos. 23-03, 26-03, 40-04, 23-04, & 19-06 (Land & **[**7**]** Titles Div. June 10, 2009). Upon observing the numerous witnesses and evaluating their respective testimonies, the trial court decided who to believe and disbelieve. We have carefully reviewed the record as a whole, and have found sufficient evidence to support the trial court's findings of fact in each of the issues raised on appeal. We will not engage in any further analysis of Appellants' assertions of reversible factual finding errors in these cases at trial.

With respect to those issues raised on appeal that also challenge the trial court's application of law to its findings of fact (i.e. issues 1, 3, and 6), Appellants have failed to demonstrate any reversible errors in the trial court's decisions.

A. Issue 1

[8-9] It has been long established that in American Samoa, co-owners of non-communal land holding an undivided interest are tenants in common. *See Willis v. Willis*, 2 A.S.R. 276, 284 (Trial Div. 1947). A tenant in common "is equally entitled to the use and possession of the common property" and "has an interest in the possession of every part of the property, and from the nature of the estate must necessarily be in possession of the whole property." *Yuhashi v. Malaga*, 3 A.S.R. 322, 330 (Trial Div. 1958) (quoting 86 CORPUS JURIS SECUNDUM 383). **[**8**]**

[10] Because the heirs of the children of Alfred and Lemusu Pritchard hold portions of Fuamete as tenants in common, they have a common interest in that property. It was not reversible error, therefore, for the trial court to conclude that the heirs of the children of Alfred and Lemusu Pritchard could legally act on their own behalf and on behalf of one another regarding those land parcels they claimed as co-owners.

B. Issue 3

[11] No lease exists when the individuals who signed the lease documents did not have authority to do so. *Fagasoaia v. Fanene*, 17 A.S.R.2d 91, 94 (Land & Titles Div. 1990). The Land and Titles division found that Appellant Vailu'u Failautusi Avagalio did not own the portions of Fuamete he purportedly leased to the Mane family in 1991. Having found that Vailu'u did not own the property he attempted to lease to others, the trial court's decision to invalidate the lease was in accordance with prevailing law.

C. Issue 6

[12-13] The trial court may award attorney fees to the prevailing party when an opposing party has acted in bad faith, wantonly, oppressively, or when it is required by statute. *Am. Samoa Gov't v. .145 Acres*, 5 A.S.R. 3d 61, 72 (Trial Div. 2001). The Land and Titles Division imposed the payment of a portion of Appellees' attorney fees on Appellants Puletu and Mane after **[**9**]** finding that "Puletu and Mane deliberately and antagonistically interfered with the Pritchards' useful enjoyment of their land" by, among other things, polluting a stream in a way that caused flooding, commencing unauthorized development, and obstructing construction. *Kneubuhl v. Puletu*, LT Nos. 23-03, 26-03, 40-04, 23-04, & 19-06, slip op. at 50 (Land & Titles Div. June 10, 2009). These factual findings are not clearly erroneous, and the trial court's award of attorney's fees based on these findings does not constitute reversible error.

IV. Conclusion

We hold that the trial court acquired jurisdiction pursuant to A.S.C.A. § 43.0302 to hear and decide these cases at trial. We further hold, for reasons set forth above, that the trial court did not commit any reversible error of law or fact in its decision in these cases, as embodied in its opinion and orders dated June 10, 2009 and November 24, 2009.

Order

The decision of the Land and Titles Division is hereby AFFIRMED.

It is so ordered.

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Cite As: *Aiono v. Territorial Registrar*, AP No. 13-12, slip op. at [page number] (App. Div. Oct. 29, 2014) (order on pet. for reh'g)

AIONO WHITNEY MAGALEI, Appellant,

v.

TERRITORIAL REGISTRAR, AMERICAN SAMOA GOVERNMENT, TUIA`ANA COMMUNAL FAMILY, MA`ATAUA TE`O, LUELI U. TE`O, MELODY TE`O-POLOA, MIRIAMA I. TE`O, KENESARETA MOI, and STEVEN SI`UFANUA representing the communal interests of HC LILI`I and HTC SI`UFANUA COMMUNAL FAMILY, ALA`IASA FILIFILI, LDS CHURCH, JONATHAN and MOLITA POUESI and ROY J.D. HALL, JR., Appellees.

High Court of American Samoa
Appellate Division

AP No. 13-12

October 29, 2014

[1] The Court does not consider review of the registration process to be a question of statutory interpretation.

[2] The Court has to assume and, absent compelling proof to the contrary, conclude that the Territorial Registrar recorded a title only after complying with his or her obligations under the law.

[3] Attacking the registration of land years after the land was initially registered and after failing to object to the initial registration, by subsequently attempting to register substantially the same land was inimical to the registration process and is not a procedure provided for by statute.

[4] There is no indication in the land registration statutes that the *Fono* intended to create a special judicial review process to review final decisions of the Territorial Registrar.

[5] The alleged absence of documents within the Territorial Registrar's records is of no import whatsoever on appeal as appellate review is limited to the record of the trial court and focuses on the documents before the trial court rather than the documents before the Territorial Registrar.

Before KRUSE, Chief Justice; WARD, Associate Justice; PATEA,[*] Acting Associate Justice; SU`APAIA, Associate Judge; and SATELE, Associate Judge

Counsel: For Appellant, Charles V. Ala`ilima
For Appellee American Samoa Government, Mark Jespersen, Assistant Attorney General
For Appellees Ma`ataua Te`o, Lueli U. Te`o, Melody Te`o-Poloa, and Miriama I. Te`o, Fiti A. Sunia

ORDER ON PETITION FOR REHEARING

Before the Court is Appellant Aiono Whitney Magalei's petition for rehearing. For the reasons set forth below, we deny the petition and issue an amended version of our September 12, 2014 Opinion and Order correcting non-material typographical errors. **[**2**]**

Jurisdiction

ACR 40 provides that within 14 days after entry of judgment, a petition for rehearing may be filed which "state[s] with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and . . . contain[s] such argument in support of the petition as the petitioner desires to present." On September 12, 2014, we issued an opinion and order affirming a decision of the Land and Titles Division. On September 25, 2014, Appellant petitioned the Court for rehearing on the basis of five purported errors of law or fact. The petition was, therefore, timely filed.

Standard of Review

"A rehearing is not a matter of right, but is a privilege granted at the discretion of the appellate court." *Fanene v. Fanene*, 30 A.S.R.2d 115, 116 (App. Div. 1996) (order denying pet. for reh'g & order to show cause). "The function of a rehearing is to correct errors of law or fact that the appellate court may have overlooked, leading to material errors." *Id.* "A rehearing will not be granted merely for the purpose of reargument of issues which have already been fully briefed, argued, and decided." *Fuavai v. Dist. Court*, 2 A.S.R.3d 56, 57 (App. Div. 1998) (order den. pet. for reh'g). "Merely disagreeing with the court's reading of the applicable statutes, rules, and case law, though, is not a basis for granting a rehearing." *Soli Corp. v. Amerika Samoa Bank*, 25 A.S.R.2d 94, 95 (App. Div. 1993) (order on mot. for reh'g). "Nor will a rehearing be granted for **[**3**]** issues raised for the first time in a petition for

[*] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

rehearing." *Fuavai*, 2 A.S.R.3d at 57.

The decision of an appellate court will stand unless the petitioner sets forth with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended. ACR 40; *Tuaolo v. Fruean*, 1 A.S.R.3d 40, 41 (App. Div. 1997) (order den. pet. for reh'g). A memorandum citing no statutes or case law supporting the petitioner's arguments and instead articulating "general allegations and bald-faced assertions" does not meet the particularity requirement of ACR 40. *Toleafoa v. Am. Samoa Gov't*, 26 A.S.R.2d. 71, 72 (App. Div. 1994) (order on mot. for recons.).

Discussion

I. Standard of review applied in the Opinion and Order

Appellant argues that the Court should have applied the de novo standard of review instead of the clear error standard of review because this appeal "is one of statutory interpretation of the Territorial Registrar's authority to register title to land where there is clear non-compliance with the statutory requirements." Pet. Hr'g Tr. 1:22-25. Appellant avers that only purely legal issues were presented to the Court during this appeal. Pet. Hr'g Tr. 2:20-22.

[1-2] We do not consider review of the registration process to be a question of statutory interpretation despite Appellant's **[**4**]** efforts to frame it as such. Instead, following *Ifopo v. Siatu'u*, 12 A.S.R.2d 24 (App. Div. 1989), we noted in the Opinion and Order ("O&O") that the Court had to assume and, absent compelling proof to the contrary, conclude that the Registrar recorded a title only after complying with his obligations under the law. *Aiono v. Territorial Registrar,* AP No. 13-12, slip op. at 4 (App. Div. Sept. 12, 2014). We then reviewed for clear error the Land and Titles Division's finding that Aiono's proof was less than compelling. We found no clear error. *Aiono,* AP No. 13-12 at 4-5 (op. & order).

There was no material error in the application of the standard of review to this case. The assessment of Appellant's proof was a question of fact for the trial court, and was, therefore, reviewed by this Court for clear error. Upon completing a review of that factual finding, we then applied the legal standard set forth in *Ifopo*. The application of *Ifopo* to the facts in this case was reviewed *de novo*, and no clear error analysis was set forth in our Opinion and Order.

II. Use of tactics inimical to the statutory registration process

Appellant argues that "[t]he route taken to bring these registration issues before the judiciary is not a ruse to get a "foot in the door" or "inimical to the statutory registration process." Pet. Hr'g Tr. 2:1-2. Additionally, "Appellant sees no other way to assert that the first registration was statutorily invalid other than to survey and offer a registration as if there were no prior valid registration and then contest any objection asserting **[**5**]** there was a valid prior registration." Pet. Hr'g Tr. 4:17-22.

In the Opinion and Order, the Court noted that the 2003 attempted registration by the Aiono family "was inimical to the statutory registration process which unambiguously admits only land 'not previously registered.'" *Aiono,* AP No. 13-12 at 2 (op. & order).

[3-4] The Court did not overlook or misapprehend any points of law or fact when making this statement. Attacking the registration of land years after the land was initially registered and after failing to object to the initial registration, by subsequently attempting to register substantially the same land was inimical to the registration process and is not a procedure provided for by statute. There is no indication in the land registration statutes that the *Fono* intended to create a special judicial review process to review final decisions of the Territorial Registrar. The tactics employed by Appellant are, therefore, inimical to the procedures enacted by the legislature.

III. Relationship between "Tuamauga" and "Gautamauga"

In the Opinion and Order, the Appellate Division identifies "Tuamauga" and "Gautamauga" as "essentially the same parcel of land." *Id.* In a footnote, the Court states that "[w]hile Tuiaana calls the land 'Tuamauga,' Aiono refers to it as 'Gautamauga.' The terms are actually synonymous. They both denote a location to the rear of or beyond the *mauga* (mountain ridge)." *Aiono,* AP No. 13-12 at 2 n.1 (op. & order).The Land and Titles Division stated that Gautamauga "extensively overlaps" with Tuamauga. *Aiono v. Am. Samoa Gov't*, LT Nos. 27-03 & 6-06 at 2 (Land & **[**6**]** Titles Div. Mar. 9, 2012) (op. & order validating land title regstr'n).

Appellant argues that Tuamauga and Gautamauga are not essentially the same parcel of land, that this question was not considered by the Land and Titles Division, and that the Court's commentary on this point "severely impacts the subsequent phase of trial." Pet. Hr'g Tr. 2:3-6. Appellant avers that this finding is unnecessary and harmful *dicta*. Pet. Hr'g Tr. 6:2-4. Appellant alleges that Tuamauga and Gautamauga overlap but that there are substantial areas that do not overlap and that the properties are distinct in terms of shape, meaning, and title structure. Pet.

Hr'g Tr. 6:8-16.

We fail to see Appellant's point. The subject matter of the controversy before the Land and Titles Division, is, both in law and fact, the "extensive overlap." Nothing more and nothing less. The overlap (or Aiono's perception of encroachment by Tuia`ana's previously registered land) was the only justiciable issue within the Land and Titles Division's purview. The parties were in fact before the Court over the very same piece of real estate. Any difference, therefore, in the phrases "extensively overlaps" and "essentially the same" as used in this case is really neither here nor there.

IV. Addenda to the Certificates of Irreconcilable Dispute

In the Opinion and Order, the Court stated that its "review of the record below revealed a 'Certificate of Irreconcilable **[**7**]** Dispute,' ("CID"), dated and filed with the Clerk of Courts on March 31, 2006, but also two separate addenda under OSA letterhead, filed concomitantly with the CID." *Aiono,* AP No. 13-12 at 7-8 (op. & order).

Appellant argues that the addenda detailing the minutes of the meetings at the Office of Samoan Affairs could not have been filed contemporaneously with the CIDs because they refer to a mediator who did not work for Samoan Affairs when the CIDs were produced. Pet. Hr'g Tr. 2:7-13. The Territorial Registrar's records also do not contain these addenda. Pet. Hr'g Tr. 7:6-9. Additionally, Appellant avers that the addenda must describe Samoan Affairs meetings unrelated to the CIDs in this case because they occurred after the matters were referred to the Land and Titles Division. Pet. Hr'g Tr. 8:3-9. Appellant seeks remand to Land and Titles to clarify this issue. Pet. Hr'g Tr. 8:14-16.

First, this point comes close to rearguing issues already fully briefed, argued, and decided. *See Fuavai v. Dist. Court*, 2 A.S.R.3d 56, 57 (App. Div. 1998) (order den. pet. for reh'g). The Court already decided that there was substantial compliance with A.S.C.A. § 43.0302. *Aiono,* AP No. 13-12 at 9 (op. & order). Appellant, however, can be understood as arguing that this determination was based on misapprehended information.

Second, the addenda were filed on March 31, 2006, concurrently with the CID, according to the Clerk's filing stamps. They detail the minutes of meetings on "Mati 08, 2006" and "Mati 29, 2006," which squares with the CID's recital of meetings on March 8 and 29, 2006. The Opinion and Order, **[**8**]** however, lists the meeting dates as March 9 and 29, 2009. *Aiono,* AP No. 13-12 at 8 (op. & order). These dates are typographical errors and the Opinion and Order will be amended to include the correct dates. The Court's holding of substantial compliance, however, is not

affected by these errors.

[5] Third, while Appellant argues that the Territorial Registrar's records do not contain these addenda, the alleged absence of the addenda within the Territorial Registrar's records is of no import whatsoever as appellate review is limited to the record of the trial court. The addenda pertain to Appellant's arguments respecting subject matter jurisdiction. Our review on this question focuses on the documents before the trial court rather than the documents before the Territorial Registrar.

Fourth, as for Appellant's argument that the addenda describe meetings that occurred after the filing of the CID because they refer to people who did not work at the Office of Samoan Affairs in 2006, Appellant produces no competent evidence to back up this assertion. He alleges that his counsel "checked with Samoan Affairs" about these matters, but there are no affidavits or similar evidence to that effect on file. Pet. Hr'g Tr. 7:19-25. This argument does not meet ACR 40's particularity requirement because it merely articulates "general allegations and bald-faced assertions." *Toleafoa*, 26 A.S.R.2d at 72.

V. Violation of the Model Rules of Professional Conduct

Appellant's counsel did not bring the addenda discussed **[**9**]** above, which were located in the trial court file, to the attention of the Appellate Division. In the Opinion and Order, the Court noted in a footnote that "Appellant counsel's seemingly willful ignorance of the addenda in the trial record constitutes either a lack of diligence or an attempt to obfuscate the factual basis of the Appellant's claim regarding the validity of the CID." *Aiono,* AP No. 13-12 at 8 n.7 (op. & order).

Appellant argues that the Court's footnote was made on an erroneous review of the record and was made without providing appropriate due process to counsel. Pet. Hr'g Tr. 2:14-17. Appellant avers that the finding of misconduct was based on the addenda to the CIDs and "should be immediately removed from the Opinion and Order with a clear explanation that this was the panel's error." Pet. Hr'g Tr. 9:22-25. Appellant also argues that the "published condemnation" was "a gratuitous act with no other purpose than to harm Appellant counsel's reputation" and was made without notice and an opportunity to be heard. Pet. Hr'g Tr. 10:1-4. Appellant requests "review by an independent authority" if the language is not removed. Pet. Hr'g Tr. 10:4-6.

First, the Court imposed no sanctions on Appellant's counsel and did not initiate any disciplinary or contempt proceedings which would require notice and a hearing. Moreover, counsel's due process argument is entirely off the subject. We see nothing in the submission as having anything to do with the merits of his **[**10**]** client's appeal, nor does it

build upon grounds for a rehearing.[1]

Second, the Court's footnote was not made on an erroneous review of the record. As discussed above, the error regarding the date of the meetings discussed in the addenda is not material. The addenda were filed on March 31, 2006 and Appellant's counsel should have discovered them in the trial record.

VI. Conclusion

In conclusion, we will not exercise our discretion in favor of rehearing. Appellant has failed to show any material errors in the Court's September 12, 2014 Opinion and Order.

Order

The Petition is denied.

An amended opinion and order correcting typographical errors as aforesaid in the September 12, 2014 opinion and order shall issue.

It is so ordered.

****

[1] The Court's statements concerning Appellant counsel's conduct are themselves intended to caution counsel that in the event of future misconduct--failure to provide a complete record on appeal and/or misleading the Court through the omission of key documents--will result in disciplinary or contempt proceedings. Counsel has been previously cautioned against similar conduct in another matter. *See Sai v. Thompson*, 9 A.S.R.3d 232, 236-37 (Land & Titles Div. Nov. 8, 2004) (op. & order upon remand).

Cite As: *Al-Shehri v. Misipati*, AP No. 14-14, slip op. at [page number] (App. Div. Nov. 24, 2014) (op. & order)

FATUMALALA L.A. AL-SHEHRI, Plaintiff,

v.

SINATAUATA MISIPATI, TUUFULI TUUFULI, FOLOLE FAGAIMA, AILINI ASIATA, SAVALAI TALAVOU ALE, MALUELUE PONE, TUAOLO SUAFO`A VAIEMA ALE, ADRIENNE EPENESA SEWELL, DOREEN TAUMAU, SO`OSO`O TUIOLEMOTU, LATISINA TAPENI, Defendants.

The High Court of American Samoa
Appellate Division

AP No. 14-14

November 24, 2014

[1] Because *pro se* pleadings are to be liberally construed, the Court treated a letter addressed to the Chief Justice as an election contest filed pursuant to A.S.C.A. §§ 6.0902-03 and accepted the letter as a timely initiating pleading by a *pro se* applicant.

[2] The Appellate Division has jurisdiction over election contests pursuant to A.S.C.A. § 6.0903, which provides for a complaint and answer to be filed in the Appellate Division and "heard by the High Court as soon as it reasonably may be heard."

[3] A.S.C.A. § 6.0903(c) sets the standard of review for invalidating a general election.

[4] When a plaintiff concedes that she was "not here to challenge the outcome" of an election in an election contest case, the Court is not presented with a "case or controversy," A.S.C.A. § 3.0221, for which it can provide a remedy.

Before KRUSE, Chief Justice; RICHMOND, Associate Justice; WARD, Associate Justice; LOGOAI, Chief Associate Judge; and SATELE, Associate Judge

Counsel: For Plaintiff, *Pro Se*
For Defendant Folole Fagaima, Gwen Tauiliili-Langkilde

KRUSE, Chief Justice:

OPINION AND ORDER

Plaintiff Fatumalala L.A. Al-Shehri ("Al-Shehri"), an unsuccessful candidate at the recent election for District No. 14 Representative to the American Samoa House of Representatives, appearing *pro se*, filed on November 11, 2014 with the Clerk of Courts a Complaint in the way of a letter addressed to the Chief Justice. The Chief Justice sitting pursuant to ACR 27 as a single justice appellate panel on November 11, 2014, Veterans Day, a statutory public holiday[1] and the final day for filing election contest complaints, accepted the letter as a timely **[**2**]** initiating pleading by a *pro se* applicant.[2] The Chief Justice also directed the Clerk of Courts to inquire of the *pro se* Plaintiff, for summons issuance purposes, as to the identity and name(s) of those whom she was complaining against. Plaintiff in response informed the Clerk to name the Defendants as herein captioned on the summonses issued. In her Complaint, Al-Shehri sought to call the Court's attention to several perceived defects in the electoral process for District #14.

Jurisdiction

[2] The Appellate Division has jurisdiction over election contests pursuant to A.S.C.A. § 6.0903, which provides for a complaint and answer to be filed in the Appellate Division and "heard by the High Court as soon as it reasonably may be heard." "At the hearing, the court shall cause the evidence to be reduced to writing and shall give judgment, stating all findings of fact and conclusions of law." A.S.C.A. § 6.0903(c).

Standard of Review

[3] A.S.C.A. § 6.0903(c) sets the standard of review for invalidating a general election, stating that a

> judgment may invalidate the general, special, or runoff election on the grounds that a correct result cannot be ascertained because of a mistake or fraud on the part of the district or election officials; or because it cannot be determined that a certain candidate, or certain candidates, received a majority or plurality of votes cast and were elected. **[**3**]**

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[1] See A.S.C.A. § 1.0501.

[2] **[1]** Because *pro se* pleadings are to be liberally construed, *see Dev. Bank v. Ilalio*, 5 A.S.R.2d 110, 116 (Trial Div. 1987), the Court treated Plaintiff's letter, as an election contest filed pursuant to A.S.C.A. §§ 6.0902-03.

"The Court's jurisdiction to grant relief to qualified persons timely bringing election contest actions under A.S.C.A. § 6.0902 is limited in scope to correcting mistakes or misconduct occurring on election day that could have caused a different result in the outcome of that election." *Bartley v. Soliai*, AP No. 14-12, slip op. at 9 (App. Div. Dec. 12, 2012). "Petitioners must prove that the election result has been made uncertain due to (1) mistake or (2) fraud or (3) the indeterminacy of the leading candidates' majority margin according to the valid votes cast." *Reid v. Tuipine*, 4 A.S.R.3d 9, 21 (App. Div. 2000). If the basis of the uncertainty is the indeterminacy of the leading candidates' majority margin, an "election is to be invalidated only if the number of ineligible ballots cast is equal to or greater than the winning margin." *Id.* at 21-22; *see Fuala`au v. Setu*, 23 A.S.R.2d 48, 50 (App. Div. 1992) (citing *Dole v. Attorney Gen.*, AP No. 24-78, slip op. at 8 (App. Div. 1978)). "Moreover, Petitioners have the burden of proving the uncertainty of the election result by clear and convincing evidence." *Reid*, 4 A.S.R.3d at 22.

Background

On election day, three candidates appeared on the ballot to represent District #14 in the House of Representatives: Al-Shehri, Samatua, and Ale. Ale received 272 votes, Samatua 108 votes, and Al-Shehri 48 votes.

On November 17, 2014, Defendant Folole Fagaima ("Fagaima"), the Election Official assigned to District No. 14 on election **[**4**]** day, filed her Motion to Dismiss Al-Shehri's Complaint. The grounds for the motion are that Al-Shehri did not seek a remedy within the power of the Court, that she failed to timely challenge the qualifications of the 14 electors named in the Complaint, and that she failed to contest a sufficient number of ballots to make a difference in the outcome of the election. On November 20, 2014, the date assigned for hearing election contests pursuant to the mandate of A.S.C.A. § 6.0903, the Court heard the motion, took it under advisement, and then heard the merits of Al-Shehri's Complaint. At the close of Plaintiff's presentation, Fagaima also moved the Court for judgment on the basis that Plaintiff did not sustain her burden of proof.

Discussion

For the reasons set forth below, we dismiss the Complaint and enter judgment for the Defendants. As discussed above, the Court can only invalidate an election when presented with clear and convincing evidence "that that a correct result cannot be ascertained because of a mistake or fraud on the part of the district or election officials; or because it cannot be determined that a certain candidate, or certain candidates, received a

majority or plurality of votes cast and were elected." A.S.C.A. § 6.0903(c). Al-Shehri failed to make such a showing.

[4] Indeed, Al-Shehri conceded that she was "not here to challenge the outcome" of the election. But § 6.0903 relief directly impacts the outcome of an election. By Plaintiff's own admission, the Court was not, therefore, presented with a "case **[**5**]** or controversy," A.S.C.A. § 3.0221, for which it can provide a remedy.

Even assuming that the truth of Al-Shehri's allegations, the extent of her showing simply does not support a finding that the results of the District #14 election are uncertain on the basis of mistake, fraud, or the indeterminacy of the leading candidate's majority margin according to the valid votes cast. In sum, we must enter judgment for Defendants because Al-Shehri did not seek a remedy within the power of the Court and did not present enough evidence to render the result of the District #14 election indeterminate.

The Complaint is dismissed and judgment shall enter for the Defendants.

It is so ordered.

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Cite As: *Sesepasara v. Mageo*, AP No. 13-14, slip op. at [page number] (App. Div. Dec. 4, 2014) (op. & order)

VA`AMUA HENRY SESEPASARA, Plaintiff,

v.

MEAUTA L. MAGEO and CHIEF ELECTION OFFICER TUAOLO M. FRUEAN, Defendants.

The High Court of American Samoa
Appellate Division

AP No. 13-14

December 4, 2014

[1] While a suit brought under A.S.C.A. § 6.0302 is decided before ballots are printed, a suit brought under A.S.C.A. § 6.0902 is decided after an election.

[2] Losing candidates have attempted to challenge the qualifications of winning candidates under the election contest provisions after the election. However, the Court has consistently held that A.S.C.A. § 6.0302 controls over the general provisions of § 6.0902, regardless of its former applicability to the challenges of candidates.

[3] Candidate eligibility is a matter that requires the complaining party to seek administrative or judicial relief prior to the election.

[4] Ultimately, it is the responsibility of the House of Representatives, not the Court, to determine whether an elected candidate is seated in that body.

Before: KRUSE, Chief Justice; RICHMOND, Associate Justice; WARD, Associate Justice; LOGOAI, Chief Associate Judge; and MAMEA, Associate Judge

Counsel: For Plaintiff, Matailupevao Leupolu Jr.
For Defendant Meauta L. Mageo, Sharron Rancourt
For Defendant Chief Election Officer Tuaolo M. Fruean, Gwen Tauiliili-Langkilde

OPINION AND ORDER

Va`amua Henry Sesepasara ("Sesepasara") filed an election contest pursuant to A.S.C.A. §§ 6.0902-6.0903 to invalidate the election result for District No. 9 in the American Samoa House of Representatives. In his Complaint, Sesepasara alleges that he recently discovered that the winning candidate, Defendant Meauta L. Mageo ("Mageo"), is a convicted felon and is not, therefore, eligible to sit in the Legislature pursuant to American Samoa Revised Constitution, art. II, section 3. Mageo received 356 votes, which was more than the 292 votes Sesepasara received. Mageo filed a motion to dismiss, in which he is joined by Defendant Chief Election Officer Tuaolo M. Fruean ("CEO"). On November 20, 2014, the Court heard the motion to dismiss, took it under advisement, and heard the merits of Sesepasara's Complaint. **[**2**]**

Discussion

[1-3] In essence, Plaintiff presents an untimely challenge to Mageo's qualifications as a candidate. A.S.C.A. § 6.0302 provides for challenges to the qualifications of candidates by 4:30 p.m. on the third business after the CEO's determination of candidate eligibility. While a suit brought under A.S.C.A. § 6.0302 is decided before ballots are printed, a suit brought under A.S.C.A. § 6.0902 is decided after an election. Losing candidates have, therefore, attempted to challenge the qualifications of winning candidates under the election contest provisions after the election. *See Bartley v. Soliai*, AP No. 14-12 (App. Div. Dec. 12, 2012); *Pili v. Tuipine*, AP No. 14-06, slip op. at 5-6 (App. Div. 2006). However, the Court has consistently held that A.S.C.A. § 6.0302 "control[s] over the general provisions of § 6.0902, regardless of its former applicability to the challenges of candidates." *Pili*, AP No. 14-06 at 5-6 (op. & order). Candidate eligibility is, therefore, a matter that requires the complaining party to seek administrative or judicial relief prior to the election. *Bartley*, AP No. 14-12 at 4 (op. & order). This matter is, therefore, time barred.

[4] In conclusion, as we noted in *Bartley*, "[u]ltimately, it is the responsibility of the House of Representatives, not the Court, to determine whether an elected candidate is seated in that body" pursuant to American Samoa Revised Constitution, art. II, section 22. *Bartley*, AP No. 14-12 at 9 (op. & order). **[**3**]**

Order

Plaintiff's Complaint is dismissed.

It is so ordered.

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Cite As: *Am. Samoa Gov't v. Whitehorn Constr., Inc.*, AP No. 09-14, slip op. at [page number] (App. Div. Dec. 18, 2014) (op. & order)

AMERICAN SAMOA GOVERNMENT, AND CHIEF PROCUREMENT OFFICER TIATALAGA J.E. KRUSE,
Petitioner,

v.

WHITEHORN CONSTRUCTION, INC., RESPONDENT.

High Court of American Samoa
Appellate Division

AP No. 09-14

December 18, 2014

[1] Under the Administrative Procedures Act, the Appellate Division is authorized by the Legislature to review certain Executive Branch agency decisions.

[2] The Legislature provided for the oversight of the Chief Procurement Officer by the Governor and for the Governor's issuance of executive orders concerning government procurement and for civil penalties against government employees or persons other than employees who violate the Act or Rules.

[3] A.S.A.C. § 10.0201 allows the Chief Procurement Officer to delegate his authority to a procurement officer responsible for administering procurement for a particular agency or governmental body.

[4] A.S.A.C. § 10.0250(b) requires a contractor submitting a bid for a competitive government construction contract to include bid security by way of certified check, cash or bid bond from an approved surety company in an amount equal to at least 5% of the bid.

[5] A.S.A.C. § 10.0282 provides for the resolution of disputes between contractors and A.S.G. concerning a procurement officer's decision in four specified categories, all four of which are set forth in other sections of the procurement rules: Source selection; Mistake-in-bidding; Contract interpretation; and Termination for convenience or default.

[6] A.S.A.C. § 10.0282 sets forth the procedures for a contractor to file a dispute and strict time constraints for the procurement officer who made the original decision to issue a final decision. An appeal of that final

decision is timely pursued by filing a written appeal to the Governor, who then appoints at least three qualified and neutral members to an appeals board to hear the dispute pursuant to the hearing procedures and documentation requirements of the A.P.A. and make a recommendation to the Governor.

[7] Under the Administrative Law Judge ("ALJ") Act, A.S.C.A. § 4.0604(f), the Office of the ALJ was conferred jurisdiction to conduct hearings and issue decisions concerning appeals of the procurement officer's final decision in a procurement bidding dispute and the Governor's authority to appoint a three member board to hear disputes of matters pertaining to procurement disputes was repealed.

[8] Reviewing the applicable statutes and administrative rules and considering the Separation of Powers Doctrine, the court found that the Legislature's reference of Rule 10.0282 in A.S.C.A. § 4.0604 (f) strongly indicated that the *Fono* intended that the entirety of this specially tailored Executive Branch procurement dispute resolution process remain intact except for substituting the administrative law judge in the role formerly discharged by the Governor-appointed appeals board.

[9] The statutory language in A.S.C.A. § 4.0604(f), fairly construed, simply substituted the administrative law judge for the previously existing appeals board appointed by the Governor on an ad hoc basis whenever a procurement dispute had been timely appealed to the Governor for a final decision.

[10] Simply stated, the administrative remedies for resolving government procurement disputes pursuant to A.S.A.C. § 10.0282 are not exhausted until the Governor takes appropriate action.

[11] The court held that a petition for judicial review was premature and it lacked jurisdiction to grant immediate judicial review when a procurement dispute was administratively incomplete.

Before RICHMOND, Associate Justice; WARD, Associate Justice; PATEA[*], Acting Associate Justice; LOGOAI, Chief Associate Judge; and MAMEA, Associate Judge

Counsel: For Petitioners, Assistant Attorney General, Vincent Kruse
For Respondent, Sharron Rancourt

[*] The Honorable Elvis R. Pila Patea, Judge, District Court of American Samoa, serving by designation of the Secretary of the Interior.

OPINION AND ORDER

Ward, Associate Justice:

[1] In this matter we have been petitioned by the American Samoa Government ("A.S.G.") and the Office of Procurement ("O.P.") and Chief Procurement Officer Tiaotalaga J.E. Kruse ("C.P.O. Kruse") (collectively "Petitioners") to judicially review the administrative ruling of the Administrative Law Judge ("A.L.J.") concerning a government procurement dispute between C.P.O. Kruse and Whitehorn Construction, Inc. ("W.C.I."). Under the Administrative Procedures Act ("A.P.A."), A.S.C.A. §§ 4.1001-.1044, **[**2**]** the Appellate Division is authorized by the Legislature to review certain Executive Branch agency decisions. Strict construction of the statutes providing for this review is required to avoid Judicial Branch encroachment upon Executive Branch powers and duties.

In response to this petition, W.C.I. filed an Answer to the petition and a Motion To Dismiss The Petition For Review. Oral arguments on the motion were presented on 30 October 2014.

Background and Case History

W.C.I. was the successful qualified bidder in a highway construction project for A.S.G. A critical element of the bidding process was that contractors submitting competitive bids demonstrate they possessed a valid performance bond. Although W.C.I. submitted evidence of its performance bond during the bidding process, after being awarded the contract and undertaking its performance, it was learned that the bond was invalid. W.C.I. and C.P.O. Kruse attempted to resolve this issue, but ultimately C.P.O. Kruse issued a final decision on 7 August 2013 to terminate the contract with W.C.I. for material breach of the contract terms. On 30 September 2013, W.C.I. filed its Petition For Appeal and For Hearing with both the A.L.J. and the Governor's Office pursuant to statute, (A.S.C.A. § 4.0604(f)), and administrative rule, (A.S.A.C. § 10.0282(c)). **[**3**]**

After a hearing was conducted, the A.L.J. issued an administrative ruling on 21 April 2014 holding that C.P.O. Kruse's decision that the contract with W.C.I. should be terminated for default was in error and that the contract should have been terminated for convenience. Following a denial by the A.L.J. of their motion for reconsideration, Petitioners filed their petition with this court on 12 June 2014.[1]

[1] This Background and Case History is predicated upon the partially reconstructed record with which counsel have provided the Court. The A.L.J., when contacted by the Clerk of Courts to provide the record in

Statutory and Administrative Rule Overview

[2] The American Samoa Procurement Act, A.S.C.A. §§ 12.0201 et seq. was enacted by the Legislature in 1983. The Act created an Office of Procurement headed by the Chief Procurement Officer, (A.S.C.A. § 12.0205), with authority to, inter alia, "in accordance with rules adopted: supervise the procurement of all construction, goods, and services needed by the government". A.S.C.A. § 12.0208(c)(1). The Legislature provided for the oversight of the Chief Procurement Officer by the Governor and for the Governor's issuance of executive orders concerning government procurement. A.S.C.A. §§ 12.0207, 12.0209, and 12.0213. The Legislature also specifically provided for civil penalties against government employees or persons other than employees who violate the Act or Rules. A.S.C.A. § 12.0218(a) and **[**4**]** (b). In subsection (c) the Legislature required that proceedings under this section "must be conducted in accordance with the hearing procedures prescribed by the Administrative Procedure Act, 4.1025 A.S.C.A. *et. seq, and the rules*." (emphasis added)

[3-4] Pursuant to A.S.C.A. § 12.0214, the Chief Procurement Officer promulgated the American Samoa Procurement Rules, A.S.A.C. §§ 10.0201-.0294 effective 11 July 1984. Significantly, Rule 10.0293 Civil penalties, using identical language to the statute, A.S.C.A. § 12.0218, was adopted.[2] Other pertinent sections of the American Samoan Procurement Rules include: § 10.0201 which allows the Chief Procurement Officer to delegate his authority to a procurement officer responsible for administering procurement for a particular agency or governmental body; and § 10.0250(b) which requires a contractor submitting a bid for a competitive government construction contract to include bid security by way of certified check, cash or bid bond from an approved surety company in an amount equal to at least 5% of the bid. **[**5**]**

[5-6] Under Chapter 9 of the American Samoa Procurement Rules ("IX

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this matter, submitted a letter on 6 August 2014 advising the Court that the file for this matter had been lost.

[2] Subsection (b) in both the statute and the rule addresses violations by persons other than government employees and authorize the procurement officer in charge of that project to sanction that violator with a "written warning of reprimand, *termination of contract or transaction*, or suspension from being a contractor or subcontractor under a government contract."

Subsection (c) in both the statute and the rule require such proceedings to be conducted according to A.S.C.A. § 4.1025 of the A.P.A. and the rules.

Contract Administration), §§ 10.0280-.0282, appears A.S.A.C. § 10.0282 Disputes and appeals.[3] This rule provides for the resolution of disputes between contractors and A.S.G. concerning a procurement officer's decision in four specified categories, all four of which are set forth in other sections of the procurement rules: Source selection (§ 10.0231); Mistake-in-bidding (§ 10.0231(b)(1)); Contract interpretation (§ 10.0280); and Termination for convenience or default (Appendix A/Appendix B). Section 10.0282 sets forth the procedures for a contractor to file a dispute and strict time constraints for the procurement officer who made the original decision to issue a final decision. An appeal of that final decision is timely pursued by filing a written appeal to the Governor, who then **[**6**]** appoints at least three qualified and neutral members to an appeals board to hear the dispute pursuant to the hearing procedures and documentation requirements of the A.P.A. and make a recommendation to the Governor. Under subsection (d) Limitation, of the rule, only as a result of a finding by the appeals board on behalf of the appellant may a contract terminated by the procurement officer for cause be converted to a termination for convenience.

[7] Some fourteen (14) years after the procurement rules became effective, the Legislature enacted the Administrative Law Judge Act of 1998,(an Executive Branch Administration Request Bill), A.S.C.A. §

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[3] 10.0282 Disputes and appeals.
(a) Definition. "Dispute" means any disagreement between contractors or potential contractors and the government regarding a procurement officer's decision on mistakes-in-bidding, source selection, contract interpretation, or termination for convenience or default.
(b) Requirement. All such disputes shall be submitted in writing to the procurement officer making the decision. The procurement officer shall acknowledge receipt of the dispute within five (5) working days of receipt and shall render a final decision within thirty (30) working days after receipt of the dispute.
(c) Appeals. Appeals of a procurement officer's final decision in a dispute may be made within sixty (60) days of the date of the decision, provided such appeal is submitted in writing to the Governor. The Governor shall appoint a board of at least three persons knowledgeable of procurement to review such appeals and recommend appropriate action to the Governor. None of the board members shall have participated in the action under appeal. At least one of the board members shall be a qualified attorney. Hearing procedures and documentation shall be as set forth in the Administrative Procedure Act, 4.1025 A.S.C.A, et seq., and the rules.
(d) Limitation. A termination for default may only be converted to a termination for convenience as a result of a finding by the appeals board on behalf of the appellant.

4.0601-.0608. This Act was later substantially amended in 2004.[4] Under the A.L.J. Act, A.S.C.A. § 4.0604(f), the Office of the A.L.J. was conferred jurisdiction to "conduct hearings and issue decisions" concerning "appeals of procurement officer's final decision in a *procurement bidding dispute* as described in section 10.0282 A.S.A.C. The Governor's authority to appoint a *three member board* to hear disputes of **[**7**]** matters pertaining to procurement disputes is hereby *repealed*."[5] (Emphasis added).

Discussion

W.C.I.'s motion to dismiss is predicated upon two separate legal theories. First, W.C.I. argues that it is not a proper party respondent to this case under Rule 15(a) A.C.R. Secondly, and in conflict with its first theory, W.C.I. is moving the court as a party to dismiss the petition filed by A.S.G. and C.P.O. Kruse because neither qualify under the A.P.A. definition of "person" set forth under A.S.C.A. § 4.1001(f) to seek judicial review under A.S.C.A. § 4.1040(a) as a person who is aggrieved by a final agency decision. Petitioners A.S.G. and C.P.O. Kruse presented oral arguments against the Motion To Dismiss stating generally that the A.L.J.'s administrative ruling was unlawful and the only avenue for the Petitioners to have this error corrected is through the judicial review process under the A.P.A.

As our review of the applicable statutes and rules set forth above reveals, the language of the A.L.J. Act as amended **[**8**]** is in tension with some of the language in Rule 10.0282 of the American Samoa

[4] As originally enacted subsection 4.0607(a) of the A.L.J. Act mandated that proceedings before the A.L.J. "shall be a trial de novo notwithstanding the nature of the controversy or dispute . . . ." This language, as amended in 2004, now states that such proceedings "shall be in the form of a hearing on the evidence and issues presented to the agency notwithstanding the nature of the controversy or dispute, supplemented by any additional evidence allowed under Section 4.0608."

[5] It is a highly unusual occurrence, (and perhaps attributable in this matter to the fact that the A.L.J. Act as amended was authored by the Executive Branch), for the Legislature to reference and "repeal" by statute, specific language appearing in an administrative rule. Generally the *Fono* has enacted statutory provisions of the Code relying upon the Savings Provision of A.S.C.A. § 1.0108(b); the Executive Branch then amends or adopts new regulations conforming to the new statutes; and the Legislature then reviews and recommends appropriate changes, amendments, repeals or additions thereto by letter or resolution pursuant to A.S.C.A. § 4.0109(d).

Procurement Rules.[6]

Under A.S.C.A. § 4.1040(a), the entitlement to judicial review by this Court is reserved to a person who has exhausted all administrative remedies available within an agency and "who is aggrieved by a final decision in a contested case . . . ." Subsection (b) of this statute in pertinent part reads, ". . . and judicial review may not be brought under this section . . . of any proceeding for which . . . the law provides other adequate means of judicial review."

Subsection (c) of this statute further allows our review of a preliminary agency action or ruling ". . . only if review of the final agency decision would not provide an adequate decision."

[8] Reviewing the applicable statutes and administrative rules and considering the Separation of Powers Doctrine, we find that the Legislature's reference of Rule 10.0282 in A.S.C.A. § 4.0604 (f) strongly indicates that the *Fono* intended that the entirety of this specially tailored Executive Branch procurement dispute resolution process remain intact except for substituting the **[**9**]** A.L.J. in the role formerly discharged by the Governor-appointed appeals board. The duty of that board under subsection (c) of A.S.A.C. § 10.0282 was to review such appeals and recommend appropriate action to the Governor, after, in appropriate appeals, reaching a finding as to whether a procurement contract terminated for default should be converted to a termination for convenience on behalf of the appellant. A.S.A.C. § 10.0282(d).[7]

Conclusion

[9-10] The language of the specifically tailored government procurement dispute resolution process set forth in A.S.A.C. § 10.0282 has not been altered since its adoption in 1983, despite the enactment of the A.L.J. Act in 1998 and the subsequent, substantial amendments thereto in 2004.

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[6] Although Rule 10.0282(a) defines procurement disputes to include "mistakes-in-bidding" and three other categories, the first sentence of A.S.C.A. § 4.0604(f) only lists appeals "... in a *procurement bidding dispute* as described in Section 10.0282 A.S.A.C." as falling within the A.L.J.'s authority to hear. The second sentence of subsection (f), however, removes the Governor's authority to appoint a board "to hear disputes of matters pertaining to *procurement disputes*." (Emphasis added).

[7] As this Court has noted in recent decisions involving judicial review of A.L.J. administrative rulings, the Executive Branch, either by utilizing its quasi-legislative powers to adopt new administrative rules or, through developing and submitting to the Legislature, proposed remedial legislation, could clarify and correct these present ambiguities.

The statutory language in that Act, A.S.C.A. § 4.0604(f), fairly construed, simply substituted the A.L.J. for the previously existing appeals board appointed by the Governor on an ad hoc basis whenever a procurement dispute had been timely appealed to the Governor for a final decision. We therefore view the A.L.J.'s administrative ruling in this matter the same as the former appeal's boards' **[**10**]** "Findings of Facts and Conclusion of Law" issued pursuant to A.S.C.A. §§ 4.1025 et seq. an advisory opinion which is then submitted to the Governor for "appropriate action." A.S.A.C. § 10.0282(c). Simply stated, the administrative remedies for resolving government procurement disputes pursuant to A.S.A.C. § 10.0282 are not exhausted until the Governor takes appropriate action.

[11] Absent a decision by the Governor in this matter, we hold that the petition for judicial review filed in this action is premature. We do not speculate as to what action the Governor may take in this matter; we hold only that we lack jurisdiction to grant immediate judicial review while this procurement dispute remains administratively incomplete.

Order

The Petition for immediate judicial review filed by A.S.G. and C.P.O. Kruse in this matter is dismissed without prejudice.

So Ordered.

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SLIP OPINIONS

OF THE

TRIAL DIVISION

OF THE

HIGH COURT OF AMERICAN SAMOA

(2014)

Cite As: *Am. Samoa Gov't v. Tilei*, CR No. 23-13 at [page number] (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

SHAWN TILEI, Defendant.

High Court of American Samoa
Trial Division

CR No. 23-13

January 13, 2014

[1] A.S.C.A. § 46.2521, which establishes the rehabilitative release program, is quite clearly a legislative policy directed to the executive branch for implementation, not the judicial branch. In contrast, Chapter 22 of the Code regarding "probation," is directed to the judiciary.

[2] Under A.S.C.A. § 46.2524(a), inmates serving terms of detention as a condition of probation are eligible to participate in the rehabilitative release program, including work release, but inmates convicted of violent sex crimes or sexual assaults on children are ineligible.

[3] The rehabilitative release program is a function of the Department of Public Safety and is administered by the Commissioner of Public Safety. A.S.C.A. §§ 46.2521 and 46.2523. This statute limits the executive branch in administering the rehabilitative release program and has no bearing on the Court's administration of probation, a squarely judicial function.

[4] A probationer serving a term of detention in the correctional facility as a condition of probation is under the direct jurisdiction of the Court.

[5] Chapter 22 does not limit the Court's ability to allow work release as a condition of probation; indeed, the Court has wide discretion in imposing probation conditions and may revoke or modify any condition at any time.

[6] The Court may "terminate" probation and thus "discharge" a defendant at any time if the Court deems it warranted.

[7] The Court has discretion to structure the Defendant's probation program to allow work release.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, Camille J. Phillipe, Assistant Attorney General
For Defendant, M. Douglas Fiaui, Public Defender

ORDER DENYING PLAINTIFF'S MOTION TO AMEND SENTENCE

Background

On May 31, 2013, the defendant Shawn Tilei ("Defendant") was sentenced to concurrent terms of imprisonment of 10 and 5 years upon his conviction for Rape and Incest, stemming from an incident involving a minor. Execution of sentence was suspended and the Defendant was placed on probation for a period of 10 years on certain conditions which included the Defendant undertaking a 36 month term of detention to be served at the Territorial Correctional Facility without any release whatsoever except for genuine medical emergency or as otherwise ordered by the Court. The judgment further provided that the Defendant may, after having serving 6 months of detention, move the Court to authorize work release provided his showing gainful employment.

On June 10, 2013, Plaintiff American Samoa Government **[**2**]** ("ASG") moved to amend the judgment and sentence, arguing that Defendant did not qualify for work release pursuant to A.S.C.A. § 46.2524(c), which states that inmates convicted of violent sex crimes or sexual assaults on children are ineligible for work release. According to ASG, because Defendant was convicted of a sexual assault on a child, he is ineligible to participate in any sort of work release.

On July 22, 2013, Defendant filed his Opposition to ASG's Motion, arguing that Defendant is on probation and is not a participant in any rehabilitative release program established by. Rather, Defendant contends, the Court's decision to allow him to apply for work release as a condition of probation falls entirely within the Court's granted by A.S.C.A. § 46.2205.

Discussion

[1] We hold that the judgment and sentence allowing work release as a condition of Defendant's probation was properly within the Court's discretion. In our view, ASG has misconstrued the American Samoa Code Annotated the ("Code") by failing to read applicable statutes in context. Notably, Chapter 25 of the Code, establishing the section 46.2521 "rehabilitative release program," is quite clearly legislative policy directed to the executive branch for implementation, not the

judicial branch. In contrast, Chapter 22 of the Code regarding "probation," is directed to the judiciary.

[2-4] ASG correctly reads that under A.S.C.A. § 46.2524(a), inmates serving terms of detention as a condition of probation **[**3**]** are eligible to participate in the rehabilitative release program, including work release, but inmates convicted of violent sex crimes or sexual assaults on children are ineligible. A.S.C.A. § 46.2524(c). However, ASG fails to account that, as contemplated in the statute, the rehabilitative release program is a function of the Department of Public Safety and is administered by the Commissioner of Public Safety. A.S.C.A. §§ 46.2521 and 46.2523. This statute limits the executive branch in administering the rehabilitative release program and has no bearing on the Court's administration of probation, a squarely judicial function. Thus, a probationer serving a term of detention in the correctional facility as a condition of probation, is under the direct jurisdiction of the Court. *Am. Samoa Gov't v. Masaniai*, 5 A.S.R.2d 152 (Trial Div. 1987).

[5-7] The enactments that bear on the Court's probation role are, as mentioned, contained in Chapter 22 of the Code. Thus, A.S.C.A. § 46.2203(3) recognizes that the court may utilize the sentencing option of probation under circumstances where "the court is of the opinion that . . . continuing *court* supervision [of a defendant] is appropriate." However, nowhere in Chapter 2 is the Court limited in its ability to allow work release as a condition of probation. Indeed, and as Defendant notes in his Opposition motion, the Court has wide discretion in imposing probation conditions and may revoke or modify any condition at any time. A.S.C.A. § 46.2205. Moreover, the Court may even **[**4**]** "terminate" probation and thus "discharge" a defendant at any time if the Court deems warranted. A.S.C.A. § 46.2208. Accordingly, the Court had proper discretion to structure the Defendant's probation program to allow work release and ASG's motion is lacking merit.

Order

ASG's Motion to Amend Sentence is, therefore, denied.

It is so ordered.

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Cite As: *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 at [page number] (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.)

UTISONE and ROWENA NOTOA, Plaintiffs,

v.

AMERICAN SAMOA POWER AUTHORITY, Defendant.

High Court of American Samoa
Trial Division

CA No. 81-06

January 22, 2014

[1] The decision of whether or not to grant a motion for a new trial or reconsideration is left to the broad discretion of the trial court.

[2] For a nonjury trial, which includes all civil trials in American Samoa, a motion for a new trial should be based on a manifest error of law or mistake of fact.

[3] It is the function of the finder of fact to determine the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts.

[4] A trial court has broad discretion to qualify an expert witness and allow expert opinions on scientific, technical, or other specialized topics beyond the purview of the trier of fact.

[5] When Defendant failed to present any convincing arguments or evidence to refute the Court's factual findings, the Court's findings were not clearly erroneous.

Before RICHMOND, Associate Justice and MAMEA, Associate Judge

Counsel: For Plaintiffs, Charles Ala'ilima
For Defendant, Richard DeSaulles

AMENDED ORDER DENYING MOTION FOR RECONSIDERATION

Background

Defendant American Samoa Power Authority ("ASPA") moves the Court to reconsider its September 10, 2013 order finding ASPA liable for the fire that destroyed the home of Plaintiffs Utisone and Rowena Notoa (jointly "Defendants"). Because this case concerns various technical arguments, significant questions of witness credibility, and the Court's overall findings of fact, we will provide a recitation of the facts below.

On September 29, 2005, ASPA disconnected the power at Plaintiffs' home due to unpaid electric bills. Later that same day, Plaintiffs paid their outstanding bills and requested that their power be reconnected. Plaintiffs alleged that ASPA then violated its own policies when two technicians reconnected the power while neither of Plaintiffs was home. Plaintiffs also **[**2**]** claimed that the ASPA technicians failed to reinstall a plastic insulation sleeve at the electric meter. According to Plaintiffs' expert witness, Tolo Tolo, Jr. ("Tolo"), the missing insulation sleeve allowed a low flow of electric current to arc to an air conditioning unit in the back of the house.[1] The current build-up caused the air conditioner to overheat and explode resulting in a fire that destroyed Plaintiffs' home. Plaintiffs' son, Dennis Spencer ("Spencer"), first discovered the fire when he returned home sometime during the day of September 29. He testified that he heard the refrigerator running before he saw the fire, thus suggesting that the power had been reconnected.

In response, ASPA argued that the power was never reconnected and that the home was already on fire when its employees arrived to reconnect the power on September 29. ASPA presented the testimony of four employees who were responsible for disconnecting and reconnecting the power and who allegedly witnessed the fire. ASPA's expert witness, Siva Kumar (Kumar), opined that the air conditioner exploded as a result of a fire ignited by an unidentified cause other than the electric meter connection. ASPA also attacked Tolo's credentials, argued that he was biased against ASPA, suggested that his installation of **[**3**]** the wiring at Plaintiffs' home gave him an interest in the outcome of the case, and claimed he provided a factually inaccurate analysis of the alleged electrical arcing and air conditioner combustion.

In our order issued on September 10, 2013, we balanced these conflicting factual allegations and ultimately credited the testimony of Plaintiffs' witnesses over that of ASPA's. The Court indicated that it was suspicious of the identical and seemingly rehearsed testimony provided by ASPA's employees. As to the expert testimony, because Tolo actually examined the electric meter and air conditioner after the fire, the

[1] Tolo testified that he inspected the electric meter and air conditioning unit shortly after the fire.

Court credited his contemporaneous investigation over Kumar's second-hand analysis. Ultimately, the Court found that the failure to install an insulation sleeve caused a current flow to overheat the air conditioner which resulted in an explosion and fire.

In compliance with T.C.R.C.P. 59, ASPA filed the instant motion for reconsideration on September 20, 2013. The parties presented their arguments in written format and at a hearing on October 29, 2013. For the reasons discussed herein, we now deny ASPA's motion for reconsideration.

Standard of Review

[1-2] The decision of whether or not to grant a motion for a new trial or reconsideration is left to the broad discretion of the trial court. 12 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE **[**4**]** § 59.13[3][a] (3d ed. 1999); *see also Tilo v. Danielson*, 8 A.S.R.3d 264, 265 (Land & Titles Div. 2004). For a nonjury trial, as are all civil trials in American Samoa, a motion for a new trial should be based on a manifest error of law or mistake of fact. *See* MOORE'S FEDERAL PRACTICE § 59.13[3][a]; *Dev. Bank of Am. Sam. v. Tuika*, 7 A.S.R.3d 86, 89 (Trial Div. 2003); *see also Am. Sam. Gov't v. S. Pac. Island Air Sys., Inc.*, 28 A.S.R.2d 170, 171 (Trial Div. 1995). The burden on the moving party is to show substantial reasons that constitute an injustice and therefore justify vacating the Court's earlier decision. *S. Pac. Island Airsystems*, 28 A.S.R.2d at 171; *Gi v. Mageo*, 2 A.S.R. 383, 384 (Trial Div. 1948).

Discussion

The vast majority of ASPA's motion for reconsideration challenges Tolo's qualifications as an expert witness and claims his alleged interest in the outcome of the trial should have barred his testimony altogether. Many of these arguments have already been addressed by the Court in original opinion and order. As a last resort, ASPA asks the Court to revisit its findings of fact and to modify those findings in ASPA's favor.

I. The Court appropriately established the causal connection between the conduct of ASPA's employees and the fire that destroyed Plaintiffs' home.

In our original order, we credited Tolo's explanation of how the improperly reconnected power meter allowed a low flow of **[**5**]** electricity to arc to and overheat the air conditioner motor. ASPA disputes this determination and argues that the Court erred as a matter of law by not sufficiently establishing the causal link between the improper electrical connection and the air conditioner explosion. Distilling this

argument to its essence, ASPA merely asks the Court to credit the testimony of Kumar over that of Tolo.

[3] As we noted in our original order, "[i]t is the function of the finder of fact to determine the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts." *See Notoa v. Am. Samoa Power Auth.*, CA No. 81-06, slip op. at 4 (Trial Div. Sept. 10, 2013) (op. & order) (citing *Am. Samoa Gov't. v. Tauala*, 25 A.S.R.2d 179, 180 (Trial Div. 1994)). We performed precisely this function and exercised our discretionary authority when we credited the expert testimony of Tolo. *See Notoa*, CA No. 81-06. at 5 (op. & order). Among other considerations, we based this decision on the fact that, unlike Kumar, Tolo actually investigated the electrical connection after the fire. In addition, despite ASPA's arguments to the contrary, we find that Tolo's 20-years experience as an ASPA employee, including two years as an electric meter superintendent, likely gave him significant familiarity with ASPA policies and procedures.

ASPA also argues that the Court "elected to shorten" the theory of causation between the improper electrical connection **[**6**]** and the fire. Notwithstanding that ASPA's contention relies on the "theory" as defined by ASPA, we again emphasize that our order explicitly credited the causal chain explained by Tolo. Moreover, our determination of the events that led to the fire was based on the full weight of the evidence, not just Tolo's expert opinion. Spencer's testimony indicating the power had been reconnected before the fire, Plaintiffs' post-trial supplemental arguments, and our skepticism regarding testimony from ASPA's employees all informed our decision. The Court is not required to enumerate a theory of causation consistent with the theory argued by ASPA.

II. The court appropriately qualified Tolo as an expert witness.

[4] ASPA next asks the court to reconsider its decision to qualify Tolo as an expert concerning electrical connections. A trial court has broad discretion to qualify an expert witness and allow expert opinions on scientific, technical, or other specialized topics beyond the purview of the trier of fact. *See* T.C.R.E. 702; *Faifaiese v. Am. Sam. Gov't*, 6 A.S.R.3d 10, 19 (App. Div. 2002); *Clifton v. Voyager, Inc.*, 31 A.S.R.2d 12, 22 (Trial Div. 1996). T.C.R.E Rule 702 provides that an expert may be qualified based on their "knowledge, skill, experience, training, or education." **[**7**]**

Here, ASPA has not advanced any substantial reason to reverse our previous decision that Tolo is indeed a qualified expert on matters of electrical connections, wiring, and electrical appliances. Tolo was an employee of ASPA for approximately 20 years including at least two

years in a supervisory position. Since leaving ASPA, Tolo has continued to work as an electrician in some capacity. Tolo's more than 30 years of experience at the time he investigated the electrical connection and his knowledge of ASPA policies and procedures surely qualifies him as an expert concerning an electric meter connected by ASPA employees. Although Tolo may not have formal education on par with that of Kumar, nothing in Rule 702 or local precedent requires a degree in order for a witness to be qualified as an expert. Overall, our qualification of Tolo as an expert was well within the discretion afforded a trial court and will not be reversed based merely on ASPA's disagreement with our decision.

Similarly, the Court will not credit ASPA's argument that Tolo gave an opinion on matters beyond his field of expertise. Tolo testified with regard to how a low flow of electrical current to the air conditioner caused an explosion and resultant fire. ASPA contends that Tolo lacked sufficient expertise of air conditioning, metallurgy, and electrical fault analysis to offer this opinion. However, Tolo's opinion did not rely on a **[**8**]** detailed analysis of these fields. Tolo testified as an electrical expert and explained how a flow of current could overheat an electrical appliance. As a highly experienced electrician familiar with wiring houses and electrical meter connections, this testimony was within the scope of his expertise.[2]

Lastly, ASPA claims that Tolo is biased against ASPA and has an interest in the outcome of the lawsuit. Any bias Tolo has toward ASPA speaks only to Tolo's credibility and the evidentiary weight of his testimony. ASPA addressed this concern by impeaching Tolo's bias and credibility on cross-examination. Whether or not to credit Tolo's testimony is not a question of law, as ASPA argues, but a factual determination left to the discretion of the Court as the trier of fact.

With regard to Tolo's alleged interest in the outcome of the trial, ASPA claims that because Tolo wired the Notoa's house, "any theory of liability predicated upon an electrical fire would potentially implicate Tolo." In support of this proposition, ASPA cites *Proteus Books v. Cherry Lane Music*, 873 F.2d 502, 515 (2nd Cir. 1989). In *Proteus*, the trial court **[**9**]** barred expert testimony from a potential witness who was both a named party to the lawsuit and directly involved as an owner

[2] ASPA specifically takes issue with Tolo's belief that the freon 22 coolant in the air conditioner was combustible. ASPA quotes Tolo as saying "there is oxygen in the freon," but does not offer a citation or any context for this quote. Other evidence in the record suggests that oxygen may have come in contact with the freon due to a rupture of the freon chamber caused by increased pressure due to overheating generated by the low flow of electricity. ASPA has not addressed this issue.

or partner with a company also named in the lawsuit. *See Proteus Books, Ltd. v. Cherry Lane Music Co.*, 688 F. Supp. 877 (S.D.N.Y. 1988). If Tolo has any interest in the outcome of the instant matter, it is not nearly as direct or potentially prejudicial as was the interest of the proposed witness in *Proteus*. Furthermore, if there is any merit to this argument, the appropriate procedure to address Tolo's alleged liability would have been for ASPA to implead Tolo as a third-party defendant under T.C.R.C.P Rule 14. *See generally Progressive Ins. Co, Ltd. v. Southern Star Int'l, Inc.*, 4 A.S.R.3d 180 (Trial Div. 2000).

III. The Court's findings of fact were appropriate and not clearly erroneous.

[5] ASPA challenges the Court's factual findings that the power was turned on by ASPA employees before the fire and that Tolo actually investigated the electrical connection after the fire. ASPA has not presented any convincing arguments or evidence to refute these findings. Further, ASPA ignores the fundamental principle that the trier of fact retains sole discretion to determine the weight of evidence and credibility of witnesses. *See In re Matai Title "Puailoa,"* 8 A.S.R.3d 39, 43 (App. Div. **[**10**]** 2004); *Willis v. Gov't of Am. Sam.*, 4 A.S.R. 926, 932 (App. Div. 1965).

Defendant ASPA's motion for reconsideration is denied. It is so ordered.

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Cite As: *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07, slip op. at [page number] (Trial Div. Jan. 24, 2014) (op. & order)

BINACO TEXTILES, LTD., Plaintiff,

v.

ALAMAI CORPORATION, CAROL GALEA'I and ESTATE of ALEX GALEA'I, Defendants.

High Court of American Samoa
Trial Division

CA No. 101-07

January 24, 2014

[1] When there is a continuous, open, concurrent account, the cause of action shall be deemed to have accrued on the date of the last item therein.

[2] In general, adopting the corporate form for a business enterprise exempts corporate shareholders from liability for the corporation's debts.

[3] Certain circumstances justify disregarding the corporate shield when failing to do so would allow abuse of corporate privileges.

[4] The courts of American Samoa have long applied a standard for piercing the corporate veil first established by the Supreme Court of California in *Minifie v. Rowley*, 187 Cal. 481, 487 (1921).

[5] When affording the Defendant the protections of the corporate form would allow him to personally benefit from his misconduct while simultaneously prejudicing the Plaintiff by denying it the ability to recoup significant losses, the circumstances warranted piercing the corporate veil and holding Defendant personally liable.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Charles V. Ala'ilima
For Defendants, Marie A. Ala'ilima

OPINION AND ORDER

Background

This case arose out of arrearage Defendant Alamai Corporation ("Alamai") on three accounts with Plaintiff Binaco Textiles ("Binaco"). Binaco is a general merchandise wholesaler based in Fiji and supplies goods to retailers throughout the South Pacific. Alamai is a defunct closely held corporation that operated general merchandise and grocery stores in Leone and Tafuna.

In a two-count amended complaint filed on August 2, 2009,[1] Plaintiff alleges that Alamai failed to pay for goods it ordered **[**2**]** between 2002 and 2007. The amended complaint also adds Caroline Galea'i ("Caroline") and the Estate of Alex Galea'i as codefendants and claims that both parties are personally liable for the debts of Alamai. In an answer filed on February 19, 2010, Defendants dispute Binaco's accounting, assert a number of affirmative defenses, and argue that Alamai and its officers complied with corporate formalities.

Prior to the early 1990s, Alex Galea'i ("Alex") owned and operated Alamai with his mother and father. After Alex and Caroline married in 1989, she began working for Alamai as an office assistant at the company's stores in Leone. At an unknown time, Alex bought out his parents' shares and became the sole shareholder and president of Alamai. In this capacity, he kept accounting records, managed the day-to-day affairs of the company, and served as its only managing officer.[2] In January 2006, Alamai hired Evelyn Luardo as a bookkeeper to assist in management of the company's accounting records.

In addition to running Alamai, Alex also engaged in a number of other entrepreneurial pursuits. He was a partner in a computer store business that rented space in Alamai's leased general merchandise building in Tafuna and also ran a Checkers restaurant franchise. **[**3**]**

As Alamai expanded in late 2005, Caroline was promoted from her secretarial position to manager of the new general merchandise store in Tafuna. At an unknown time, Caroline was also given signature authority over Alamai's bank account and, at Alex's instruction, signed

[1] Binaco's original complaint filed on November 26, 2007 alleged a single count of breach of contract against Alamai Corporation as the sole defendant. After Plaintiff moved to amend its complaint on February 12, 2009, Defendants filed an opposition to the motion on March 3, 2009. The Court granted Plaintiff's motion on August 14, 2009.

[2] Caroline also participated in Alamai account management to some extent.

checks on behalf of the company. Alex and Caroline were the only Alamai employees with signature authority over Alamai's company bank account.

As evidenced in Plaintiff's Exhibit 14, a significant number of payments from Alamai's accounts do not appear to be related to Alamai's business operations. These include payments to the South Pacific Academy, a number of checks made to cash, at least eight payments related to the construction of Alex's Checkers restaurant, thousands of dollars to Haleck motors, purchases made on behalf of Alex's computer store, and home loan payments. Many, if not all, of the checks for these purchases and payments were signed by Caroline.

Testimony from Dillup Kumar, the owner of Binaco, suggests Alamai and Binaco first began doing business sometime in the early 1990s. Although Caroline ordered goods from Binaco for Alamai's stores, she first submitted all purchase orders to Alex for his approval. Until roughly September 2005, Binaco processed all of Alamai's purchases and payments through an account labeled AS130. *See* Pl.'s Ex. 1. At some point in late 2005, the companies came to a mutual agreement to **[**4**]** stop using AS130 and open a new account identified as AS144. *See* Pl.'s Ex. 3. At that time, AS130 had an outstanding balance of $615,400.76. It appears that the account changeover coincided with the opening of Alamai's general merchandise store in Tafuna. Alamai also had a third account with Binaco's subsidiary, Jeanica Plastics, Ltd., through which it purchased plastic shopping bags.

In July 2007, Alex travelled to Fiji to meet with Kumar regarding business between Alamai and Binco. During this trip, Alex was stabbed to death in his hotel room.[3] After Alex's death, Caroline assumed management of Alamai's affairs with assistance from her brother. Later in 2007, Binco sent demands for payment on Alamai's three accounts. Defendants disputed the amounts owed and sought to return unsold goods it received from Binaco before it made any payments on the outstanding balance. Around this time, Alamai was also making payments to at least four other creditors.

After the parties could not come to an agreement as to Alamai's arrearage, Binaco filed the instant action. The Court presided over a two-day trial on November 20-21, 2012. **[**5**]**

[3] Fijian investigators claim Alex's death was a suicide. At trial, defense counsel made vague accusations that Kumar may have been involved in Alex's death. Nothing in the trial record substantiates these allegations.

Discussion

I. Defendant Alamai Corporation's failure to pay for goods it received from Plaintiff constitutes a breach of contract.

Though not explicitly stated, Binaco's first claim against Alamai is best interpreted as based on a breach of contract argument. Binaco claims that Alamai failed to pay for a number of goods it received between approximately November 2002 and May 2007. The dispute between the parties concerns not whether Alamai owes but how much.

According to Binco's accounting records, Alamai owed debts on the three accounts as follows: (1) AS130: $615,400.76; (2) AS144: $457,614.62; (3) A108: $37,302.00. However, in May 2008, the parties cooperated to return unsold goods still in Alamai's possession to Binaco. Binaco subtracted shipping and handling fees and credited the remaining value of the returned goods toward Alamai's outstanding debt.[4] Bianco now seeks to recover a grand total of $800,419.11.

Alamai counters that it never ordered many of the goods it received from Binaco. Alamai also claims that Binaco never **[**6**]** credited the payments listed on the account record for AS144. *See* Pl.'s Ex. 2.

Overall, the Court credits the evidence and explanations provided by Binaco. The only evidence that Alamai did not order all of the goods it received from Binaco is Caroline's stand-alone allegation. In contrast, Binaco submitted substantial accounting records and detailed invoice slips clearly identifying the goods at issue. Though these orders date from 2003 to 2006, Defendants did not submit any evidence of disputed shipments when they were received and only now challenges their validity. Thus, we find that Alamai did in fact make the orders identified in Binaco's invoice slips and remains responsible for payment.

As to the allegedly uncredited payments listed in Plaintiff's Exhibit 2, Binaco explains that these payments related to prior invoices in the AS144 account. According to Binaco, after Alamai paid for an invoice, the accounting system Binaco used would clear that invoice from the accounting records and reduce the overall amount owed accordingly. By way of support for this explanation, we note that the most recent payments–-receipts 794, 866, and 859–-are in fact credited toward the oldest invoices in AS144. Yet again, Defendants **[**7**]** offer little, if

[4] Binaco's invoices valued the returned unsold goods at $320,520.56. The shipping and handling fees totaled $10,622.29. Binaco used this credit to clear the $37,302.00 balance on account A108 and reduce the amount owed on AS144 by $272,596.27.

any, evidence to refute this explanation.[5] We therefore find that the payments in Plaintiff's Exhibit 2 relate to invoices cleared by Binaco once the payments were received and that Binaco has not been compensated for any of the invoices postdating invoice #2695.

Although Binaco requests payment of $800,419.11, due to clerical errors with three of the invoices, the Court will modify this demand. As Binaco concedes, its accounting records for AS130 overbilled for invoices #2203 and #2207. These errors reduce the amount Alamai owes by $2,751.00.[6]

The circumstances are less clear regarding the final alleged error found in invoice #2708 of account AS144. Defendants claim that they were double-billed for invoice #2708 and present two copies of that invoice. *See* Def.'s Ex. 15. Both invoices are for 90 units of linen measuring a total of 20,749 yards. The price per yard is $2.90 in one invoice but only 60¢ in the other resulting in a $47,722.70 difference in value. In response to this alleged error, Binaco suggested that the higher priced invoice was a correction to the misquoted **[**8**]** price in the first invoice.[7] While this may very well be the case, nothing in the evidence supports Plaintiff's claim. Binaco did not submit a cancelled copy of the 60¢ per yard invoice and neither invoice submitted by Defendants contains any notation to indicate which invoice is correct.

Ultimately, Binaco carries the burden to prove its case by a preponderance of the evidence. Here, insofar as concerns the correct value of invoice #2708, Binaco has failed to meet this burden. Therefore, on the limited issue of the value of invoice #2708, the Court holds in Defendants' favor and finds that the correct invoice was for $12,449.40. Combining the three errors reduces Binaco's damages by $50,473.70 resulting in a final damages calculation of $749,945.41.

[1] As to Defendants' cursory argument regarding the three-year statute of limitations for contracts (A.S.C.A. § 43.0120(3)), we find that

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[5] We also note that both Alamai's bookkeeper, Evelyn Luardo, and Caroline Galea'i admitted that many of Alamai's records are missing. Without full records demonstrating what the company owed and what it had paid, it is difficult for the Court to credit Defendants' unsubstantiated assertions that Binaco's comprehensive records are simply incorrect.

[6] Specifically, the accounting records in AS130 (Pl.'s Ex. 1) valued invoice #2203 at $10,248.00 despite the actual invoice listing goods worth only $10,032.00. Similarly, AS130 valued invoice #2207 at $5,817.00 while the actual invoice amount was for $3,282.00.

[7] Furthermore, Binaco never affirmatively made this argument until its closing statement. Before that time, Plaintiff only eluded to such a possibility through indirect questions during the cross-examination of Evelyn Luardo.

A.S.C.A. § 43.0122 controls this case. Pursuant to that statute, "[w]hen there is a continuous, open, concurrent account, the cause of action shall be deemed to have accrued on the date of the last item therein." With the exception of the American Samoa statute replacing the word "current" with **[**9**]** "concurrent," this statute appears to be copied nearly verbatim from Iowa Code § 614.5 (2013).[8]

Dating back to January 2003 and November 2002 respectively, accounts AS130 and A108 both contain invoices that would normally be outside the statute of limitations period. However, because the accounts are "continuous, open, [and] concurrent" the statute of limitations did not toll until the final invoice in each account--February 23, 2005 for AS130 and February 20, 2006 for A108. Binaco brought this action on November 26, 2007, leaving the claims on both accounts well within the statute of limitations. Lastly, although the parties agreed to stop using AS130 and open a new account, we do not interpret this to mean the account was closed, especially in light of the considerable outstanding balance.

II. Because Alex Galea'i disregarded the corporate form, Defendant Estate of Alex Galea'i is liable for the debts of Alamai Corporation.

[2-4] Binaco also seeks to pierce the corporate veil to hold Defendants Caroline Galea'i and Estate of Alex Galea'i personally liable for the debts of Alamai. In general, adopting **[**10**]** the corporate form for a business enterprise exempts corporate shareholders from liability for the corporation's debts. *See Jiang v. Daewoosa Samoa, Ltd.*, 6 A.S.R.3d 138, 173 (Trial Div. 2002); *Amerika Samoa Bank v. Adams*, 22 A.S.R.2d 38, 42 (Trial Div. 1992) ("Exemption from liability is the norm, not the exception." (internal quotation omitted)). However, certain circumstances justify disregarding the corporate shield when failing to do so would allow abuse of corporate privileges. *Am. Sam. Gov't v. Amerika Samoa Bank*, 7 A.S.R.3d 92, 93(Trial Div. 2003) (quoting *Adams*, 22 A.S.R.2d at 42; *N.L.R.B. v. Greater Kan. City Roofing*, 2 F.3d

[8] The Court assumes that this substitution was a mere legislative oversight or scrivener's error. *But see Blue Pac. Mgmt. Corp. v. Anderson*, 8 A.S.R.3d 87, 101 (Trial Div. 2004) (interpreting "concurrent account" to mean an account identifying mutual obligations of debit and credit between the parties); *see also See Oppenheim v. Hood*, 33 S.W.2d 265, 267 (Tex. Civ. App. 1930) (describing a concurrent account composed of credits and debits). However, even if the substation was intentional, applying the *Anderson* interpretation of "concurrent account," we still find that AS130 and A108 fall within the purview of A.S.C.A. § 43.0122. The invoices submitted by Binaco adequately demonstrate mutuality of obligation and the credit extended to Defendants that resulted in the debts listed in the accounts.

1047, 1051 (10th Cir. 1993)). The courts of American Samoa have long applied a standard for piercing the corporate veil first established by the Supreme Court of California in *Minifie v. Rowley*, 187 Cal. 481, 487 (1921)[9]:

> Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice. **[**11**]**

In order to determine whether or not there is a "unity of interest" under the first prong, the court will consider the totality of the circumstances. *See Amerika Samoa Bank*, 7 A.S.R.3d at 94. We have previously found such unity where a corporation's president was the dominant or sole shareholder, used personal funds to pay corporate debts, and failed to keep corporate records. *Id*. Similarly, in *Jiang*, 6 A.S.R.3d at 174, the court found that the defendant acted as a corporation's alter ego where he was the corporation's sole shareholder and owner, did not adhere to corporate formalities, and "siphoned off corporate funds for his own use."

Here, the circumstances surrounding Alex Galea'i's ownership and control of Alamai essentially mirror the facts of both *Amerika Samoa Bank* and *Jiang*. After he purchased his parents' shares, Alex became the president and sole shareholder of Alamai until his death in 2007. Under his leadership and control, Alamai failed to keep any corporate records, hold corporate meetings, or otherwise follow corporate formalities.[10] Lastly, Alex controlled Alamai's accounts and often used corporate funds to pay both his personal debts and expenses related to his other business interests. In light of these **[**12**]** circumstances, we find that Alex disregarded the corporate form and acted as an alter ego for Alamai.

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[9] By way of further instruction, see *Jiang*, 6 A.S.R.3d at 174: "The applied effect of the alter ego doctrine treats the corporation and the dominating person as one person, so that any act committed by one is attributed to both, and if either is bound, by contract, judgment, or otherwise, both are equally bound."

[10] Defendants did not submit any corporate records for Alamai. Furthermore, during her deposition, Caroline could not recall Alamai holding any corporate meetings.

[5] As to the second prong of the *Minifie* standard, we find that "adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or promote injustice." 187 Cal. At 487. The key factor in determining whether this prong has been met is a "showing of inequity . . . [flowing] from the misuse of the corporate form." *N.L.R.B.*, 2 F.3d at 1053. Here, Alex's conduct significantly depleted Alamai's corporate funds leaving it unable to pay its debts and obligations. Had Alex not used revenue from Alamai to pay for his home loan or the construction of his Checkers restaurant, it is entirely possible that Alamai would have sufficient funds for payment of its debts to Binaco. Affording Alex the protections of the corporate form would allow him to personally benefit from his misconduct while simultaneously prejudicing Binaco by denying it the ability to recoup significant losses. This is precisely the type of inequity the Court will not sanction. Therefore, the circumstances of this case warrant piercing the corporate veil and holding the Estate of Alex Galea'i personally liable for the debts of Alamai.

We cannot, however, reach the same conclusion with regard to Caroline. At no time did Caroline own any shares in Alamai. She entered the company as a low-level employee and even after **[**13**]** assuming managerial duties acted at all times pursuant to explicit instructions from Alex. Although she held signature authority over the corporate account and signed checks on behalf of Alamai, Alex was the controlling force behind these payments. Caroline is therefore not personally liable for the debts of Alamai.

Order

Defendants Alamai Corporation and Estate of Alex Galea'i are jointly and severally liable to Plaintiff Binaco Textiles, Ltd. for a total debt of $749,945.41.

It is so ordered.

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Cite As: *Samuelu v. Patu*, CA No. 34-13 at [page number] (Trial Div. Jan. 29, 2014) (order den. req. for partition of real property by sale).

VIRGINIA SAMUELU, Plaintiff,

v.

VON-PAUL PATU, NELLIE TORRES, and MARGRET HODGES (surviving Children of Pila F. Patu, Jr., deceased), NINA PATU SCANLON, SOLOMONA PATU, TELESIA ATONIO PATU, JOHN PATU, ATIVALU PATU, CAMELITA PATU, HENRY PATU and FRANCES PATU, a minor child, HAZEL VAIVAO, MARMER PATU, and MARGIE PATU (the surviving spouse and children, respectively, of John Patu, deceased), LATA PATU, PUA PATU, FAITU PATU, PILA TAMA PATU and NINA OLAFOU PATU (the surviving children of Tumua Patu, deceased), NINA PATU-AASA, and DOES 1-10, Defendants.

High Court of American Samoa
Trial Division

CA No. 34-13

January 29, 2014

[1] Partition by sale relief is more a creature of statute rather than common law.

[2] No American Samoa statute on partitions by sale exists.

[3] Court denied a motion for partition by sale when many of the defendants lived off-island, some of the defendants were minors, and plaintiff had only attempted A.S.C.A. §§ 43.0501-.0502 substituted service by publication in American Samoa.

[4] Any judgment against a defendant who has not been properly served by publication is null and void since the court would not have obtained jurisdiction over the defendant.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, David P. Vargas

ORDER DENYING REQUEST FOR PARTITION OF REAL PROPERTY BY SALE

Background

The facts to be gleaned from the record herein are: Plaintiff inherited an undivided 1/8 interest in common in individually-owned land, "Autapini" in Pago Pago village. Defendants collectively own the remaining 7/8 undivided interests in Autapini. The property in question has not been occupied or used for the past eight years after its structures were destroyed **[**2**]** by fire. Plaintiff has attempted to obtain the consent of Defendants to lease the property or otherwise allow it to be used to generate income for all parties involved, but Plaintiff and Defendants have not been able to agree on a use.

On December 24, 2013, Plaintiff filed a Memorandum in Support of Motion to Enter Default Judgment and Plan for Partitioning Land by Sale. Plaintiff believes that a partition by sale is the only mode of partition that would be equitable.

Discussion

[1-2] Contrary to Defendant's bald claim, we found from our very cursory research that "partition by sale" relief is more a creature of statute rather than common law. No American Samoa statute on partitions by sale exists. Furthermore, despite supposed "significant research" by Plaintiff's counsel, Plaintiff fails to cite any law from any jurisdiction in its memorandum. We therefore deny Plaintiff's motion for lack of showing.

[3-4] Moreover, the extent of the Clerk's file herein leaves us with procedural due process reservations. We are concerned with the sufficiency of notices herein attempted given the fact that many of the Defendants live off-island. Plaintiff has attempted A.S.C.A. § 43.0501-0502 substituted service by publication only in American Samoa. *Cf. In re Memorandum of the Justices*, 3 A.S.R.2d 33, 34 (1986) ("[Notice by publication must] be genuinely calculated to reach the defendant"); *In re a Minor Child*, 7 A.S.R.2d 125, 126 (Trial Div. 1988) (Publication genuinely **[**3**]** calculated to reach a Samoan resident required publication in a newspaper of general circulation in Apia, Samoa, given in the Samoan language). Otherwise, any judgment against a defendant who has not been properly served by publication would be null and void, since the court would not have obtained jurisdiction over the defendant. *In re Three Minor Children*, 10 A.S.R.2d 57 (Trial Div. 1989). It further concerns the Court that Plaintiff is attempting to push a default judgment and forced sale of land when some of the Defendants are minors.

Order

Plaintiff's Motion to Enter Default Judgment and Plan for Partitioning Land by Sale is, therefore, denied.

It is so ordered.

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Cite As: *Magalasin v. F/V San Nanumea*, CA No. 63-11, slip op. at [page number] (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.)

JOEL MAGALASIN, Plaintiff,

v.

F/V SAN NANUMEA, her hull, engines, tackle, apparel, furniture, equipment, skiffs, nets, boats, and appurtenances, IMO Official Number/VIN 8102866, Defendant In Rem,

and SANFORD LIMITED, a foreign corporation, and DOES 1 through 20, inclusive, Defendant In Personam.

High Court of American Samoa
Trial Division

CA No. 23-14

November 30, 2014

[1] A motion to dismiss pursuant to T.C.R.C.P. 12(b)(6) will be treated as a summary judgment motion when evidence extrinsic to the complaint is presented to and considered by the court.

[2] Conversion of a T.C.R.C.P. 12(b)(6) motion into a motion for summary judgment lies squarely with the court's discretion.

[3] When a court converts a T.C.R.C.P. 12(b)(6) motion into a motion for summary judgment under T.C.R.C.P. 56, the court must make the parties aware that the court is considering a motion for summary judgment by giving the parties 10 days notice of the conversion.

[4] Notice that the court will look beyond the pleadings need not be explicit because a party who submits extrinsic materials in support of or opposition to a 12(b)(6) motion is considered to be on notice that the judge may treat the motion as a motion for summary judgment.

[5] When both parties submitted extrinsic evidence for the court to consider in the form of affidavits, declarations, and exhibits, both parties were properly on notice that the 12(b)(6) motion would be treated as a motion for summary judgment.

[6] Summary judgment is appropriate when the pleadings and supporting papers show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[7] Typically, in ruling on a summary judgment motion, the court must view all pleadings and supporting papers in the light most favorable to the non-moving party, treat the non-moving party's evidence as true, and draw from such evidence the inferences most favorable to the non-moving party.

[8] In matters of choice of law or *forum non conveniens* determinations, a trial court may have to resolve disputed factual issues prior to a trial on the merits.

[9] While it may seem inapt to allow pretrial findings of disputed facts in a converted summary judgment motion, determining proper forum after the trial is already underway is injudicious. The same reasoning applies to a choice of law determination.

[10] The court may part from the summary judgment standard of viewing all facts in the light most favorable to the non-moving party, but only to the extent necessary, so as to resolve disputed factual issues underlying choice of law and *forum non conveniens* determinations.

[11] Choice of law determinations for foreign seamen suing under the Jones Act are to be made by weighing the factors: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured seaman; the allegiance of the defendant shipowner; the place where the employment contract was made; the inaccessibility of a foreign forum; the law of the forum; and the shipowner's base of operations.

[12] The Supreme Court has stated that the choice of law determination factors are not exhaustive and should be examined in the overall context of the case to determine whether, taken together, the factors rise to the level of "substantial contacts" between the United States and the defendant.

[13] When a wage claim is involved, 46 U.S.C. § 10313(i) notes that the courts are available to the seaman for enforcement of wage claims once a vessel is arrested in a harbor of the United States, thereby providing for High Court jurisdiction.

[14] The Court declined to determine whether the choice of law determination factors rose to the level of substantial contacts when Plaintiff's wage claim, included in the initial complaint, explicitly provided for jurisdiction in the High Court.

[15] When Plaintiff alleged a contractual claim for maintenance, cure, and wages, began work on Defendants' vessel in Pago Pago Harbor, and the vessel was later arrested in Pago Pago Harbor, Plaintiff had a right to sue under the Jones Act in a U.S. court and the High Court had proper jurisdiction for the action.

[16] Under the doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear a case and when a trial in the chosen forum would burden the defendant, the court may, in the exercise of its discretion, dismiss the case.

[17] The court should balance various public and private interests in its analysis of *forum non conveniens* , including relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of unwilling witnesses, the possibility of viewing subject premises, and all other factors that render trial of the case expeditious and inexpensive.

[18] The Court declined to apply *forum non conveniens* even though Plaintiff resided in the Philippines, Defendants' corporate headquarters was in New Zealand, and the witnesses were scattered seamen because it held that splitting four cases arising out of the same incident in two separate forums would not benefit Defendants, witnesses, or the judicial systems.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge.

Counsel: For Plaintiff, Marcellus T. Uiagalelei, William L. Banning, *admitted Pro Hac Vice*
For Defendants, Roy J.D. Hall, Jr., Sterling J. Stires, *admitted Pro Hac Vice*

ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Background

On August 29, 2011, Plaintiff Joel Magalasin filed his Complaint against Defendants F/V San Nanumea, Sanford Limited, and Does 1 through 20 for personal injury damages and unpaid wages under the Jones Act, 46 U.S.C. § 30104, 46 U.S.C. §§ 31301 et seq., and the American Samoa Code Annotated section 3.0208(a)(3).

According to Plaintiff's Complaint, he was injured in an accident that occurred on international waters while employed as a seaman aboard the vessel San Nanumea, which is owned and operated by Defendant Sanford

Limited ("Sanford"). The San Nanumea is a New Zealand flag vessel. Plaintiff is a citizen of the Philippines, but was admitted to American Samoa on a temporary basis and joined Sanford's vessel in Pago Pago Harbor, where the vessel frequently stops to off-load at the canneries.

On May 4, 2012, Sanford filed a motion to dismiss for failure to state a claim upon which relief can be granted, arguing that the present action is governed by foreign law and therefore Plaintiff cannot establish he is entitled to relief under the Jones Act or U.S. maritime law and dismissal is proper under the doctrine of *forum non conveniens*. On September 13, 2013, Plaintiff filed a memorandum of points and authorities in opposition to Sanford's motion to dismiss. Both parties supplemented their filings with affidavits and declarations as extrinsic materials.

Standard of Review

[1-4] A motion to dismiss pursuant to T.C.R.C.P. 12(b)(6) will be treated as a summary judgment motion when evidence extrinsic to the complaint is presented to and considered by the court. T.C.R.C.P. 12(b)(6), 56. *Samoana Fellowship, Inc. v. American Samoa Power Authority*, 24 A.S.R.2d 71, 72 (Trial Div. 1993). Conversion of a 12(b)(6) motion into a motion for summary judgment lies squarely with the court. *ASG Employees Fed. Credit Union v. Gurr*, 26 A.S.R.2d 87 (Trial Div. 1994). When a court converts a 12(b)(6) motion into a motion for summary judgment under T.C.R.C.P. 56, the court must make the parties aware that the court is considering a motion for summary judgment by giving the parties 10 days notice of the conversion. T.C.R.C.P. 12(b), 56. *McKenzie v. Le`iato*, 27 A.S.R.2d 63 (Trial Div. 1994). Notice that the court will look beyond the pleadings need not be explicit. *See In re Rothery*, 143 F.3d 546, 549 (9th Cir. 1998). A party who submits extrinsic materials in support of or opposition to a 12(b)(6) motion is on notice that the judge may treat the motion as a motion for summary judgment. *Id*. ("A party is `fairly appraised' that the court will in fact be deciding a summary judgment motion if that party submits matters outside the pleadings to the judge and invites consideration of them.")

[5] The court is treating the 12(b)(6) motion as a motion for summary judgment. Both Sanford in the Motion to Dismiss and Plaintiff in his Opposition to Sanford's Motion to Dismiss submitted extrinsic evidence for the court to consider in the form of affidavits, declarations, and exhibits. Both parties are therefore properly on notice that the 12(b)(6) motion will be treated as a motion for summary judgment.

[6-7] Summary judgment is appropriate when the pleadings and supporting papers show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. T.C.R.C.P. 56; *Etimani v. Samoa Packing Co.*, 19 A.S.R.2d 1 (Trial Div.

1991). Typically, in ruling on a summary judgment motion, the court must view all pleadings and supporting papers in the light most favorable to the non-moving party, treat the non-moving party's evidence as true, and draw from such evidence the inferences most favorable to the non-moving party. *Id*.

[8-10] In matters of choice of law or *forum non conveniens* determinations, however, a trial court may have to resolve disputed factual issues prior to a trial on the merits. *Villar v. Crowley Maritime Corp.*, 782 F.2d 1478, 1479 (9th Cir. Cal. 1986). While it may seem inapt to allow pretrial findings of disputed facts in a converted summary judgment motion, the Ninth Circuit has found the alternative--determining proper forum after the trial is already underway--to be "completely unacceptable." *Id*. The same reasoning applies to a choice of law determination. Therefore, to only the extent necessary, the court may part from the summary judgment standard of viewing all facts in the light most favorable to the non-moving party so as to resolve disputed factual issues underlying the choice of law and *forum non conveniens* determinations. *See id*.

Discussion

As will be discussed below, we find Plaintiff a Jones Act seaman and U.S. maritime law applies to his personal injury claims. We further decline to apply the doctrine of *forum non conveniens*. Accordingly, jurisdiction in the High Court is proper and Sanford's motion to dismiss or in the alternative for summary judgment is denied, as there are remaining factual issues to be tried.

1. Choice of Law

Sanford asserts that the High Court does not have jurisdiction under the Jones Act because the seven factors in U.S. Supreme Court case *Lauritzen v. Larsen* and the additional factor from *Hellenic Lines Ltd. v. Rhoditis* weigh in Sanford's favor. We disagree.

[11-12] As set out in the aforementioned cases, the factors for the court to consider in a choice of law determination for foreign seamen suing under the Jones Act are: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured seaman; the allegiance of the defendant shipowner; the place where the employment contract was made; the inaccessibility of a foreign forum; the law of the forum; and the shipowner's base of operations. *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). Choice of law determinations are to be made by weighing the above factors. *Lauritzen v. Larsen*, 345 U.S. at 582. The Supreme Court has further clarified that these factors are not exhaustive. *Hellenic Lines Ltd.*

v. Rhoditis, 398 U.S. at 308-309. Instead, the factors are to be examined in the overall context of the case to determine whether, taken together, the factors rise to the level of "substantial contacts" between the United States and the defendant. *Warn v. M/Y Maridome*, 169 F.3d 625, 628 (9th Cir. Cal. 1999).

In the instant case, the place of the alleged injury occurred on international waters. The law of the flag is New Zealand. The injured seaman was a Philippine citizen, temporarily admitted into American Samoa. Sanford owes allegiance to New Zealand. The employment contract was made in American Samoa. A foreign forum in New Zealand appears to be available, though the High Court claims no expertise in foreign laws. The shipowner's corporate base of operations is New Zealand, though the vessel itself has significant ties to Pago Pago Harbor in its daily operations. Notably, four persons were allegedly injured in the accident Plaintiff was involved in. Sanford has stipulated jurisdiction in the High Court for two of these plaintiffs. The only difference between the plaintiffs is residency. The two plaintiffs Sanford concedes High Court jurisdiction were foreign citizens but admitted into American Samoa on a one-year and five-year visa while the two plaintiffs, including Magalasin, Sanford disputes High Court jurisdiction were foreign citizens admitted into American Samoa on only a temporary basis.

[13] Furthermore, when a wage claim is involved, 46 U.S.C. § 10313(i) notes that "the courts are available to the seaman" for enforcement of wage claims once a vessel is arrested "in a harbor of the United States," thereby providing for High Court jurisdiction.

[14-15] While we note several contacts between the United States and Sanford, we decline to determine whether the *Lauritzen* and *Rhoditis* factors rise to a level of substantial contacts because Plaintiff's wage claim, included in the initial complaint, explicitly provides for jurisdiction in the High Court. In the Third Claim for Relief in the Complaint, Plaintiff alleged a contractual claim for maintenance, cure, and wages. Plaintiff began work on Sanford's vessel in Pago Pago Harbor and the vessel was later arrested in Pago Pago Harbor. Accordingly, Plaintiff has a right to sue under the Jones Act in a U.S. court and the High Court has proper jurisdiction for the action.

2. Forum Non Conveniens

Sanford next argues the High Court should not hear this case under the doctrine of *forum non conveniens*. We again disagree.

[16-17] Under the doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear a case and when a trial in the chosen forum would burden the defendant, the court may, in the exercise of its discretion, dismiss the case. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 447-48 (1994). The court should balance various public and private interests in its analysis, including relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of unwilling witnesses, the possibility of viewing subject premises, and all other factors that render trial of the case expeditious and inexpensive. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

[18] Although the Plaintiff resides in the Philippines, Sanford's corporate headquarters is in New Zealand, and witnesses are scattered seamen, we decline to apply the doctrine of *forum non conveniens* because we fail to see how splitting four cases arising out of the same incident in two separate forums benefits Sanford, witnesses, or the judicial systems.

Order

Sanford's motion to dismiss or in the alternative for summary judgment is hereby denied.

It is so ordered.

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Cite As: *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 at [page number] (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term)

PROGRESSIVE INSURANCE COMPANY (PAGO PAGO) LIMITED, Petitioner/Plaintiff,

v.

FALEMA'O PHIL PILI, in his capacity as TREASURER OF AMERICAN SAMOA, Respondent.

High Court of American Samoa
Trial Division

CA No. 36-04

February 25, 2014

[1] A writ of mandamus is appropriate only if the plaintiff has exhausted all other avenues of relief and the defendant owes him a clear nondiscretionary duty.

[2] As to the second requirement for a writ of mandamus, the alleged duty of the defendant to act must be mandatory or ministerial, not discretionary or directory.

[3] A ministerial duty is one that is so plainly prescribed as to be free from doubt.

[4] A subordinate executive officer acting pursuant to the statutorily mandated duties of the Governor, such as the Treasurer, has a nondiscretionary duty to disburse legislatively appropriated judgment funds under A.S.C.A. § 43.1212(c).

[5] While it is the Governor's obligation to submit legislation appropriating funds, the Legislature holds the sole constitutional authority to effectuate the appropriation and enable an expenditure of public revenue.

[6] It is not within the Treasurer's power to abrogate appropriations by simply electing not to act, even where both the Governor and Legislature act to appropriate funds for payment of a judgment under A.S.C.A. § 43.1212(c).

[7] An equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date. Under this doctrine, if the plaintiff institutes an action establishing his or her right to the appropriated funds before the lapse date, equity will ignore the expiration of the appropriation and maintain the plaintiff's right to the funds.

Before RICHMOND, Associate Justice and MAMEA, Associate Judge

Counsel: For Petitioner, Roy J.D. Hall Jr. and Devin A. McRae, *Pro Hac Vice*
For Respondent and Defendant, Eleasalo V. Ale, Deputy Attorney General and Eloisa A. Rivera, Assistant Attorney General

ORDER GRANTING PETITION FOR EXTRAORDINARY RELIEF BUT STAYING EXECUTION PENDING OUTCOME OF APPEAL ANTICIPATED NEAR TERM

Background

Before the Court is Plaintiff Progressive Insurance Company's ("Progressive") petition for a writ of mandamus to order Respondent Faelema'o Phil Pili ("Treasurer Pili"), and in effect Defendant American Samoa Government ("ASG") (collectively "Defendants"), to pay to Progressive $550,000 appropriated for partial payment of the $6,000,000 judgment against ASG. **[**2**]**

On July 24, 2007, we issued our first order and opinion granting Progressive judgment against ASG with damages of $6,606,784 in connection with a fire at the Laufou Shopping Center in April 2002. Defendants appealed this decision and moved to stay judgment pending appeal. We denied the motion to stay on May 12, 2008 and ordered Defendants to satisfy the judgment against them without further delay. The Appellate Division reversed and remanded our first order on jurisdictional and other technical legal grounds. By our Order on Remand entered on December 14, 2011, this Court again held for Progressive but reduced the damages to $6,000,000 to comport with Progressive's administrative claim in this amount. After we denied Defendants' subsequent motion to alter or amend the judgment or for a new trial, Defendants again moved to stay the second judgment during the currently pending appeal of this decision, which is now scheduled for oral arguments in April 2014. We denied the motion to stay on October 29, 2012.

On April 12, 2013, the *Fono* enacted Public Law No. 33-3 which appropriated public revenue for various settlements and judgments

against ASG including $550,000 for payment of the Lafou Shopping Center judgment. Notwithstanding this enactment, Progressive claims that Treasurer Pili refused to disburse any of the appropriated judgment funds. In response to Defendants' **[**3**]** evasive behavior and repeated refusal to satisfy the judgment, Progressive filed the instant petition for a writ of mandamus on September 30, 2013.

Standard of Review

[1] The Court grants a T.C.R.C.P. Rule 90 petition for extraordinary relief, or "writ of mandamus," only if "(1) the plaintiff has a plain right to have the act performed; (2) the defendant has a plain duty to perform it; and (3) there is no other adequate remedy available to the plaintiff." *Mulitauaopele v. Maiava*, 29 A.S.R.2d 116, 117-18 (App. Div. 1995) (quoting *Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1082-83 (D. Ore. 1990)); *see also Lutu v. Ale*, 28 A.S.R.2d 43, 45 (Trial Div. 1995); *Am. Sam. Gov't v. Adams*, 29 A.S.R.2d 180, 181 (Trial Div. 1996). Stated otherwise, a writ of mandamus is appropriate "only if [the plaintiff] has exhausted all other avenues of relief and . . . the defendant owes him a clear nondiscretionary duty." *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (citing *Kerr v. United States Dist. Court*, 426 U.S. 394, 402-03 (1976)).

Discussion

Pursuant to the first requirement for a writ of mandamus, it is indisputable that Progressive has a plain right to the judgment awarded by this Court. *See Gibbons v. Am. Sam. Gov't*, **[**4**]** 6 A.S.R.3d 115, 116 (Trial Div. 2006) (issuing writ of mandamus to compel payment of damages for judgment under the Government Tort Liability Act); *Arnold v. BLaST Intermediate Unit 17*, 843 F.2d 122, 125 (3d Cir. 1988) (holding that it is "undisputed that the plaintiffs have a clear legal right to their judgment"). As if to confirm this right, Governor Lolo M. Moliga and the *Fono* complied with the Court's denial of a stay pending appeal and appropriated funds to satisfy the judgment.

[2-3] As to the second requirement for a writ of mandamus, the alleged duty of the defendant to act "must be mandatory or ministerial, not discretionary or directory." *Mulitauaopele v. Maiava*, 24 A.S.R.2d 97, 99 (Trial Div. 1993). A ministerial duty is one that "is so plainly prescribed as to be free from doubt." *Gifford Pinchot*, 742 F. Supp. 1077 at 1083. For example, this court has previously held that the Governor has a mandatory duty to submit legislation appropriating funds for payment of judgments rendered under the Government Tort Liability Act (GTLA), A.S.C.A. §§ 43.1201-.1205. *See Gibbons*, 6 A.S.R.3d at 116; A.S.C.A. § 43.1212. In contrast, in *Adams*, 29 A.S.R.2d at 181, where a statute explicitly provided that the parole board may exercise "its

discretion" to parole inmates, we held that the board retains discretionary authority. *See* **[**5**]** A.S.C.A. § 46.2703(a).

Here, pursuant to GTLA, A.S.C.A. § 43.1212, ASG and Pili have a nondiscretionary, ministerial duty to appropriate and disburse funds for payment of the judgment to Progressive. Section 43.1212(a) provides that the "Treasurer shall [immediately] pay any judgment against the government" for damage to property not exceeding $5,000.[1] For property claims above the $5,000 ceiling, pursuant to Section 43.1212(c), "the Governor *shall* forward legislation appropriating funds for the payment of such [judgments] to the Legislature" (emphasis added). Once the Legislature enacts the appropriations bill, "[t]he Treasurer is authorized to pay such amount as may be appropriated there-for by the Legislature." A.S.C.A. § 43.1212(c).

The GTLA statutes establish an unequivocal mandate ordering the Governor to provide for the payment of judgments against ASG. *See Gibbons*, 6 A.S.R.3d at 116. In the case at bar, the Governor complied with his statutory duties when he submitted legislation to the Legislature appropriating $550,000 for the "Lafou Shopping Centre Judgment partial payment." *See* Pub. L. No. 33-3. **[**6**]**

However, the nature of the Treasurer's duty to disburse judgment funds under GTLA Section 43.1212 is somewhat more ambiguous than the unmistakably ministerial duties of the Governor. For judgments within the $5,000 limit of Section 43.1212(a), the GTLA explicitly charges the Treasurer with the duty immediately pay judgments against ASG. This plainly ministerial duty contrasts with the less definitive language of Section 43.1212(c) wherein "[t]he Treasurer is *authorized* to pay" (emphasis added) appropriated funds for judgments exceeding $5,000.

[4-6] Nonetheless, we are confident that as a subordinate executive officer acting pursuant to the statutorily mandated duties of the Governor, the Treasurer has a nondiscretionary duty to disburse legislatively appropriated judgment funds under Section 43.1212(c). *See* A.S.C.A. §§ 4.0112(e), 4.0301(a)(12) (establishing that the Treasurer is appointed by the governor as a subordinate departmental officer). While it is the Governor's obligation to submit legislation appropriating funds, the Legislature holds the sole constitutional authority to effectuate the appropriation and enable an expenditure of public revenue. *See Nua v. Sunia*, 4 A.S.R.3d 208, 212-13 (Trial Div. 2000); AM. SAMOA REV. CONST. art. II, § 1(c). Where, as here, both the Governor and Legislature

[1] In the same subsection, the GTLA establishes a limited $100,000 annual fund to provide for the immediate payment of property tort claims not exceeding $5,000 and personal injury or death tort claims not exceeding $25,000.

acted to appropriate funds for **[**7**]** payment of a judgment under Section 43.1212(c), it is not within the Treasurer's power to abrogate that appropriation by simply electing not to act.[2] Treasurer Pili therefore violated his ministerial duty to pay Progressive the appropriated funds for the Lafou Shopping Center judgment in Public Law No. 33-3.

Finally, under the third requirement, the Court will issue a writ of mandamus "only if [the plaintiff shows] other forms of relief are unavailable." *Maiava*, 24 A.S.R.2d at 98. Defendants contend that Progressive has not exhausted all available remedies because the Trial Division's final order is currently pending appellate review.

This argument fails for two reasons. First, Defendants fail to explain how an appeal constitutes an adequate remedy for Progressive as the party that prevailed on the merits at trial. While the appeal may affirm the final judgment in favor of Progressive, it cannot provide alternative relief to a writ of mandamus ordering payment of funds appropriated to comply with that judgment. Second, Defendants' argument misconstrues Progressive's petition as an attempt to enforce the entire $6,000,000 judgment. Instead, the petition only seeks to compel **[**8**]** Treasurer Pili to disburse the $550,000 appropriation. Progressive cannot appeal Pili's decision to unlawfully withhold the appropriated funds in violation of both the Court's original order and denial of a stay pending appeal. In light of these circumstances, mandamus is the appropriate remedy to order payment of the appropriated funds.

Defendants also challenge Progressive's petition for a writ of mandamus on the grounds that the petition is moot. According to Defendants, because Treasurer Pili did not expend the appropriated funds by the end of the 2013 fiscal year, they lapsed into the general fund and reverted to public revenue. Neither law nor equity supports this argument.

To begin with, Progressive filed the instant petition for a writ of mandamus on September 30, 2013, the last day of the 2013 fiscal year.[3] Pursuant to A.S.C.A. § 10.0602, this petition constitutes a specific "right of action" which safeguards against the appropriation lapsing to the

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[2] As the Court understands it, Defendants' argument that this writ is unconstitutional rests on the presumption that the Executive Branch has discretionary authority to pay an adjudicated judgment under A.S.C.A. §§ 43.1212 et seq. Because we hold that neither the Governor nor Treasurer retains such discretion, this argument is moot.

[3] Although, as per Progressive's argument, the timeliness of the petition may well have tolled the lapse of the appropriation, we do not address that contention herein.

general fund.[4] Under Section 10.0602, "[a] provision of law which requires unexpended funds to return to the general fund at the end of the fiscal year shall not be held to affect the status of any lawsuit or **[*9**]** right of action involving the right to those funds." *See generally Senate v. Lutali*, 27 A.S.R.2d 126, 133 (Trial Div. 1995). This statute supersedes A.S.A.C § 5.0103(16)(B)(1), which Defendants cite for their argument that the Lafou judgment appropriation lapsed after the end of the 2013 fiscal year.

As a second rule of law against Defendants' argument, under A.S.A.C. § 5.0103(13)(A), with regard to "obligations already incurred [the] balance can be carried forward indefinitely . . . until the obligations are paid." *See also Lutali*, 27 A.S.R.2d at 131-32. A judgment of the Court constitutes one such obligation "already incurred." *See United States v. Ripa*, 323 F.3d 73, 82 (2d Cir. 2003) ("one meaning of 'judgment' is 'an obligation (as a debt) created by decree of a court.' (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1223 (3d ed. 1981))); *Barnidge v. United States*, 101 F.2d 295, 298 (8th Cir. 1939) ("judgment is an obligation of the general fund of the Treasury"). Here, the $550,000 appropriated to partially satisfy the $6,000,000 judgment ordered by this Court is an obligation that does not "revert to the general fund" but instead "will carry forward until the obligation is paid." *Lutali*, 27 A.S.R.2d at 135.

[7] Lastly, "an equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to **[**10**]** a deserving plaintiff even after the statutory lapse date." *West Virginia Ass'n of Cmty. Health Ctrs., Inc. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984) (citing 31 U.S.C. § 1502(b) which mirrors A.S.C.A. § 10.0602). Under this doctrine, if the plaintiff institutes an action establishing his or her right to the appropriated funds before the lapse date, equity will ignore the expiration of the appropriation and maintain the plaintiff's right to the funds.[5] *Id.* Considering the circumstances of this case--where appropriated funds were not paid to Progressive due solely to an inappropriate exercise of discretion by Treasurer Pili--equity

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[4] Even without filing this petition, Progressive has a legitimate claim to the appropriated funds by virtue of the $6,000,000 judgment from this Court.

[5] The court in *Heckler* continued to say that "[a]pplication of this equitable doctrine, however, assumes that funds remain [available] after the statutory lapse date. 734 F.2d at 1576. If the funds at issue have been otherwise expended, "it will be impossible . . . to award the plaintiffs the relief they request if they should eventually prevail on the merits." *Ambach v. Bell*, 686 F.2d 974, 986 (D.C. Cir. 1982). Here, there is no evidence that the funds appropriated for the Lafou judgment in Public Law No. 33-3 are not still available.

favors maintaining Progressive's right to the funds despite the fact that they were not timely expended.[6]

Although Progressive's petition is appropriate and meritorious, this Court will not imprudently require Treasurer Pili to pay the $550,000 appropriation to Progressive when the decision in the current appeal of this action is anticipated near term after the scheduled oral arguments in April 2014. *See Gifford Pinchot*, 742 F. Supp. at 1082 (emphasizing that mandamus **[**11**]** is a form of extraordinary relief). We therefore grant the petition for the extraordinary relief of mandamus and order Treasurer Pili to pay the appropriated $550,000 to Progressive but stay execution of this order pending the imminent outcome of the appeal.

Order

Plaintiff Progressive Insurance Company's petition for extraordinary relief is granted, and Treasurer Falema`o Phil Pili is mandated to pay to Progressive the $550,000 appropriated for partial payment of Progressive's judgment against the American Samoan Government. However, execution of this order is stayed pending the anticipated near-term outcome of the currently pending appeal of this action, or until further order of the Court.

It is so ordered.

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[6] We also note that the federal doctrine relies in large part on the federal equivalent of A.S.C.A. § 10.0602. *See* 31 U.S.C. § 1502(b). This fact lends further support to the local adoption of this equitable principle.

Cite As: *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 at [page number] (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.)

BIRDSALL ALA'ILIMA, for himself and his minor daughter MARLENE ALIA ALA'ILIMA, Plaintiff,

v.

AMERICAN SAMOA GOVERNMENT, SALA, FREDERICK O'BRIEN, HAWAIIAN AIRLINES and DOES I-XX, Defendants.

High Court of American Samoa
Trial Division

CA No. 22-09

April 11, 2014

[1] The court may grant a motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the clear weight of evidence, a decision that is manifestly unjust, an intervening change in the law, or the discovery of previously unavailable evidence. However, a judgment will not be set aside except for substantial reasons.

[2] On review of a motion for reconsideration, the Court will not construct a legal theory on behalf of the moving party.

[3] It is the responsibility of the movant to fully articulate his or her arguments in opposition to the original order and to provide the court with research and justification beyond unadorned, conclusory statements.

[4] The Court will not reverse a dismissal of Plaintiffs' unconstitutional stop order claim more than four years after the fact based on a second motion for reconsideration that is entirely unsupported by factual or legal arguments.

[5] It is apodictic that a party moving for reconsideration must do more than reiterate our reasons for a decision and then make a blind assertion that we were incorrect.

[6] The High Court has previously identified the *matai* title system, communal land ownership, and Samoan language as the "pillars of *fa'a* Samoa."

[7] The freedom of speech is not absolute.

[8] United States Supreme Court precedent has established that vulgar, offensive, and shocking speech is not entitled to absolute constitutional protection.

[9] Federal precedent provides for local discretion with respect to specific types of speech so that what constitutes obscene speech rests in part on a local or community "prurient interests" standard.

[10] Whether a "public attack" runs afoul of Section 4 is determined by whether the comment is malicious, unjustifiable, and deleterious to traditional Samoan cultural standards of comity, respect, dignity, or honor.

[11] While the Defendant's comments to local media were a protected opinion under a defamation analysis, the same was not true under an Article I, Section 4 analysis since Defendant's comments amounted to an unsubstantiated acrimonious opinion designed to impinge on the honor and reputation of Plaintiff in violation of Samoan cultural norms. Such comments do not warrant Section 1 freedom of speech protection.

[12] The measure of damages is a question of fact, and, as the trier of fact in civil controversies, the Court enjoys substantial discretion in determining damages.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiffs, Charles Ala'ilima
For Defendants, Elesalo V. Ale and Michael L. Iosua, Assistant Attorney Generals

ORDER DENYING PLAINTIFFS' AND DEFENDANTS' MOTIONS FOR RECONSIDERATION

Background

The Court's decision entered in this action provides an extensive factual and procedural background of this case. *See Ala'ilima v. Am. Sam. Gov't,* CA No. 22-09, slip op. at 8-11 (Trial Div. August 15, 2013) (op. & order). Currently before the Court are each party's motions for reconsideration and Defendants' motion for clarification, all of which

were filed on August 26, 2013.[1] For the reasons stated below, the three motions are denied. **[**2**]**

Standard of Review

[1] The court may grant a motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the clear weight of evidence, a decision that is manifestly unjust, an intervening change in the law, or the discovery of previously unavailable evidence. *See Boral Gas of Am. Samoa, Inc. v. Iaulualo*, 7 A.S.R.3d 57, 58 (Trial Div. 2003); *Nua v. Sunia*, 4 A.S.R.3d 234, 238 (Trial Div. 2000); *Clifton v. Voyager*, 31 A.S.R.2d 12, 16 (Trial Div. 1996). However, a judgment will "not be set aside except for substantial reasons." *Am. Samoa Gov't v. S. Pac. Island Airsystems, Inc.*, 28 A.S.R.2d 170, 171 (Trial Div. 1995).

[2-3] In addition, on review of a motion for reconsideration, the Court will not construct a legal theory on behalf of the moving party. *See Suluai v. Nat'l W. Life Ins. Co.*, 6 A.S.R.3d 216, 218 (Trial Div. 2002). Instead, it is the responsibility of the movant to fully articulate his or her arguments in opposition to the original order and to provide the court with research and justification beyond unadorned, conclusory statements. *See id*.; *In re: a Minor Child*, 30 A.S.R.2d 22, 22-23 (Trial Div. 1996).

I. Plaintiffs' Motion for Reconsideration.

A. Denial of Plaintiffs' motion to reconsider a challenge of the stop order originally dismissed by the Court in August 2009 [**3**]

Plaintiffs first ask the Court to reconsider the order of August 17, 2009 in which we dismissed Count Four of the initial complaint concerning Plaintiffs' challenge of the allegedly "unconstitutional" stop order. *See Ala'ilima v. Am. Sam. Gov't,* CA No. 22-09 at 13 (Trial Div. Aug. 17, 2009) (order granting in part & den. in part def. mtn. to dismiss). As Plaintiffs mention, we previously denied a motion to reconsider this issue on February 4, 2010.

[4] In an exceedingly vague argument, Plaintiffs claim reconsideration is warranted due to "the evidence presented at trial regarding the circumstances surrounding the issuance" of the stop order. The Court will not reverse a dismissal of Plaintiffs' unconstitutional stop order claim more than four years after the fact based on a second motion for reconsideration that is entirely unsupported by factual or legal arguments.

[1] Although the parties' motions are alternatively labeled as a "motion for reconsideration" and a motion to "amend judgment," these motions are identical under the auspices of T.C.R.C.P. 59.

The absurdity of this statement alone should serve to caution Plaintiffs against filing motions that could very well be deemed frivolous.

Plaintiffs also ask the Court to reconsider the stop order due to the Attorney General's alleged pattern of non-compliance with appropriate stop order procedures. *See* A.S.C.A. § 41.0513. Plaintiffs' motion amounts to a request for an advisory opinion or a general injunction proscribing procedurally invalid stop orders. Neither of these remedies is appropriate or within the **[**4**]** Court's authority. Moreover, our ultimate holding did not depend on the validity of the stop order but instead concerned the content of and impetus for Defendants' allegedly defamatory and offensive conduct. We therefore deny Plaintiffs' motion for reconsideration of this matter.

B. Denial of Plaintiff Birdsall Ala'ilima's motion to reconsider the liability of Defendants O'Brien and Sala for allegedly defamatory comments.

Plaintiff Birdsall Ala'ilima ("Birdsall") next moves for reconsideration of whether Defendants Frederick O'Brien ("O'Brien") and Mike Sala ("Sala") are liable for defamation. At trial, Birdsall claimed O'Brien defamed him both by issuing a baseless stop order and by commenting to local media regarding a purported criminal investigation into Birdsall's management of THOS.[2] As to Sala, Birdsall's defamation claims arose from Sala's conversation with O'Brien to request the stop order and later comments to Samoa News that Birdsall's directorship of THOS contributed to the territory's financial crisis.

With respect to O'Brien, we held that he issued the stop order and commented in his official capacity as acting Attorney General, did not act with malice, and was therefore not liable for defamation. *See* A.S.C.A. §§ 43.5202(1), (3). Regarding Sala's liability, we first held that his comments to O'Brien **[**5**]** were made pursuant to his official duties as the director of OTICIDE.[3] We next held that Sala's public comments to Samoa news, though malicious, constituted a hyperbolic opinion that could not be taken seriously by a reasonable person.

[5] In the instant motion, Birdsall does not present plausible alternative arguments to these holdings but instead merely disagrees with the Court's reasoning and findings of fact. It is apodictic that a party moving for reconsideration "must do more than reiterate our reasons for a decision and then make a blind assertion that we were incorrect." *G.M.*

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[2] THOS was the Territorial Office of Homeland Security since reorganized as the American Samoa Department of Homeland Security.

[3] OTICIDE is the Office of Territorial and International Criminal Intelligence and Drug Enforcement.

Meredith & Assoc. v. Blue Pac. Mgmt. Corp., 28 A.S.R.2d 204, 206 (Trial Div. 1995). This is precisely what Birdsall has done in his motion to reconsider the liability of O'Brien and Sala for allegedly defamatory publications. We therefore deny the motion for reconsideration.

C. Denial of Plaintiffs' motion to reconsider ASG's liability under A.S.C.A. §§ 43.1201 et seq.

Plaintiffs finally moves for reconsideration of whether ASG is liable for the allegedly unconstitutional stop order issued by O'Brien and the defamatory statements made by both O'Brien and Sala. In support of their argument, Plaintiffs make the unsubstantiated assertion that "the facts here show that the ASG through the Attorney General have been permitting the unofficial **[**6**]** practice of Assistant Attorney Generals to issue stop orders." Plaintiffs also claim that "ASG was complicit in permitting this activity." Plaintiffs' argument is entirely conclusory, exceedingly vague, devoid of factual references or support, and will therefore not be entertained by the Court.

II. Defendants' Motion for Clarification and Reconsideration of Sala's Liability Pursuant to article I, section 4 of the Revised Constitution of American Samoa.

A. Denial of Defendants' motion to reconsider Sala's liability under article I, section 4.

Defendant American Samoa Government ("ASG") questions our holding that although Sala's comments to the newspaper regarding Birdsall and THOS were not defamatory, they did constitute "a malicious and unjustifiable public attack[] on [his] name, reputation, or honor," a violation of AM. SAMOA REV. CONST. art. I, § 4. According to ASG, it is a "universal maxim" that a former departmental director such as Birdsall should be assigned responsibility for his department's financial difficulties and eventual dissolution. [4] Thus, ASG argues, Sala's comments were "certainly justifiable" and "to be expected." Lastly, ASG argues that the Court did not define a clear standard for the constitutional violation and that whatever standard we did apply **[**7**]** established a lower burden than that required for statutory defamation.

[6] Our holding recognizes the unique circumstances of American Samoan jurisprudence which must accommodate both Samoan custom

[4] In addition, ASG posits a questionable and reactive eye-for-an-eye argument that Birdsall subjected himself to public attacks by first making public comments about TOHS and his directorship. We are not convinced by ASG's acerbic rhetoric or the similarly inflammatory language peppered throughout ASG's motion.

and Western law. American Samoa's Constitution, statutory law, and Treaties of Cession all attempt to bolster the delicate balance of this dichotomy through provisions to safeguard *fa'a* Samoa against excessive intrusions from Western law. *See* AM. SAMOA REV. CONST. art. I, § 3; Treaty of Cession of Tutuila and Aunu'u; A.S.C.A. § 1.0202; A.S.C.A. §§ 1.0401 et seq. The High Court has previously identified the *matai* title system, communal land ownership, and Samoan language as the "pillars of *fa'a* Samoa." *Kruse v. Am. Sam. Gov't*, 6 A.S.R.3d 318, 321 (Trial Div. 2002); *see also Fanene v. Fanene*, 8 A.S.R.3d 339, 339-40 n.1 (Land & Titles Div. 2002) (citing *Fairholt v. Aulava*, 1 A.S.R.2d 73, 78 (Land & Titles Div. 1983))

Article I, Section 3 of the Revised Constitution provides that, "[i]t shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against . . . destruction of the Samoan way of life and language."[5] To that end, it is important to recognize the interplay of language and culture. A defining attribute of the Samoan language is its syntax, which **[**8**]** is uniquely structured to project a degree of formality and respect specific to *fa'a* Samoa. Thus, a comment or personal reference that might not cause offense in the American cultural context may in fact be an affront to individual or familial honor and dignity in Samoan culture. That a comment is spoken in English rather than Samoan does not dilute its potency.

With due deference to the decorum of Samoan culture, the framers of American Samoa's Revised Constitution included Article I, Section 4 to defend individuals and families from disparaging remarks that may not run afoul of anti-defamation statutes borrowed from Western law. *Compare* A.S.C.A. § 43.5201 *with* Cal. Civ. Code §§ 44-46 (containing virtually identical language). However, there is some concern that Section 4 may conflict with the freedom of speech protections in both the American Samoa and United States constitutions. *See* AM. SAMOA REV. CONST. art. I, § 1; U.S. CONST. art I, § 1.

[7-9] But the freedom of speech is not absolute. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 56 (1988). Roundly-accepted United States Supreme Court precedent has established that "'vulgar,' 'offensive,' and 'shocking' [speech] is not entitled to absolute constitutional protection." *FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978); *see also Condit v. Dunne*, 317 F. Supp. 2d 344, 360 (S.D.N.Y. 2004). In addition, federal precedent provides for local discretion with respect to specific types of **[**9**]** speech. For example, what constitutes "obscene speech" rests in

[5] Similarly, A.S.C.A. § 1.0202 instructs that, "[t]he customs of the Samoan people not in conflict with the laws of American Samoa or the laws of the United States concerning American Samoa shall be preserved."

part on a local or community "prurient interests" standard. *See Miller v. California*, 413 U.S. 15, 20-22 (1973).

[10] Similar to these restrictions, the inclusion of Section 4 in the American Samoa Bill of Rights serves as a local limitation to the Section 1 freedom of speech protection. *Falwell*, 485 U.S. at 56 (holding that freedom of speech is "subject to limitations"). Whether a "public attack" runs afoul of Section 4 is determined by whether the comment is malicious, unjustifiable, and deleterious to traditional Samoan cultural standards of comity, respect, dignity, or honor. This standard is informed both by the express language of Section 4 as well as the High Court's precedent interpreting and applying *fa'a* Samoa.

[11] In the case at bar, we held that what is offensive under Samoan cultural norms embodied by Article I, Section 4 is different than what is defamatory under Western norms codified by A.S.C.A. § 43.5201. *See Ala'ilima*, CA No. 22-09 op. at 8-11 (op. & order). As per the discussion above, this holding is consistent with the amplified Samoan cultural protection of dignity and honor. *See* AM. SAMOA REV. CONST. art. I, § 4. As to freedom of speech, although we held that Sala's comments to local media were a protected opinion under a defamation analysis, the same is not true under an Article I, Section 4 analysis. Sala's comments amounted to an unsubstantiated acrimonious opinion designed to **[**10**]** impinge on the honor and reputation of Birdsall in violation of Samoan cultural norms. Such comments do not warrant Section 1 freedom of speech protection. We therefore deny Defendants' motion for reconsideration of our holding that Sala's comments violated Article I, Section 4 of the American Samoa Constitution.

B. Clarification of Defendant Sala's individual liability for all damages and denial of Defendants' motion to reconsider damages.

[12] ASG also moves for reconsideration of our damages award based largely on ASG's opinion that Plaintiffs did not prove damages by a preponderance of the evidence. As we stated in our order, "the measure of damages is a question of fact." *Ala'ilima*, CA No. 22-09 at 11 (op. & order) (citing *Clifton v. Voyager, Inc.*, 31 A.S.R.2d 12, 24 (Trial Div. 1996). In addition, as the trier of fact in civil controversies, the Court "enjoys substantial discretion in determining damages." *Id.*

We awarded Birdsall $15,000 in actual damages due to the emotional distress he suffered as a result of Sala's comments. Nothing in ASG's motion shows that our damages award was based on a manifest mistake of fact. *See Iaulualo*, 7 A.S.R.3d at 58. Similar to the tort of intentional infliction of emotional distress, emotional distress in a defamation action does not require proof of objective symptoms of distress. *See Kloepfel v. Bokor*, 149 Wn.2d 192, 198 (Wash. 2003)(holding that "many **[**11**]**

states" do not require evidence of objective symptoms). Here, the totality of the circumstances provides sufficient evidence that Birdsall suffered emotional distress from Sala's malicious and outrageous comments. The $15,000 damages award was appropriate to compensate Birdsall for this injury. Moreover, the spiteful and malicious nature of Sala's comments fully justifies our punitive damages award of $30,000. We therefore deny Plaintiffs' motion to reconsider damages.

To clarify our holding regarding liability for the damages, Sala is individually liable for the full damages of $45,000. ASG does not share any joint liability for these damages.

Order

Plaintiffs' motion for reconsideration is denied in full. Pursuant to Defendants' request for clarification, we hold that Defendant Mike Sala is individually liable for the $45,000 damages award and that Defendant ASG is not liable for any damages. Defendants' motion for reconsideration is denied in full.

It is so ordered.

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Cite As: *Am. Samoa Gov't v. Kim & Samani*, CR Nos. 86-10 & 88-10 at [page number] (Trial Div. Apr. 30, 2014) (order deferring ruling on admissibility of expert test)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

MIKE KIM, Defendant.

MOTAU SAMANI, Defendant.

High Court of American Samoa
Trial Division

CR No. 86-10
CR No. 88-10

April 30, 2014

[1] The Court withheld ruling on whether a witness was an expert because it is a decision is better left for trial where Defendants may conduct *voir dire* regarding the expert's qualifications.

[2] Any alleged issues with the chain of custody speak to the weight of the evidence rather than its admissibility.

[3] The evidentiary process includes ruling on the qualification and content of the proposed expert testimony. With respect to the chain of custody over the DNA sample and the weight of this evidence, these are questions for the jury to determine as the trier of fact.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Mitzie Jessop, Deputy Attorney General
For Defendant Mike Kim, Fiti A. Sunia
For Defendant Motau Samani, Doug Fiaui, Public Defender

ORDER DEFERRING RULING ON ADMISSABILITY OF EXPERT TESTIMONY

Background

This case arises from the alleged sexual assault of a minor complaining witness, C.T., by Defendant Mike Kim as facilitated by Defendant Motau Samani. A jury trial on this matter is scheduled for May 6, 2014. Currently before the Court is the motion of Plaintiff American Samoa Government ("ASG") to qualify **[**2**]** Dr. Ma Ivy Clemente as an expert in the collection and handling of deoxyribonucleic acid ("DNA"). Defendant Kim is the only defendant who filed a written opposition. We conducted an expedited hearing on this motion on April 15, 2014.

After C.T. and her guardian reported Kim's alleged sexual assault to police on June 29, 2010, C.T. was examined at the Lyndon Baines Jonson Tropical Medical Center ("LBJ"). Medical staff at LBJ collected articles of C.T.'s clothing and other unspecified items. According to ASG, seminal fluid was found on C.T.'s undergarments. Police and medical staff sent some of the clothing and "other items" to Forensic Analytical Sciences, Inc. ("FASI") in Hayward, California for forensic analysis.

ASG then moved to compel Kim to submit his DNA for comparison with the samples taken from C.T.'s clothing. On April 7, 2011, a certified medical laboratory technician at LBJ, Freida Taumua, performed a buccal swab on Kim to collect a DNA sample. Kim's attorney Fiti A. Sunia, was present during this procedure. Kim's DNA sample was also sent to FASI for forensic analysis.

ASG apparently intended to call Taumua as a witness to explain the nuances of DNA collection and analysis and to substantiate the chain of custody over the DNA sample. However, Taumua passed away on December 3, 2013. ASG then filed **[**3**]** the instant motion to qualify Dr. Clemente, Taumua's supervisor at LBJ, as an expert witness who could testify in lieu of Taumua. For the reasons stated below we defer ruling on the admissibility of the proposed expert testimony until trial and only presently provide clarification pertaining to the admissibility and weight of potential evidence.

Discussion

[1] The majority of ASG's motion petitions the court to qualify Dr. Clemente as an expert in DNA collection methodology and DNA analysis. In his opposition, Defendant Kim does not substantively challenge ASG's contention that Dr. Clemente possesses the requisite expert qualifications. Despite ASG's extensive discussion of Dr. Clemente's training, experience, and education, it would be inappropriate for the Court to qualify Dr. Clemente at this time. This decision is better left for trial where Defendants may *voir dire* Dr. Clemente's

qualifications. We therefore withhold ruling on ASG's motion.

The remainder of ASG's motion argues that, when supplemented by Dr. Clemente's expert testimony, the admission of the FASI DNA analyses will not run afoul of Sixth Amendment confrontation clause protections. ASG also preemptively defends any potential chain of custody issues. According to ASG, even without having direct knowledge of the specific DNA samples in **[**4**]** this case, Dr. Clemente can explain DNA collection and handling procedures in the same manner as Taumua. In opposition, Defendant Kim argues that the testimony ASG seeks to elicit from Dr. Clemente concerns a factual matter outside the doctor's personal knowledge. According to Kim, Dr. Clemente's alleged expert qualifications are immaterial to the fact that she cannot offer factual testimony without personal knowledge of how the DNA samples in this case were processed. *See* T.C.R.Ev. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.").

[2] The overarching question presented by the parties' arguments is whether Dr. Clemente has sufficient personal knowledge of the DNA sample handling procedures in this case to establish an adequate chain of custody over the proffered evidence. However, any alleged issues with the chain of custody speak to "the weight of the evidence rather than its admissibility." *See United States v. Brumfield*, 686 F.3d 960, 965 (8th Cir. 2012) (holding lower court did not abuse discretion by admitting evidence once held by an investigating police officer who died before trial)(citing *United States v. Briley*, 319 F.3d 360, 363 (8th Cir. 2003)); *see also United States v. Lott*, 854 F.2d 244, 250 (7th Cir. 1988) ("[T]he **[**5**]** government need not prove a perfect chain of custody for evidence to be admitted at trial; gaps in the chain normally go to the weight of the evidence rather than its admissibility.").

Order

[3] We defer ruling on the admissibility of the DNA analyses until such time as that evidence is submitted during the jury trial, presently scheduled to begin on May 6, 2014. The evidentiary process will include ruling on the qualification and content of the proposed expert testimony. With respect to the chain of custody over the DNA sample and the weight of this evidence, these are questions for the jury to determine as the trier of fact.

It is so ordered.

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Cite As: *Am. Samoa Gov't v. Hari*, CR No. 113-13 at [page number] (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceeding)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

FAIVA HARI, Defendant.

High Court of American Samoa
Trial Division

CR No. 113-13

May 14, 2014

[1] The domestic relations statute and the criminal justice act conflict in that the former allows any girl who has reached the age of 14 years to get legally married provided that she has the consent of her parents and the latter states that it is a crime for any man to have sexual intercourse with a girl 16 years and under.

[2] The proscribed or forbidden conduct constituting rape, which is a sexual intercourse with a girl 16 or under, is exactly the same conduct that constitutes sexual assault; however, the punishment for rape and sexual assault are 15 years and 7 years respectively.

[3] Whether one is charged with rape or sexual assault is a matter left entirely up to the prosecutor's discretion.

[4] Our criminal law statutes specifically recognize, for purposes of all sexual offenses, that a co-habitable couple living together as man and wife are to be treated as if they are married.

[5] In a marital situation where children are involved, the question naturally arises as to whether the desired outcome should simply be punitive and deterrent measures against men who have sex with 16 year olds. However, under a scenario of a family unit with children, the concurrent outcome with deterrence is the effect of breaking up of a marital unit and depriving the mother and child of the economic benefit of spousal and child support while the husband and father is locked away in jail for a period of time.

Before KRUSE, Chief Justice; FA'AMAUSILI, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Tony F. Graf Jr., Assistant Attorney General
For Defendant, M. Douglas Fiaui, Public Defender

REPORTER'S TRANSCRIPT OF JURY TRIAL PROCEEDING

[2**]** THE COURT: Good morning, Members of the Jury. Our apologies for telling you yesterday that we'll reconvene at 9 o'clock but we're reconvening at 35 minutes late, from your point of view. But after the recess yesterday, the lawyers were involved in certain negotiations regarding this proceeding and presenting a stipulation to the court for approval.

[1] Our domestic relations statute allows, on the one hand, any girl who has reached the age of 14 years to get legally married provided that she has the consent of her parents. On the other hand, our criminal justice act states that it is a crime for any man to have sexual intercourse with a girl 16 years and under.

In other words, our criminal law statutes seem to be saying that if you're the husband of a 14-year old girl to whom you are legally married, you cannot consensually consummate your marriage without running the risk of going to jail. Jail could consist of a period of up to 15 years in the case of being charged with statutory rape or up to seven years in the case of being charged with sexual assault, as in the **[**3**]** case that is before us.

[2-4] Incidentally, the prescribe or forbidden conduct constituting rape which is a sexual intercourse with a girl 16 or under is exactly the same conduct constituting sexual assault. The difference between rape and sexual assault is the difference between 15 years and 7 years. Whether one is charged with rape or sexual assault is a matter left entirely up to the prosecutor's discretion. To add confusion to this seeming anomaly, our criminal law statutes specifically recognizes, for purposes of all sexual offenses, that a co-habitable couple living together as man and wife is to be treated as if they are married.

Now, in the interim while during the recess, the lawyers have jointly requested they've been working on this joint request and the court has granted a deferral or continuance of the proceedings with the defendant opting to waive his speedy trial right and is asking for a bench trial as oppose to a continuing jury trial. The lawyers have asked for this deferral continuance to allow them to review what sort of options or social outcomes would best serve the interest of justice, given the extent of the testimony thus far.

[5] In a marital situation where children are **[**4**]** involved, the question naturally arises as to whether the desired outcome should simply

be punitive and deterrent measures against men who have sex with 16 year olds. However, under a scenario of a family unit with children, the concurrent outcome with deterrence is the effect of breaking up of a marital unit and depriving the mother and child of the economic benefit of spousal and child support while the husband and father is locked away in jail for a period of time.

Alright. Members of the Jury, given the stipulation and given that the court has granted this, this effectively means any future continuance of this case will no longer be in front of a jury, but in front of a panel of judges which means, Members of the Jury, that your service have effectively come to an end at this time. The court, nonetheless, would like to extend its appreciation to you for attending to its summons and indeed participating in the jury process.

As I mentioned to your fellow venire or panel members that were summoned with you, without the civic cooperation of citizens like yourselves, our jury system simply wouldn't work. And that system of justice is that, a person accused of a crime in American Samoa and indeed in the rest of the United States, you are tried not by the government, but a panel of your own **[**5**]** peers.

At this time, the court thanks you again. You are discharged. You may take your notes if you so want. Thank you.

(Conclusion of proceedings)

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Cite As: *Vergara v. Am. Samoa Gov't*, CA No. 44-13, slip op. at [page number] (Trial Div. May 21, 2014) (order granting mot. to dismiss)

HUBERT VERGARA, Plaintiff,

v.

AMERICAN SAMOA GOVERNMENT, Defendant.

High Court of American Samoa
Trial Division

CA No. 44-13

May 21, 2014

[1] Pursuant to T.C.R.C.P. 12(b)(6), the Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted.

[2] Under the *Twombly-Iqbal* heightened pleading standard, the Court applies a two prong analysis. The first prong one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. Prong two instructs the Court to analyze whether the well-pleaded allegations "plausibly give rise to an entitlement to relief."

[3] Under the first prong in the *Twombly-Iqbal* heightened pleading standard, the pleading does not need to include detailed factual allegations, but must contain more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

[4] The *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal. First, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true.

[5] If the plaintiff's "well-pleaded" facts permit the court to infer only the mere possibility of misconduct, the complaint fails because it alleges but does not show that the plaintiff is entitled to relief.

[6] Inmates do not have a right to visitation. Rather, visitation is a privilege governed by policies ordained by the warden.

[7] Res judicata, or claim preclusion, applies when (1) there has been a final judgment on the merits (2) in a prior action involving the same parties or their privies and (3) the prior action involved the same claim.

[8] It is well-established that prison overcrowding can foment conditions that run afoul of the constitutional prohibition against "cruel or unusual punishment."

[9] Pursuant to the guidelines established in Chapter 25 of the American Samoa Code Anotated, the warden holds at least some discretion to evaluate and approve an inmate's application for work release.

[10] Based on the plain language of the statutes, it appears that there is at the very least a right to apply for work release for specified categories of inmates.

Before RICHMOND, Associate Justice and MUASAU, Associate Judge

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Masaya Uchino, Assistant Attorney General

ORDER GRANTING MOTION TO DISMISS

This order denies the motion of Defendant Mobil Oil American Samoa (Mobil) for partial summary judgment on claims of Plaintiff Patolomeo Fulu (Fulu) for wrongful termination and breach of contract related to Mobil's termination of Fulu's employment in 2004 on the grounds that these causes of action are time barred.

Background

Plaintiff Hubert Vergara is an inmate at the Territorial Correctional Facility ("TCF"). TCF is operated by the Department of Public Safety, an agency of Defendant American Samoa Government ("ASG"). In his most recent complaint filed on September 3, 2013, Plaintiff alleges ASG has treated him improperly by restricting his visitation privileges, housing him in overcrowded conditions, revoking his work release, and providing inadequate medical care. Plaintiff outlines each of these grievances under four causes of action for negligence.

The instant complaint is similar to a complaint we previously dismissed in February 2012 for failure to state a claim. *See Vergara v. Am. Samoa Gov't*, CA No. 86-11, slip op. at 1-7 (Trial Div. February 9, 2012) (order on def.'s mot. to **[**2**]** dismiss). Further, in CA 36-09, originally filed by Plaintiff on May 21, 2009, we considered and rejected an argument concerning Plaintiff's visitation privileges that was essentially identical

to count one of the current complaint. *See Vergara v. Am. Samoa Gov't*, CA No. 36-09, slip op. at 4-10 (Trial Div. Oct. 16, 2009).

Standard of Review

[1-3] Pursuant to T.C.R.C.P. 12(b)(6), the Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted. *See McConnell Dowell (Am. Samoa), Ltd. v. Am. Samoa Power Auth.*, 4 A.S.R.3d 73, 76-77 (Trial Div. 2000); *Afele-Fa`amuli v. Am. Samoa Cmty. Coll.*, 4 A.S.R.3d 219, 221-22 (Trial Div. 2000). Under the *Twombly-Iqbal* heightened pleading standard, the Court applies a two prong analysis. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *see also Vergara*, CA No. 86-11 at 4-5(order on def.'s mot. to dismiss). Part one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. *Iqbal*, 129 S.Ct. at 678-79. While the pleading does not need to include detailed factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. Next, prong two instructs the Court to analyze whether the well-pleaded **[**3**]** allegations "plausibly give rise to an entitlement to relief." *Id*. at 679.

[4] However, the *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal. First, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true. *Haleck v. Agaoleatu Tautolor*, 7 A.S.R.3d 203, 204 (Trial Div. 2003); *see also Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976) (holding that motions to dismiss are generally disfavored "and doubts should be resolved in favor of the pleader"). Second, a complaint should not "be dismissed because a court does not believe that a plaintiff will prevail on [his or her] claim." *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011) (citations omitted).

[5] Yet while the above guiding principles counsel the court "to liberally construe pleadings to avoid injustice, this does not extend to refashioning [a plaintiff's] theory of relief." *Mackenzie v. Lutali* , 24 A.S.R.2d 75, 76 (Trial Div. 1993). Thus, if the plaintiff's "well-pleaded" facts "permit the court to infer only 'the [mere] possibility of misconduct,' . . . the complaint fails because it *alleges* but does not *show*" that the plaintiff is entitled to relief. *Vergara*, CA No. 86-11 **[**4**]** at 4-5 (order on def.'s mot. to dismiss) (quoting *Iqbal*, 556 U.S. at 679).

Discussion

The heightened pleading standard governs this case. Plaintiff has done little to develop his complaint beyond the barebones outline we dismissed for failure to state a claim in CA No. 86-11. As explained below, count one does not present cognizable claims and is barred by the doctrine of res judicata. Counts two, three, and four suffer from Plaintiff's continued inability to present an adequately pleaded claim.

I. Count One: Plaintiff's Claim that ASG Negligently Denied his Right to Visitation

[6] With respect to Count one, Plaintiff's argument presents a litany of "naked assertions" explicitly proscribed by the heightened pleading standard. *Iqbal*, 556 U.S. at 678 (internal quotations omitted). Stating that ASG has "a duty not to deny reasonable visitation," a duty apparently divined from pure ether, is insufficient. As we explained in CA No. 36-09, inmates do not have a "right" to visitation. Rather, visitation is a privilege governed by policies ordained by TCF's warden. As such, "[t]he Court will not interfere when TCF administrators exercise reasonable judgments in managing the means to accomplish the facility's penological objectives." *Vergara*, CA No. 36-09 at 4.

[5**]** With respect to damages, Plaintiff claims that his "medical condition has been affected" by ASG's visitation restrictions. Plaintiff does not provide us any information regarding his alleged medical condition let alone how he has actually been harmed. *See Iqbal*, 556 U.S. at 678, (A well pleaded complaint "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."). Such a conclusory statement cannot withstand a 12(b)(6) motion to dismiss.

[7] Lastly, considering we already decided this matter in CA No. 36-09, even if Plaintiff had set forth a cognizable claim, it would be barred by the doctrine of res judicata. "*Res judicata*, or claim preclusion, applies when (1) there has been a final judgment on the merits (2) in a prior action involving the same parties or their privies and (3) the prior action involved the same claim." *Alai'asa v. Te'o*, 5 A.S.R.3d 266, 267 (Land & Titles Div. 2001); *see also Toomata v. Vea*, 2 A.S.R. 564, 570 (Trial Div. 1950) ("It is a fundamental principle of jurisprudence that material facts or questions which were in issue in a former action, and were there admitted or judicially determined, are conclusively settled by a judgment rendered therein, and that such facts or questions become *res judicata* and may not again be litigated in a subsequent action between the same parties or their privies, regardless of the form the issue may take in the subsequent action . . ."). In our **[**6**]** October 2009 Opinion and Order in CA No. 36-09 (1) we reached a final judgment; (2) between Plaintiff and ASG (3) regarding Plaintiff's claim that he had been denied

his "right" to visitation. *See Alai'asa,* 5 A.S.R.3d at 267. Therefore, Count one alleging that ASG negligently denied Plaintiff's right to visitation is dismissed with prejudice.

II. Count Two: Plaintiff's Claim that ASG Negligently Housed him in Overcrowded Conditions

[8] ASG concedes "without hesitation" that it has a duty not to violate Plaintiff's constitutional rights. It is well-established that prison overcrowding can foment conditions that run afoul of the constitutional prohibition against "cruel or unusual punishment." AM. SAMOA REV. CONST. art. I, § 6; *see also* U.S. CONST. art I, § 8; *see generally Brown v. Plata*, 131 S. Ct. 1910, 1923, 1933-34 (2011) (detailing negative impacts constitutional violations inherent to prison overcrowding).

We note from the outset that the nature of Plaintiff's cause of action and the damages he seeks are strikingly unclear. Plaintiff frames his overcrowding claim as a negligence cause of action. Further, though Plaintiff never once mentions the Government Tort Liability Act (GTLA), his reference to administrative claims letters suggests that he is at least attempting to pursue a GTLA claim against ASG. *See* A.S.C.A. §§ 43.1201 et seq.; *see generally Mataipule v. Tifaimoana P'ships*, **[**7**]** *Ltd.*, 16 A.S.R.2d 48 (discussing the GTLA administrative claim requirement). Yet, in light of Plaintiff's discussion of his 8th Amendment "right to not be imprisoned under cruel and unusual punishment," it appears his negligence claim is actually a constitutional tort. Such a cavalier conflation of causes of action cannot compose a well-pleaded complaint.

Similarly, it is unclear whether Plaintiff seeks money damages typical of a tort claim or some form of mandamus as through a writ of habeas corpus. Although he initially states that the amount in controversy exceeds the $15,000 jurisdictional requirement (A.S.C.A. § 3.0208(a)(1)), Plaintiff fails to plead monetary damages anywhere in his complaint. By way of injury, his overcrowding claim states that he "continues to be harmed by unsanitary conditions, meager foodstuffs, and [] increased violence." It would seem a writ of habeas corpus would be the appropriate avenue to rectify these alleged wrongs. Without a more adeptly pleaded complaint, the Court finds itself on an odyssey down the rabbit hole into a legal wonderland of nebulous causes of action. This does not bode well for Plaintiff's ability to withstand a 12(b)(6) motion to dismiss.

Even if a negligence cause of action is the appropriate avenue to pursue this claim, Plaintiff has failed to adequately plead the elements of negligence. First, he has not provided a "a short and plain statement" of what harm he has actually **[**8**]** suffered from the overcrowding.

T.C.R.C.P. 8(a). As we stated above, it is entirely unclear whether Plaintiff seeks declaratory or monetary relief. Second, he has only shown causation by casually tossing the words "proximate cause" into his complaint.

Overall, despite our instructions in CA 86-11, Plaintiff's counsel remains woefully incapable of establishing a viable claim of negligence. If one "lesson in simple negligence hardly befits a practicing attorney," then two such lessons should serve as a stern warning to exercise the diligence and competence that serve as the foundation of the profession. *Vergara*, CA No. 86-11. at 6 (order on def.'s mot. to dismiss); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.1 (competence), R. 1.3 (diligence); *see also* H.C.R. 104 (adopting the American Bar Association Model Rules of Professional Conduct). Count two regarding the ASG's alleged negligence by housing Plaintiff in overcrowded conditions is dismissed with prejudice.

III. Count Three: Plaintiff's Claim that ASG Negligently Revoked his Right to Work Release

We now turn to Plaintiff's third cause of action, that ASG negligently revoked his work release. Similar to visitation, Plaintiff appears to view work release as an absolute right rather than a privilege. Thus, Plaintiff argues that ASG has a **[**9**]** duty to provide him a reasonable opportunity for work release and to not revoke this privilege without due process.

A.S.C.A. § 46.2501 governs rehabilitative release programs in American Samoa. It appears that much of Chapter 25 was enacted in response to this Court's decision in *Am. Samoa Gov't v. Byung Soo Ki*, 31 A.S.R.2d 118 (Trial Div. 1995).[1] In that case, we "essentially struck down the Correctional Facility's various release programs as contrary to the statutory prohibition against the release of inmates except as authorized by law." *Adams v. Reavis*, 1 A.S.R.3d (Trial Div. 1997).

[9-10] Under A.S.C.A. § 46.2524, work release "*shall* be available to all sentenced inmates confined in the territorial correctional facility who meet" certain qualifications. (emphasis added). However, "pursuant to the guidelines established in [Chapter 25]," the warden holds at least some discretion to evaluate and approve an inmate's application for work release. A.S.C.A. § 46.2523. Based on the plain language of the statutes, it appears that there is at the very least a right to apply for work release for specified categories of inmates. While the warden retains discretion to review applications, this discretion must be exercised based

[1] Through Pub. L. No. 26-5, the *Fono* undertook an extensive modification and update of Chapter 25 in 1999.

on statutory guidelines. *But see Siaumau v. Am. Samoa Gov't*, 7 **[**10**]** A.S.R.3d 130, 131 (Trial Div. 2003) (holding that the work release program is under the supervision of the warden and, therefore, that the court "lacks the authority" to order work release pursuant to a writ of habeas corpus).

Plaintiff's complaint fails to allege whether he is within the category of inmates eligible for work release under A.S.C.A. § 46.2524. In addition, if Plaintiff is eligible, he fails to allege whether or not the warden abused his discretion by revoking his work release authorization. *See* A.S.C.A. § 46.2524. In view of Plaintiff's failure to address these issues and despite our considerable skepticism that Plaintiff's claim as currently framed sounds in tort (let alone negligence), we dismiss count three with prejudice.

IV. Count IV: Plaintiff's Claim that ASG's Negligently Provided Him Inadequate Medical Care

ASG's motion to dismiss did not substantively address Plaintiff's fourth claim that ASG breached its duty to provide Plaintiff adequate medical care. This cause of action is similar to Count two and may be combined with Count two into a single cause of action. Both claims stem from the constitutional prohibition against cruel and unusual punishment. *See* AM. SAMOA REV. CONST. art. I, § 6; *Brown*, 131 S. Ct. at 1923, 1926. Similarly, both claims suffer primarily from Plaintiff's failure to plead damages beyond stating "Plaintiff has been **[**11**]** harmed." Thus, as with count two, count four suffers from a conflation of tort and constitutional violations and monetary and habeas corpus relief. Lastly, while the facts Plaintiff alleges in count four establish causation somewhat more thoroughly than in count two, he has still failed to meet the heightened pleading standard necessary to survive a motion to dismiss for failure to state a claim. Count four is therefore dismissed with prejudice.

Order

Pursuant to T.C.R.C.P. 12(b)(6), we dismiss the entirety of Plaintiff's complaint with prejudice.

It is so ordered.

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Cite As: *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 at [page number] (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.)

PATOLOMEO FULU, Plaintiff,

v.

MOBIL OIL AMERICAN SAMOA, TUTUILA SATAUA, and DOES I through X, jointly and severally, Defendant.

High Court of American Samoa
Trial Division

CA No. 29-07

June 3, 2014

[1] A claim for punitive damages is not an independent cause of action, thus the Court could only consider as a separate element of damages.

[2] The Court will grant a motion for summary judgment when the pleadings and other supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

[3] The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact.

[4] If the movant meets his or her burden, the non-moving party must then affirmatively show there is a genuine issue for trial.

[5] All inferences in a summary judgment motion are construed in a light most favorable to the non-moving party.

[6] In general, when a party must exhaust administrative remedies before he or she may file suit before the Court, the limitations period will be tolled during administrative proceedings.

[7] In general, the filing of an action in a court that clearly lacks jurisdiction will not toll the statute of limitations.

[8] Where a party seeks to toll the statute of limitations after originally filing in a tribunal that lacked jurisdiction over the action, equitable tolling principles will still apply if the first tribunal's jurisdiction was "unclear" at the time of filing.

[9] Substantial state and federal precedent interpreting jurisdictional statutes has established that unless explicitly stated otherwise, where statutes grant courts overlapping jurisdiction, that jurisdiction is concurrent.

[10] A.S.C.A. § 4.0604(d) does not expressly grant the Office of the Administrative Law Judge ("OALJ") exclusive original jurisdiction over wage and hour claims, and A.S.C.A. § 32.0341 states that wage and hour claims may be brought before the OALJ. Neither of these provisions precludes the High Court from exercising concurrent jurisdiction with the OALJ over wage and hour claims brought concomitant to other causes of action within the exclusive original jurisdiction of the High Court.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Mark F. Ude
For Defendants, Fiti A. Sunia

ORDER DENYING MOTION FOR PARTIAL SUMMARY JUDGMENT

This order denies the motion of Defendant Mobil Oil American Samoa ("Mobil") for partial summary judgment on claims of Plaintiff Patolomeo Fulu ("Fulu") for wrongful termination and breach of contract related to Mobil's termination of Fulu's employment in 2004 on the grounds that these causes of action are time barred.

Factual Background

Mobil principally employed Fulu as a driver of its tanker transporting fuel in American Samoa from the tank farm in Utulei to vendors throughout the island of Tutuila. In March 2004, Fulu was suspended by his supervisor Defendant Tutuila Sataua **[**2**]** ("Sataua"), after Fulu was seen smoking next to the tanker pumping fuel delivered to an American Samoa Power Authority power plant. Smoking next to the fuel tanker violated Mobil's safety policies. Sataua informed Mobil's regional headquarters in Fiji of the safety violation.

Fulu alleges that Mobil effectively ended the suspension when he was reinstated during a staff shortage. However, pursuant to instructions from the Fiji headquarters, Mobil subsequently terminated his employment on March 25, 2004. Fulu states that his termination violated Mobil's policies and procedures including a four-week pre-termination notice requirement. Although not explicitly stated, Fulu appears to assert that he was terminated due to the smoking safety violation.

Following his termination, Fulu claims he sent numerous letters to Mobil demanding remuneration for his accrued vacation and sick leave but never received a response. Fulu further alleges that after he received a job offer from another company in April 2008, Mobil and Sataua proactively contacted the prospective employer, and following this conversation, this job offer was withdrawn. In an affidavit submitted in support of his motion to dismiss, Sataua claims that he merely responded to questions from the prospective employer regarding Fulu's termination. **[**3**]**

Procedural Background

Fulu initiated a small claims action against Mobil related to his termination in the District Court on June 30, 2004. *See* Exhibit "A" attached to Fulu's Opposition to Motion for Summary Judgment. According to Fulu, the District Court Judge instructed him to seek relief from the Administrative Law Judge ("ALJ").

Fulu filed his claims against Mobil with the Office of the Administrative Law Judge ("OALJ") on May 27, 2005. *See* Exhibit "B" to Fulu"s Opposition to Motion for Summary Judgment. The Court takes judicial notice of the subsequent motion to dismiss without prejudice and dismissal order in the OALJ proceedings. On December 14, 2006, Fulu moved to dismiss the administrative proceedings without prejudice for lack of jurisdiction over some of Fulu's claims. On December 20, 2006, the ALJ dismissed the administrative proceedings without prejudice so that Fulu could refile his claims in the proper judicial forum.

On March 23, 2007, Fulu commenced this action in the High Court, alleging his wrongful termination and breach of contract claims against Mobil. On April 15, 2009, Fulu filed an amended complaint, adding Sataua as a co-defendant and Fulu's claim of tortious interference. **[**4**]**

[1] On March 30, 2011, Sataua filed a motion to dismiss all of Fulu's claims, and specifically the tortuous interference claim (Count five) as it pertained to him. On May 11, 2011, the Court's Order Granting Motion to Dismiss in Part was entered. We held that the tortuous interference claim as alleged failed to state a cause of action and dismissed this claim in effect against both Sataua and Mobil. In the same order, we addressed the claims remaining against Mobil alone. Counsel were advised that Counts One and Two as alleged were identical causes of actions and would be considered together as single claim for wrongful termination. Counsel were further advised that Counts Three and Four claims alleged respectively for nonpayment of earned vacation and sick leave were essentially breach of contract claims and would be treated as such. Because it is not an independent cause of action, we also advised counsel

that we could consider Fulu's claim for punitive damages (Count Six) not as an independent action but only as a separate element of damages at issue.

On December 4, 2012, Mobil filed the instant motion for partial summary judgment.[1] For the reasons stated below, we deny this motion for partial summary judgment. **[**5**]**

Standard of Review

[2-5] The Court will grant a motion for summary judgment "when the pleadings and other supporting documents 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact." *Constr. Servs. of Sam., Inc. v. Bank of Hawaii*, 8 A.S.R.3d 114, 115 (Trial Div. 2004) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also* T.C.R.C.P. 56. If the movant meets his or her burden, "the non-moving party must then affirmatively show there is a genuine issue for trial." *Bank of Hawaii*, 8 A.S.R.3d at 115; *see also RDL Inc. v. Am. Sam. Cmty. Coll.*, 8 A.S.R.3d 327, 328 (Trial Div. 2002). "[A]ll inferences are construed in a light most favorable to the non-moving party." *Am. Samoa Power Auth. v. Nat'l Pac. Ins. Co.*, 30 A.S.R.2d 145, 146-47 (Trial Div. 1996); *see also Pal Air Int'l, Inc. v. Porter*, 30 A.S.R.2d 104, 105 (Trial Div. 1996)

Discussion

Mobil's motion for partial summary judgment argues that Fulu's claims against Mobil violate the two-year statute of limitations for each cause of action. According to Mobil, Plaintiff's claims accrued when his employment was terminated on March 25, 2004. Because Plaintiff did not file the instant **[**6**]** action in the High Court until nearly three years later on March 23, 2007, Mobil argues that the complaint violates the statutory limitation period for commencing this action.

[6] In general, when a party must exhaust administrative remedies before he or she may file suit before the Court, the limitations period will be tolled during administrative proceedings. *See Bradcock v. Am. Samoa Gov't*, 1 A.S.R.3d 42, 44 (App. Div. 1997); *Randall v. Am. Samoa Gov't*, 28 A.S.R.2d 70, 72-73 (Trial Div. 1995) (discussing *Mataipule v. Tifaimoana P'ship, Ltd*., 16 A.S.R.2d 48, 53 (Trial Div. 1990) "statute of limitation does not begin to run until the necessary administrative claims

[1] For the sake of brevity, we are dispensing with a discussion of numerous other motions to continue trial and an order to compel discovery.

have been denied," citing 51 AM. JUR. 2D, *Limitation of Actions* § 115 at 686 (1970)). As we have previously held, this tolling principle operates "on the theory that filing an administrative claim constitute[s] the beginning of an action." *Randall*, 28 A.S.R.2d at 72-73 (internal quotations omitted).

However, complicating the application of tolling in this case is the ALJ's dismissal of the OALJ proceeding to allow Fulu to refile his claims in the proper forum. *See Fulu v. Mobil Oil Am. Samoa*, ALJ No. 04-05, slip op. at 2 (December 14, 2006) (order to dismiss without prejudice). Consistent with the parties' stipulation, the ALJ effectively held that the case extended beyond a simple claim for "unpaid or improperly paid **[**7**]** wages and hours" over which the ALJ would have jurisdiction. *See* A.S.C.A. §§ 4.0604(d), 32.0340-41. Instead, the ALJ essentially found the controversy principally concerned issues within the original jurisdiction of the High Court.

[7-8] Despite the ALJ's finding that the OALJ was not the proper forum, we hold that Fulu's administrative proceeding still tolled the limitations period. In general, "the filing of an action in a court that clearly lacks jurisdiction will not toll the statute of limitations." *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129 (6th Cir. Mich. 1989); *see also Shofer v. Hack Co.*, 970 F.2d 1316, 1319 (4th Cir. Md. 1992); *Fox v. Eaton Corp.*, 615 F.2d 716, 719 (6th Cir. Ohio 1980) (holding tolling applied where state court's jurisdiction over a federal claim was unclear). However, the use of word "clearly" in this standard provides courts with significant latitude. Where a party seeks to toll the statute of limitations after originally filing in a tribunal that lacked jurisdiction over the action, equitable tolling principles will still apply if the first tribunal's jurisdiction was "unclear" at the time of filing.

[9-10] Here, the OALJ's jurisdiction over this case was not readily apparent either to the parties or the ALJ. Shortly after Fulu filed the action, the ALJ issued a written order explicitly holding that the OALJ had jurisdiction over the case. *See Fulu v. Mobil Oil Am. Samoa*, ALJ No. 04-05, slip op. at 1 **[**8**]** (October 18, 2005) (order). Furthermore, Fulu asserts that he filed this action with the OALJ pursuant to the District Court Judge's instructions. It appears that the parties and ALJ seriously began to consider questions of subject matter jurisdiction only after Mobil moved to dismiss the OALJ proceeding. Lastly, the sparse language and poor construction of A.S.C.A. § 4.0604(d) leave the statute open to manipulation and misinterpretation.[2]

[2] A.S.C.A. § 4.0604(d) is decidedly unclear as to the nature and extent of the OALJ's jurisdiction over causes of action arising from the same transaction as a wage and hour dispute. Nonetheless, we agree with the ALJ's apparent determination that the OALJ lacks jurisdiction over any

Simply put, the extent of the OALJ's jurisdiction over the wage and hours controversy in this action was "far from clear." **[**9**]** *Fox*, 615 F.2d at 719. We therefore hold that Fulu's complaint filed with the OALJ on May 27, 2005 and dismissed on December 20, 2006 tolled the statutory limitation period for filing Fulu's action before the High Court for more than 18 months. Fulu commenced this action in High Court almost three years after his employment termination. Therefore, taking into account the length of this tolling period while the OALJ was pending, neither his wrongful termination nor breach of contract claims were filed in the High Court in violation of the two-year limitation period.

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cause of action outside the scope of the wage and hour laws codified in Chapter 3 of Title 32. However, this construction presents the possibility that the OALJ could undertake original jurisdiction over Fulu's wage and hour claim while the High Court would have original jurisdiction over Fulu's wrongful termination claim.

Substantial state and federal precedent interpreting jurisdictional statutes has established that unless explicitly stated otherwise, where statutes grant courts overlapping jurisdiction, that jurisdiction is concurrent. *See United States v. Bank of New York & Trust Co.*, 296 U.S. 463, 479 (1936); *Lubecki v. Ashcroft*, 557 A.2d 1208, 1213 (R.I. 1989); *Gurr v. Willcutt*, 707 P.2d 979, 983 (Ariz. Ct. App. 1985). Courts place great significance on whether or not a statute grants a court "exclusive jurisdiction." *See De Horney v. Bank of America Nat'l Trust & Sav. Ass'n.*, 879 F.2d 459, 463 (9th Cir. 1989). Overall, "[i]t is a general rule that the grant of jurisdiction to one court does not, of itself, imply that the jurisdiction is to be exclusive." *Bank of New York & Trust Co.*, 296 U.S. at 470; *see generally United States v. Shepard*, 515 F.2d 1324, 1329 (D.C. Cir. 1979).

Significantly, § 4.0604(d) does not expressly grant the OALJ *exclusive* original jurisdiction over wage and hour claims, and A.S.C.A. § 32.0341 states that wage and hour claims *may* (emphasis added) be brought before the OALJ. Neither of these provisions precludes the High Court from exercising concurrent jurisdiction with the OALJ over wage and hour claims brought concomitant to other causes of action within the exclusive original jurisdiction of the High Court. We therefore hold that the High Court has concurrent jurisdiction over § 32.0340 wage and hour claims brought concurrently with other civil causes of action.

Order

Mobil Oil American Samoa's motion for partial summary judgment is denied.

It is so ordered.

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Cite As: *Barlow v. Am. Samoa Gov't*, CA No. 45-14, slip op. at [page number] (Trial Div. July 2, 2014) (order granting def.'s mot. to dismiss)

JAMES BARLOW, Plaintiff,

v.

AMERICAN SAMOA GOVERNMENT, Defendant.

High Court of American Samoa
Trial Division

CA No. 45-14

July 2, 2014

[1] Under the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, this Court applies a two prong analysis. Prong one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. Prong two instructs the Court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief.

[2] The complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true.

[3] If the plaintiff's "well-pleaded" facts permit the court to infer only the mere possibility of misconduct, the complaint fails because it alleges but does not show that the plaintiff is entitled to relief.

[4] Negligent infliction of emotional distress is not an independent in tort but instead rests on a claim of negligence. Thus, whether plaintiffs can recover damages for the negligent infliction of emotional distress is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation, and damages must exist to support the cause of action.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Vincent G. Kruse, Assistant Attorney General

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Background

Defendant American Samoa Government ("ASG") moves pre-answer to dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted pursuant to T.C.R.C.P. 12(b)(1) and (6).

The action arises from ASG's alleged mistreatment of Plaintiff James Barlow during Plaintiff's incarceration in a criminal proceeding. Plaintiff loosely alleges four tort claims: (a) negligent failure to provide discovery in the criminal proceeding; (b) breach of his privacy protected by the Health Insurance Portability and Accountability Act ("HIPAA"); (c) negligent infliction of emotional distress ("NIED"); and (d) intentional infliction of emotional distress ("IIED"). **[**2**]**

Both the Trial and Appellate Divisions of the High Court have repeatedly instructed Plaintiff's counsel on the standard for initial pleadings, reprimanded counsel for his habitual lack of diligence, and dismissed a number of his procedurally and substantively deficient submissions to the High Court. *See Oloapu v. Am. Samoa Gov't*, AP No. 17-10 (App. Div. Dec. 6, 2012); *Pago Pago Yacht Club, Inc. v. Am. Samoa Gov't*, AP No. 04-12 (App. Div. June 1, 2012) (order granting in part & den. in part mot. to dismiss); *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting mot. to dismiss); *Togiai v. Hawaiian Airlines, Inc.*, CA No. 101-06 (Trial Div. July 24, 2013) (order den. def.'s mot. to dismiss but imposing sanctions); *Fa'asala v. O'Brien*, CA No. 08-11 (Trial Div. Jan. 15, 2013) (order dismissal with prejudice); *In re Estate of Tuato'o*, PR No. 21-12. (Trial Div. Sept. 21, 2012) (mem. of Rule 11 sanction order & order staying sanction); *Tuli'au v. Tuiasina*, CA No. 22-12 (Trial Div. July 26, 2012) (order granting def.'s mot. to dismiss); *Bartolome v. JKL, Inc.*, CA No. 30-08 (Trial Div. June 21, 2012) (order granting in part & den. in part def.'s mot. for summ. j.); *Native Res. Developers, Inc. v. Am. Samoa Gov't*, CA No. 86-10. (Trial Div. March 20, 2012) (order den. mtn. for j. on the pleadings); *Vergara v. Am. Sam. Gov't*, CA No. 86-11, **[**3**]** (Trial Div. Feb. 9, 2012) (order on def.'s mot. to dismiss). It bears noting that this list of ten cases represents only a selection of those from approximately the past 30 months.

In this action, Plaintiff has again failed to set forth well-pleaded facts that support a plausible claim for relief. Pursuant to T.C.R.C.P. 12(b)(6), we therefore grant ASG's motion to dismiss this action for Defendant's failure to state a claim upon which relief can be granted. The Court again admonishes Plaintiff's counsel to exercise a base degree of diligence and competence that the legal profession demands of all practicing attorneys.

Standard for a 12(b)(6) Motion to Dismiss

[1] Pursuant to T.C.R.C.P. 12(b)(6), the Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted. *See McConnell Dowell (Am. Samoa), Ltd. v. Am. Sam. Power Auth.*, 4 A.S.R.3d 73, 76-77 (Trial Div. 2000); *Afele-Fa`amuli v. Am. Sam. Cmty. Coll.*, 4 A.S.R.3d 219, 221-22 (Trial Div. 2000). Under the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), this Court applies a two prong analysis. *Vergara*, CA No. 86-11 at 4-5 (order on def.'s mot. to dismiss). Prong one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal **[**4**]** conclusions not buttressed by facts in the complaint. *Iqbal*, 556 U.S. at 678-79. The pleading does not need to include detailed factual allegations, but "it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id. at* 678. Prong two instructs the Court to analyze whether the well-pleaded allegations "plausibly give rise to an entitlement to relief." *Id*. at 679.

[2] However, the *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal. First, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true. *Haleck v. Agaoleatu Tautolo*, 7 A.S.R. 3d 203, 204 (Trial Div. 2003); *see also Williams v. Gorton*, 529 F.2d 668, 672 (9th Cir. 1976) (holding that motions to dismiss are generally disfavored "and doubts should be resolved in favor of the pleader"). Second, a complaint should not "be dismissed because a court does not believe that a plaintiff will prevail on [his or her] claim." *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011) (citations omitted).

[3] Yet while the above guiding principles counsel the court "to liberally construe pleadings to avoid injustice, this does not extend to refashioning [a plaintiff's] theory of relief." *Mackenzie v. Lutali* , 24 A.S.R.2d 75, 76 (Trial Div. 1993). **[**5**]** Thus, if the plaintiff's "well-pleaded" facts "permit the court to infer only 'the [mere] possibility of misconduct,' . . . the complaint fails because it *alleges* but does not *show*" that the plaintiff is entitled to relief. *Vergara*, CA No. 86-11, slip op. at 4-5 (order on def.'s mot. to dismiss) (emphasis in original) (quoting *Iqbal*, 556 U.S. at 679).

Discussion

I. Negligence

Plaintiff's first cause of action alleges that ASG was negligent in responding to his discovery requests in a separate, unspecified matter. As a result of this delay, Plaintiff claims he has endured an unnecessarily long pre-trial detention period during which he "incurred severe injuries." Plaintiff fails to provide the court with any information in his complaint identifying this phantom case. It appears Plaintiff intends to reference CR No. 26-12, a pending criminal case for his alleged sexual assault against minors. Plaintiff also alleges that "the Chief Justice determined in an Order issued on DATE [sic] that Defendant's failure to provide the requested discovery was negligent." The Court will not go on a snipe hunt to seek out ASG's alleged negligent action in an undated order from an unnamed case.

As to the elements of a negligence claim, Plaintiff has failed to establish duty, causation, and damages. *See Vergara*, **[**6**]** CA No. 86-11 at 6 (order on def.'s mot. to dismiss) (restating the elements of negligence). First, the negligent conduct Plaintiff highlights–ASG's alleged mismanagement of discovery–involves an individual Assistant Attorney General's duty to ASG and the Attorney General's office. Plaintiff has failed to show how a duty owed to ASG equates to a duty owed to an incarcerated criminal defendant awaiting trial. Second, Plaintiff has failed to establish causation between that conduct and his "severe injuries." The connection between an alleged delay in discovery and injuries during incarceration is tenuous at best. Last, Plaintiff has not pleaded any facts as to the nature or source of his injuries. In short, Plaintiff has failed to plead facts that set forth a plausible claim of negligence.

II. Violation of HIPAA Privacy Rights

Plaintiff's second cause of action alleges that ASG violated his HIPPA privacy rights. This cause of action offers a litany of "naked assertions," poorly pleaded facts, and conclusory legal statements, that cannot survive a motion to dismiss. For example, Plaintiff claims that his "privacy was violated by employees of Defendant ASG." This is precisely the sort of unadorned, unsubstantiated statement that the heightened pleading standard proscribes. Similarly, Plaintiff twice alleges that ASG employees "interfered" with his medical treatment, yet fails to identify any of the employees or explain **[**7**]** how they interfered with his treatment. Lastly, it appears Plaintiff's breach of privacy claim attempts to set forth the elements of negligence. To that end Plaintiff includes a misguided discussion of duty. Plaintiff claims that "ASG has a *duty* to ensure that all *patients are entitled to privacy* under HIPAA." (Emphasis

added). We are not convinced that such a duty exists and are confused how the elements of negligence relate to Plaintiff's breach of privacy claim.

III. Negligent Infliction of Emotional Distress

[4] Plaintiff's third cause of action for NIED alleges that ASG's failure to properly supervise and protect Plaintiff and his fellow inmates has caused him undue emotional distress. As we held in *Filoiali'i v. Am. Samoa Gov't*, CA No. 07-08, slip op. at 163 (Trial Div. Nov. 1, 2012) (op. & order), NIED is not an independent tort but instead rests on a claim of negligence. "As such, the question of 'whether plaintiffs can recover damages for NIED is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation, and damages must exist to support the cause of action.' " *Id*. (quoting *Klein v. Children's Hosp. Med. Ctr of N. Cal.*, 46 Cal. App. 4th 889, 894 (Ct. App. 1996)).

As with Plaintiff's prior claims, Plaintiff's NIED claim fails for want of well-pleaded facts. Plaintiff has not indentified a clear breach of duty related to ASG's management **[**8**]** of the Tafuna Correctional Facility ("TCF"). Further, Plaintiff's argument is riddled with unsupported conclusory statements such as "ASG's actions are outrages" and "sanctionable." Though we have no doubt that ASG and TCF officials have a duty to supervise inmates in their custody, Plaintiff largely leaves it to the Court to identify this duty and does not clearly articulate how ASG breached the duty.

IV. Intentional Infliction of Emotional Distress

Largely mirroring Plaintiff's claim for NIED, Plaintiff's fourth cause of action alleges that his incarceration in TCF evidences intentional infliction of emotional distress by ASG. Rather than reciting the deficiencies with this cause of action, we will simply say that it suffers from the same deficiencies as the rest of Plaintiff's complaint. Plaintiff presents a muddled jumble of seemingly random naked assertions and asks the court to divine a cognizable cause of action for IIED from that slurry.

Order

This action is dismissed pursuant to T.C.R.C.P. 12(b)(6). It is so ordered.

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Cite As: *Samuelu v. Patu*, CA No. 34-13, slip op. at [page number] (Trial Div. Sept. 12, 2014) (order den. mot. for recons.)

VIRGINIA SAMUELU, Plaintiff,

v.

VON-PAUL PATU, NELLIE TORRES, and MARGRET HODGES (surviving Children of Pila F. Patu, Jr., deceased), NINA PATU SCANLON, SOLOMONA PATU, TELESIA ATONIO PATU, JOHN PATU, ATIVALU PATU, CAMELITA PATU, HENRY PATU and FRANCES PATU, a minor child, HAZEL VAIVAO, MARMER PATU, and MARGIE PATU (the surviving spouse and children, respectively, of John Patu, deceased), LATA PATU, PUA PATU, FAITU PATU, PILA TAMA PATU and NINA OLAFOU PATU (the surviving children of Tumua Patu, deceased), NINA PATU-AASA, and DOES 1-10, Defendants.

High Court of American Samoa
Trial Division

CA No. 34-13

September 12, 2014

[1] American Samoa statutes and rules of court provide no authority for bringing a motion to reconsider a non-final interlocutory order in a pending a case.

[2] In order to appeal an interlocutory order, it must be final or fall within the collateral order exception.

[3] To fall within the collateral order exception, an order must (1) conclusively resolve the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from the final judgment in the main case.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, David P. Vargas

ORDER DENYING MOTION FOR RECONSIDERATION

Plaintiff moves this Court to reconsider the Court's January 29, 2014 order denying Plaintiff's request for the partition of real property by sale. For the reasons set forth below, Plaintiff's motion will be denied.

[1-3] "American Samoa statutes and rules of court provide no authority for bringing a motion to reconsider a non-final interlocutory order in a pending a case." *Progressive Ins. Co., Ltd. v. S. Star Int'l, Inc.*, 5 A.S.R.3d 57, 59 (Trial Div. **[**2**]** 2001). In order to appeal an interlocutory order, it must be final or fall within the collateral order exception. *Id*. at 59 (citing *Kim v. Am. Samoa Gov't*, 17 A.S.R.2d 193, 195 (App. Div. 1990)); *Lafaele v. Am. Samoa Gov't*, 4 A.S.R.3d 35, 36 (App. Div. 2000). To fall within the collateral order exception, an order must (1) conclusively resolve the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from the final judgment in the main case. *Kim*, 17 A.S.R.2d at 195.

The Court's January 29, 2014 order is a non-final interlocutory order in a pending a case. Among other things, the Court's due process concerns remain unallayed. The record does not bear out Petitioner's compliance with the requirements of A.S.C.A. §§ 43.0501 et seq. and *Memorandum of the Justices*, 2 A.S.R.2d 33 (1986) when serving Defendants. A cursory look at the caption of the case itself shows party defendants as including minors as well as estates.

This failure to properly serve Defendants and provide proof of such service is particularly alarming because the record reflects that the citation to the authorities was specifically provided Plaintiff on July 26, 2013.

The motion is denied.

It is so ordered.

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Cite As: *Leulua'i v. Galea'i*, CA No. 86-04 at [page number] (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.)

KALALA LEULUA'I, Plaintiff,

v.

PETE IETI GALEA'I, Defendant.

High Court of American Samoa
Trial Division

CA No. 86-04

September 23, 2014

[1] Multiple parties may, but need not be, joined if claims against them (1) arise out of the same transaction, occurrence, or series of transactions or occurrences and (2) will present some question of law or fact in common.

[2] The movant bears the burden of demonstrating whether the third party they seek to join satisfies the requirements of either necessary or permissive joinder.

[3] The common law rules of joint and several liability are subject to judicial modification in American Samoa, provided the modification is consistent with American Samoan law.

[4] In either a traditional joint and several liability regime or a modern comparative liability regime, a court has authority to make adjustments based on the circumstances in order to assure that contribution does not work an injustice.

[5] This Court is not bound to immediately declare joint and several liability, especially where the law provides another, more apt, avenue for relief.

[6] A garnishee who is evasive and dishonest, in an apparent attempt to assist the judgment debtors in avoiding payment can be held liable for the whole amount of the judgment debt.

[7] The plaintiff may have judgment against the garnishee for the amount of money due from the garnishee to the defendant, or for the delivery to the clerk of the court, within a time to be fixed by the court of any money

or property in the garnishee's hands belonging to the defendant as fixed in the judgment, and for the value of the same if not delivered within the time thus fixed.

[8] If the garnishee answers the interrogatories and Plaintiff is not satisfied with the answers, the proper action is to controvert the answers via a pleading under A.S.C.A. §§ 43.1807-.1808.

[9] Because Plaintiff failed to controvert the answers earlier and in the proper manner, the Court denied Plaintiff's motion, without prejudice, to hold the garnishee responsible for Plaintiff's full judgment against Defendant.

Before RICHMOND, Associate Justice and MAMEA, Associate Judge

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Fiti A. Sunia
For Garnishee Erica Young dba island Breeze, Charles V. Ala`ilima

ORDER DENYING MOTION TO NAME GARNISHEE JOINTLY SEVERALLY LIABLE FOR THE JUDGMENT

Background

Plaintiff Kalala Leulua`i moves to name Garnishee Erica Young dba Island Breeze jointly and severally liable for the judgment entered on November 20, 2007 holding Defendant Pete Ieti Galea`i liable to Plaintiff for battery and intentional infliction of emotional distress, and awarding her damages in the principal amount of $100,000, $25,000 for pain and suffering and $75,000 for punitive damages, plus court costs, which were assessed at $4,835.00 for a total amount $104,835.00. Defendant has not paid Plaintiff any amount on this judgment. **[**2**]**

Standard of Review

[1-3] Multiple parties may, but need not be, joined if claims against them (1) arise out of the same transaction, occurrence, or series of transactions or occurrences and (2) will present some question of law or fact in common. *RDL, Inc./CIDA, Inc. v. Am. Samoa Comty. College*, 6 A.S.R.3d 269 (Trial Div. 2002). "The movant bears the burden of demonstrating whether the third party they seek to join satisfies the requirements of either T.C.R.C.P. 19(a) (necessary joinder) or T.C.R.C.P 20 (permissive joinder)." *RDL, Inc./CIDA, Inc. v. Am. Samoa Comty. College*, 6 A.S.R.3d 269 (Trial Div. 2002); *see also Inman v. Comm'r*, 871 F.Supp. 1275, 1276 (E.D. Cal. 1994); 4 James Wm. Moore et al., MOORE'S FEDERAL PRACTICE, 20.02(2)(a)(ii)(3d ed. 1999).

Furthermore, the Court has significant leeway in American Samoa. "The common law rules of joint and several liability are subject to judicial modification in American Samoa, provided the modification is consistent with American Samoan law." *Gibbons v. Am. Samoa Gov't*, 6 A.S.R.3d 50 (App. Div. 2002).

[4] "In either a traditional joint and several liability regime or a modern comparative liability regime, a court has authority to make adjustments based on the circumstances in order to assure that contribution does not work an injustice." *See* **[**3**]** *Michael N. Sofris, APC v. Maple-Whitworth, Inc. (In re Maple-Whitworth, Inc.)*, 375 B.R. 558 (B.A.P. 9th Cir. 2007).

[5-7] However, this Court is not bound to immediately declare joint and several liability, especially where the law provides another, more apt, avenue for relief. Where a garnishee refuses to answer interrogatories or fails to appear and answer, A.S.C.A §43.1806(c) states, "If a garnishee notified to appear and answer fails to do so without sufficient excuse, he shall be presumed to be indebted to the defendant to the full amount of the plaintiffs demand, but for a mere failure to appear, no judgment shall be rendered against him until he has had an opportunity to show cause against the same." Furthermore, a "Garnishee who was evasive and dishonest, in an apparent attempt to assist the judgment debtors in avoiding payment, would be held liable for the whole amount of the judgment debt." A.S.C.A. §43.1806(c); *see also Dev. Bank v. Savusa* (Mem.), 11 A.S.R.2d 46 (1989). Also, "The plaintiff may have judgment against the garnishee for the amount of money due from the garnishee to the defendant, or for the delivery to the clerk of the court, within a time to be fixed by the court of any money or property in the garnishee's hands belonging to the defendant as fixed in the judgment, and for the value of the **[**4**]** same if not delivered within the time thus fixed . . . ." A.S.C.A. §43.1811(b).

[8] However, when interrogatories are answered and if Plaintiff is not satisfied with the answers, Plaintiff's proper action is to controvert the answers via a pleading under A.S.C.A. §§ 43.1807-.1808.

Discussion

Since 2007, Plaintiff has been trying to collect the $104,835 judgment that she rightfully obtained and is owed to her after Defendant physically beat her leaving her face and body black, blue, and red; including leaving her eyes swollen shut. Defendant has failed to pay a single penny awarded to Plaintiff under the 2007 judgment. Defendant has repeatedly made a mockery of this Court and its decision by continuously fighting having to pay. Defendant and his wife, Garnishee Erica Young doing business as Island Breeze, currently claim Defendant is 'volunteering' for

his wife's business. The Court wonders if Defendant's 'volunteer' work rather than his seeking compensatory employment is an attempt to make money without appearing to have garnishable and traceable wages. Worse, Defendant's counsel makes statements claiming this Court "does not have jurisdiction to hear this action." *See* (Galea'i, Mot., at 2, Mar. 4, 2014). This Court unequivocally has jurisdiction. **[**5**]** Under *Arnold v. BLaST Intermediate Unit 17*, 843 F.2d 122, 125 (3d Cir. 1988) (holding that it is "undisputed that the plaintiffs have a clear legal right to their judgment"); *see also U.S. v. Young* 553 F.3d 773 (citing that a Court can initiate proceedings to collect restitution as part of a criminal sentence); *Oppenheim v. Circuit Court of Eleventh Judicial Circuit*, 91 Ill. 2d 336 (Ill. 1982).[1]

However, as to the issue of whether Plaintiff's present motion is appropriate action, the Court finds that this motion is not proper at this time for two principal reasons. First, Plaintiff argues that Defendant's answers to the 2012 interrogatories do not match up with the Garnishee's answers to 2008 interrogatories, and, therefore, Defendant lied and misrepresented the facts. Why the 2012 and 2008 answers to interrogatory answers align is puzzling. A lot can happen in four years and circumstances change. After reviewing the 2008 and 2012 interrogatory answers, as well as Defendant's 2010 interrogatory answers, there is nothing inconsistent across the answers themselves that lead us to conclude that Defendant was **[**6**]** lying. However, misrepresentation is another factor we will discuss shortly.

[0] Second, and perhaps more important, Plaintiff should read A.S.C.A. §§ 43.1801-.1808 on garnishment. If Plaintiff had an issue with the interrogatory answers, then Plainitff should have properly controverted the answers and sought joinder and judgment at that time under A.S.C.A. §§43.1807-.1808. Instead, Plaintiff now contests the answers years after the fact in a peculiar and curiously strange manner. Because Plaintiff failed to controvert the answers earlier and in the proper manner, we deny without prejudice Plaintiff's present motion to hold Island Breeze responsible for Plaintiff's judgment against Defendant. *See Robinson v. Robinson,* 154 Fla. 464 (Fla. 1944) (remanding without prejudice a writ of garnishment for failure to initiate proceedings under proper statute for the remedy desired).

[1] The court held that the issue presented and the contending parties were the same in both proceedings, and because garnishment was a ancillary proceeding designed to obtain satisfaction of a judgment and was not a distinct or separate suit from the original action for judgment, the matters in controversy were properly adjudicated in the garnishment proceedings.

Order

Plaintiff's motion to name Garnishee jointly and severally liable for the judgment is denied. It is so ordered.

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Cite As: *Tuumalo v. Salesa*, CA No. 23-14, slip op. at [page number] (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.)

MISITANA TUUMALO, Plaintiff,

v.

VINETA SALESA, Defendants.

High Court of American Samoa
Trial Division

CA No. 23-14

October 10, 2014

[1] Petition to partition property that was filed in the Trial Division was improperly filed and thus transferred to the Land and Titles Division.

[2] The Court may raise the issue of jurisdiction *sua sponte* lest the whole exercise and effort of a trial should prove to be for naught.

[3] The Land and Titles Division has exclusive jurisdiction over all controversies relating to land, which includes petitions for partition of real property.

[4] Divisions of the High Court, outside of the Land and Title Division, are precluded from asserting jurisdiction over land-related disputes, unless the *Fono* has otherwise allowed.

[5] Where the *Fono* has employed plain and simple language, the judicial supply of modifying distinctions under the guise of statutory construction would seem tantamount to making law, rather than interpreting it.

[6] A.S.C.A. § 3.0221 prescribes an expanded role for the Samoan Associate Judges when sitting at the appellate level on appeals from decisions of the Land and Titles Division.

[7] In Land and Titles Division appellate matters, the Associate Judges have an "equal voice" in the decision making with the law-trained Justices.

[8] In appellate matters outside the Land and Title Division, the law-trained Justices' views prevail where there is a difference of opinion among the appellate panel members.

[9] The Associate Judges are historically chosen from the ranks of leading *matai*.

[10] As ranking *matai* in their own right, the Associate Judges may be viewed as symbolically manifesting the traditional decision making structure within the imported judicial framework and process.

[11] The *Fono's* deliberate assignment of a more authoritative voice to the Associate Judges in matters concerning land, should not be lightly treated or nullified through the artifice of unnecessary distinctions.

Before KRUSE, Chief Justice and LOGOAI, Chief Associate Judge

Counsel: For Plaintiff, Fiti A. Sunia
For Defendant, Matailupevao Faleupolu, Jr.

ORDER OF TRANSFER TO LAND AND TITLES DIVISION

This matter came on before us for hearing upon Plaintiff's motion to set a date for trial. We noted that the dispute concerns a tract of land comprising 0.34 acre, known as *Soata*, which Plaintiff referred to as "individually-owned" land while Defendant averred, in her Answer, to *Soata* as a "fee simple" interest. Plaintiff's complaint further alleges that the parties, who are close relatives, had acquired *Soata* from a third party, Mr. and Mrs. Anterea Sioka, who, upon receipt of the total purchase price of $55,000.00,[1] gave their warranty deed to the parties as tenants-in-common. Plaintiff seeks to partition the property proportionately to his purchase price contribution. Defendant strenuously objects, alleging, inter alia, that she **[**2**]** paid off the purchase price balance with the understanding that *Soata* would be used to build a family home in which family members from Manu`a could stay when visiting Tutuila.

Discussion

[1] This is undoubtedly a dispute "relating to land," A.S.C.A. § 3.0208(b)(2), and hence a matter within the "exclusive jurisdiction" of the Land and Titles Division. *Id*. Yet Plaintiff's initiating pleading was filed in the Trial Division. Upon the Court's inquiry at the hearing on this matter as to why the case is not before the Land and Titles Division, Plaintiff's counsel simply offered the explanation that the dispute was not so much one about "title" to land, but merely the "partition" of land. We ordered the matter transferred to the Land and Titles Division. Our

[1] $35,000 was apparently initially paid by Plaintiff to the Grantors by way of deposit, with the latter agreeing that the balance, $20,000, was to be paid in monthly installments of $1,000. Defendant subsequently paid the balance of the purchase price in monthly installments to the Grantors.

reasons are as follows:

1. Jurisdiction

[2-5] We are compelled by both precedent and experience to raise the issue of jurisdiction *sua sponte* lest the whole exercise and effort of a trial should prove to be all for naught. *See e.g. Fagaima v. Am. Samoa Gov't.*, AP No. 01-10, (App. Div. 2012). With this end in mind, our immediate difficulty with counsel's jurisdictional submission is that its premise--distinguishing "title" and "partition"--runs contrary to clear and unambiguous legislative expression. A.S.C.A. § 3.0208(b)(2) states in no uncertain terms: "The land and titles division of the High Court *shall* have *exclusive* jurisdiction . . . in *all* controversies relating to land." **[**3**]** (Emphasis added). The statute is couched in the imperative, "shall," and plainly talks about "all" controversies relating to land, not just "title" disputes. Additionally, a natural corollary of "exclusive" is "preclusive." The *Fono's* use of "exclusive" suggests that other divisions of the High Court are precluded from asserting jurisdiction over land-related disputes, unless off course the *Fono* has otherwise allowed.[2] Indeed, legislative delineation of subject matter jurisdiction in such broad and sweeping terms--"all controversies relating to land"--really leaves no room for statutorily repugnant distinctions.

Where, as here, the *Fono* has employed plain and simple language, the

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[2] *Cf.* A.S.C.A. § 43.1402. This enactment explicitly empowers the Trial Division to determine a circumscribed range of landlord/tenant disputes--delimited in A.S.C.A. § 43.1405--under summary process available under the Summary Proceedings Act, A.S.C.A. §§ 43.1401-.1416. Notwithstanding this specific grant of jurisdiction, the Summary Proceedings Act does not purport to deprive the Land and Titles division of its "pre-existing general jurisdiction." *Diocese of Samoa Pago Pago v. KMST, Inc.*, 15 A.S.R.2d 20, 24 (Land & Titles Div. 1990).

Additionally, the Declaratory Relief Act, A.S.C.A. §§ 43.1101 et seq., has also given rise to confusion owing to the Act's specific reference to the "Trial Division" as the venue for declarative relief actions. A.S.C.A. § 43.1101. Arguably, declaratory proceedings may well encompass land-related issues, and, therefore, land-related disputes may well come before the Trial Division under the language of § 43.1101. This confusion was put to rest by the *Fono* in 1979 with the enactment of 1979 Pub. L. No. 16-28, which effectively added A.S.C.A. § 3.0202(b). This 1979 enactment clarified that both the "trial and land and titles divisions of the High Court shall have power to give declaratory relief." *Id.* Thus, in *Faumuina v. Fraser*, AP No. 13-10, slip op. at 2 (App. Div. Dec. 3, 2012) (op. & order), the Appellate Division recently made clear that the Declaratory Relief Act did not expand the Trial Division's jurisdiction to matters within the Land and Titles Division's exclusive competence.

judicial supply of modifying distinctions under the **[**4**]** guise of statutory construction would seem tantamount to making law, rather than interpreting it. We are, therefore, strongly disinclined toward Plaintiff's jurisdictional submission.

2. Appeals Process

[6-8] Our concern with curtailing the jurisdictional reach of Land and Titles Division is highlighted elsewhere in the American Samoa Code Annotated, when looking at those provisions governing appeals from decisions of the Land and Titles Division. Specifically, A.S.C.A. § 3.0221 prescribes an expanded role for the Samoan Associate Judges when sitting at the appellate level on appeals from decisions of the Land and Titles Division. In such matters, the Associate Judges have an "equal voice" in the decision making with the law-trained Justices. *Vaouli v. Satele*, 3 A.S.R.3d 3, 9 (App. Div. 1999); *Faumuina*, AP No. 13-10 at 5-6 (op. & order). In all other appellate matters, the law-trained Justices' views prevail where there is a difference of opinion among the appellate panel members. A.S.C.A. § 3.0221.

[9-11] The Associate Judges are historically chosen from the ranks of leading *matai*. *Vaouli*, 3 A.S.R.3d at 12. As ranking *matai* in their own right, the Associate Judges may thus be viewed as symbolically manifesting the traditional decision making structure within the imported judicial framework and process. [3] **[**5**]** The *Fono's* deliberate assignment, therefore, of a more authoritative voice to the Associate Judges in matters concerning land, should not be lightly treated or nullified through the artifice of unnecessary distinctions.

Order

Accordingly, the Clerk shall redocket this matter for disposition before the Land and Titles Division.

It is so ordered.

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[3] *Cf.* Revised Constitution of American Samoa, article II, sections 3 and 4 which also incorporates the traditional decision making structure within the imported legislative framework and process. (Senators, must be "registered matai" who have been "elected in accordance with Samoan custom by the county councils . . . they are to represent.").

Cite As: *Am. Samoa Gov't v. Tolmie*, CR No. 156-13, slip op. at [page number] (App. Div. Nov. 13, 2014) (decision & order)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

MICHAEL TOLMIE, Defendant.

High Court of American Samoa
Trial Division

CR No. 156-13

November 13, 2014

[1] The Complaint and Information indicated that the defendant was accused of violating a statutory section that does not exist. As neither counsel brought this typographical error to the Court's attention and the parties proceeded to trial on the premise that Defendant was charged with violating a real statutory section, the Court was satisfied that this typographical error did not deprive the defendant of a fair trial.

[2] While at common law embezzlement was a specific intent crime, discussion of requirements at common law is inapposite because in American Samoa embezzlement is defined by statute. The mens rea required by A.S.C.A. § 46.4104(a) is "knowingly." No distinction between general and specific intent need be drawn.

[3] Ordinarily, knowledge is proven inferentially.

[4] A person acts knowingly with respect to his conduct when he is aware of the nature of his conduct or he is aware that his conduct is practically certain to cause a result. In other words, an act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, Tony F. Graf Jr., Assistant Attorney General
For Defendant, M. Douglas Fiaui, Public Defender

DECISION AND ORDER

[1] Defendant Michael Tolmie is charged with one count of embezzlement in violation of A.S.C.A. § 46.4104.[1] On October 20, 2014, after Defendant waived his right to a jury trial, the Court conducted a bench trial and took the matter under advisement. For the reasons set forth below, the Court hereby finds the Defendant not guilty of embezzlement. **[**2**]**

Background

The government alleges that Defendant embezzled funds from New Dimensions Corporation ("NDC") while working as manager of its flooring division in American Samoa from December 2009 to July 2010. The government alleges that Defendant knowingly misappropriated NDC property by hiring and paying employees including Marilyn Tolmie, Defendant's then-wife; purchasing a Lincoln Navigator from Haleck Island Motors; making payments to the Methodist Church of American Samoa; and issuing checks written to cash from NDC's account at Bank of Hawaii.

Standard of Review

"A person commits the crime of embezzlement if he knowingly misappropriates property of another which has been entrusted to him or which has lawfully come under his control." A.S.C.A. § 46.4104(a). For a defendant to be convicted of embezzlement, the government must prove each element of this crime beyond a reasonable doubt.

[2] At trial and in written closing arguments, Defendant urged the Court to find that the government failed to prove the "specific intent" required for embezzlement. While at common law embezzlement was a specific intent crime, Black's Law Dictionary 826 (8th ed. 2004), discussion of requirements at common law is inapposite because in American Samoa embezzlement is defined by statute. The mens rea required by A.S.C.A.

[1] The Complaint and Information indicate that Defendant is accused of violating A.S.C.A. § 41.4104, a statutory section that does not exist. As neither counsel brought this typographical error to our attention and the parties proceeded to trial on the premise that Defendant was charged with violating A.S.C.A. § 46.4104, the Court is satisfied that this typographical error did not deprive Defendant of a fair trial. *See Am. Samoa Gov't v. Tauasosi*, 3 A.S.R.2d 66, 70-6 (Trial Div. 1986) (holding that being accused by an information that mistakenly included the word "recklessly" did not deprive a defendant of a fair trial or fair notice of the charges against him in part because the defendant was not mislead by the error and both counsel and court proceeded as though the defendant had been correctly charged).

§ 46.4104(a) is **[**3**]** "knowingly."[2] No distinction between general and specific intent need be drawn.[3]

Discussion

Here, the government failed to meet its burden to demonstrate each element of embezzlement beyond a reasonable doubt. In particular, the government has failed to prove that Defendant knowingly misappropriated property of another beyond a reasonable doubt.

I. The Evolving Business Relationship Between Defendant and NDC

The evidence in this case is indicative of an evolving and ill-defined business relationship between the Defendant and others that went sour. This relationship was hurriedly fashioned to pursue a perceived and imminent business opportunity in obtaining anticipated federal government contracts flowing from remediation efforts in American Samoa following the 2009 tsunami. While the organic end (purpose) was clear, the means to that end--the organic structuring of the business relationship--was never settled between the performing parties from the outset. The evidence showed that Billy Vaouli ("Vaouli"), an off-island resident, had access to seed capital, while Defendant, also an off-island resident at the time, possessed the specialized skill **[**4**]** to perform on the anticipated government contracts.

While the government alleges that Defendant was merely an employee of NDC, we find the evidence to equally and plausibly suggest something more. The evidence indicated that Defendant was to become a part owner in a venture to capture tsunami-related federal contracts. Defendant contributed his skill to this venture while Vaouli, President of NDC, contributed money. Because the relationship between Defendant and NDC was never reduced to writing, its precise form is unknown.[4] At trial, testimony included that Defendant considered himself an owner of NDC's flooring division and that stock was contemplated to be issued to him. The only thing that was clearly shown was that NDC was a pre-existing corporate shell, which had been previously set up by Vaouli and others in 2001, and which was utilized as a ready vehicle--a cognizant

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[2] A.S.C.A. § 46.3202(a) ("[A] person is not guilty of an offense unless he acts with a culpable mental state, that is, unless he acts . . . knowingly.")

[3] Similarly, in the Ninth Circuit, distinguishing between general and specific intent is discouraged and the preferred practice is to only consider the intent required by the offense charged. MANUAL OF MODEL CRIM. JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE 9TH CIR. § 5.4 (2010).

[4] A partnership contract does not need to be reduced to writing and may be implied from conduct and circumstances alone. *Hong v. Chung Yong # 21*, 5 A.S.R.3d 197, 201 (Trial Div. 2001).

legal entity--to quickly set up operations in American Samoa. Consequently, the means to the organic end were entirely muddled and confused.

The evolving nature of the relationship was very apparent from Vaouli's testimony. He testified that Defendant was contemplated as a part owner only of NDC's "Flooring Division." When asked to clarify how stockholding in NDC could be amended to restrict shares to a mere division of corporate activity, Vaouli could only say that the Flooring Division was to be a "wholly-owned" subsidiary of NDC. We learned nothing more from this **[**5**]** evidence beyond an intent to incorporate a "wholly-owned" subsidiary and we were not edified as to how Defendant was to feature in this structural set up. Beyond vague intentions, the organic purpose--flooring contracts--and its embodiment--Vaouli's seed money coupled with Defendant's flooring skills--does not exactly rise to the level of proof beyond a reasonable doubt of a mere employer/employee relationship.

II. The Government Failed to Prove Beyond a Reasonable Doubt that Defendant Knowingly Went Beyond the Limits of His Authorization to Expend NDC Funds.

[3] The government's case hinges on the Court finding that Defendant's hiring and paying employees, purchasing a Lincoln Navigator from Haleck Motors, issuing payments to the Methodist Church of American Samoa, or writing checks to cash from NDC's account at Bank of Hawaii constitute knowing misappropriation of NDC property. Defendant was authorized to expend NDC funds and withdraw funds from NDC's Bank of Hawaii account. The government failed to prove beyond a reasonable doubt that Defendant knew that any of the above-listed expenditures went beyond the limits of this authorization. While ordinarily knowledge is proven inferentially, *see* MANUAL OF MODEL CRIM. JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE 9TH CIR. § 5.6, the evidence presented at trial does not allow the Court to draw such an inference beyond a reasonable doubt.

[4] The government argues that Defendant hired employees without consent from Vaouli and that, therefore, paying these employees with NDC funds constitutes embezzlement. Our immediate **[**6**]** difficulty with the government's case is that the sole basis of its claim of "absence of authority" is, indeed, the entire absence of any objective indices by which the Court could weigh misappropriation.[5] The subjective and self-serving claims of complainant Vaouli when testifying as to what

[5] "Misappropriates" means to unlawfully take, to unlawfully obtain, to unlawfully use, to unlawfully transfer, to unlawfully conceal or to unlawfully retain possession of. *See* A.S.C.A. § 46.4101(b).

Defendant was authorized to do and not to do, were in our view nothing less than an attempt at developing on the witness stand the parties' business relationship. Moreover, the government failed to present any evidence to show that hiring employees was not in pursuit of the joint venture's organic purpose, or, indeed, that these employees did not perform work for the venture; Marilyn Tolmie, for example, worked as a secretary. The Court is not satisfied that Defendant lacked the authority to hire and pay employees. The government failed to prove beyond a reasonable doubt that the Defendant knew[6] he could not hire and pay employees without Vaouli's consent, as Vaouli claimed at trial. Given the urgency of the organic purpose, capturing federal contracts, which directly resulted in hurried operational setup in the Territory, we are hard pressed to believe that the **[**7**]** Defendant (1) could not hire employees, and (2) knew that he could not hire any employees. The convoluted hiring process to which Vaouli testified, including the requirement of his pre-approval, seems beyond the bounds of believability given the avowed exigencies of the time and Vaouli's own admission, when asked by the prosecutor to state his place of residency between December 2, 2009 and July 2, 2010, that he was "floating" between California and the Middle East.

The government argues that Defendant knowingly misappropriated NDC funds by writing two checks to Haleck Motors from NDC's Bank of Hawaii account. The funds were used to purchase a Lincoln Navigator in Defendant's name. Testimony showed that Defendant also had the use of a Ford truck for NDC business purposes.

This testimony alone does not leave us firmly convinced that the acquisition of another vehicle with business funds was per se embezzlement. The government entirely failed to prove that the vehicle was not purchased for business needs. The fact of a purchase in Defendant's name might have been criminally significant if the government had shown that the Navigator was disposed of by the Defendant to the exclusion of the business. As the record stands, we are not convinced beyond a reasonable doubt. Moreover, because the Defendant may have considered himself a partner or owner of the venture, the government did not establish beyond a reasonable doubt that Defendant knew such a purchase was not authorized. A partner or owner, for example, **[**8**]** might receive part of his compensation through drawings for the purchase of personal items such as a vehicle

[6] A person acts knowingly with respect to his conduct when he is aware of the nature of his conduct or he is aware that his conduct is practically certain to cause a result. A.S.C.A. § 46.3202(c). In other words, an act is done knowingly if the defendant is aware of the act and *does not act through ignorance, mistake, or accident.* MANUAL OF MODEL CRIM. JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE 9TH CIR. § 5.6 (2010).

with business funds.

The government argues that Defendant misappropriated NDC funds by issuing checks to the Methodist Church of American Samoa and to cash. The government has not proved beyond a reasonable doubt that these checks were not written for a business purpose. Indeed, no explanation of the use of these checks was proffered at trial. The checks to the Methodist Church include the words "rent" and "lease." There was no attempt by government to explain the nature of these expenditures. The Court cannot conclude, therefore, that (1) the expenditures were unlawful and tantamount to misappropriation, and (2) the Defendant did not act through "ignorance or mistake" when he spent business funds as averred in the Information.

III. Conclusion

In sum, the government failed to prove beyond a reasonable doubt that Defendant knowingly misappropriated NDC property which had been entrusted to him or which had lawfully come under his control. Notwithstanding the NDC corporate shell utilized to set up the venture, substantively, and given the dearth of details, the objective relationship between Vaouli and Defendant was essentially a joint venture contemplating seed money from one and performance by the other. Once the venture secured and performed upon a federal contract, Vaouli's claim to sole authority to the expenditure of business funds is debatable. As the record stands, we were not supplied with sufficient evidence to convict. **[**9**]**

Defendant must be acquitted of the charge against him.

Order

Defendant is NOT GUILTY of embezzlement in violation of A.S.C.A. § 46.4104.

It is so ordered.

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Cite As: *Binaco Textiles, Ltd. v. Alamai Corp., et al.*, CA No. 101-07 at [page number] (Trial Div. Dec. 1, 2014) (order granting mot. to quash order to show cause)

BINACO TEXTILES, LTD., Plaintiff,

v.

ALAMAI CORPORATION, CAROL GALEA'I and ESTATE of ALEX GALEA'I, Defendants.

ALAMAI GENERAL SALES CORP., AND SUNSHINE CORP., INTERVENORS.

FITI AND SONJA GALEA'I, ROSAMANA GALEA'I HOPKINSON, AND ANZ GUAM, INC., dba ANZ AMERIKA SAMOA BANK, GARNISHEES.

High Court of American Samoa
Trial Division

CA No. 101-07

December 1, 2014

[1] As Garnishees correctly point out in their motion, the garnishment statutes provide a process when a party disagrees with answers to the interrogatories.

Before RICHMOND, Associate Justice and MAMEA, Associate Judge

Counsel: For Plaintiff, Charles V. Ala`ilima
For Defendants, Marie A. Ala`ilima and Ruth Risch-Fuatavi
For Intervenors, Fiti A. Sunia
For Garnishee ANZ Guam, Inc., Jennifer L. Joneson
For Garnishees Fiti and Sonja Galea`i, and Rosamana Galea`i Hopkinson,

ORDER GRANTING MOTION TO QUASH ORDER TO SHOW CAUSE

On September 26, 2014, this Court issued an Order to Show Cause against Defendant Garnishees ordering them to show cause as to why they should not be jointly and severally liable for the full amount of

Plaintiff's judgment against Defendants as **[**2**]** sought by Plaintiff's Application for Joinder of Garnishees to Judgment. On October 6, 2014, Intervenors moved to quash this order. Garnishee ANZ Guam, Inc. and Defendants concurred with Intervenors during the October 5, 2014 hearing on this motion. For the reasons stated below, we grant the motion.

Discussion

Plaintiff cites to A.S.C.A. §§ 43.1806 (c) and 43.1811, and Defendants cite to A.S.C.A. §§ 43.1807 and 43.1808, which are included in statutes regulating garnishment. A.S.C.A. § 43.1806 sets forth a progression of opics from the right to garnish to judgments on garnishment proceedings.

A.S.C.A. § 43.1806(c), in the section entitled "Refusal to answer interrogatories—Failure to appear and answer," states:

> (c) If a garnishee notified to appear and answer fails to do so without sufficient excuse, he shall be presumed to be indebted to the defendant in the full amount of the plaintiff's demand, but for a mere failure to appear, no judgment shall be rendered against him until he has had an opportunity to show cause against the same.

In the instant case, Garnishees neither refused to answer the interrogatories nor failed to appear and answer. Therefore § 43.1806(c) does not apply. A.S.C.A § 43.1811, entitled "Judgment," also does not really apply because no judgment has been made as to exactly what property Garnishees may or may not have of Defendant Alamai Corporation. **[**3**]**

[1] Instead, Plaintiff merely disagrees with the answers that Garnishees gave to the interrogatories. As Garnishees correctly point out, the garnishment statutes provide a process when a party disagrees with answers to the interrogatories. This process is initiated by utilizing the provisions in A.S.C.A. § 43.1807, entitled "Controversion of answers by pleading," and A.S.C.A. § 43.1807, entitled "Notice of controverting pleading." Plaintiff controverts answers required by garnishment interrogatories and, accordingly, must comply with the statutory provisions for the controversion process.

Order

We grant Garnishees' motion and quash the Order to Show Cause.

It is so ordered.

****

Cite As: *Jessop v. Savini*, CA No. 55-13 at [page number] (Trial Div. Dec. 1, 2014) (order den. defs.' mot. for j. on the pleadings or alternatively summ. j.)

FONOTI JESSOP AND HELEN JESSOP, Plaintiff,

v.

ANNA SAVINI, Defendant.

High Court of American Samoa
Trial Division

CA No. 55-13

December 1, 2014

[1] A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law.

[2] The Court will grant a motion for summary judgment when the pleadings and other supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact.

[3] If the movant meets his or her burden, the non-moving party must then affirmatively show there is a genuine issue for trial. Only disputes over facts that might affect the outcome of the suit under the governing law are material, and such a dispute is "genuine" only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party.

[4] A court must resolve any factual issues in controversy in favor of the nonmoving party, but conclusory, non-specific allegations are not sufficient to survive a motion for summary judgment, and missing facts will not be presumed. All inferences are construed in a light most favorable to the non-moving party.

[5] Dismissing a complaint for failure to state a claim upon which relief can be granted is especially disfavored where the complaint sets forth a novel legal theory that can best be assessed after factual development.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge

Counsel: For Plaintiff, Marian I. McGuire
For Defendants, Sharron I. Rancourt

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS OR ALTERNATIVELY SUMMARY JUDGMENT

This order denies the motion of Defendant Mobil Oil American Samoa ("Mobil") for partial summary judgment on claims of Plaintiff Patolomeo Fulu ("Fulu") for wrongful termination and breach of contract related to Mobil's termination of Fulu's employment in 2004 on the grounds that these causes of action are time barred.

Background

Plaintiff filed this action in December 2013 for breach of contract to recover the cost of repair and loss of rent related to their fire damaged unit in the Helen Jessop Apartments under the indemnification clause in lease of this unit to Defendant. Shortly after leasing this unit, Defendant installed a new propane tank in the premises. Then, while Defendant was not home, a fire broke out in the apartment causing damage to the premises and its contents. One estimate to repair the damage puts the cost at $45,368.82. Defendant is now moving for a Judgment on the Pleadings or alternatively summary judgment. **[**2**]**

For the reasons stated below, we deny Defendant's motion for judgment on the pleadings and the alternative, summary judgment.

Standard of Review

Motion for Judgment on the Pleadings

[1] "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." (internal quotation marks and citation omitted); *see also Marshall Naify Revocable Trust v. United States, 672 F.3d 620, 623 (9th Cir. 2012); Lyon, 656 F.3d at 883.*

Motion for Summary Judgment

[2-4] The Court will grant a motion for summary judgment "when the pleadings and other supporting documents 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact."

Constr. Servs. of Sam., Inc. v. Bank of Hawaii, 8 A.S.R.3d 114, 115 (Trial Div. 2004)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also* T.C.R.C.P. 56. If the movant meets his or her burden, "the non-moving party must then affirmatively show there is a genuine issue for trial." *Bank of Hawaii*, 8 A.S.R.3d at 115; *see also* **[**3**]** *RDL Inc. v. Am. Sam. Cmty. Coll.*, 8 A.S.R.3d 327, 328 (Trial Div. 2002). "Only disputes over facts that might affect the outcome of the suit under the governing law" are "material," and such a dispute is "genuine" only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). A court must resolve any factual issues in controversy in favor of the nonmoving party, but conclusory, non-specific allegations are not sufficient to survive a motion for summary judgment, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990). "[A]ll inferences are construed in a light most favorable to the non-moving party." *Am. Samoa Power Auth. v. Nat'l Pac. Ins. Co.*, 30 A.S.R.2d 145, 146-47 (Trial Div. 1996); *see also Pal Air Int'l, Inc. v. Porter*, 30 A.S.R.2d 104, 105 (Trial Div. 1996).

Discussion

Motion for Judgment on the Pleadings

"A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." (internal quotation marks and citation omitted); *see also Marshall Naify* **[**4**]** *Revocable Trust v. United States, 672 F.3d 620, 623 (9th Cir. 2012); Lyon, 656 F.3d at 883.*

[5] We are not inclined to render a judgment on the pleadings because we are not convinced that Plaintiffs would not prevail as a matter of law. Dismissing a complaint for failing to state a claim upon which relief can be granted is especially disfavored "where the complaint sets forth a novel legal theory that can best be assessed after factual development." *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004); *Baker v. Cuomo*, 58 F.3d 814, 818-819 (2d Cir. 1995). Plaintiffs bring up valid issues concerning the indemnification clause, which deserve to be fully heard at trial. We, therefore, deny Defendant's motion for judgment on the pleadings.

Motion for Summary Judgment

The reason to deny summary judgment is clear. There are simply too many opposing issues of genuine material fact to resolve before this Court can make a final ruling. The following questions pertain to some of these issues. Was the tank properly installed? Did it have anything to

do with the fire? Who are the proper parties? Does the indemnification claim hold? These are among the material issues that definitively will determine the outcome of this case. A trial **[**5**]** is needed to answer these and other questions. Accordingly, summary judgment alternative in the motion is also denied.

Order

Defendant's motion for judgment on the pleadings and alternatively for summary judgment is denied.

It is so ordered.

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SLIP OPINIONS

OF THE

LAND AND TITLES DIVISION

OF THE

HIGH COURT OF AMERICAN SAMOA

(2014)

Cite As: *Soliai v. Ito*, LT No. 22-13 at [page number] (Land & Titles Div. Jan. 22, 2014) (order den. mot. to dismiss & granting prelim. inj.)

ROBERT SOLIAI, JOE SOLIAI, and CARTER JERRETT SOLIAI as Administrator for the Estate of Apelu M. Soliai, Plaintiffs,

v.

SIONE ITO, PAGOFIE FIAGOA, TUIA'ANA MOIMOI, TOFILI MUASAU, JR., LOIA MENE, and DOES I-XX, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 22-13

January 22, 2014

[1] Sufficient grounds for the issuance of a preliminary injunction exist when (1) there is a substantial likelihood that the applicant will prevail at trial on the merits and that a permanent injunction will be issued against the opposing party; and (2) great or irreparable injury will result to the applicant before a full and final trial can be fairly held on whether a permanent injunction should issue.

[2] A preliminary injunction should not be granted unless the plaintiff clearly establishes the burden of persuasion as to each of the elements.

[3] The Court will issue a preliminary injunction to provide for a survey when it is necessary in order for the Court to form an accurate picture of what is claimed by each party and what is in dispute.

[4] In order for the High Court to have jurisdiction over communal land disputes, the parties must first submit to mediation through the Office of Samoan Affairs and provide the court with a Certificate of Irreconcilable Dispute.

Before RICHMOND, Associate Justice and MAMEA, Associate Judge

Counsel: For Plaintiffs, Sharron I. Rancourt
For Defendants Pagofie Fiaigoa, Tofili Muasau, Jr., and Mene Loia, Fiti A. Sunia
For Tuia`ana Moimoi, Charles V. Ala`ilima
For Defendant Sione Ito, Matailupevao Leupolu, Jr.

ORDER DENYING MOTION TO DISMISS AND GRANTING PRELIMINARY INJUNCTION

Background

Before the Court are two motions: (1) an application by Plaintiffs Robert Soliai, Joe Soliai, and Carter Jerrett Soliai[1] (jointly "Plaintiffs") for a preliminary injunction to proceed with their survey of land named "Titiafu" in the village of Pavaia'i; and (2) a motion by Defendants Pagoifie Fiaigoa, Tofili Muasau, and Mene Loia, and later joined by Defendant Sione Ito (jointly "Defendants"). For the reasons stated below, **[**2**]** the court denies Defendants' motion to dismiss, and grants Plaintiffs' preliminary injunction application.

This action arises from Plaintiffs' attempt to retrace a survey of Titiafu as previously surveyed and offered for registration by Mataalii Soliai[2] as his individually owned land in the early 1980s. Objections to the registration were filed, and the dispute proceeded to judicial adjudication.[3] However, in 1985, as the case progressed through pre-trial litigation, Mataalii passed away. The still pending registration lawsuit was dismissed, which left Mataalii's title claim to Titiafu unsettled and unregistered but without prejudice to his heirs to later claim the title. It appears that, at least since 1985, Plaintiffs, Defendants and third parties have cultivated portions of Titiafu.

In January 2009, Plaintiffs apparently first undertook to retrace Mataalii's original 1981 survey of Titiafu. Plaintiffs claim that Tofili Muasau, Jr. stopped the retrace as it neared completion. Plaintiffs allege that again attempted to retrace the survey in June 2011 but were prevented from doing so by Defendant Tuiaana Moimoi. Plaintiffs further assert that in **[**3**]** April 2013, Plaintiff Carter Soliai attempted to plant taro and bananas in Titiafu but was forced off the land by Defendants Pagofie Fiaigoa and Mene Loia, and a third individual named John Ito. Plaintiffs now petition the Court for an injunction to prevent Defendants from interfering with the retrace survey of Titiafu and to protect their surveyor.

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[1] Carter Jerret Soliai appears as the administrator of the Estate of Apelu M. Soliai.

[2] Plaintiffs Robert Soliai and Joe Soliai are sons of Mataalii Soliai's sons, and Plaintiff Carter Jerrett Soliai is his grandson.

[3] This action is styled *Tuia'ana Moi, Filipo Toilolo, Muasau E. Tofili, Vele Kuka, Sr and Atulasi Taleni Sunia v. Mataalii F. Solia'i*, LT No. 39-82.

Discussion

[1-2] Sufficient grounds for the issuance of a preliminary injunction exist when "(1) there is a substantial likelihood that the applicant will prevail at trial on the merits and that a permanent injunction will be issued against the opposing party; and (2) great or irreparable injury will result to the applicant before a full and final trial can be fairly held on whether a permanent injunction should issue." A.S.C.A. § 43.1301(j); *Drabble v. Mikaele*, 8 A.S.R.3d 242, 243 (Land & Titles Div. 2004); *Am. Sam. Rugby Football Ass'n v. Godinet*, 7 A.S.R.3d 161, 162 (Trial Div. 2003). A preliminary injunction should not be granted unless the plaintiff clearly establishes the burden of persuasion as to each of the elements. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

Here, as to element one, we hold that there is a substantial likelihood Plaintiffs will prevail on the merits. **[**4**]** Plaintiffs are the heirs of Mataalii Soliai who previously sought to register his title Titiafu in 1981. Although that registration was aborted, the court never had the opportunity to quiet title and we have no reason to believe Mataalii would not have prevailed. Plaintiffs have repeatedly attempted to survey Titiafu since that time and are the only parties attempting to legitimize a claim to the land. Lastly, it appears that Plaintiffs have continued to occupy and cultivate some portions of Titiafu since Mataalii's death in 1985.[4] Furthermore, Defendants' motion only presents affirmative defenses of questionable merit and does not make even the most cursory claim to Titiafu. Without any factual basis as to the legitimacy of Defendants' claim of title, the Court cannot weigh the merits of their claim against that of Plaintiffs.

[3] Turning to element two, the court will issue a preliminary injunction to provide for a survey when it is necessary in order for the Court to form an "accurate picture of what is claimed by each [party] and what is in dispute." *Satele v. Uiagalelei*, 6 A.S.R.2d 109, 109-10 (Land & Titles Div. 1987). Without a land survey, Plaintiffs cannot proceed with their claim to Titiafu **[**5**]** and the Court cannot quiet title. Failure to settle this dispute may permanently deprive Plaintiffs of access to land they claim as their inheritance from Mataalii. This certainly qualifies as irreparable harm.

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[4] This last point is not entirely clear from the facts alleged. However, in his affidavit, Plaintiff Robert Soliai mentioned that some of the Defendants may have been on the land with the permission of his deceased brother, Abel Soliai. In addition, Plaintiff Carter Soliai claims he attempted to plant crops in Titiafu in 2013.

Defendants' motion to dismiss attacks Plaintiffs' claim to the title of the land Titiafu at issue in this action on the basis that Plaintiffs' action to quiet title violates the 20 year statute of limitations. *See* A.S.C.A. § 43.0120(6). Defendants argue that the limitations period accrued in 1985 when the court dismissed the challenge to Mataalii Soliai's title to Titiafu in LT No. 39-82. However, none of the Defendants were parties to that action nor do they claim privity with those who originally challenged Titiafu's title. Thus, with respect to Defendants in the present dispute, it is unclear why Plaintiffs would have had cause to quiet title in 1985. Consistent with Plaintiffs' argument, it appears that at least some Defendants did not occupy or cultivate Titiafu until at least the mid-1990s if not later. Overall, it is unclear when Defendants first entered Titiafu and, therefore, when Plaintiffs' cause of action to quiet title accrued.

[4] Furthermore, if as Plaintiffs contend Defendants claim Titiafu as communal land, the argument above fails for want of jurisdiction. In order for the High Court to have jurisdiction **[**6**]** over communal land disputes, the parties must first submit to mediation through the Office of Samoan Affairs ("OSA") and provide the court with a Certificate of Irreconcilable Dispute ("CID"). *See* A.S.C.A. § 43.0302. Although OSA issued a CID in 2010 for a controversy involving Titiafu, it appears this mediation concerned different claims and claimants from the controversy currently before the Court. In addition, Plaintiffs Joe Soliai and Carter Jerrett Soliai and Defendants Pagofie Fiaigoa, Mene Loia, and Sione Ito did not participate in that mediation. Therefore, as per A.S.C.A. § 43.0302, the 2010 CID cannot give this court jurisdiction over a dispute between the current parties and their particular claims to Titafu.

Order

Defendants' motion to dismiss is denied.

Plaintiffs' petition for a preliminary injunction to survey the land named Titiafu in the village Pavaia'i is granted. While this action is pending, or until further order of the Court, Defendants, individually and collectively, their agents and employees, and those persons in active concert or participation with them are enjoined from obstructing in any manner Plaintiffs or their surveyors from retracing the survey of the land Titiafu obtained by Mataalii Soliai and offered by **[**7**]** him for registration of the title as his individually owned land in the action LT No. 39-82.

It is so ordered.

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Cite As: *Ma'ataua v. Puia'i*, MT No. 05-11, slip op. at [page number] (Land & Titles Div. Jan. 27, 2014) (op. & order)

MA`ATAUA UIVA TE`O, Claimant,

v.

PUIA`I TUFELE, Objector.

[In re *Matai* Title "TE`O" of the Village of Pago Pago]

High Court of American Samoa
Land and Titles Division

MT No. 05-11

January 27, 2014

[1] The Appellate Division has made clear that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., can only be invoked after the family has, at first instance, convened as a Samoan family to consider the selection of a successor *matai* in accordance with the traditions of the family.

[2] The Land and Titles Division lacks subject matter jurisdiction in any *matai* title dispute until the Samoan family has had the meaningful opportunity to consider the selection of a successor.

[3] When one side of the Samoan family favors one *matai* candidate and another side favors a different *matai* candidate, neither prevails on the issue of family clan support.

Before KRUSE, Chief Justice; SU`APAIA, Associate Judge; FA`AMAUSILI, Associate Judge; SATELE, Associate Judge; and MUASAU, Associate Judge

Counsel: For Claimant, Tauivi M. Tuinei
For Objector, Sharron I. Rancourt

OPINION AND ORDER

Background

This dispute involves competing claims to the vacant *matai* title Te`o from the village of Pago Pago. Claimant Ma`ataua Uiva Te`o ("Ma`ataua") initially offered to register the title with the Territorial Registrar, pursuant to A.S.C.A. § 1.0405. As a consequence, Puia`i Tufele ("Puia`i") then filed his timely objection and counter-claim under A.S.C.A. § 1.0407. Thereafter, the matter was referred by the Territorial Registrar to the Office of Samoan Affairs ("OSA") for A.S.C.A. § 43.0302 extra-judicial proceedings (mandating the parties to attend and "attempt . . . to resolve the controversy" before the Secretary of Samoan Affairs). The OSA meetings were to no avail, whereupon the Secretary issued his "certificate of irreconcilable dispute," **[**2**]** A.S.C.A. § 43.0302 and the matter is now before us as a "disputed claim." A.S.C.A. § 1.0409.

Discussion

I. Jurisdiction

[1-2] The Appellate Division recently made clear in *Leautu v. Nu'utai*, AP No. 11-11, slip op. at 6, (Land & Titles Div. 2013) (op. & order, Aug. 7, 2013), that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., could only be invoked *after* the family has, at first instance, convened as a Samoan family to consider the selection of a successor *matai* in accordance with the traditions of the family. Until and unless a Samoan family has had the meaningful opportunity to do so, resort to the statutory registration process is premature and the Land and Titles Division is without subject matter jurisdiction in any *matai* title dispute. *Id.*

As discussed *infra*, we are satisfied on the evidence received that the Te`o family has so met; however, we are also satisfied that the family was not able to successfully come to any sort of consensus. Additionally, the Secretary of Samoan Affairs having duly certified an irreconcilable dispute after due compliance with the requirements of A.S.C.A. § 43.0302, we are satisfied that the matter is properly before us at this time and so assert subject matter jurisdiction. *See also Fagaima v. Am. Samoa Gov't.*, AP No. 01-10 (App. Div. Nov. 15, 2012); *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Nov. 30, 2011). **[**3**]**

II. A.S.C.A. § 1.409(c)

On the evidence presented, we make the below findings with regard to the four statutory criteria under A.S.C.A. § 1.409(c):

1. Best Hereditary Right--A.S.C.A. § 1.0409(c)(1)

We find for Puia`i on best hereditary right. Puia`i has credibly shown his descent to Te`o Mutiatai his second great grandfather, a common ancestor he shares with his first cousin Te`o Seuga Manuma, a former titleholder. *See In re Matai Title Te`o*, MT No. 11-97 (Land & Titles Div. Sep. 9, 1978).

Ma`ataua's pedigree claim is not so clear on the evidence. Ma`ataua traces his claim to his paternal grandfather Pulu Taulaga Te`o. The evidence shows that Pulu Taulaga Te`o had a brother named Falepopo who, according to Exhibit 31, Pago Pago Matai Title Registry (the "Registry"), was installed as the Te`o titleholder in 1918. However, we fail to see by this fact alone how Ma`ataua's claim through his paternal grandfather, a descent line collateral to the descent line from Falepopo, establishes his hereditary entitlement. Moreover, in our review of Exhibit 31, we did not find Pulu Taulaga Te`o's name on the Registry so as to affirm that there was such a Te`o titleholder in village of Pago Pago.[1] Indeed, the Registry, as it is, lends credence to **[**4**]** Puia`i's testimony (as to his side's version of family history) that Te`o Falepopo was the first from this [collateral] side of the family to hold the Te`o title attached to the village of Pago Pago. Moreover, the Te`o family's customary clans have clearly evolved, at least in terms of organization, as a two-clan family. *See, infra*, note 1.

We hold that Puia`i prevails on this criterion.

2. Wish of the Majority or Plurality of the Clans—A.S.C.A. § 1.0409(c)(2)

Ma`ataua claimed three customary clans, namely, Vaigalu, Vaitele, and

[1] We note in a prior Te`o succession dispute that Ma`ataua's father, Uiva Te`o, testified that his father Pulu Taulaga Mauga Te`o, the brother of Te`o Falepopo, was a Te`o titleholder in Pago Pago "for a short period before he left American Samoa for missionary work." *In re Matai Title Te`o*, MT No. 11-77, slip op. at 2 (Land & Titles Div. 1978). Although this claim was accepted by the 1978 Court as fact, we remain nonetheless unable to reconcile this finding with Exhibit 31, the Registry. Exhibit 31 reveals that the only prior Te`o titleholders to Falepopo were Te`o Mutia and then Te`o Salevao. Conspicuously, the Registry contains no entry concerning a Pulu Taulaga Mauga Te`o.

Fuamanogi. On the other hand, and consistent with his position taken in prior litigation, *see In re Matai Title Te`o*, 26 A.S.R.2d 101 (Land & Titles Div. 1994), Puia`i claims two customary clans in the Te`o family of Pago Pago, namely, Falepopo and Si`itia Manuma.

We find the evidence to preponderate in favor of Puia`i's version of a two-clan family. Although Ma`ataua assigned different and multiple labels to family clans, the weight of the evidence points nonetheless to a family organization that is comprised of two very defined, albeit very fractious, family factions. This was very evident in the manner family meetings had arisen as well as in the manner family affairs have been handled during the extended interim vacancy of a *sa`o* (senior **[**5**]** *matai*). Today, the Te`o family operates and interacts as a family along two descent lines; one part of family identifies with the former titleholder Te`o Falepopo, while the other identifies itself as the Si`itia Manuma clan.

[3] We are satisfied moreover that the family, comprising both clans, has assembled on diverse occasions in the past to discuss, at first instance, the matter of a successor *matai*. In addition, we find that the assembled family has not in all their efforts been able to reach any sort of consensus as to a *matai* successor. While there is solidarity in the Falepopo side in favor of Ma`ataua's candidacy, the Si`itia clan is equally steadfast in its support of Puia`i's bid.

We conclude that neither candidate prevails on the issue of family clan support.

3. Forcefulness, Character and Personality, and Knowledge of Samoan Customs—A.S.C.A. § 1.0409(c)(3)

On forcefulness and personality, we rate both parties more or less on parity. Both are reasonably well educated with comparable personal history demonstrating personal ambition and drive. Each has managed to achieve a reasonable standard of living having managed to accumulate the wherewithal to enjoy a comfortable lifestyle. Likewise, with the issue of knowledge of Samoan customs, we find the parties to be similarly situated.

However, on character assessment, we find the scales tilted in favor of Puia`i. Ma`ataua has a demonstrated a disconcerting history of indifference towards the Te`o family. While resolute **[**6**]** in his desire for family leadership, Ma`ataua has done little more in this regard beyond simply invoking the statutory *matai* registration process but then only to disappear thereafter for extended off-island missionary work, all without word to the family or the court. *See In re Matai Title Te`o*, MT No. 05-11, slip op. at 2 (Land & Titles Div. Aug. 29, 2013) (order). His

apathy towards a timely resolution to the family's succession lacuna[2] has in no small part contributed to a leaderless--and increasingly divided--Te`o family. This unfortunate situation has endured for the past twelve years to the self evident detriment of the family.

Finally, we take judicial notice of *In re Ma`ataua Mountain*, LT No. 11-07 (Land & Titles Div. 2008) (consolidated). Two pertinent observations are to be made from this case; one touches on the "character" consideration under this heading, and the other concerns the "value to family" factor under the succeeding A.S.C.A. § 1.0409(a) criterion. First, this case concerns Ma`ataua's unsuccessful bid to claim in "individual-ownership" a large tract of Faleniu hinterlands to the apparent exclusion of his Si`ufanua communal family. This hardly bespeaks good leadership potential for a *sa`o*. Second, we **[**7**]** noted from the Clerk's file that Ma`ataua has yet to pay his share of court ordered "costs," outstanding since 2010. *See id.* (Land & Titles Div. Jan. 12, 2010) (order to show cause For non-payment of composite map survey costs). While there might be a plausible excuse for the nonpayment of court ordered costs (an issue not before us), we do find it difficult reconciling this tardiness in paying court ordered costs against Ma`ataua's self serving testimony in this matter concerning his various and successful agricultural and business ventures. While these observations are not independently conclusive, they do in aggregate weigh against Ma`ataua as above alluded.

We find for Puia`i on this criterion.

4. Value to Family, Village and Country—A.S.C.A. § 1.0409(c)(4)

In our relative assessment of the candidates, we find the parties equal in terms of value to the country. However, we have to rate Puia`i as decidedly ahead of Ma`ataua in terms of demonstrated value to the family and village. Puia`i has spent his whole life living and working within the village of Pago Pago, rendering traditional service on a day to day basis not only to the Te`o family but also to the village of Pago Pago. Ma`ataua, on the other hand, has spent his life living and working without. Predominantly, Ma`ataua's active life has largely been aligned with his maternal roots, the Si`ufanua family of Faleniu. This is where Ma`ataua has mostly resided, when on-island and, consequently, it is Faleniu where Ma`ataua has mostly operated his various farming and

[2] An earlier registration effort initiated by Ma`ataua in 2002, culminated in *Te`o v. Tuliau*, MT No. 03-04 (Land & Titles Div. Oct. 5, 2007) (order for dismissal). This case, however, was subsequently dismissed by this Court in 2007 for failure "to diligently prosecute." *Id.* Not unlike the scenario now before the Court, Ma`ataua's failure to prosecute entailed another earlier and extended off-island mission absence from the Territory.

business enterprises. **[**8**]**

With his lifelong presence in Pago Pago, Puia`i has been in the forefront of cultural family affairs representing his side of the family. Not only has he acquired a better familiarity with the extent of communal family assets, but he has naturally been more involved with both intra and inter-Te`o family obligations, especially throughout this extended period of time when the family has been without a *matai*. Moreover, with his first-hand experience in village affairs, especially in his role of *matai taulealea* representing the Te`o family within the village *aumaga* (council of untitled men), Puia`i has better rapport with the village. Puia`i, overall, is better suited to lead the family, having lived in the village and having interacted with family and village affairs on a day-to-day basis. Moreover, we are satisfied that Puia`i's ambitions are better aligned with those of the Te`o family's; its communal interests and general welfare.

We also find in favor of Puia`i under this heading.

Conclusion and Order

On the foregoing, we conclude that Puia`i is qualified to hold the *matai* title Te`o attached to the village of Pago Pago. While the parties are equal on the second statutory criterion, Puia`i prevails over Ma`ataua on the first, third, and fourth criteria. The Territorial Registrar shall, in accordance with A.S.C.A. § 1.0409(b), register the *matai* title Te`o in candidate Puia`i Manuma Tufele.

It is so ordered.

Cite As: *Ifopo v. Am. Samoa Gov't*, LT No. 14-04. at [page number] (Land & Titles Div. Feb. 26, 2014) (order of conditional dismissal)

CHIEF IFOPO NAKISO, and MEMBERS OF IFOPO/NAKISO FAMILY OF FAGATOGO, Plaintiffs,

v.

AMERICAN SAMOA GOVERNMENT, ASPA, and ANY OTHER PERSON CLAIMING INTEREST TO LESOLO AND FANUAEE LANDS IN FAGATOGO, AMERICAN SAMOA, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 14-04

February 26, 2014

[1] A.S.C.A. § 43.0302(a) requires an accompanying Certificate of Irreconcilable Dispute from the Secretary of Samoan Affairs to be filed with a party's complaint before any action relating to controversies over communal land can be commenced in the Land and Titles Division, even if the Clerk issues his Summons *pro forma* without one.

[2] Although a case is technically amenable to dismissal for want of subject matter jurisdiction when there is no Certificate of Irreconcilable Dispute, the practice of this Court has been to stay proceedings pending A.S.C.A. § 43.0302 proceedings, purely on considerations of "equity and convenience."

[3] Where Plaintiffs had failed to obtain a Certificate of Irreconcilable Dispute over a period of 10 years, during which the Court had stayed the proceedings, the Court ordered a conditional dismissal.

[4] The obligation to file an accompanying Certificate of Irreconcilable Dispute is clearly on Plaintiffs, as the complaining party.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiffs, Salanoa S.P. Aumoeualogo, substituted by Charles V. Ala`ilima
For Defendant American Samoa Government, Diane B. Roy, Assistant Attorney General, substituted by Asaua Fuimaono, Assistant Attorney General

ORDER OF CONDITIONAL DISMISSAL

[1] On May 24, 2004, Plaintiffs filed their "Complaint to Quiet Title" against the government and the American Samoa Power Authority, regarding land(s) in Fagatogo known as LESOLO AND FANUAEE and allegedly the communal realty of Plaintiffs. The Clerk issued his Summons *pro forma*, quite without regard to the requirements of A.S.C.A. § 43.0302(a), which requires an accompanying certificate of irreconcilable dispute ("CID") from the Secretary of Samoan Affairs to be filed with a party's complaint "[b]efore any action relating to controversies over communal land . . . may be commenced in the Land and Titles Division." **[**2**]** Although each Defendant answered *pro forma* in response to the Summons, there is, quite clearly, no actionable cause before us over which this Court can assert jurisdiction. *Poiali`i v. Manuma*, AP No. 04-06, slip op. at 5 (App. Div. Feb. 25, 2008) ("Section 43.0302 is a jurisdictional requirement").

[2] The absence of a CID on file went undetected for the next four years--notwithstanding an interim flurry of discovery activity and a trial setting motion--until the matter came on for pre-trial conference call on May 5, 2008. Consequently, the proceedings were effectively suspended, pending the mandatory prerequisite section 43.0302 proceeding before the Office of Samoan Affairs. Although technically amenable to dismissal for want of subject matter jurisdiction, T.C.R.C.P. 12(b)(6), the practice of this Court has been to stay proceedings pending section 43.0302 proceedings, purely on considerations of "equity and convenience." *Tupua v. Faleafine*, 5 A.S.R.2d 131, 133 (Land & Titles Div. 1967).

Some 5 years later, Plaintiff American Samoa Power Authority ("ASPA") filed its motion on October 18, 2013 to either set the matter for trial or dismiss for want to prosecution. Over the ASPA's objection, we once again appealed to "equity and convenience" and suspended proceedings; however, not without the issuance of an order of referral to Samoan Affairs, for section 43.0302 meetings, with a status call for February 25, 2014.

[3-4] Today, February 25, 2014, the matter duly came on for status **[**3**]** review and to Plaintiffs' tired refrain of "no CID," a further continuance was sought. After 10 years of "equity and convenience," it is nigh time for Plaintiffs to comply with the mandatory requirements of statute. At some point in time, Defendants are entitled to substantive due process and their day in court. At some point in time, the Court not only must be mindful of the need for the expeditious resolution of cases, but the management its docket as well. *Estate of Pua`auli v. LBJ Tropical Med. Ctr.*, 4 A.S.R.3d 103, 105 (Trial Div. 2000). The obligation to file

an accompanying CID is clearly on Plaintiffs, as the complaining party. A.S.C.A. § 43.0302(a).

Wherefore, unless that mandatory section 43.0302 requirement is met within the next 30 days from date hereof, the matter will be dismissed without prejudice and without further notice.

It is so ordered.

****

Cite As: *Ioapo v. Fa'alevao*, MT No. 02-02, slip op. at [page number] (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay)

TAUA`I IOAPO JR., Claimant,

v.

AVIATA FANO FA`ALEVAO, Counter-claimant.

[In re *Matai* Title "PAPALAUENA" of the village of Olosega]

High Court of American Samoa
Land and Titles Division

MT No. 02-02

March 11, 2014

[1] The decision whether to grant a motion for reconsideration or new trial is left to the broad discretion of the trial court.

[2] A motion for reconsideration or new trial should be based on a manifest mistake of fact or error of law, and the court should find substantial reasons before setting aside a judgment.

[3] A party moving for new trial must do more than reiterate the trial court's reasons for a decision and then make a blind assertion that the court is incorrect.

[4] T.C.R.C.P. 7(b)(1) requires that an application to the court for any order shall be by motion, which shall state the grounds with particularity. The particularity requirement is especially important for a motion for new trial, one of whose purposes is to avoid unnecessary appeals by alerting the trial court to possible errors or omissions in its opinion.

[5] The Court did not make a manifest mistake of fact in determining that the family had held a proper family meeting to determine a *matai* successor when it found that there were two distinct descent groups within the family and that all clans were represented at the meeting.

[6] A party cannot file partial motions and later argue supplement issues at oral argument as the Court has no jurisdiction to hear extrinsic issues.

[7] A court should not automatically or casually grant a stay of judgment pending appeal; instead, the court's discretion to grant a stay should be exercised only if cause is shown.

[8] A judgment will be stayed when it appears to the trial or appellate court that there is a strong chance the judgment will be vacated on appeal; that compliance with the judgment during the pendency of the appeal would so change the status quo as to amount to an effective denial of the right to appeal, or would otherwise work extraordinary hardship on the appellant; that little or no hardship would be imposed on adverse parties by appellant's noncompliance; or that some combination of these conditions overcomes the presumption in favor of allowing each party the present enjoyment of what has been held to be his lawful rights.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; MAMEA, Associate Judge; FA`AMAUSILI, Associate Judge; and MUASAU, Associate Judge

Counsel: For Claimant, Afoa L.S. Lutu, substituted by Matailupevao Leupolu, Jr.
For Counter-claimant, Pro se, substituted by M. Talaimalo Uiagalelei

ORDER ON MOTION FOR NEW TRIAL AND/OR STAY

On October 16, 2013, this Court issued its Opinion and Order awarding the *matai* title "Papalauena" to the Claimant, Taua`i Ioapo, Jr. On October 25, 2013, Counterclaimant Aviata Fano Fa`alevao timely filed a motion for reconsideration and/or for a new trial and motion for stay of enforcement of judgment. This matter came to hearing on February 12, 2014. For reasons addressed below, we deny both motions.

Discussion

1. Motion for New Trial

[1-2] The decision whether to grant a motion for reconsideration or new trial is left to the broad discretion of the trial court. **[**2**]** *Pulu v. Pulu*, 8 A.S.R.3d 230 (Land & Titles Div. 2004). A motion for reconsideration or new trial should be based on a manifest mistake of fact or error of law, and the court should find substantial reasons before setting aside a judgment. *Id*.

[3-4] A party moving for new trial must do more than reiterate the trial court's reasons for a decision and then make a blind assertion that the court is incorrect. *G.M. Meredith & Assoc. v. Blue Pac. Mgmt. Corp.*, 28 A.S.R.2d 204 (Trial Div. 1995). It is the attorney's, not the court's, job to

advocate, do legal research, and construct the legal theory upon which a losing party might oppose our decision. *Id*. Moreover, T.C.R.C.P. 7(b)(1) requires that an application to the court for any order shall be by motion which shall state with particularity the grounds therefore. This particularity requirement is especially important for a motion for new trial, one of whose purposes is to avoid unnecessary appeals by alerting the trial court to possible errors or omissions in its opinion. *Id*.; *Kim v. Star-Kist Samoa, Inc.*, 8 A.S.R.2d 146 (App. Div. 1988); *Taulaga v. Patea*, 17 A.S.R.2d 34 (App. Div. 1990); *Judicial Memorandum No. 2-87*, 4 A.S.R.2d. 172 (1987).

[5] Counterclaimant's motion for new trial contains one argument--that the Court did not have proper jurisdiction to hear and determine this matter because there was no proper family meeting. This argument is unavailing. The Court made no manifest mistake of fact in determining that the Papalauena **[**3**]** family in fact held a proper family meeting to determine a *matai* successor. The thrust of Counterclaimant's argument is that the Papalauena family is comprised of multiple clans, some of whom were not present at the family meeting. However, the Court found that there are two distinct descent groups within the family and that all clans were represented at the meeting. Counterclaimant has failed to convince the Court that this finding was a manifest mistake. Rather, we remain satisfied that the finding is substantially based on the evidence.

[6] At the February 12, 2014 hearing, Counterclaimant attempted to argue additional basis for a new trial that were not raised in the Motion for New Trial. Such tactic violates the particularity requirement of T.C.R.C.P. 7(b) to which attorneys are bound. Parties cannot file partial motions and hope to later supplement issues at oral argument. The Court has no jurisdiction to hear extrinsic issues, *Patea*, 17 A.S.R.2d, and the Court will not consider them.

2. Motion for Stay of Enforcement of Judgment

[7-8] A court should not automatically or casually grant a stay of judgment pending appeal; the court's discretion to grant a stay should be exercised only if cause is shown. A.S.C.A. § 43.0803; T.C.R.C.P. 62; *Asifoa v. Lualemana*, 17 A.S.R.2d 10, 12 (App. Div. 1990). A judgment will be stayed when it appears to the trial or appellate court that there is a strong chance the judgment will be vacated on appeal (e.g., when the correctness of **[**4**]** the trial court decision depends on a question of law that can fairly be characterized as a close one); that compliance with the judgment during the pendency of the appeal would so change the status quo as to amount to an effective denial of the right to appeal, or would otherwise work extraordinary hardship on the appellant; that little or no hardship would be imposed on adverse parties by appellant's

noncompliance; or that some combination of these conditions overcomes the presumption in favor of allowing each party the present enjoyment of what has been held to be his lawful rights. *Id*.

Counterclaimant attempts to argue that the equities favor a stay because the public and family would be confused if Taua`i proceeds with the use of the Papalauena *matai* title, only to face the Appellate Division's reversal of the trial court's judgment in his favor. According to Counterclaimant, confusion was the result of the Appellate Division's recent decision overturning the Land and Titles Division in *Leautu v. Nu'utai*, AP No. 11-11 (App. Div. Aug. 7, 2013). The argument is specious. First it is entirely dependent on the presumption that Counterclaimant will, as did the appellant in *Leautu*, prevail on appeal. However, Counterclaimant has failed to show that there is a strong chance the judgment will be vacated on appeal. Counterclaimant similarly does not argue any of the additional factors the court is to consider in granting or denying a motion for stay of enforcement of judgment. There is thus no cause shown that a **[**5**]** stay should be granted. Secondly, since Counterclaimant's *Leautu* based argument is dependent on the presumption of prevailing on the merits, it necessarily advocates, contrary to precedent, the abrogation of the "balancing of equities" exercise; it necessarily advocates a stay as of right pending appeal.

Since the court must not casually grant a stay, we will not.

Order

Counterclaimant's Motion for Reconsideration and/or New Trial and Motion for Stay of Enforcement of Judgment are hereby denied.

It is so ordered.

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Cite As: *Estate of Salavei v. Lemani*, LT Nos. 21-11, 22-11 & PR No. 01-90 at [page number] (Land & Tit. Div. Apr. 2, 2014) (order den. mot. for recons. or new trial)

ESTATE OF SALAVEI AH HING, Deceased.

ESTATE OF SALAVEI AH HING, By KAIO AH HING, Administrator, Plaintiff/Counter-Defendant,

v.

ANESI LEMANI, Defendant/Counterclaimant/Third Party Plaintiff, and

FEFILOI AH HING, Third-Party Defendant.

ESTATE OF SALAVEI AH HING, By KAIO AH HING, Administrator, Plaintiff,

v.

VA'I VANCAMP and MATANIU-MATA'I VA'I, Defendants/Cross-Claimants/Third-Party Plaintiffs,

SATAOA KALEUATI and LITIA KALEUATI, Defendants/Cross-Defendants,

GALUEFA MOSE, SULU OSA, and DOES I-X, Defendants, and FEFILOI AH HING, Third Party Defendant.

High Court of American Samoa
Land and Titles Division

PR No. 1-90
LT No. 21-11
LT No. 22-11

April 2, 2014

[1] The court may grant a motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the clear weight of evidence, a decision that is manifestly, an intervening change in the law, or the discovery of previously unavailable evidence.

[2] A judgment will not be set aside except for substantial reasons.

[2**]**
Before RICHMOND, Associate Justice, and MAMEA, Associate Judge

Counsel: For Kaio Ah Hing, Administrator of the Estate of Salevai Ah Hing, David P. Vargas
For Sataoa Kaleuati and Litia Kaleuati, Fiti A. Sunia
For Vancamp Va'i, Mataniu-Mata'i Va'i and Anesi Lemani, Sharron I. Rancourt

ORDER DENYING MOTION FOR RECONSIDERATION OR FOR A NEW TRIAL

This case arises from a series of quiet title actions brought by Plaintiff Kaio Ah Hing ("Kaio") as the administrator of the Estate of Salevai Ah Hing (the "Estate") relating to parcels of the land Alatutu'i. At trial, Kaio and the Estate contested the validity of land transfers to Defendants [1] executed by the deceased Salevai Ah Hing ("Salevai") and a former administrator of the estate, Fefiloi Ah Hing ("Fefiloi"). The Court's Opinion and Order was entered on July 22, 2013. We invalidated the land conveyances based on statutory law but on equitable grounds, ordered specific performance of the land transfers.

[1-2] The Estate now moves for reconsideration or a new trial based on a number of alleged erroneous findings of fact and legal errors in the opinion and order. The court may grant a **[**3**]** motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the clear weight of evidence, a decision that is manifestly, an intervening change in the law, or the discovery of previously unavailable evidence. *See Boral Gas of Am. Sam., Inc. v. Iaulualo*, 7 A.S.R.3d 57, 58 (Trial Div. 2003); *Nua v. Sunia*, 4 A.S.R.3d 234, 238 (Trial Div. 2000); *Clifton v. Voyager*, 31 A.S.R.2d 12, 16 (Trial Div. 1996). A judgment will "not be set aside except for substantial reasons." *Am. Samoa Gov't v. S. Pac. Island Airsystems, Inc.*, 28 A.S.R.2d 170, 171 (Trial Div. 1995).

Our July 22, 2013 Opinion and Order provided factual and legal grounds to support the holdings in favor of the various Defendants. We therefore deny Plaintiff's motion for reconsideration or for a new trial.

It is so ordered.

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[1] As detailed in our July 22, 2013 opinion and order, Defendants in this case are individuals who either currently hold or previously held title to parcels of the Alatutu'i tract. Each of the defendants either directly purchased his or her tract from Salevai and the Estate or acquired title via a subsequent conveyance from one of the initial buyers.

Cite As: *Tuatagaloa v. Fisimaka*, LT No. 17-14 at [page number] (Land & Titles Div. Aug. 12, 2014) (order den. ex parte & expedited mot. to refer matter to Assoc. Justice Richmond)

FAU ROBERT TUATAGALOA, himself and on behalf of the FAU FAMILY, Plaintiff

v.

KALALA FISIMAKA, SEUPULE S. SU`E, KOLETI SU`E, VA`ALULUMULIAGA and DOES 1-X, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 17-14

August 12, 2014

[1] The Court will not reassign a matter to different judge on the grounds that the other judge is already presiding over a number of like matters involving Plaintiff when there is no common subject matter among the cases, thus giving the appearance that Plaintiff is "judge shopping."

[2] A judge has the obligation not to recuse himself when there is no occasion for recusal.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, Matailupevao Leupolu Jr.
For Defendants, M. Talaimalo Uiagalelei

ORDER DENYING EX PARTE AND EXPEDITED MOTION TO REFER THIS MATTER TO ASSOCIATE JUSTICE RICHMOND

Upon random assignment, this matter came on for hearing before the Chief Justice, as presiding judge, on August 7, 2014, upon Plaintiff's application for Order to Show Cause. The parties appeared with counsel.

[1-2] Plaintiff's counsel at the outset orally moved for reassignment of the matter specifically to Associate Justice Richmond as presiding judge on the grounds that Justice Richmond was already presiding over a number of like matters (eviction actions) involving Plaintiff as senior *matai* and other members of his family. Upon inquiry of Plaintiff's

counsel as to whether there was common subject matter among all these cases, we found there was not. Whereupon, we denied the motion, troubled with **[**2**]** the appearance of "judge shopping." *See e.g. Pene v. Am. Samoa Power Auth.*, 10 A.S.R.2d 23, 25 (Trial Div. 1989) (A judge has [the] obligation not to recuse himself when there is no occasion for recusal. . ." Nonetheless, we made denial conditional upon Plaintiff's further showing, by way of subsequent motion and memorandum of points and authority. Hence the application before us.

Having both considered the application and conferred with Associate Justice Richmond, we find nothing to assuage the appearance of "judge shopping." *Id*.

The application is, therefore, denied. The Clerk will reset the show cause matter for provisional injunctive relief on the hearing calendar. Since the Chief Justice will not be on-island for the next three work weeks, the matter is assigned to the default associate justice, Justice Ward.

It is so ordered.

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Cite As: *Tua`au v. Pa`aga*, LT No. 06-12, slip op. at [page number] (Land & Titles Div. Dec. 9, 2014) (op. & order)

TUA`AU FA`AVI as the SA`O OF THE TUA`AU COMMUNAL FAMILY, Plaintiff,

v.

VILIAMU PA`AGA and AMANAVE ASSEMBLY OF GOD, and DOES I-XX, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 06-12

December 9, 2014

[1] A religious congregation of persons has no separate existence as a legal entity apart from those of its current congregation or membership pursuing the ends of its organic existence, viz., worship in accordance with the tenets of its religion.

[2] A religious community is capable of holding an interest in land in American Samoa under A.S.C.A. § 37.0204 even though it is not registered as a separate entity.

[3] There is no precedential value in a Court-approved stipulation purporting to convey communal land simply because a single justice signed off on it.

[4] Without gubernatorial participation in the conveyance process or gubernatorial approval of the concluded exercise, a document is effectively a nullity insofar as it purports to be a conveyance of communal land.

[5] Legislative restrictions against the alienation of communal lands are self-evident and they are clearly protective measures to ensure the preservation of the "*fa`a Samoa*" or Samoan way of life, as reserved under the Cessions Instruments with the United States and as further entrenched in Revised Constitution of American Samoa, article I, section 3.

[6] While the Court has allowed unjust enrichment claims in the context of improvements made based on a mistake of fact, successful claims require an improver to act in good faith. Here, Defendants did not have

a reasonable belief that they owned the land because this belief was based on a document that is void as a matter of law.

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, Charles V. Ala`ilima
For Defendants, Matailupevao Leupolu, Jr.

OPINION AND ORDER

Plaintiff Tua`au Fa`avi is the senior *matai* of the Tua`au extended family of Amanave Village. He filed suit against Viliamu Pa`aga ("Pa`aga"), the Amanave Assembly of God Church ("AAOG"), and unidentified parties "Does I through XX" (collectively, the "Defendants") to recover possession of the Tua`au communal land located in Amanave Village currently in the use and occupation of the Defendants (the "Land").

Jurisdiction

This is a controversy relating to land. Accordingly, this Court has, pursuant to A.S.C.A. § 3.0208(b)(2), exclusive subject matter jurisdiction.[1] *Am. Samoa Veterans Ass'n v. Am.* **[**2**]** *Samoa Gov't.*, AP No. 08-11, slip op. at 3 (App. Div. Jan 4, 2013).

By memorandum dated October 2, 2013, the Secretary of Samoan Affairs certified an "irreconcilable dispute" pursuant to A.S.C.A. § 43.0302, for determination by the Lands and Titles Division. *See* Certificate of Irreconcilable Dispute, Serial No. 301-13) ("CID"). On October 8, 2013, the CID was filed with the Clerk of Courts. The Court having perused the CID and being satisfied that the requirements of § 43.0302 have been fully met, concludes that this dispute is properly before us for adjudication.

Findings

[1] Defendant Pa`aga is the current pastor of the AAOG congregation. The evidence clearly shows that Defendant AAOG is, as Plaintiff avers in his Complaint, "a religious congregation of persons." (Complaint, 1:24). As such, AAOG has no separate existence as a legal entity apart from those of its current congregation or membership pursuing the ends of its organic existence, viz., worship in accordance with the tenets of the Assembly of God Church in American Samoa ("AOGAS"). "As a

[1] A.S.C.A. § 3.0208(b)(2) reads in pertinent part: "The land and titles division of the High Court shall have *exclusive* jurisdiction . . . in *all controversies relating to land*." (Emphasis added).

congregational body, the temporal affairs of the church would generally vest in that form of government established by the congregation or membership." *Faleali`i v. Savea*, 11 A.S.R.2d 110, 112 (Land & Titles Div. 1989) (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 666 (1971)).

The Defendants' presence on the Land today stems from a 1972 **[**3**]** extra-judicial resolution of a conflict--arising between Tua`au family members--concerning the initial establishment of a church in Amanave under the umbrella of the AOGAS. This intra-family dispute culminated in *Tua`au Sitoa v. Liugalua Reed*, LT No. 1250-72; and *Liugalua Reed, Fa`avi Tua`au vs. Tua`au Sito`a*, LT No. 1294-74. From what is to be gleaned from the pleadings in these cases, the parties were siblings who descended from Plaintiff's predecessor-in-title, Tua`au Sito`a ("Sito`a"). Sito`a was sued by his sister (Liugalua Reed, "Reed") and brother (Fa`avi Tua`au, "Fa`avi") after Sito`a had, as senior *matai*, unilaterally attempted to establish a church in Amanave on family land known as "Matatufu." The above-referenced lawsuits ensued and were eventually settled with Reed (and apparently Fa`avi)[2] conceding Sitoa's designation of an approximately 100' x 100' area of Matatufu to construct "a Church of Assembly of God." *See Tua`au v. Reed*, LT No. 1250-72 (Land & Titles Div. Apr. 10, 1972) (am. stipulation & order). In return, Sitoa was to also assign a comparable 100' x 100' portion of land, from family property known as "Siulepa" for Reed's use in accordance with Samoan custom. *See id.*

At trial, a document styled "Amanave Assembly of God Agreement" was received into evidence from the Territorial Registrar's Office as Exhibit 1. This document, dated October **[**4**]** 12, 1972, recites the stipulation concluded in LT No. 1250-72 and purports to "grant, transfer, and convey" from Grantor to Grantee, "for the purpose of constructing an Assembly of God church building, land of an area of approximately 100' x 100.'" Ex. 1 at 1. The signature block for "Grantor" contains the signature of "Tua`ua Sito`a," while the signature block for "Grantee" contains the signature of "Tuigamala E. Laulu," the original pastor of AAOG congregation. Of note is that a filing stamp from the Territorial Registrar's Office on Exhibit 1 indicates that the document was recorded with the Territorial Registrar eleven years after it was signed, on April 3, 1983, in "Gen. Misc., Volume Misc-83, P. 38."

Consequently, a church building was built (or completed)[3] within a

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[2] The companion matter LT No. 1294-72, in which Fa`avi was a named party, was subsequently dismissed by the court with prejudice for lack of prosecution.

[3] Sito`a in his affidavit in support of his application for a show cause order in LT No. 1250-72, deposes that the church structure was "approximately 95% complete[]" by the time of filing suit.

designated portion of Matatufu, in accordance with the stipulation, and without further objection from Tua`au family members. The structure was thereafter used for AAOG worship until it was totally destroyed by the tsunami of September 29, 2009. The evidence also showed that another building (a two-story parsonage) was constructed on Matatufu, but outside the stipulated 100' x 100' area, by Pa`aga and the AAOG during the succeeding *matai* administration of Sito`a's son, Tua`au Sito`a, **[**5**]** Jr., ("Sito`a, Jr.").[4] The parsonage was built upon the oral authorization of Sitoa, Jr., which was given at the (apparently persistent) urging of Pa`aga.

Following the tsunami, Pa`aga made overtures to the Tua`au family concerning the Defendants' desire to rebuild the church. Pa`aga was advised to await a decision from the family. Eventually, Plaintiff and his assembled family decided against allowing the church to be rebuilt.[5] Pa`aga was accordingly informed.

A site visit to the disputed area by the Court, undertaken on November 15, 2014, provided a visual regarding the extent and condition of Matatufu in the actual possession of the Defendants. The site visit revealed a mass of concrete rubble and tangled reinforcing iron heaped on the remnants of what was the church's concrete flooring. To the immediate rear of this debris, we found an imposing and deteriorating two-story concrete parsonage with protruding reinforcing iron suggesting the structure was actually annexed to the church building. This second structure visibly appears to have sustained significant damage but was not entirely destroyed by the tsunami. It is nonetheless being used **[**6**]** for residential purposes as well as for congregational activity.[6] Behind the parsonage we noticed a shed storing lumber and other material and an inland curtilage area bounded by typically subsistence crops. Also readily apparent were defined vehicular accessways running on both sides of the structures. While the western accessway is clearly appurtenant to the parsonage itself, the eastern accessway services a sizeable parking area also to the rear of the parsonage.

This dispute came to a head after Tua`au family members learned that

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[4] The Territorial Registrar's Matai Register reveals that in 1987 the Tua`au title was registered in Sito`a, Jr. Moreover, the registry shows that in 1979 Sito`a was succeeded by Fa`avi, who in 1983 was succeeded by Reed, who in 1987 was succeeded by Sito`a, Jr. In 2006, upon the passing of Sito`a Jr., the title was left vacant until November 2, 2011, when it was registered in Plaintiff's name.

[5] The members of the Tua`au family who live in Amanave are unanimous with their matai and the Court will not substitute its judgment for that of the family's matai in this decision.

[6] Whether or not the structure remains habitable is another matter.

Pa`aga had signed off as "land owner" on a government building permit application seeking authorization to construct a new church edifice on Matatufu. The filing of this action then ensued, with the family desiring to retake possession of all of the family's property. Plaintiff's position is that Tua`au family numbers have increased and, with limited land resources, Matatufu should revert to family use. At the same time, the AAOG of today no longer counts among its numbers actively serving (*"tautua"*) Tua`au family members. Additionally, with regard to the parsonage, Plaintiff objects to its continuing threat to adjacent land in times of heavy rains. The parsonage is situated over (straddling) a defined waterway. We accept the testimony of Plaintiff's witnesses on this point, and find that in times of heavy rains, the parsonage constitutes a runoff barrier posing a flooding danger to the area. Significantly, **[**7**]** Plaintiff views Defendants' use of the Land as having significantly sprawled beyond the original 1972 permission to build a church upon a 100' x 100' parcel. Pa`aga's proprietary assertion of title, by signing off on a building permit application in derogation of *pule* (*matai* authority), is clearly symptomatic of this perceived usurpation.

Defendants Viliamu Pa`aga and AAOG answered Plaintiff's Complaint, asserting, among other things, adverse possession and "Statute of Limitation." (Answer 9, 14). They have also counter-claimed, seeking "quiet title" and even "removal" of Plaintiff's title. (Answer 4-5).

Discussion

1. AAOG's Ability to Hold Property

[2] Initially, we summarily dismiss Plaintiff's contention that AAOG is not capable of holding "a real property interest" under A.S.C.A. § 37.0204 because it failed to register as a "separate entity." (*See* Pl.'s Closing Arguments 4:22-5:24). In our reading of Section 37.0204, we could not find any mention of a registry nor a requirement placed upon a religious community to register as a separate entity in order to legally hold an interest in land in American Samoa. Rather, the statute merely talks of Governor-approved land transfer "to an authorized, recognized religious *society*, of sufficient land for erection thereon of a church, or dwelling house for the pastor, or both," subject to conditions on reconveyance and retransfer of the land. A.S.C.A. § 37.0204(d) (emphasis added). Black's Law Dictionary defines "society" as **[**8**]** "[a]n association or company of persons (usu[ally] unincorporated) united by mutual consent . . ." 1425 (8th ed. 2004). We have previously recognized that an unincorporated association is capable of holding association property. *See Ala`ilima-Utu v. Tufele*, 22 A.S.R.2d 34, 36 (Trial Div. 1992) (allowing unincorporated YWCA branch in American Samoa to retain membership fees). We see no disability under A.S.C.A. § 37.0204 barring AAOG from being transferred sufficient land for a

church or parsonage simply on the grounds that AAOG did not separately incorporate as a body corporate as other AOGAS communities, such as the Cornerstone Assembly of God Church in Malaeimi, may have done.

2. Defendants' Claim to the Land

Having said as much, we find Exhibit 1 to be the only real basis to Defendants' claim to Matatufu and that claim to be entirely baseless.[7] We agree with Plaintiff that Exhibit 1 does not evidence a valid alienation of native land in accordance with the requirements of the Alienation of Land Act, A.S.C.A. §§ 37.0201 et seq., (the "Act"). Specifically, A.S.C.A. § 37.0204 provides in pertinent part: **[**9**]**

> (a) It is prohibited for any matai of a Samoan family who is, as such, in control of the communal family lands or any part thereof, to alienate such family lands or any persons without the written approval of the Governor of American Samoa. . . .
> (d) This section does not prohibit the conveyance and transfer of native land . . . in the discretion and upon approval of the Governor, to an authorized, recognized religious society, of sufficient land for erection thereon of a church, or dwelling house for the pastor or both; provided that the reconveyance and retransfer of such land shall be to native Samoans only and in the discretion and upon approval of the Governor.

Notwithstanding the foregoing provisions of the Act, the Defendants argue that Exhibit 1 is irrevocable and binding upon Plaintiff and his family because Exhibit 1 is the product of a past stipulation between the parties' respective predecessors-in-interest, and that the same was given court approval in *Reed*. LT No. 1250-72; (Final Arguments of Defendants, 3:4-10). Second, Defendants submit that Exhibit 1 explicitly binds "successors, assigns, heirs, family and *matai*, if applicable" of Sito`a as long as there is an Assembly of God Church in Amanave. (Def.'s Final Arguments 3:14-4:2). Third, Defendants argue that the proper construction to give to Exhibit 1 is that its effect is that of a "*foa`i*" (gift), as opposed to Plaintiff's contention that Exhibit 1 is

[7] The Defendants' alternative thesis of adverse possession was not seriously pursued at trial, and correctly so--the evidence was abundantly clear that Defendants' possession of Matatufu is permissive, rather than hostile. *Malaga v. Alaga*, 4 A.S.R. 735, 738 (Trial Div. 1966) (Possession of communal family land with the consent of *matai* cannot be adverse to family of *matai*). Moreover, Defendants' contention regarding Plaintiff's standing to sue as the Tua`au titleholder is also unsubstantiated. The evidence was clear that Plaintiff is the registered Tua`au holder and as such is the proper party to represent the Tua`ua family in Court.

effectively a mere license revocable at will. (Final Arguments of Defendants, 4:6-14). Finally, Defendants, appealing to equity, urge the Court to deny relief on the basis that "[i]t would be greatly unreasonable and unjust if the court rule [sic] in favor of the Tua`au Family. . . ." (Final Arguments of Defendants, 9:19-22). **[**10**]**

[3-4] Defendants' reliance on *Tua`au v. Reed* is totally misplaced. Clearly, there is no precedential value in the Court-approved stipulation simply because a single justice signed off thereon. *Cf.* A.S.C.A. § 3.0240 ("In the land and titles division. . . the presence of a justice and 1 associate judge [is] necessary to constitute a quorum for the trial and determination of a case or controversy."). In any event, a statute trumps inconsistent common law, if, indeed, the *Tua`au* Court-approved stipulation purports to be, as canvassed by Defendants, judicial precedent. *See* A.S.C.A. § 1.0201(4). The stipulation is facially at odds with the unequivocal requirements of A.S.C.A. § 37.0240. Foremost, the Act commits the approval authority of communal land alienation to the executive branch, not the judiciary. It follows, therefore, that without gubernatorial participation in the conveyancing process at issue or gubernatorial approval of the concluded exercise, Exhibit 1 is effectively a nullity insofar as it purports to be a conveyance of communal land for the duration of the AAOG's existence in Amanave. *See* A.S.C.A. § 37.0230 ("[a]ny alienation in violation of [the Act] *shall be void*.") (emphasis added). Consequently, the defense's use of emotionally charged labels such as *foa`i* lends nothing substantive to the unadorned fact that a nullity is a nullity. Just as Sito`a's (Court-approved) designation of a 100' x 100' area for a church building was void for noncompliance with the alienation process set out in the Act, so too was the subsequent authorization by Sito'a, Jr. to further use Matatufu for the **[**11**]** parsonage, the woodshed, the driveways, and the parking lot. Incidentally, the fact that Defendants' actual occupation extends well beyond "sufficient land for erection thereon of a church, or dwelling house for the pastor, or both," A.S.C.A. § 37.0204(d), is also separately prohibited under the Act.[8]

3. Equitable Relief

[5] We find Defendants' unfairness argument to be meritless. Legislative restrictions against the alienation of communal lands are self-evident and they are clearly protective measures to ensure the preservation of the "*fa`a Samoa*" or Samoan way of life, as reserved under the Cessions Instruments with the United States, *see* April 17, 1900 Cession of Tutuila and Aunu`u, ch. 281, 45 Stat. 1253 (1929) (securing "the rights and property of the inhabitants of [Tutuila and

[8] The Act's interdiction extends not only to the *matai* and religious society, but it also governs the scope of gubernatorial approval authority as well.

Aunu`u]"); July 16, 1904 Cession of Manu`a Islands, ch. 6, 46 Stat. 4 (1929) (securing "the rights of . . . all people concerning their property according to their customs."), and as further entrenched in the Revised Constitution of American Samoa, article I, section 3.[9] As the courts have **[**12**]** often acknowledged, "the Samoan way of life has twin cornerstones, the *matai* system *and communal land tenure*." *Fairholt v. Aulava*, 1 A.S.R.2d 73, 78 (Land & Titles Div. 1983) (emphasis added).

> The twin cornerstones of the Samoan way of life are communal land tenure and the *matai* system. Each is essential to the other. Without the *matai* system to administer it, the communal land system becomes anarchy. *Without the communal land system, there is no reason for the matai*. *Pen v. Lavata`i*, 30 A.S.R.2d 10, 15 (App. Div. 1996) (emphasis added) (quoting *Tavai v. Silao*, 2 A.S.R.2d 1, 2 (Land & Titles Div. 1983)). Likewise in *Haleck v. Lee*, 4 A.S.R. 519, 551 (Trial Div. 1964), when upholding the constitutionality of the 1949 version of the Act--Sections 1281 and 1283 of the Code of American Samoa, 1949 Edition--the Trial Division reasoned that without the Act's protective measures to preserve communal land ownership, "the whole fiber, the whole pattern of the American Samoan way of life will be forever destroyed."

In light of these pronounced expressions of territorial public policy, Defendants' equity argument hardly resonates as it is an argument that effectively seeks to stultify underlying legislative policy (preservation of the Samoan way of life) and to make a complete mockery of the Act. The preeminence of this public policy over any equity notions of fairness is reinforced with the *Fono's* rather severe treatment for certain violators of the Act, including the forfeiture of all improvements erected or **[**13**]** made on the land to the owner of the land. *See* A.S.C.A. § 37.0230.

[6] Finally, there was some discussion in this case alluding to an award of compensation based on the equitable notion of "unjust enrichment." While the Court has allowed unjust enrichment claims in the context of improvements made based on a mistake of fact, successful claims require

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[9] "It shall be the policy of the Government of American Samoa to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and language, contrary to their best interests. Such legislation as may be necessary may be enacted to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons. No change in the law respecting the alienation or transfer of land or any interest therein shall be effective unless the same be approved by two successive legislatures by a two-thirds vote of the entire membership of each house and by the Governor. AM. SAMOA REV. CONST. art. I, § 3.

an improver to act in good faith. *See, e.g.*, *Roberts v. Sesepasara*, 8 A.S.R.2d 124, 128-33 (Trial Div. 1988) (defining "good faith improver" as "someone who builds a house or some other permanent improvement on real property in the honest but erroneous belief that he is the owner" and awarding compensation to one such good faith improver to prevent unjust enrichment). "A good faith possessor must have a reasonable belief that he holds valid title to the property." *Am. Samoa Gov't v. Estate of Fuimaono Tuinanau*, 29 A.S.R.2d 114, 115 (Land & Titles Div. 1995). Here, as detailed above, Defendants did not have a reasonable belief that they owned the Land because this belief was based on Exhibit 1, which is void as a matter of law. We are not prepared to extend unjust enrichment to improvements made pursuant to an agreement in violation of the law of the Territory.[10]

For these reasons, we deny Defendants' request for relief on the basis of equity. **[**14**]**

Conclusion

In sum, we hold that Defendants' claim to either ownership of the Land or an irrevocable license to the use the Land, is entirely unfounded. Defendants' use of the Land is permissive and that permission has been revoked by Plaintiff and his family. Plaintiff and his family are entitled to possession of the Land.

Order

Plaintiff is entitled to possession of the Land.

Defendants shall vacate the Land within 60 days of date hereof.

It is so ordered.

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[10] In any event, Defendants failed to provide the Court with any evidence of economic value of any remaining improvements on the land such as would sustain an equitable compensation award to a good faith improver.

SLIP OPINIONS

OF THE

FAMILY DRUG AND ALCOHOL DIVISION

OF THE

HIGH COURT OF AMERICAN SAMOA

(2014)

Cite As: *Hart v. Hart*, FDADR No. 02-14 & DR No. 31-14 at [page number] (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody)

JANICE HART, Petitioner/Counter-Respondent,

v.

ERIC NOAH HART, Respondent/Counter-Petitioner.

High Court of American Samoa
Family Drug and Alcohol Division

FDADR No. 02-14[1]
DR No. 31-14

September 9, 2014

[1] The Trial Division lacks the authority to issue interim orders pertaining to child custody and support before a petition for divorce, separation, or annulment is granted.

[2] While the Trial Division is granted jurisdiction under the Juvenile Justice Act, A.S.C.A. §§ 45.0101 et seq., to determine the legal custody of any child who comes within the Court's jurisdiction under provisions of A.S.C.A. § 45.0115, custody determinations under this enactment pertain only to children who are delinquent, in need of supervision, neglected or dependent within the meaning of A.S.C.A. § 45.0103.

[3] The Trial Division is empowered under the Domestic and Family Violence Act, A.S.C.A. §§ 47.0101 et seq., to make custody determinations; however, such grant of authority concerns only situations where domestic or family violence has occurred. *See* A.S.C.A. § 47.0302.

[4] With the enactment of the Family, Drug and Alcohol Court Act, A.S.C.A. §§ 3.0501 et seq., the *Fono* not only established the Family, Drug and Alcohol Division of the High Court, but vested this division with the authority to address all matters affecting families, from juvenile offenses to domestic violence and adoptions to divorce and child support. This broad grant of jurisdiction clearly authorizes the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendente lite* concerning child custody and support.

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[1] Case number in original filed decision erroneously reported as "FDA 01-14."

[5] In American Samoa, married parents have joint custody of their minor children unless and until a court orders otherwise.

[6] Under the Domestic and Family Violence Act, a determination by the Court that domestic or family violence occurred raises a presumption of fitness against the perpetrator(s).

Before KRUSE, Chief Justice and FA'AMAUSILI, Associate Judge

Counsel: For Petitioner, Sharron I. Rancourt
For Respondent, Richard Desaulles

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION AND INTERIM ORDER ON CUSTODY

Petitioner Janice Hart moves this Court for a preliminary injunction pending the outcome of her divorce from her husband, Respondent Eric Noah Hart. The requested orders primarily pertain to the custody and support of the parties' minor child (the "Minor"). The Court held an evidentiary hearing on Petitioner's request on September 2, 2014 and heard closing arguments on September 5, 2014. For the reasons set forth below, we deny Petitioner's request for a preliminary injunction and issue alternative interim orders on child custody.

Jurisdiction

[1] On September 2, 2014, the Court requested supplemental briefing from the parties addressing the apparent conflict between *Tuiolosega v. Tuiolosega*, DR No. 07-14 (Trial Div. Apr. 4, 2014) (order denying application for temporary orders of custody, support and maintenance and order to show cause) and *Sesepasara v. Sesepasara*, 21 A.S.R.2d 71 (Trial Div. 1992) (denying divorce petition but determining child custody and support). Under the Domestic Relations Act, A.S.C.A. §§ 42.0101 et seq., the Trial Division may grant orders for maintenance or custody of minor children "when the divorce, separation or annulment is granted." A.S.C.A. §§ 42.0209, 42.0210. The plain language of this statute does not provide jurisdiction for such ancillary orders while a petition is pending. By clear implication, the Trial Division lacks the authority to issue interim orders pertaining to child custody and support before a petition for divorce, separation, or annulment is granted.

Other courts, notwithstanding statutes to the contrary, have invoked their "inherent" authority in equity to issue such interim orders, *see, e.g.*, *Sesepasara*, 21 A.S.R.2d at 74-5; *Atwood v. Atwood*, 39 N.W.2d 103, 105 (Minn. 1949), reasoning that resort to this authority was necessary to address "immediate problem[s] which would otherwise fall into a

jurisdictional no-man's land." *Sovereign v. Sovereign*, 92 N.W.2d 585, 585 (Mich. 1958). The courts in these cases trace the source of their authority in equity to the notion of *parens patriae*. *See Atwood*, 39 N.W.2d at 105. While invoking this authority interstitially, the courts seem to only exercise their equitable authority under certain circumstances: if there would be no other way for custody issues to be decided or if it would be more efficient to decide the matter of child custody in a divorce action rather than a separate proceeding. *See id.*, at 106.

[2-3] Here, it does seem, given the posture of these proceedings, that the matter is in somewhat of a jurisdictional no-man's land. While the Trial Division is elsewhere granted jurisdiction under the Juvenile Justice Act, A.S.C.A. §§ 45.0101 et seq., "to determine the legal custody of any child . . . who comes within the Court's jurisdiction under provisions of [A.S.C.A. § 45.0115]," custody determinations under this enactment pertain only to children who are delinquent, in need of supervision, neglected or dependent within the meaning of A.S.C.A. § 45.0103. At the same time, the Trial Division is also empowered under the Domestic and Family Violence Act, A.S.C.A. §§ 47.0101 et seq., to make custody determinations; however, such grant of authority concerns only situations where domestic or family violence has occurred. *See* A.S.C.A. § 47.0302.

[4] Fortunately, in American Samoa there is a way to avoid the "jurisdictional no-man's land" dilemma without having to contravene the plain and clearly delimiting language of the Domestic Relations Act. That is, with the enactment of the Family, Drug and Alcohol Court Act, A.S.C.A. §§ 3.0501 et seq., the *Fono* not only established the Family, Drug and Alcohol Division of the High Court, but vested this division with the authority "to comprehensively address all matters affecting families, from juvenile offenses to domestic violence and adoptions to divorce and child support." This broad grant of jurisdiction clearly authorizes the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendente lite* concerning child custody and support.

At the hearing on September 5, 2014, therefore, the Chief Justice, as "Chief Justice," exercised his authority pursuant to A.S.C.A. § 3.0502 to transfer this domestic relations action to the Family, Drug and Alcohol Division and consolidate the divorce action with a pending Family, Drug and Alcohol Division case between the parties.

Standard of Review

> A preliminary injunction may be issued by a court having subject matter jurisdiction of the case and personal jurisdiction of the opposing party only after: (1) there has been a hearing in which sufficient grounds for the issuance of a preliminary injunction has been established by a preponderance of the evidence adduced . . . .

A.S.C.A. § 43.1303(a).

> "Sufficient grounds for the issuance of a preliminary injunction" means: (1) there is a substantial likelihood that the applicant will prevail at trial on the merits and that a permanent injunction will be issued against the opposing party; and (2) great or irreparable injury will result to the applicant before a full and final trial can be fairly held on whether a permanent injunction should issue.

A.S.C.A. § 43.1301(j).

[5-6] In American Samoa, married parents have joint custody of their minor children unless and until a court orders otherwise. When there is custody dispute, the Appellate Division has affirmed that both parents "start out on equal footing," *Tapeni v. Tapeni*, 6 A.S.R.3d 81, 84 (App. Div. 2002), and the trial court is to be guided by the "best interests of the child." *Id.* at 86. The *Fono* has, however, interposed certain rebuttable presumptions. Under the Domestic and Family Violence Act, a determination by the Court that domestic or family violence has occurred raises a presumption of fitness against the perpetrator(s). A.S.C.A. § 47.0301.

> "Domestic or family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense: (A) Attempting to cause or causing physical harm to another family or household member; (B) Placing a family or household member in fear of physical harm; or (C) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

A.S.C.A. § 47.0102(1).

Discussion

Here, Petitioner has failed to prove sufficient grounds for the issuance of a preliminary injunction and her request is, therefore, denied for lack of showing. We are not satisfied on the showing provided that domestic or

family violence occurred in the Hart household, prompting Petitioner to depart the Utulei marital home for a government shelter facility, and to unilaterally assume sole custody of the Minor to extent of removing him from the familiarity of the family home and school surroundings. Moreover, we are not persuaded by Petitioner's showing that Respondent physically harmed or attempted to harm any family or household member during the family's time in American Samoa. Additionally, the evidence was entirely bereft of any suggestion that Respondent was in any way a danger to the Minor's welfare.

Pending a fuller exposition of the facts by a trial on the merits, we find that the best interests of the Minor to preserving the status quo, and some sense of stability, with regard to his school and residential environs. Because the parties have joint legal custody of their child, one party does have the right to unilaterally determine drastic changes to the Minor's circumstances, such as abrupt changes in his school and where he lives without the consent of the other party. Therefore, the minor will continue to attend Matafao Elementary School, where he attended the previous school year, and live at the family home in Utulei, as opposed to the temporary location at the government shelter in Tafuna. Both parents are entitled to access to their son and ideally should have allowed one another access to their son since their separation. We find that it is in the best interests of the Minor to reside with Respondent in the family home in Utulei, provided that Petitioner has access to her son, including visitation at reasonable times.[2]

Orders

1. Petitioner's request for a preliminary injunction is DENIED.

2. The parties shall continue to have joint legal custody of the Minor.

3. The Minor shall be enrolled in and attend Matafao Elementary School.

4. The Minor shall reside with Respondent in the family home in Utulei.

[2] The parties had previously operated on the basis of an informal agreement which they had concluded between them with the assistance of counsel. We urge the parties to revisit that agreement, or the spirit thereof, to ensure the Minor meaningful access to both of his parents.

5. The Minor shall have access to both of his parents. This access includes visitation with Petitioner at reasonable times.

It is so ordered.

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SUPPLEMENT

2013 SLIP OPINIONS

(PREVIOUSLY UNRELEASED)

Cite As: *Am. Samoa Gov't v. Bode*, CR No. 80-13 at [page number] (Trial Div. June 26, 2013) (order den. def.'s mot. to compel)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

COLIN BODE, Defendant.

High Court of American Samoa
Trial Division

CR No. 80-13

June 26, 2013

[1] Parties should make every effort to resolve discovery disputes before involving the court.

[2] The rules do not require a responding party to make copies of requested documents and hand them over to the requesting party; it is enough for the responding party to permit the defendant to inspect and copy the documents.

[3] Defendant's request to compel his written recorded statements and photographs was moot when the Government was willing to provide Defendant with all of the relevant documents in its possession.

[4] When defense counsel is equally able to obtain requested information from a third party, they should do so and not request the government to do so for them.

[5] When defense counsel could not identify how requested field testing results were material to Defendant's defense, the Court denied Defendant's request for the documents.

[6] The Court stated that defense counsel's request for victim statements in a drug possession case where there were no victims was farcical and could merit serious sanctions in the future.

[7] Neither T.C.R.Cr.P. 16 nor any other authority affords a criminal defendant a pre-trial right to discover a list of the prosecution's prospective witnesses in a non-capital case.

Before KRUSE, Chief Justice and FA`AMAUSILI, Associate Judge

Counsel: For Plaintiff, Julie Pasquale, Assistant Attorney General
For Defendant, Mark F. Ude

ORDER DENYING DEFENDANT'S MOTION TO COMPEL

Defendant Colin Bode ("Defendant"), charged with one count of Unlawful Possession of a Controlled Substance, to wit: methamphetamine, in violation A.S.C.A. §§ 13.1022(a) and 13.1009, moves to compel the government ("ASG") to disclose certain information outlined in his motion to compel. ASG contends it already provided Defendant with everything in its possession. For the reasons stated below, the motion is denied.

Discussion

[1-2] As an initial matter, it is important to note that parties should make every effort to resolve discovery disputes before involving the court. In response to Defendant's request for pre-trial discovery, ASG informed Defendant's counsel that he could inspect tangible evidence and conviction records of Defendant and witnesses by arrangement with the Department of Public Safety and further advised defendant's counsel that the case file was available to him for inspection. It is enough for the responding party to permit the defendant to inspect and copy the requested documents, as the rules do not require the responding party to make copies of the documents and hand them over to the requesting party. *See* T.C.R.Cr.P. 16.

[3] Defendant's counsel did not indicate that ASG subsequently refused to allow such an inspection. Moreover, it appears that ASG has already provided—or will provide—Defendant with all of the relevant documents in its possession. Therefore, Defendant's request to compel his written or recorded statements and photographs is moot at this time.

[4] Defendant also seeks the names of customs employees who were employed at Pago Pago International Airport in March 2013. The information requested is equally available to Defendant. Thus, it seems that Defendant's counsel wishes for ASG to retrieve such documents for him. ASG, however, is not the defense counsel's legal consultant or assistant. This request is denied.

[5] Defendant also seeks documents pertaining to the training certificates and documents for Captain Leuma who conducted the field testing on the seized material. Defense counsel however could not say how field test results, prima facie in evidentiary value as they are, were material to the Defendant's defense. Without more, we deny this request.

[6] Defendant seeks to compel production of all statements "made by the victim to the Police or other investigating officers in their conversations with the victim" and "all written statements made by the alleged victims, witnesses, or any other persons, whether signed or unsigned, which relate to this case." (Def. Motion to Compel, May 28, 2013.) This is a drug possession case and therefore there are no victims. When we inquired of defense counsel in open court as to who the victim was in this case, he responded the "people of American Samoa." This sort of request is farcical and will merit serious sanctions against counsel in the future.[1]

[7] Defendant seeks to compel production of ASG's witness list and all witness statements, written or recorded. However, neither the Trial Court Rules of Criminal Procedure 16 nor any other authority affords a criminal defendant a pre-trial right to discover a list of the prosecution's prospective witnesses in a non-capital case. U.S. CONST. amend. V; AM. SAMOA REV. CONST. art. I § 2; T.C.R.Cr.P. 16(a)(2); *Amer. Samoa Gov't v. Wilson*, 24 A.S.R.2d 26, 29 (Trial Div. 1993). With respect to witness statements, ASG is not obligated to provide the defense with such statements absent some showing that exculpatory evidence is being withheld. These requests are denied.

Defendant seeks to compel production of the police report, yet at the same time admits that a copy of the police report has already been provided to his counsel. This request for duplicative effort on the part of ASG is denied.

Order

Defendant's Motion to Compel is denied.

It is so ordered.

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[1] In viewing this request, along with the entire motion as a whole, it is quite obvious that defendant's counsel is recycling stock requests that are not specific to the instant case, which not only wastes the Court's time but raises questions as to whether this is a reasonable expenditure of defense counsel's time and effort.

Cite As: *Ve'ave'a v. Uhrle*, FDAJU No. 06-13, slip op. at [page number] (Dist. Ct. July 02, 2013) (op. & order)

SEMO VE'AVE'A, Petitioner,

v.

MARY UHRLE, Respondent.

High Court of American Samoa
Family Drug and Alcohol Division

FDAJU No. 06-13

July 02, 2013

[1] The Juvenile Justice Act of 1980, nor any other statutes relating to Guardianships, Reciprocal Enforcement of Child Support, Divorce or Illegitimate Children, provide a cause of action for a Petitioner who wishes to secure custody and protection of his child against the child's natural mother's family.

[2] Pursuant to the Family Drug and Alcohol Court Division Act, the Chief Justice has promulgated rules governing the issuance of Civil Protection Orders, and the Court has developed and published Forms of such Orders, Warnings, Applications, and Consent Agreements.

[3] Court lacked any clear remedy to apply to Petitioner's filing when Petitioner filed for a protective order against the child's natural mother but in reality sought to protect the child from abuse or neglect by the child's natural mother's family while the mother was outside the Territory.

[4] When it appears to any police officer that a child may be neglected and therefore subject to the Court's jurisdiction, the law enforcement officer or another person may refer the matter to the Court, which shall have a preliminary investigation made.

[5] In cases where a child suspected of being abused is taken into police custody, the Court and other appropriate agencies are required to be given immediate notice under A.S.C.A. §§ 45.2005 and 45.2017 so that child protective proceedings may be initiated.

[6] Mandatory arrests and reports to the Attorney General's Office prosecutors within 72 hours of law enforcement officers responding to

allegations of domestic violence are required pursuant to A.S.C.A. §§ 47.0602 and 47.0603.

[7] When the Court found that authorities failed to follow procedures set forth in the Juvenile Justice Act with respect to neglected or abused children, it referred the case to the Attorney General's Office so that a full investigation could be conducted and the appropriate action undertaken by ASG.

Before WARD, Associate Justice and SATELE, Associate Judge

Counsel: For Petitioner, Anne H. Wellborn

OPINION AND ORDER

This matter came on regularly before the Court on 10 June 2013 for a hearing on Petitioner's motion for the Court to issue protective orders concerning the custody of his 3 year old daughter. The Respondent, who is the natural mother of this 3 year old, resides off-island and has not been formally served with notice of the underlying Petition For Custody, Child Support and Visitation, filed on 25 January 2013. Petitioner appeared and testified at the hearing.

Background

Based upon the pleadings, testimony and other documents on file with the court in this matter and in related criminal cases, the following account of past events support Petitioner's motion. Petitioner and Respondent were never married but did co-habitat for slightly less than a year after **[**2**]** the child was born on 15 July 2009. After that period, Respondent and the child left and resided with Respondent's mother, sister, and other family members here in the Territory. Petitioner states he would visit the child, and have custody over her during weekends. Petitioner also testified he provided food, diapers, and money to Respondent and her family during this period for the child's needs. Approximately 2 years ago Respondent left island for the United States, leaving the parties' daughter with her family. Petitioner testified he continued to provide support for the child and would sometimes be allowed by Respondent's family to take the child to his home for brief visits. On or about 23 September 2012, Petition learned of allegations of physical abuse of his daughter by Respondent's family and filed a complaint with the Department of Public Safety ("D.P.S."). The D.P.S. Report, filed on 7 December 2012 with the D.P.S. Records Division, reveals that D.P.S. investigated the allegations of abuse, but did not refer the matter for prosecution because Petitioner did not wish to press charges; Petitioner simply wanted his daughter to be in his custody for her safety. The Report further noted the Respondent natural mother was

off-island and that Petitioner, who appears on the child's birth certificate as her natural father, has the right to take care of his daughter. The Report further adds the child was removed from the (maternal) **[**3**]** grandmother's home and was later released from police custody to Petitioner. D.P.S. then closed its case.

At a later date Petitioner was confronted by Respondent's mother and sister while out shopping, resulting in misdemeanor charges being filed against both females over this incident. Petitioner, prompted by rumors that Respondent might be returning to the Territory, filed the underlying Petition to have the Court decide which parent should have primary custody of the child and ancillary issues of support and visitation. The motion for protective orders stem from the Petitioner's apprehension that Respondent and her family may attempt to remove the child from his home and perhaps remove her from the Territory.

Discussion

[1] As conceded by Petition at the hearing, the Juvenile Justice Act of 1980 (A.S.C.A. § 45.0101 *et. seq*) does not specifically set forth a clear cause of action for Petitioner to pursue in these circumstances. Nor are other statutes relating to guardianships, reciprocal enforcement of child support, divorce or illegitimate children of much assistance. We assume this is why Petitioner has not opted for the only presently apparent avenue of seeking civil judicial relief via application for a protective order. **[**4**]**

[2] Pursuant to the Family Drug and Alcohol Court Division Act (A.S.C.A. §§ 3.0501 et seq.) the Chief Justice has promulgated rules governing the issuance of civil protection orders, and the Court has developed and published forms of such orders, warnings, applications, and consent agreements. [1]

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[1] The Family Drug and Alcohol Court Division Act ("F.D.A. Act") was approved by the Department of Interior before being reenacted into its present form. Under Section 4, Judicial Authority, of the United States Department of Interior Secretary's Order No. 2657:

> Laws or regulations bearing on the organization or operation of the judiciary shall be submitted to the Secretary of Interior for approval prior to promulgation.

Between the F.D.A. Act's original enactment as a temporary, sun-setted, measure and its later enactment as a permanent division of the High Court, the Legislature enacted Title 47, Domestic and Family Violence. Under Chapter 02, Title 47, "Civil Orders for Protection," a separate provision for protective orders, was established, replete with

[3] In the present matter, however, Petitioner does not seek on his child's behalf, protection from any domestic violence attributable to the Respondent, the child's mother. The child's abuse or neglect alleged by Petitioner is limited to Respondent's mother, siblings or other members of Respondent's family, occurring while Respondent was residing outside of the Territory. The grounds necessary for the Court to issue either a temporary or permanent civil protection against Respondent have not been established. **[**5**]**

Petitioner is the natural father of the minor child who is in his legal custody. Petitioner's parental rights and authority over the child, as articulated under the Juvenile Justice Act of 1980, may be responsibly discharged without interference until or unless the Respondent herein returns to the Territory, or otherwise asserts her parental rights. As to additional judicial relief addressing Petitioner's concerns over future events or contingencies, this Court presently lacks any clear remedy to apply to Petitioner's filing.

[4-6] The statutes of the Territory discussed above, present no clear avenue of relief for any current private action by Petitioner. What is clear from the record, however, are that the police powers set forth in the Juvenile Justice Act and under Title 47, with respect to neglected or abused children were not followed. When it appears to any police officer that a child may be neglected and therefore subject to the Court's jurisdiction, ". . . the law enforcement officer or other person may refer the matter to the Court which shall have a preliminary investigation made . . . ." A.S.C.A. § 45.0302. Further, in cases where a child suspected of being abused is taken into police custody, the Court and other appropriate agencies are required to be given immediate notice under A.S.C.A. §§ 45.2005 and 45.2017 so that child protective proceedings may be initiated. In addition, mandatory arrests and reports thereof to the **[**6**]** Attorney General's Office prosecutors within 72 hours of law enforcement officers responding to allegations of domestic violence are required pursuant to A.S.C.A. §§ 47.0602 and 47.0603.

In this matter, the D.P.S. Report reveals no substantial compliance with any of the applicable statutes. As a result, the Petitioner was left to his own devices to seek relief by bringing this action before the Court.

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detailed duties and extraordinary powers being assigned to the Court. This Court has never been presented with a petition for a protective order under Title 47, and, in the absence of any clear indication that the Secretary of Interior has granted approval for the Court to operate thereunder, must confine its actions concerning civil protection orders to approved statutory authority provided under the F.D.A. Act and the rules adopted thereunder.

[7] To correct, now for then, what should have occurred when this matter was investigated by D.P.S., the Court hereby refers this matter to the Attorney General's Office, which may, upon notice to petitioner, request authority to review the court file herein. The American Samoa government ("ASG") has clear statutory duties with respect to neglected or abused children under the Juvenile Justice Act of 1980 and an affirmative duty to arrest and prosecute individuals engaging in domestic violence under both the F.D.A. Act and Title 47 A.S.C.A. (Title 47).[2] Petitioner and counsel may share information with the Attorney General's Office so that a full investigation may be conducted and the appropriate action(s) undertaken by ASG. Child Protective Services should also be alerted to this **[**7**]** situation so that any ongoing visitation issues may be addressed. This case will remain open in the event the Respondent returns to the Territory. Should circumstances develop that the application by Petitioner for an emergency Temporary civil Protection Order against the Respondent or any other person subject to such an order, is necessary, all required forms of available from the Clerk of Courts.

The Clerk of Courts shall cause a copy of this Opinion and Order to be served upon the Office of the Attorney General and a return of service to be filed with this case. Petitioner shall be serviced with a copy via counsel's court box.

So Ordered.

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[2] The Department of Public Safety, with the advice of the Attorney General may wish to review its existing practices with respect to such cases to ensure statutory compliance.

Cite As: *Am. Samoa Gov't v. Mulipola*, DCR No. 481-13 at [page number] (Dist. Ct. July 10, 2013) (notice of record of dismissal)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

MARK MULIPOLA, Defendant.

District Court of American Samoa

DCR 481-13

July 10, 2013

Before: WARD, District Court Judge

Counsel: For Plaintiff, Tony Graff, Assistant Attorney General
For Defendant, Sharron I. Rancourt

NOTICE OF RECORD OF DISMISSAL (A.S.C.A. § 47.0502)

Please take notice that pursuant to A.S.C.A. § 47.0502, the Court has reduced to writing a summary of its oral Bench Decision finding lack of probable cause to believe an A.S.C.A. Title 47 Domestic Violence crime was committed. The order binding over the defendant on the underlying A.S.C.A. Title 46 felony Assault in the First Degree reflected this finding and are contained the attached summary outlining the reasons therefore as required by A.S.C.A. § 47.0502.

Summary of Oral Bench Ruling 3 July '13
P.X. Hearing, ASG v. Mulipola DCR 481-13

The Court found that the government failed to demonstrate probable cause that a "crime involving domestic or family violence" pursuant to A.S.C.A. § 47.0401 was charged or proven under Count 1 of the Complaint. A summary of the grounds orally cited in that Bench Decision are:

1. Assault in the 1st Degree is a criminal offense codified under Title 46, A.S.C.A. § 46.3520.
2. Pursuant to A.S.C.A. § 46.1901, for an offense defined outside of Title 46, the term of imprisonment or the fine is that in the statute defining the offense.
3. Title 47 defines a distinct crime, (outside of Title 46), and provides specific punishment therefore under A.S.C.A. §

47.0402 of a mandatory fine of $150.

4. Under A.S.C.A. § 47.03103, the "crime involving domestic or family violence" defined in A.S.C.A. § 47.0401, punishable only by a fine, becomes an infraction, which needs to be separately charged and proven under its Title 47 definition, specified criminal proceedings, and punishment established therein.
5. Under A.S.C.A. § 47.0401, a crime involving domestic or family violence occurs when a household or family member commits one or more of the listed categories of "crimes" against another family or household member. None of the "crimes" categories referenced by statute or by other designation demonstrate that these categories of "crimes" are those set forth, defined, and for which punishment is established under Title 46 A.S.C.A.
6. Under A.S.C.A. § 46.3107, a person whose conduct may establish the commission of more than one offense, he may be charged with each applicable offense, but may not be convicted if inconsistent findings of fact are required for each, or if the charges differ only as to prohibit a course of conduct generally, versus a specific instance of that conduct. Nothing in this section authorizes charging a defendant with a single "hybrid" felony comprised of a Title 46 felony and a Title 47 infraction.
7. Other conflicts between these separate A.S.C.A. titles addressed orally.

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Cite As: *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 at [page number] (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

IETI NAUFA'AMU, Defendant.

District Court of American Samoa

DCR 421-13

July 18, 2013

[1] Under A.S.C.A. § 47.0402, the mandatory fine for a domestic or family violence crime conviction of $150.00 is paid to the court.

[2] The Court may use up to one-third of the fines under A.S.C.A. § 47.0402 to off-set its costs of collection and deposit as well as to cover filing fee waivers costs and preparation costs of forms required under Title 47 A.S.C.A. The balance of the fines, after such authorized Court costs are subtracted, are deposited quarterly in the A.S.G. General Fund and earmarked for victim services, training, a batterer's counseling program, and other uses.

[3] A.S.C.A. § 47.0102 applies to all of the chapters in Title 47 even though it restricts the applications of the definitions to "[a]s used in this chapter." This appears to have been an oversight or misprint, because the definitions are used throughout the remaining chapters of this Title.

[4] The list of the "crimes within the crime" presented in Section 47.0401(a) sets forth broad categories of criminal behavior and does not reference or identify the corresponding Title 46 crimes; however, the Court presumes the Legislature when listing these "crimes" intended Title 46 crimes to be the "crimes" within the crime of domestic and family violence.

[5] When Title 46—Criminal Justice—was enacted in 1979, it not only codified the bulk of the Territory's criminal offense and infraction statutes in that Title, but also established how criminal offense and infraction statutes established under different titles of A.S.C.A. were to be classified and charged, as well as how much cases were to be adjudicated and the punishment for violations imposed.

[6] Because the Legislature did not amend or provided exemption from the controlling Title 46 criminal law sections when enacting Title 47 in 2004, the Court must assume the crime of domestic or family violence established therein was intended to be subject to the Title 46 provisions.

[7] Pursuant to A.S.C.A. § 46.1901, every person found guilty of an offense, whether set forth in Title 46 or elsewhere in the A.S.C.A., shall be sentenced under the provisions of Title 46, except that for offenses established outside of Title 46, the term of imprisonment or fine that may be imposed is that set forth in that separate statute.

[8] An offense defined in a statute outside of Title 46 is an infraction if no punishment other than a fine is imposed.

[9] When sentencing a person found guilty of committing an infraction, the Court has the sentencing options of imposing a fine, suspending the imposition or execution of a sentence to pay a fine and place the person on probation, with a separate option of requiring the person to perform ordinary labor.

[10] Crime defined in Title 47 is an infraction that although dependent upon committing another crime as an element is separately punishable only by a mandatory minimum fine.

[11] The Court denied Defendant's motion to defer in part the mandatory imposition of the $150.00 fine for his Title 47 crime because the Legislature specifically set forth how infraction fine proceeds are to be applied or deposited in A.S.C.A. § 47.0402.

Before: WARD, District Court Judge

Counsel: For Plaintiff, Lorna C. Meredith, Assistant Attorney General,
Masaya Uchino, Assistant Attorney General
For Defendant, Karen Shelly, Assistant Public Defender

ORDER DENYING MOTION TO REDUCE FINE

This matter came on regularly for hearing on July 18, 2013 upon motion by the Defendant. Raised therein was Defendant's request to have the Court off-set the mandatory fine requirement under A.S.C.A. § 47.0402 by giving credit for some or all of the counseling fees Defendant will be required to pay.

Background

Defendant was charged with Assault in the Third Degree (A.S.C.A. § 46.3522(a)(1)) and Endangering the Welfare of a Child (A.S.C.A. § 46.3810(a)(1)), on May 30, 2013. Both are Class A misdemeanors. On

July 2, 2013, the Government and Defendant announced a plea agreement under which Defendant would enter a plea of guilty to an amended lesser charge of Assault in the third degree, a Class C misdemeanor, charged as a Domestic **[**2**]** Violence crime under Title 47 of the A.S.C.A. The Court accepted the plea and on the issue of crediting the counseling fees against the mandatory fine of $150.00 imposed in Domestic Violence crimes, requested briefing. Both the Government and Defendant acknowledge that the only batterers counseling program available within the Territory is provided by Catholic Social Services for which a $95.00 fee is required for participants.

[1-2] Under A.S.C.A. § 47.0402 the mandatory fine for a domestic or family violence crime conviction of $150.00 is paid to the court. The Court may use up to one-third of such fines to off-set its costs of collection and deposit as well as to cover filing fee waivers costs and preparation costs of forms required under Title 47 of the A.S.C.A. The balance of the fines, after such authorized Court costs are subtracted, are deposited quarterly in the A.S.G. General Fund and earmarked for victim services, training, a batterer's counseling program, and other uses. The Court has collected such fines in the past and deposited them as required by law, but the Department of Human and Social Services has not as yet developed a non-fee batterer's counseling program.

In the past this Court has deferred, in whole or part, fines imposed upon conviction for those persons ordered to attend other fee-based Catholic Social Services programs such as Family Counseling or Alcohol Counseling, as part of their **[**3**]** conditions of probation; most of those instances were for convictions of misdemeanor offenses under Title 46 Criminal Justice, A.S.C.A. In this matter the authority of the Court to defer all or part of the fine imposed upon the Defendant in return for paying fees and attending counseling is less clear.

Discussion Statutory Construction

[3] Title 47 consists of 8 Chapters providing civil remedies, criminal sanctions, and government policies and programs addressing domestic or family violence. Apparently because this separate Title of the American Samoa Code Annotated was intended to address all aspects of such violence, the definitions of 'domestic or family violence' and 'family or household members' contained in Chapter 1 of this Title were cast in terms broad enough to apply to all of the following chapters dealing with separate aspects, remedies, punishment, and programs to prevent such violence. [1] Although A.S.C.A. § 47.0102 Definitions, restricts the

[1] This section and other sections of Title 47, A.S.C.A. footnoted herein are set forth at length in the attached appendix.

applications of the definitions to "[a]s used in this chapter", this appears to have been an oversight or misprint, because the definitions are used throughout the remaining chapters of this Title. Chapter 04 Criminal Violations, of Title 47 defines a "crime involving **[**4**]** domestic of family violence" at Section 47.0401.[2] Section 47.0402 addresses the mandatory minimum fine of $150.00 (discussed above) imposed upon all persons convicted of such a crime.

The essential elements of a Title 47 crime may therefore be reduced to:

> Any family or household member not acting in self-defense who attempts to cause or cause physical harm to a family or household member, or places such in fear of physical harm, or causes such person by force, threats thereof, or duress, to engage in sexual activity and commits or one or more of the crimes listed in Section 47.0401(a), against a family or household member, is guilty of a crime of domestic or family violence, punishable by a mandatory minimum fine of $150.00.

[4] The list of the "crimes within the crime" presented in Section 47.0401(a) sets forth broad categories of criminal behavior. Neither the classes within, nor the elements of, these "crimes" are provided. Although the Legislature previously enacted The Criminal Justice Act of 1979, Title 46 Criminal Justice, A.S.C.A. which defined, classified, prohibited, and provided punishment for, specific criminal behavior, the list of "crimes" within Title 47, Section **[**5**]** 47.0401(a) A.S.C.A. does not reference or identify the corresponding Title 46 crimes. For purposes of considering this motion, the Court presumes the Legislature when listing these "crimes" intended Title 46 crimes to be the "crimes" within the crime of domestic and family violence.[3]

[5-9] When Title 46—Criminal Justice, A.S.C.A. was enacted in 1979, it not only codified the bulk of the Territory's criminal offense and infraction statutes in that Title, but also established how criminal offense and infraction statutes established under different Titles of A.S.C.A. were to be classified and charged, as well as how much cases were to be adjudicated and the punishment for violations imposed. Because the Legislature did not amend or provided exemption from these controlling,

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[2] See Appendix.

[3] Whether the list of "crimes" in Section 47.0401(a) "define criminal activity" or "present fair warning" *Am. Samoa Gov't v. Satele*, CR No. 66-09 (Trial Div. Sept. 2009) (order rejecting plea agreement), or if referencing specific crimes in Title 46 A.S.C.A. required such statutory language be set forth a length pursuant to the Revised Constitution of American Samoa, article II, section 17, is beyond the scope of this motion and not addressed herein.

Title 46 criminal law sections when enacting Title 47 in 2004, the Court must assume the crime of domestic or family violence established therein was intended to be subject to those Title 46 provisions. Pursuant to A.S.C.A. § 46.1901 General Sentencing Provisions, every person found guilty of an offense, whether set forth in Title 46 or elsewhere in the A.S.C.A., shall be sentenced under the provisions of Title 46, **[**6**]** except that for offenses established *outside* of Title 46, the term of imprisonment or fine that may be imposed is that set forth in that separate statute. Under A.S.C.A. § 46.3103, an offense defined in a statute outside of Title 46 is an infraction if no punishment other than a fine is imposed therein. The Court, when sentencing a person found guilty of committing an infraction has the sentencing options of imposing a fine, suspending the imposition or execution of a sentence to pay a fine and place the person on probation, with a separate option of requiring the person to perform ordinary labor. A.S.C.A. § 46.1903.

Application

[10] Under the applicable statutes it appears the crime defined in Title 47 is an infraction that although dependent upon committing another crime as an element thereof, is separately punishable only by a mandatory minimum fine. In this case, the defendant was originally charged with two misdemeanor offenses under Title 46: Assault in the third degree, a Class A misdemeanor under A.S.C.A. § 46.3522(a)(1); and Endangering the welfare of a child, a Class A misdemeanor under A.S.C.A. § 46.3810(a)(1). At the pre-trial hearing the government, pursuant to a plea agreement with the defendant, moved to amend the charges against defendant to a domestic violence crime of Assault in the third degree as a Class C misdemeanor and dismiss **[**7**]** the remaining Title 46 misdemeanors. The Court then went through the entire plea agreement litany with the Defendant. At the allocution stage of that process, the Defendant acknowledged that he had knowingly slapped his niece to discipline her.

At this stage of the proceedings the Court was satisfied the essential elements of the Title 47 crime had been established and Defendant's plea of guilty was knowingly, voluntarily, and intelligently made, and so declared.[4] Being presented, by way of plea agreement and motion with what appeared to be this Court's first purely Title 47 conviction, the Court continued the sentencing of the Defendant allowing counsel to brief their opinions as to whether the mandatory minimum fine for that

[4] The government has adopted an approach of charging defendants in a single count of a complaint or information both with violating a Title 46 felony or misdemeanor charge and with the Title 47 infraction charge. For reasons set forth above and in other decisions of this court, such a hybridization of charges is suspect under the laws of this Territory.

offense could lawfully be diminished if the Defendant, as a condition of probation was ordered to attend and pay for a batterer's counseling program.

Positions of the Parties

[11] Defendant argues that the Court may and should decrease the fine because the government has not established a non-fee counseling program as funded by the mandatory fines. The Government's position is more nuanced, stating, essentially, that the Court could diminish the fine to the extent that the **[**8**]** net fine proceeds earmarked for deposit and distribution to agencies of government were not affected. Although each of these positions acknowledge that a defendant being assessed a fine designed in part to fund an unavailable government service requires fairness considerations in sentencing, the statute enacted by the Legislature specifically sets forth how the fine proceeds are to be applied or deposited. Up to one-third of such fines collected may be used by the Court to off-set administrative costs, non-fee filings, and costs of mandated forms. The balance must be deposited in the A.S.G. General Fund earmarked for the victims of crime advocacy program. A.S.C.A. § 47.0402. The clear meaning of this statute is that the Court may use up to one-third of these funds, but only for the cost offsetting purposes specified therein. All remaining funds are then deposited in the General Fund. The proposed, "use" of these funds via a suspended portion of the fine for attending fee-based batterer's counseling would amount to an unauthorized court cost being imposed and the illegal reduction of the deposit of the earmarked funds in the General Fund.

Conclusion

A person convicted of a Title 47, crime of domestic or family violence is required to pay the mandatory minimum fine of $150.00 to the court. After subtracting up to one-third of this fine for costs permitted under the statute the balance must be **[**9**]** deposited in the A.S.G. General Fund. The Court is precluded from otherwise indirectly using or reducing these fines. For reasons set forth above, Defendant's motion to defer in part the mandatory imposition of the $150.00 fine for this Title 47 crime is therefore denied.

So Ordered.

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Cite As: *Ma'ataua v. Puia'i*, MT No. 05-11 at [page number] (Land & Titles Div. Aug. 29, 2013) (order)

MA`ATAUA UIVA TE`O, Claimant,

v.

PUIA`I TUFELE, Objector.

[In re *Matai* Title "TE`O" of the Village of Pago Pago]

High Court of American Samoa
Land and Titles Division

MT No. 05-11

August 29, 2013

[1] A Samoan family must at first instance convene to meaningfully consider the selection of a successor *matai* in accordance with the traditions the family. It is only after the family has had the opportunity to do so that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., can be invoked and, in the event of an unresolved dispute, the Land and Titles Division can assert subject matter jurisdiction.

[2] Family preference, as expressed in terms of the weight of clan opinion, is the second weightiest criterion for the court to consider in determining a disputed *matai* case.

[3] When the parties only offer hearsay and other self-serving testimony that does not include details of any family meetings on the issue, an informed and substantially based finding on prior meaningful family meetings, such as would provide support for the Court asserting subject matter jurisdiction, cannot be made.

[4] Under A.S.C.A. § 3.0242(b), the Land and Titles Division is accorded the procedural flexibility to "act in each case in such manner as it considers to be most consistent with natural justice and convenience."

[5] When the record is not substantially based to warrant a finding of prior meaningful family meetings, the Court may give the parties the benefit of the doubt and find that the extent of the record before it is not so much the product of the absence of evidence, but rather the absence of effort to make a substantially based record.

Before KRUSE, Chief Justice; SU`APAIA, Associate Judge; FA`AMAUSILI, Associate Judge; SATELE, Associate Judge; and MUASAU, Associate Judge

Counsel: For Claimant, Tauivi M. Tuinei
For Objector, Sharron I. Rancourt

ORDER

Background

This matter concerns the *matai* title Te`o attached to the village of Pago Pago. On August 6, 2010, claimant Ma`ataua Uiva Te`o ("Ma`ataua") offered the *matai* title Te`o for registration with the Territorial Registrar, pursuant to A.S.C.A. § 1.0405. Ma`ataua's claim attracted the timely objection of Puia`i Tufele ("Puia`i)--and hence his counter-claim under A.S.C.A. § 1.0407--which he filed with the Territorial Registrar on October 8, 2010. The Territorial Registrar then referred the matter to the Office of Samoan Affairs ("OSA") pursuant to A.S.C.A. § 43.0302, requiring the parties to attend to "attempt . . . to resolve the controversy" before the Secretary of Samoan Affairs. The OSA meetings were held, but these efforts were to no avail. **[**2**]** Consequently, the Secretary issued a "certificate of irreconcilable dispute," A.S.C.A. § 43.0302, dated September 7, 2011, referring the matter for determination by the Land and Titles Division. A.S.C.A. § 1.0409.

On November 22, 2011, the Clerk of Courts accordingly docketed the matter and duly notified the parties in accordance with T.C.R.L.T. Rule 3 to file their Questionnaire response within 30 days. The Clerk's file reveals that Puia`i promptly filed his Questionnaire responses *pro se* on November 22, 2011, while Ma`ataua did not until June 14, 2013, only just prior to trial. Apparently after his offering the Te`o title for registration, Ma`ataua took an unannounced and extended off-island leave of absence for mission work in a remote and hard to reach location.[1] Following a number of agitated attempts by Puia`i to move this matter for trial, the case was finally tried on July 2, 2013, after Ma`ataua's hasty return to the Territory, and after his newly hired counsel asked for one more continuance to prepare for trial. After hearing the evidence, we directed final arguments in writing, which have

[1] A prior registration effort by Ma`ataua in 2004, culminating in *In Re Matai Title Te`o (Ma`ataua v. Tuliau*, MT No. 03-04 (Trial Div. Oct. 5, 2007) (order for dismissal), was dismissed by this Court for failure "to diligently prosecute." Not unlike the scenario before us, Ma`ataua's failure to prosecute entailed another earlier and extended off-island mission absence from the Territory.

now been filed.

Discussion

Jurisdiction

[1] The Appellate Division's recent decision handed down in **[**3**]** *Leautu v. Nu'utai*, AP No. 11-11, slip op. at 6, (Land & Titles Div. Aug. 7, 2013) (op. & order), made clear that a Samoan family must at first instance convene to meaningfully consider the selection of a successor *matai* in accordance with the traditions the family. It is only after the family has had the opportunity to do so that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., can be invoked and, in the event of an unresolved dispute, the Land and Titles Division can assert subject matter jurisdiction. *Id*.

[2] After considering the evidence and the arguments of counsel, we find the record here to be scant and wanting in evidence on the question of prior and meaningful family meetings. Even though family preference, as expressed in terms of the weight of clan opinion, is the second most weighty criterion for the court to consider in determining a disputed *matai* case, the parties here have both been rather lackadaisical in showing details of family meetings, if any, and also the threshold matter of clan definition and family make up. *See* A.S.C.A. § 1.0409(c)(2) From their respective responses to the Questionnaire filed and testimony at trial, the best that can be said about a Section 1.0409(c)(2) inquiry is that the parties were all at sea on this factor.

With regard to family meetings, Ma`ataua's testimony refers to his being selected at a certain family meeting or meetings which, as he admits, he did not attend owing to his being called away on a church mission. In a desperate attempt to get around **[**4**]** this crucial detail, which is hearsay, Ma`ataua's counsel attempted to amplify the record by introducing a copy of his client's self-serving letter to the Territorial Registrar, in which Ma`ataua claimed that he was selected as the Te`o in three family meetings. Counsel sought to move this writing onto the record as a "business record," simply because the writing was certified as having been found at and retrieved from the Territorial Registrar's Office. Moreover, and to add to the futility of the exercise, counsel attempted this under the guise of cross-examining an uncooperative and obdurate Puia`i, who apparently attended the meeting(s) but who adamantly refused to corroborate upon cross-examination any of his opponent's hearsay claims of being selected as titleholder at "three" meetings of the family.

While Puia`i could, on other hand, competently testify about a meeting or meetings which he had personally attended, including those he made

preparations for in the way of providing notices in the paper as well as the tents and chairs that were used for the meetings, it also became apparent to us that Puia`i was indiscriminately referencing meetings that preceded the abortive 2004 proceeding, which was subsequently dismissed by this court for lack of prosecution. *See, supra*, note 1.

[3-5] Thus, an informed and substantially based finding on prior meaningful family meetings, such as would provide support for our asserting subject matter jurisdiction, cannot be made on the extent of the record before us. However, having said as much, we **[**5**]** do not think that dismissal for want of subject matter jurisdiction under *Leautu*, is necessary at this point if the parties are given another opportunity revisit and perhaps amplify the record on the issue of prior meaningful family meetings. Under A.S.C.A. § 3.0242(b), the Land and Titles Division is accorded the procedural flexibility to "act in each case in such manner as it considers to be most consistent with natural justice and convenience." Here, although the record before us is not substantially based to warrant a finding of prior meaningful family meetings, we are prepared at this point in time to give the parties the benefit of the doubt and find that the extent of the record before us is not so much the product of the absence of evidence, but rather the absence of effort to make a substantially based record. Given the checkered and drawn out history of this succession dispute and the equally extended *matai* vacancy that has befallen the Te`o family, we feel it consistent with the interests of natural justice and convenience to keep the record open for one more amplification opportunity to show whether prior meaningful family attempts at selecting a *matai* had in fact occurred.

Order

For reasons discussed, the following order will be entered: The parties shall within the next 14 days meet with the Clerk of Courts to set a further hearing date for purposes of taking evidence consistent herewith. Otherwise, dismissal without prejudice, for want to subject matter jurisdiction, will be **[**6**]** inevitable.

It is so ordered.

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DIGEST OF CASES REPORTED

ADMINISTRATIVE LAW

Administrative Agencies, Officers and Agents[1]

Powers and Proceedings of Administrative Agencies, Officers, and Agents[2]

Neither of these provisions precludes the High Court from exercising concurrent jurisdiction with the Office of the Administrative Law Judge over wage and hour claims brought concomitant to other causes of action within the exclusive original jurisdiction of the High Court. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

A.S.C.A. § 4.0604(d) does not expressly grant the Office of the Administrative Law Judge ("OALJ") exclusive original jurisdiction over wage and hour claims, and A.S.C.A. § 32.0341 states that wage and hour claims may be brought before the OALJ. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

The Legislature provided for the oversight of the Chief Procurement Officer by the Governor and for the Governor's issuance of executive orders concerning government procurement and for civil penalties against government employees or persons other than employees who violate the Act or Rules. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

A.S.A.C. § 10.0201 allows the Chief Procurement Officer to delegate his authority to a procurement officer responsible for administering procurement for a particular agency or governmental body. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

A.S.A.C. § 10.0250(b) requires a contractor submitting a bid for a competitive government construction contract to include bid security by way of certified check, cash or bid bond from an approved surety company in an amount equal to at least 5% of the bid. *Am. Samoa*

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[1] *See* ADMINISTRATIVE LAW—Powers and Proceedings of Administrative Agencies, Officers, and Agents

[2] *See* ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

Gov't. v. Whitehorn Constr., Inc., AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

A.S.A.C. § 10.0282 provides for the resolution of disputes between contractors and A.S.G. concerning a procurement officer's decision in four specified categories, all four of which are set forth in other sections of the procurement rules: Source selection; Mistake-in-bidding; Contract interpretation; and Termination for convenience or default. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

A.S.A.C. § 10.0282 sets forth the procedures for a contractor to file a dispute and strict time constraints for the procurement officer who made the original decision to issue a final decision. An appeal of that final decision is timely pursued by filing a written appeal to the Governor, who then appoints at least three qualified and neutral members to an appeals board to hear the dispute pursuant to the hearing procedures and documentation requirements of the A.P.A. and make a recommendation to the Governor. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

Under the A.L.J. Act, A.S.C.A. § 4.0604(f), the Office of the A.L.J. was conferred jurisdiction to conduct hearings and issue decisions concerning appeals of the procurement officer's final decision in a procurement bidding dispute and the Governor's authority to appoint a three member board to hear disputes of matters pertaining to procurement disputes was repealed. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

Reviewing the applicable statutes and administrative rules and considering the Separation of Powers Doctrine, the court found that the Legislature's reference of Rule 10.0282 in A.S.C.A. § 4.0604 (f) strongly indicated that the *Fono* intended that the entirety of this specially tailored Executive Branch procurement dispute resolution process remain intact except for substituting the A.L.J. in the role formerly discharged by the Governor-appointed appeals board. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

The statutory language in A.S.C.A. § 4.0604(f), fairly construed, simply substituted the A.L.J. for the previously existing appeals board appointed by the Governor on an ad hoc basis whenever a procurement dispute had been timely appealed to the Governor for a final decision. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

Simply stated, the administrative remedies for resolving government procurement disputes pursuant to A.S.A.C. § 10.0282 are not exhausted until the Governor takes appropriate action. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

The court held that a petition for judicial review was premature and it lacked jurisdiction to grant immediate judicial review when a procurement dispute was administratively incomplete. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

Judicial Review of Administrative Decisions

In general, when a party must exhaust administrative remedies before he or she may file suit before the Court, the limitations period will be tolled during administrative proceedings. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

Where a party seeks to toll the statute of limitations after originally filing in a tribunal that lacked jurisdiction over the action, equitable tolling principles will still apply if the first tribunal's jurisdiction was "unclear" at the time of filing. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

The High Court may not substitute its judgment for that of an agency as to the weight of evidence on questions of fact, and must afford appropriate weight to the agency's experience, technical competence, and specialized knowledge when reviewing the agency's interpretation of evidence, factual inferences, and conclusions of law. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

The Court may reverse or modify an agency's decision or remand it back for further proceedings upon deciding the substantial rights of the petitioner have been prejudiced because the agency's decision: (1) violated applicable constitutional or statutory provisions; (2) was in excess of the agency's statutory authority; (3) made upon unlawful procedure; (4) affected by other error of law; (5) was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or (6) was arbitrary, capricious or characterized by abuse of discretion. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Judicial review of final agency decisions under the A.P.A. are initiated by filing a petition with the High Court within 30 days from the issuance date of the agency decisions (initial or upon reconsideration). *Viena v.*

Am. Samoa Gov't, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Pursuant to A.C.R. 15, a petition for review of a final agency decision shall specify the parties seeking review, naming the agency that issued the order as the respondent, and specify the agency order or part thereof to be reviewed. , and provide the Clerk of Courts with a copy of the petition for each named respondent, which the clerk shall serve. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Under A.C.R. 15, within 20 days after service, the respondent shall file an answer to the petition. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Unless either party so requests the Court to further brief the issue or, by motion, seeks to supplement the record, the Court proceeds to the immediate review of the record after receiving respondent's answer. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

When plaintiff's counsel filed a "Notice of Appeal" instead of petition conforming to statute and rule, no answer had been filed, and both parties proceeded with briefs without notifying the Court, the briefs were stricken from the record and the Court confined its review to the administrative record filed in the case. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

The Court had no authority under its limited judicial review powers to direct the Executive Branch Departments, officers, or agencies involved with the termination of an individual who was in a career service position to review and address the matter when the time limit for a contested case hearing and decision before the Personnel Advisory Board had expired 30 days after the individual filed his complaint. Instead, it could only remand the matter to the Personnel Advisory Board. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

ADMIRALTY

Jurisdiction and Procedure[3],[4],[5]

[3] *See* REAL PROPERTY—Public Land
[4] *See* CIVIL PROCEDURE—Summary Judgment
[5] *See* CIVIL PROCEDURE—Initial Matters

] In matters of choice of law or *forum non conveniens* determinations, a trial court may have to resolve disputed factual issues prior to a trial on the merits. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Choice of law determinations for foreign seamen suing under the Jones Act are to be made by weighing the factors: the place of the wrongful act; the law of the flag; the allegiance or domicile of the injured seaman; the allegiance of the defendant shipowner; the place where the employment contract was made; the inaccessibility of a foreign forum; the law of the forum; and the shipowner's base of operations. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The Supreme Court has stated that the choice of law determination factors are not exhaustive and should be examined in the overall context of the case to determine whether, taken together, the factors rise to the level of "substantial contacts" between the United States and the defendant. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

When a wage claim is involved, 46 U.S.C. § 10313(i) notes that the courts are available to the seaman for enforcement of wage claims once a vessel is arrested in a harbor of the United States, thereby providing for High Court jurisdiction. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The Court declined to determine whether the choice of law determination factors rose to the level of substantial contacts when Plaintiff's wage claim, included in the initial complaint, explicitly provided for jurisdiction in the High Court. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

When Plaintiff alleged a contractual claim for maintenance, cure, and wages, began work on Defendants' vessel in Pago Pago Harbor, and the vessel was later arrested in Pago Pago Harbor, Plaintiff had a right to sue under the Jones Act in a U.S. court and the High Court had proper jurisdiction for the action. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Under the doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear a case and when a trial in the chosen forum would burden the defendant, the court may, in the exercise of its discretion, dismiss the case. *Magalasin v. F/V San Nanumea*, CA No.

63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The court should balance various public and private interests in its analysis of *forum non conveniens* , including relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of unwilling witnesses, the possibility of viewing subject premises, and all other factors that render trial of the case expeditious and inexpensive. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The Court declined to apply *forum non conveniens* even though Plaintiff resided in the Philippines, Defendants' corporate headquarters was in New Zealand, and the witnesses were scattered seamen because it held that splitting four cases arising out of the same incident in two separate forums would not benefit Defendants, witnesses, or the judicial systems. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

AMERICAN SAMOA GOVERNMENT

Separation of Powers[6, 7]

Under the Administrative Procedures Act, the Appellate Division is authorized by the Legislature to review certain Executive Branch agency decisions. *Am. Samoa Gov't. v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Dec. 18, 2014) (op. & order).

The Legislature

Where the *Fono* has employed plain and simple language, the judicial supply of modifying distinctions under the guise of statutory construction would seem tantamount to making law, rather than interpreting it. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

The Executive

A subordinate executive officer acting pursuant to the statutorily mandated duties of the Governor, such as the Treasurer, has a nondiscretionary duty to disburse legislatively appropriated judgment funds under A.S.C.A. § 43.1212(c). *Progressive Ins. Co. (Pago Pago)*

[6] *See* AMERICAN SAMOA GOVERNMENT—The Legislature
[7] *See* AMERICAN SAMOA GOVERNMENT—The Judiciary

Ltd. v. Pili, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

While it is the Governor's obligation to submit legislation appropriating funds, the Legislature holds the sole constitutional authority to effectuate the appropriation and enable an expenditure of public revenue. *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

It is not within the Treasurer's power to abrogate appropriations by simply electing not to act, even where both the Governor and Legislature act to appropriate funds for payment of a judgment under A.S.C.A. § 43.1212(c). *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

An equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date. Under this doctrine, if the plaintiff institutes an action establishing his or her right to the appropriated funds before the lapse date, equity will ignore the expiration of the appropriation and maintain the plaintiff's right to the funds. *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

The Judiciary[8]

When a court's decision is one of statutory interpretation, it is purely a question of law. *Progressive Ins. Co. Ltd. v. Estate of Jonathan Tagaloa*, AP No. 16-12 (App. Div. Aug. 4, 2014) (op. & order).

The Court will not reassign a matter to different judge on the grounds that the other judge is already presiding over a number of like matters involving Plaintiff when there is no common subject matter among the cases, thus giving the appearance that Plaintiff is "judge shopping." *Tuatagaloa v. Fisimaka*, LT No. 17-14 (Land & Titles Div. Aug. 12, 2014) (order den. ex parte & expedited mot. to refer matter to Assoc. Justice Richmond).

A judge has the obligation not to recuse himself when there is no occasion for recusal. *Tuatagaloa v. Fisimaka*, LT No. 17-14 (Land & Titles Div. Aug. 12, 2014) (order den. ex parte & expedited mot. to refer

[8] *See* AMERICAN SAMOA GOVERNMENT—Separation of Powers

matter to Assoc. Justice Richmond).

A judge has the obligation not to recuse himself when there is no occasion for recusal. *Tuatagaloa v. Fisimaka.*, LT No. 17-14 (Land & Titles Div. Aug. 12, 2014) (order den. exparte & expedited mot. to refer matter to Assoc. Justice Richmond).

The Trial Division of the High Court is a court of general jurisdiction with the power to hear any matter not otherwise provided by statute. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The Appellate Division declined to consider matters that were neither taken up nor decided by the court below. Such discussion might venture into the potentially confusing realm of *dicta*, if not the troublesome notion of the "advisory" and the "case or controversy" limitation on jurisdiction found in Article III, section 2 of the U.S. Constitution and the replicative language conferring jurisdiction on the High Court of American Samoa. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

At the appellate level, the Court's review of the findings of the Land and Titles Division is limited in scope to "clear error." *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

A.S.C.A. § 3.0221 prescribes an expanded role for the Samoan Associate Judges when sitting at the appellate level on appeals from decisions of the Land and Titles Division. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

In Land and Titles Division appellate matters, the Associate Judges have an "equal voice" in the decision making with the law-trained Justices. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

In appellate matters outside the Land and Title Division, the law-trained Justices' views prevail where there is a difference of opinion among the appellate panel members. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

The Associate Judges are historically chosen from the ranks of leading *matai*. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

As ranking *matai* in their own right, the Associate Judges may be viewed as symbolically manifesting the traditional decision making structure within the imported judicial framework and process. *Tuumalo v. Salesa*,

CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

The *Fono's* deliberate assignment of a more authoritative voice to the Associate Judges in matters concerning land, should not be lightly treated or nullified through the artifice of unnecessary distinctions. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

The appellate division declined to engage in further analysis of Appellants' assertions when the trial court had clearly assessed the conflicting and ambiguous facts that the parts had presented in a 56-page opinion. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

CIVIL PROCEDURE

Jurisdiction[9],[10]

In general, the filing of an action in a court that clearly lacks jurisdiction will not toll the statute of limitations. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

Substantial state and federal precedent interpreting jurisdictional statutes has established that unless explicitly stated otherwise, where statutes grant courts overlapping jurisdiction, that jurisdiction is concurrent. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

The Court may raise the issue of jurisdiction *sua sponte* lest the whole exercise and effort of a trial should prove to be for naught. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

Divisions of the High Court, outside of the Land and Title Division, are precluded from asserting jurisdiction over land-related disputes, unless the *Fono* has otherwise allowed. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

Under the doctrine of *forum non conveniens*, when an alternative forum has jurisdiction to hear a case and when a trial in the chosen forum

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[9] *See* ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

[10] *See* ADMIRALTY—Jurisdiction and Procedure

would burden the defendant, the court may, in the exercise of its discretion, dismiss the case. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The court should balance various public and private interests in its analysis of *forum non conveniens* , including relative ease of access to sources of proof, availability of compulsory process for attendance of unwilling witnesses and cost of obtaining attendance of unwilling witnesses, the possibility of viewing subject premises, and all other factors that render trial of the case expeditious and inexpensive. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The Court declined to apply *forum non conveniens* even though Plaintiff resided in the Philippines, Defendants' corporate headquarters was in New Zealand, and the witnesses were scattered seamen because it held that splitting four cases arising out of the same incident in two separate forums would not benefit Defendants, witnesses, or the judicial systems. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Service of Process

Any judgment against a defendant who has not been properly served by publication is null and void since the court would not have obtained jurisdiction over the defendant. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Jan. 29, 2014) (order den. req. for partition of real property by sale).

Pleadings

Because *pro se* pleadings are to be liberally construed, the Court treated a letter addressed to the Chief Justice as an election contest filed pursuant to A.S.C.A. §§ 6.0902-03 and accepted the letter as a timely initiating pleading by a *pro se* applicant. *Al-Shehri v. Misipati*, AP No. 14-14 (App. Div. Nov. 24, 2014) (op. & order).

Pretrial Motions[11]

Pursuant to T.C.R.C.P. 12(b)(6), the Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

[11] *See* CIVIL PROCEDURE—Summary Judgment

Under the *Twombly-Iqbal* heightened pleading standard, the Court applies a two prong analysis. The first prong one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. Prong two instructs the Court to analyze whether the well-pleaded allegations "plausibly give rise to an entitlement to relief." *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

Under the first prong in the *Twombly-Iqbal* heightened pleading standard, the pleading does not need to include detailed factual allegations, but must contain more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

The *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal. First, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

Under the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, this Court applies a two prong analysis. Prong one directs the Court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. Prong two instructs the Court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief. *Barlow v. Am. Samoa Gov't*, CA No. 45-14 (Trial Div. July 2, 2014) (order granting def.'s mot. to dismiss).

The complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true. *Barlow v. Am. Samoa Gov't*, CA No. 45-14 (Trial Div. July 2, 2014) (order granting def.'s mot. to dismiss).

If the plaintiff's "well-pleaded" facts permit the court to infer only the mere possibility of misconduct, the complaint fails because it alleges but does not show that the plaintiff is entitled to relief. *Barlow v. Am. Samoa Gov't*, CA No. 45-14 (Trial Div. July 2, 2014) (order granting def.'s mot. to dismiss).

Negligent infliction of emotional distress is not an independent in tort but instead rests on a claim of negligence. Thus, whether plaintiffs can recover damages for the negligent infliction of emotional distress is dependent upon traditional tort analysis, and the elements of duty, breach

of duty, causation, and damages must exist to support the cause of action. *Barlow v. Am. Samoa Gov't*, CA No. 45-14 (Trial Div. July 2, 2014) (order granting def.'s mot. to dismiss).

A motion to dismiss pursuant to T.C.R.C.P. 12(b)(6) will be treated as a summary judgment motion when evidence extrinsic to the complaint is presented to and considered by the court. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Conversion of a T.C.R.C.P. 12(b)(6) motion into a motion for summary judgment lies squarely with the court's discretion. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

When a court converts a T.C.R.C.P. 12(b)(6) motion into a motion for summary judgment under T.C.R.C.P. 56, the court must make the parties aware that the court is considering a motion for summary judgment by giving the parties 10 days notice of the conversion. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Notice that the court will look beyond the pleadings need not be explicit because a party who submits extrinsic materials in support of or opposition to a 12(b)(6) motion is considered to be on notice that the judge may treat the motion as a motion for summary judgment. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

When both parties submitted extrinsic evidence for the court to consider in the form of affidavits, declarations, and exhibits, both parties were properly on notice that the 12(b)(6) motion would be treated as a motion for summary judgment. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law. *Jessop v. Savini*, CA No. 55-13 (Trial Div. Dec. 1, 2014) (order den. def.'s mot. for j. on the pleadings or alternatively summ. j.).

Dismissing a complaint for failure to state a claim upon which relief can be granted is especially disfavored where the complaint sets forth a novel legal theory that can best be assessed after factual development. *Jessop v. Savini*, CA No. 55-13 (Trial Div. Dec. 1, 2014) (order den. def.'s mot. for j. on the pleadings or alternatively summ. j.).

Parties & Claims[12]

Multiple parties may, but need not be, joined if claims against them (1) arise out of the same transaction, occurrence, or series of transactions or occurrences and (2) will present some question of law or fact in common. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

The movant bears the burden of demonstrating whether the third party they seek to join satisfies the requirements of either necessary or permissive joinder. T.C.R.C.P. 19(a), 20. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

Discovery[13]

Summary Judgment[14], [15]

The Court will grant a motion for summary judgment when the pleadings and other supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

If the movant meets his or her burden, the non-moving party must then affirmatively show there is a genuine issue for trial. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

All inferences in a summary judgment motion are construed in a light most favorable to the non-moving party. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

Summary judgment is appropriate when the pleadings and supporting papers show that there is no genuine issue as to any material fact and that

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[12] *See* TORTS—Joint and Several Libaility
[13] *See* CRIMINAL PROCEDURE—Pre-Trial Matters
[14] *See* CIVIL PROCEDURE—Pretrial Motions
[15] *See* ADMIRALTY—Jurisdiction and Procedure

the moving party is entitled to judgment as a matter of law. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

Typically, in ruling on a summary judgment motion, the court must view all pleadings and supporting papers in the light most favorable to the non-moving party, treat the non-moving party's evidence as true, and draw from such evidence the inferences most favorable to the non-moving party. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

While it may seem inapt to allow pretrial findings of disputed facts in a converted summary judgment motion, determining proper forum after the trial is already underway is injudicious. The same reasoning applies to a choice of law determination. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The court may part from the summary judgment standard of viewing all facts in the light most favorable to the non-moving party, but only to the extent necessary, so as to resolve disputed factual issues underlying choice of law and *forum non conveniens* determinations. *Magalasin v. F/V San Nanumea*, CA No. 63-11 (Trial Div. Nov. 30, 2014) (order den. def.'s mot. to dismiss or for summ. j.).

The Court will grant a motion for summary judgment when the pleadings and other supporting documents show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact. *Jessop v. Savini*, CA No. 55-13 (Trial Div. Dec. 1, 2014) (order den. def.'s mot. for j. on the pleadings or alternatively summ. j.).

If the movant meets his or her burden, the non-moving party must then affirmatively show there is a genuine issue for trial. Only disputes over facts that might affect the outcome of the suit under the governing law are material, and such a dispute is "genuine" only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Jessop v. Savini*, CA No. 55-13 (Trial Div. Dec. 1, 2014) (order den. def.'s mot. for j. on the pleadings or alternatively summ. j.).

A court must resolve any factual issues in controversy in favor of the nonmoving party, but conclusory, non-specific allegations are not sufficient to survive a motion for summary judgment, and missing facts will not be presumed. All inferences are construed in a light most favorable to the non-moving party. *Jessop v. Savini*, CA No. 55-13

(Trial Div. Dec. 1, 2014) (order den. def.'s mot. for j. on the pleadings or alternatively summ. j.).

Injunctions

Sufficient grounds for the issuance of a preliminary injunction exist when (1) there is a substantial likelihood that the applicant will prevail at trial on the merits and that a permanent injunction will be issued against the opposing party; and (2) great or irreparable injury will result to the applicant before a full and final trial can be fairly held on whether a permanent injunction should issue. *Soliai v. Ito*, LT No. 22-13 (Land & Titles Div. Jan. 22, 2014) (order den. motion to dismiss & grant. prelim. inj.).

A preliminary injunction should not be granted unless the plaintiff clearly establishes the burden of persuasion as to each of the elements. *Soliai v. Ito*, LT No. 22-13 (Land & Titles Div. Jan. 22, 2014) (order den. motion to dismiss & grant. prelim. inj.).

The Court will issue a preliminary injunction to provide for a survey when it is necessary in order for the Court to form an accurate picture of what is claimed by each party and what is in dispute. *Soliai v. Ito*, LT No. 22-13 (Land & Titles Div. Jan. 22, 2014) (order den. motion to dismiss & grant. prelim. inj.).

The use of the term "injunction" within a statute does not necessarily trigger the full application of A.S.C.A. Title 43 Civil Procedures, Chapter 13 Injunctions. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Equitable Remedies

While the Court has allowed unjust enrichment claims in the context of improvements made based on a mistake of fact, successful claims require an improver to act in good faith. Here, Defendants did not have a reasonable belief that they owned the land because this belief was based on a document that is void as a matter of law. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Judgments

The measure of damages is a question of fact, and, as the trier of fact in civil controversies, the Court enjoys substantial discretion in determining damages. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

Res judicata, or claim preclusion, applies when (1) there has been a final judgment on the merits (2) in a prior action involving the same parties or their privies and (3) the prior action involved the same claim. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

A claim for punitive damages is not an independent cause of action, thus the Court could only consider as a separate element of damages. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. June 3, 2014) (order den. mot. for partial summ. j.).

American Samoa statutes and rules of court provide no authority for bringing a motion to reconsider a non-final interlocutory order in a pending a case. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Sept. 12, 2014) (order den. mot. for recons.).

In order to appeal an interlocutory order, it must be final or fall within the collateral order exception. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Sept. 12, 2014) (order den. mot. for recons.).

To fall within the collateral order exception, an order must (1) conclusively resolve the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from the final judgment in the main case. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Sept. 12, 2014) (order den. mot. for recons.).

Post Judgment Motions & Appeals

The decision of whether or not to grant a motion for a new trial or reconsideration is left to the broad discretion of the trial court. *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.).

For a nonjury trial, which includes all civil trials in American Samoa, a motion for a new trial should be based on a manifest error of law or mistake of fact. *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.).

When Defendant failed to present any convincing arguments or evidence to refute the Court's factual findings, the Court's findings were not clearly erroneous. *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.).

The decision whether to grant a motion for reconsideration or new trial is left to the broad discretion of the trial court. *Ioapo v. Fa'alevao*, MT

No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A motion for reconsideration or new trial should be based on a manifest mistake of fact or error of law, and the court should find substantial reasons before setting aside a judgment. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A party moving for new trial must do more than reiterate the trial court's reasons for a decision and then make a blind assertion that the court is incorrect. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

T.C.R.C.P. 7(b)(1) requires that an application to the court for any order shall be by motion, which shall state the grounds with particularity. The particularity requirement is especially important for a motion for new trial, one of whose purposes is to avoid unnecessary appeals by alerting the trial court to possible errors or omissions in its opinion. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A party cannot file partial motions and later argue supplement issues at oral argument as the Court has no jurisdiction to hear extrinsic issues. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A court should not automatically or casually grant a stay of judgment pending appeal; instead, the court's discretion to grant a stay should be exercised only if cause is shown. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A judgment will be stayed when it appears to the trial or appellate court that there is a strong chance the judgment will be vacated on appeal; that compliance with the judgment during the pendency of the appeal would so change the status quo as to amount to an effective denial of the right to appeal, or would otherwise work extraordinary hardship on the appellant; that little or no hardship would be imposed on adverse parties by appellant's noncompliance; or that some combination of these conditions overcomes the presumption in favor of allowing each party the present enjoyment of what has been held to be his lawful rights. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

The court may grant a motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the

clear weight of evidence, a decision that is manifestly, an intervening change in the law, or the discovery of previously unavailable evidence. *Estate of Salavei Ah Hing v. Lemani*, LT Nos. 21-11, 22-11 & PR No. 01-90 (Land & Titles Div. Apr. 2, 2014) (order den. mot. for recons. or new trial).

A judgment will not be set aside except for substantial reasons. *Estate of Salavei Ah Hing v. Lemani*, LT Nos. 21-11, 22-11 & PR No. 01-90 (Land & Titles Div. Apr. 2, 2014) (order den. mot. for recons. or new trial).

The court may grant a motion for reconsideration or a new trial based upon a manifest error of law or mistake of fact, a decision contrary to the clear weight of evidence, a decision that is manifestly unjust, an intervening change in the law, or the discovery of previously unavailable evidence. However, a judgment will not be set aside except for substantial reasons. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

On review of a motion for reconsideration, the Court will not construct a legal theory on behalf of the moving party. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

It is the responsibility of the movant to fully articulate his or her arguments in opposition to the original order and to provide the court with research and justification beyond unadorned, conclusory statements. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

The Court will not reverse a dismissal of Plaintiffs' unconstitutional stop order claim more than four years after the fact based on a second motion for reconsideration that is entirely unsupported by factual or legal arguments. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

It is apodictic that a party moving for reconsideration must do more than reiterate our reasons for a decision and then make a blind assertion that we were incorrect. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

At the appellate level, the Court's review of the findings of the Land and Titles Division is limited in scope to "clear error." *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

The Appellate Division does not review factual matters de novo. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

The test for clear error is whether there is substantial evidence on the record to support the Land and Titles Division's findings - not whether a dissatisfied litigant himself presented substantial evidence. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

Questions of law are reviewed de novo by the appellate division. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

The appellate division reviews findings of fact by the trial court under the clearly erroneous standard. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

A finding of fact is erroneous when the entire record produces the definite and firm conviction that the court below committed a mistake, according particular weight to the trial judge's assessment of conflicting and ambiguous facts. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

The test for clear error is whether there is substantial evidence on the record to support the lower court's findings – not whether a dissatisfied litigant himself presented substantial evidence. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

Writs[16]

A writ of mandamus is appropriate only if the plaintiff has exhausted all other avenues of relief and the defendant owes him a clear nondiscretionary duty. *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

As to the second requirement for a writ of mandamus, the alleged duty of the defendant to act must be mandatory or ministerial, not discretionary or directory. *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04 (Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

A ministerial duty is one that is so plainly prescribed as to be free from doubt. *Progressive Ins. Co. (Pago Pago) Ltd. v. Pili*, CA No. 36-04

[16] *See* AMERICAN SAMOA GOVERNMENT—The Executive

(Trial Div. Feb. 25, 2014) (order granting pet. for extraordinary relief but staying execution pending outcome of appeal anticipated near term).

Garnishment

A garnishee who is evasive and dishonest, in an apparent attempt to assist the judgment debtors in avoiding payment can be held liable for the whole amount of the judgment debt. A.S.C.A. §43.1806(c). *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

The plaintiff may have judgment against the garnishee for the amount of money due from the garnishee to the defendant, or for the delivery to the clerk of the court, within a time to be fixed by the court of any money or property in the garnishee's hands belonging to the defendant as fixed in the judgment, and for the value of the same if not delivered within the time thus fixed. A.S.C.A. §43.1811(b). *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

If the garnishee answers the interrogatories and Plaintiff is not satisfied with the answers, the proper action is to controvert the answers via a pleading under A.S.C.A. §§ 43.1807-.1808. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

Because Plaintiff failed to controvert the answers earlier and in the proper manner, the Court denied Plaintiff's motion, without prejudice, to hold the garnishee responsible for Plaintiff's full judgment against Defendant. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

As Garnishees correctly point out in their motion, the garnishment statutes provide a process when a party disagrees with answers to the interrogatories. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Dec. 1, 2014) (order granting mot. to quash order to show cause).

CONSTITUTIONAL LAW

Justiciable Case or Controversy[17]

Individual Rights

The freedom of speech is not absolute. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

United States Supreme Court precedent has established that vulgar, offensive, and shocking speech is not entitled to absolute constitutional protection. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

Federal precedent provides for local discretion with respect to specific types of speech so that what constitutes obscene speech rests in part on a local or community "prurient interests" standard. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

Whether a "public attack" runs afoul of Section 4 is determined by whether the comment is malicious, unjustifiable, and deleterious to traditional Samoan cultural standards of comity, respect, dignity, or honor. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

While the Defendant's comments to local media were a protected opinion under a defamation analysis, the same was not true under an Article I, Section 4 analysis since Defendant's comments amounted to an unsubstantiated acrimonious opinion designed to impinge on the honor and reputation of Plaintiff in violation of Samoan cultural norms. Such comments do not warrant Section 1 freedom of speech protection. *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

CONTRACTS

Remedies

When there is a continuous, open, concurrent account, the cause of action shall be deemed to have accrued on the date of the last item

[17] *See* AMERICAN SAMOA GOVERNMENR—Judiciary

therein. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Jan. 24, 2014) (op. & order).

CORPORATION AND PARTNERSHIP

Limited Liability & the Corporate Entity

In general, adopting the corporate form for a business enterprise exempts corporate shareholders from liability for the corporation's debts. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Jan. 24, 2014) (op. & order).

Certain circumstances justify disregarding the corporate shield when failing to do so would allow abuse of corporate privileges. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Jan. 24, 2014) (op. & order).

The courts of American Samoa have long applied a standard for piercing the corporate veil first established by the Supreme Court of California in *Minifie v. Rowley*, 187 Cal. 481, 487 (1921). *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Jan. 24, 2014) (op. & order).

When affording the Defendant the protections of the corporate form would allow him to personally benefit from his misconduct while simultaneously prejudicing the Plaintiff by denying it the ability to recoup significant losses, the circumstances warranted piercing the corporate veil and holding Defendant personally liable. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Jan. 24, 2014) (op. & order).

CRIMINAL LAW

Liability[18]

Ordinarily, knowledge is proven inferentially. *Am. Samoa Gov't v. Tolmie*, CR No. 156-13 (Trial Div. Nov. 13, 2014) (decision & order).

A person acts knowingly with respect to his conduct when he is aware of the nature of his conduct or he is aware that his conduct is practically certain to cause a result. A.S.C.A. § 46.3202(c). In other words, an act is done knowingly if the defendant is aware of the act and does not act

[18] *See* CRIMINAL LAW—Specific Crimes

through ignorance, mistake, or accident. *Am. Samoa Gov't v. Tolmie*, CR No. 156-13 (Trial Div. Nov. 13, 2014) (decision & order).

Defenses

Specific Crimes[19]

The domestic relations statute and the criminal justice act conflict in that the former allows any girl who has reached the age of 14 years to get legally married provided that she has the consent of her parents and the latter states that it is a crime for any man to have sexual intercourse with a girl 16 years and under. *Am. Samoa Gov't v. Hari*, CR No. 113-13 (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceedings).

The proscribed or forbidden conduct constituting rape, which is a sexual intercourse with a girl 16 or under, is exactly the same conduct that constitutes sexual assault; however, the punishment for rape and sexual assault are 15 years and 7 years respectively. *Am. Samoa Gov't v. Hari*, CR No. 113-13 (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceedings).

Our criminal law statutes specifically recognize, for purposes of all sexual offenses, that a co-habitable couple living together as man and wife are to be treated as if they are married. *Am. Samoa Gov't v. Hari*, CR No. 113-13 (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceedings).

In a marital situation where children are involved, the question naturally arises as to whether the desired outcome should simply be punitive and deterrent measures against men who have sex with 16 year olds. However, under a scenario of a family unit with children, the concurrent outcome with deterrence is the effect of breaking up of a marital unit and depriving the mother and child of the economic benefit of spousal and child support while the husband and father is locked away in jail for a period of time. *Am. Samoa Gov't v. Hari*, CR No. 113-13 (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceedings).

Whether one is charged with rape or sexual assault is a matter left entirely up to the prosecutor's discretion. *Am. Samoa Gov't v. Hari*, CR No. 113-13 (Trial Div. May 14, 2014) (rep.'s tr. of jury trial proceedings).

Under A.S.C.A. § 47.0402, the mandatory fine for a domestic or family violence crime conviction of $150.00 is paid to the court. *Am. Samoa*

[19] *See* CRIMINAL PROCEDURES—Punishment and Sentencing

Gov't v. Naufa'amu, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

A.S.C.A. § 47.0102 applies to all of the chapters in Title 47 even though it restricts the applications of the definitions to "[a]s used in this chapter." This appears to have been an oversight or misprint, because the definitions are used throughout the remaining chapters of this Title. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

The list of the "crimes within the crime" presented in Section 47.0401(a) sets forth broad categories of criminal behavior and does not reference or identify the corresponding Title 46 crimes; however, the Court presumes the Legislature when listing these "crimes" intended Title 46 crimes to be the "crimes" within the crime of domestic and family violence. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

Because the Legislature did not amend or provided exemption from the controlling Title 46 criminal law sections when enacting Title 47 in 2004, the Court must assume the crime of domestic or family violence established therein was intended to be subject to the Title 46 provisions. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

While at common law embezzlement was a specific intent crime, discussion of requirements at common law is inapposite because in American Samoa embezzlement is defined by statute. The *mens rea* required by A.S.C.A. § 46.4104(a) is "knowingly." No distinction between general and specific intent need be drawn. *Am. Samoa Gov't v. Tolmie*, CR No. 156-13 (Trial Div. Nov. 13, 2014) (decision & order).

CRIMINAL PROCEDURE

Criminal Complaints, Indictments and Bills of Information[20]

The Complaint and Information indicated that the defendant was accused of violating a statutory section that does not exist. As neither counsel brought this typographical error to the Court's attention and the parties proceeded to trial on the premise that Defendant was charged with violating a real statutory section, the Court was satisfied that this typographical error did not deprive the defendant of a fair trial. *Am. Samoa Gov't v. Tolmie*, CR No. 156-13 (Trial Div. Nov. 13, 2014) (decision & order).

[20] *See* CRIMINAL LAW—Specific Crimes

Pre-Trial Matters

Pursuant to T.C.R.Cr.P. 46(e)(1), forfeiture is mandatory whenever a defendant breaches a condition of release on bond. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

Under Rule 46(e)(2), a determination of whether to set aside forfeiture or whether justice requires enforcement is a matter of judicial discretion. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

While one purpose of bail bond is to secure a defendant's presence at trial, forfeiture is not limited only to situations where a defendant fails to appear. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

The defendant's violation of three conditions of release on bond by failing to remain a law abiding citizen, leaving the Territory, and failing to surrender his travel documents provided ample grounds for the trial court to revoke bail and forfeit bond under T.C.R.Cr.P. 46(e)(1) regardless of the defendant's ultimate appearance at trial. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

The plain text of T.C.R.Cr.P. 46(e)(2) vests the trial court with broad discretion to set aside a forfeiture if it appears that justice does not require enforcement of the forfeiture. But the rule does not require the trial court to set aside forfeiture, nor does it limit the trial court's discretion. Unlike its federal counterpart, T.C.R.Cr.P. 46(e)(2) does not list a defendant's appearance or surrender as a ground for setting aside a forfeiture. Such an omission is a clear indication that a defendant's appearance is not an independent ground, let alone a controlling factor, for setting aside forfeiture in this jurisdiction. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

If the Court were to adopt the premise that the court should set aside forfeiture whenever a defendant appears at trial, regardless of his or her failure to comply with other coequal bond conditions, then the Court would be adding to T.C.R.Cr.P. 46(e)(2). This would usurp the trial court's discretion and dilute the potency of bond conditions beyond the self-evident requirement that the defendant appear at trial. *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

Trial courts in this jurisdiction may consider all relevant factors for bail revocation and bond forfeiture determinations, including those set forth in *United States v. Frias-ramirez*, 670 F.2d 849, 852 (9th Cir. 1982),

when exercising their discretion under T.C.R.Cr.P. 46(e)(2). *Siaumau v. Am. Samoa Gov't*, AP No. 02-13 (App. Div. June 23, 2014) (op. & order).

Parties should make every effort to resolve discovery disputes before involving the court. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

The rules do not require a responding party to make copies of requested documents and hand them over to the requesting party; it is enough for the responding party to permit the defendant to inspect and copy the documents. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

Defendant's request to compel his written recorded statements and photographs was moot when the Government was willing to provide Defendant with all of the relevant documents in its possession. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

When defense counsel is equally able to obtain requested information from a third party, they should do so and not request the government to do so for them. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

When defense counsel could not identify how requested field testing results were material to Defendant's defense, the Court denied Defendant's request for the documents. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

The Court stated that defense counsel's request for victim statements in a drug possession case where there were no victims was farcical and could merit serious sanctions in the future. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

Neither T.C.R.Cr.P. 16 nor any other authority affords a criminal defendant a pre-trial right to discover a list of the prosecution's prospective witnesses in a non-capital case. *Am. Samoa Gov't v. Bode*, CR No. 80-13 (Trial Div. June 26, 2013) (order den. def.'s mot. to compel).

Punishment and Sentencing

A.S.C.A. § 46.2521, which establishes the rehabilitative release program, is quite clearly a legislative policy directed to the executive branch for implementation, not the judicial branch. In contrast, Chapter 22 of the Code regarding "probation," is directed to the judiciary. *Am. Samoa*

Gov't v. Tilei, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

Under A.S.C.A. § 46.2524(a), inmates serving terms of detention as a condition of probation are eligible to participate in the rehabilitative release program, including work release, but inmates convicted of violent sex crimes or sexual assaults on children are ineligible. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

The rehabilitative release program is a function of the Department of Public Safety and is administered by the Commissioner of Public Safety. This statute limits the executive branch in administering the rehabilitative release program and has no bearing on the Court's administration of probation, a squarely judicial function. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

A probationer serving a term of detention in the correctional facility as a condition of probation is under the direct jurisdiction of the Court. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

Chapter 22 does not limit the Court's ability to allow work release as a condition of probation; indeed, the Court has wide discretion in imposing probation conditions and may revoke or modify any condition at any time. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

The Court may "terminate" probation and thus "discharge" a defendant at any time if the Court deems it warranted. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

The Court has discretion to structure the Defendant's probation program to allow work release. *Am. Samoa Gov't v. Tilei*, CR No. 23-13 (Trial Div. Jan. 13, 2014) (order den. pl.'s mot. to am. sentence).

Inmates do not have a right to visitation. Rather, visitation is a privilege governed by policies ordained by the warden. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

It is well-established that prison overcrowding can foment conditions that run afoul of the constitutional prohibition against "cruel or unusual punishment." *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

Pursuant to the guidelines established in Chapter 25, the warden holds at least some discretion to evaluate and approve an inmate's application for work release. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

Based on the plain language of the statutes, it appears that there is at the very least a right to apply for work release for specified categories of inmates. *Vergara v. Am. Samoa Gov't*, CA No. 44-13 (Trial Div. May 21, 2014) (order granting def.'s mot. to dismiss).

The Court may use up to one-third of the fines under A.S.C.A. § 47.0402 to off-set its costs of collection and deposit as well as to cover filing fee waivers costs and preparation costs of forms required under Title 47 A.S.C.A. The balance of the fines, after such authorized Court costs are subtracted, are deposited quarterly in the A.S.G. General Fund and earmarked for victim services, training, a batterer's counseling program, and other uses. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

When Title 46—Criminal Justice—was enacted in 1979, it not only codified the bulk of the Territory's criminal offense and infraction statutes in that Title, but also established how criminal offense and infraction statutes established under different titles of A.S.C.A. were to be classified and charged, as well as how much cases were to be adjudicated and the punishment for violations imposed. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

Pursuant to A.S.C.A. § 46.1901, every person found guilty of an offense, whether set forth in Title 46 or elsewhere in the A.S.C.A., shall be sentenced under the provisions of Title 46, except that for offenses established outside of Title 46, the term of imprisonment or fine that may be imposed is that set forth in that separate statute. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

An offense defined in a statute outside of Title 46 is an infraction if no punishment other than a fine is imposed. A.S.C.A. § 46.3103. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

When sentencing a person found guilty of committing an infraction, the Court has the sentencing options of imposing a fine, suspending the imposition or execution of a sentence to pay a fine and place the person on probation, with a separate option of requiring the person to perform ordinary labor. A.S.C.A. § 46.1903. *Am. Samoa Gov't v. Naufa'amu*,

DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

Crime defined in Title 47 is an infraction that although dependent upon committing another crime as an element is separately punishable only by a mandatory minimum fine. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

he Court denied Defendant's motion to defer in part the mandatory imposition of the $150.00 fine for his Title 47 crime because the Legislature specifically set forth how infraction fine proceeds are to be applied or deposited in A.S.C.A. § 47.0402. *Am. Samoa Gov't v. Naufa'amu*, DCR No. 421-13 (Dist. Ct. July 18, 2013) (order den. mot. to reduce fine).

ELECTIONS

Issues – Candidates

A.S.C.A. § 6.0302 allows a qualified elector to challenge the right of a person to be a candidate within 3 days after the Chief Election Officer issues an official determination of nominated candidates eligible for election. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Candidate eligibility is a matter that requires the complaining party to seek administrative or judicial relief prior to the election. *Sesepasara v. Mageo*, AP No. 13-14 (App. Div. Dec. 4, 2014) (op. & order).

Ultimately, it is the responsibility of the House of Representatives, not the Court, to determine whether an elected candidate is seated in that body. *Sesepasara v. Mageo*, AP No. 13-14 (App. Div. Dec. 4, 2014) (op. & order).

Election Contests

Once the Chief Election Officer rules on a challenge, either the challenger or the candidate may appeal the decision directly to the Appellate Division of the High Court no later than 4:30 p.m. on the 5th day thereafter for expedited judicial review of the administrative decision. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Review of the Chief Election Officer's decision by the Appellate Division is expedited due to the need to print ballots for the impending election and occurs under the standards and rules set forth by the

Administrative Procedures Act ("APA"), A.S.C.A. §§ 4.1001 et seq. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Petitioner's contention that the Chief Election Officer was required by her challenge to conduct a detailed and exhaustive investigation into another candidate's birth records or any other local records that may have been used in her application for a U.S. passport as a U.S. national but not a citizen is not supported by law. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

The Chief Election Officer's authority as an Officer of the Executive Branch of the American Samoa Government is limited to the powers and duties conferred under A.S.C.A. §§ 6.0103.1 et seq. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Upon receiving a challenge to a candidate's eligibility, the Chief Election Officer is required to investigate and rule on the challenge as soon as possible. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

The Chief Election Officer's decision that a candidate was a United States National after reviewing files containing copies of a facially valid U.S. passport was not unlawful, in excess of his authority, clearly erroneous, or arbitrary, capricious, or an abuse of discretion pursuant to A.S.C.A. § 4.1044. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

The Appellate Division has jurisdiction over election contests pursuant to A.S.C.A. § 6.0903, which provides for a complaint and answer to be filed in the Appellate Division and "heard by the High Court as soon as it reasonably may be heard." *Al-Shehri v. Misipati*, AP No. 14-14 (App. Div. Nov. 24, 2014) (op. & order).

A.S.C.A. § 6.0903(c) sets the standard of review for invalidating a general election. *Al-Shehri v. Misipati*, AP No. 14-14 (App. Div. Nov. 24, 2014) (op. & order).

When a plaintiff concedes that she was "not here to challenge the outcome" of an election in an election contest case, the Court is not presented with a "case or controversy," A.S.C.A. § 3.0221, for which it can provide a remedy. *Al-Shehri v. Misipati*, AP No. 14-14 (App. Div. Nov. 24, 2014) (op. & order).

While a suit brought under A.S.C.A. § 6.0302 is decided before ballots are printed, a suit brought under A.S.C.A. § 6.0902 is decided after an election. *Sesepasara v. Mageo*, AP No. 13-14 (App. Div. Dec. 4, 2014) (op. & order).

Losing candidates have attempted to challenge the qualifications of winning candidates under the election contest provisions after the election. However, the Court has consistently held that A.S.C.A. § 6.0302 controls over the general provisions of § 6.0902, regardless of its former applicability to the challenges of candidates. *Sesepasara v. Mageo*, AP No. 13-14 (App. Div. Dec. 4, 2014) (op. & order).

EMPLOYMENT LAW

Government Employees

Under the implementing administrative rules, A.S.A.C. § 4.0808 supplies an initial set of procedures to be followed when a position is abolished. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Once placed on the reemployment register, the administrative rules require special treatment of the displaced employee by the Director of Human Services with respect to any open positions in the career service. These rules are designed to effect the prompt reemployment of such individuals. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Pursuant to A.S.A.C. § 4.0902, an employee whose position was abolished may "appeal" his reduction-in-force status before the Personnel Advisory Board. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

A separated employee is afforded sufficient time to exhaust his alternative reemployment or reduction-in-force options before filing for a hearing with the Personnel Advisory Board under the rules and is not required to file within 10 calendar days from his notice of the reduction-in-force from the Director of Human Services. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Under A.S.A.C. § 4.0808(d), consistent with the equitable treatment of employees affected by reductions in force required under A.S.C.A. § 7.0806, the Director of Human Resources must place terminated career service employees on the reemployment register and effect territory-wide R.I.F. procedures. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Once an employee is placed on the reemployment register, the administrative rules impose a duty upon the Director and Department of Human Services to place that individual in the next available open career

service position, non-competitively. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

Failing placement of a separated employee in the next available open noncompetitive career service position, the language of Rule 4.0808(d) strongly indicates the Director of Human Services must effect a "Territory-wide" reduction-in-force. *Viena v. Am. Samoa Gov't*, AP No. 07-11 (App. Div. June 10, 2014) (op. & order).

ENVIRONMENTAL LAW

Coasts & Waters[21]

The Office of Development Planning (Department of Commerce) is designated to receive and manage all related federal grants and funds and provide for the implementation and administration of the office known as the "American Samoa Coastal Management Program." *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The general goal of the American Samoa Coastal Management Program is to provide effective resource management by protecting, maintaining, restoring, and enhancing the resources of the coastal zone. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Under the land use permit process of the A.S.C.M.P. the Office of Development Planning is vested with exclusive authority to designate uses subject to land use permits and to approve (with conditions, if necessary) or disapprove permit applications according to permit review rules. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Officials designated by the Director of Development Planning may issue stop orders upon reasonable cause to believe a violation of the A.S.C.M.P. Act, or administrative rules adopted pursuant thereto, has occurred. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

A stop order under the A.S.C.M.P. Act must detail the facts alleged to constitute a violation and may include an order that necessary corrective action be taken within a reasonable time. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

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[21] *See* REAL PROPERTY—Public Lands

In the event of the failure of the person or persons to comply with the stop order, the Director of Development Planning may apply to the High Court for an injunction. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

A.S.C.A. § 24.0506 instructs the Director of Development Planning to promulgate rules that establish a streamlined land use permit system embracing all requirements of the various government agencies having environment management duties; a reasonable fee schedule; and procedures for the conduct of appeals by aggrieved parties on land use applications. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Under A.S.C.A. § 24.0508, altering the natural shoreline is a class A misdemeanor and also punishable by civil fines. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Under A.S.C.A. § 24.0509(c), making a false statement in a land use permit application, or tampering with orders or monitoring devices is a class B misdemeanor. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The burden is on the land use permit applicant to obtain the proper permits prior to commencement of the work for any action which may cause or threaten an adverse impact to coastal resources. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The regulations establish a penalty schedule for filing a land use permit application after work has commenced and if the application is not approved, the applicant may be required to remediate damage to the site or pay for the government's remediation efforts. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The Manager of the PNRS Board may issue a stop work order, upon finding reasonable cause to believe that a project use or action violates one or more provisions of the A.S.C.M.P. or the terms and conditions of a land use permit or that an imminent threat exists of adverse impact. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

An individual served with a stop order may contest it within five days of service and may also submit a land use permit within 10 days of service, which will then be considered pursuant to the established protocol. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

If an individual contests a stop order, they are entitled to a hearing before the Board with at least 24 hours notice of the hearing. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Within 30 days of the hearing concerning a stop order, the Board may approve, with conditions, or overturn the stop work order by a unanimous vote. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

If an individual fails to comply with a stop work order after a hearing, the matter shall be referred to the Office of the Attorney General, which may then petition the High Court for injunctive relief to obtain compliance. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

An aggrieved party may file a motion for reconsideration within 10 days of an adverse decision concerning a stop order from the Board, and the Board must conduct a hearing on the motion within 10 to 30 days of filing. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

A party must file a motion for reconsideration before they may file an appeal, which then proceeds to the Office of the Administrative Law Judge (ALJ). *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

A controversy regarding a stop order is reviewable by the High Court only after the ALJ adopts findings based on the entire record and submits written conclusions of law. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

By prematurely filing in court for an injunction before issuing a valid stop order complying with the A.S.C.M.A. and the administrative rules, the government effectively denied appellant his due process administrative remedies to timely contest the stop order before the Board and to seek further review upon an unfavorable Board decision from an administrative law judge upon appeal. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The use of the term "injunction" within a statute does not necessarily trigger the full application of A.S.C.A. Title 43 Civil Procedures, Chapter 13 Injunctions. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The threshold question to be answered by the trial court in injunction actions brought under the A.S.C.M.A. is whether and to what limited extent its extraordinary powers of injunctive relief should be wielded

against a private individual in favor of the government pursuant to the dictates of a regulatory statute or administrative rule. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Enforcement of the A.S.C.M.A. is limited to the misdemeanor and civil infraction penalties set forth in the A.S.C.M.A., actions for exemplary damages, and injunction actions to enforce stop orders. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The trial court lacked subject matter jurisdiction to grant the government equitable relief in the form of an injunction when the government failed to follow the procedures laid out by the A.S.C.M.A. for civil infractions of stop orders. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

EVIDENCE

General Provisions

It is the function of the finder of fact to determine the credibility of witnesses, resolve evidentiary conflicts and draw reasonable inferences from proven facts. *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.).

Relevance

Any alleged issues with the chain of custody speak to the weight of the evidence rather than its admissibility. *Am. Samoa Gov't v. Kim & Samani*, CR Nos. 86-10 & 88-10 (Trial Div. Apr. 30, 2014) (order deferring ruling on admissibility of expert test.).

Witnesses

A trial court judge may use all of his senses in evaluating a witness's testimony and is free to believe, or disbelieve, the testimony. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

Opinions and Expert Testimony

A trial court has broad discretion to qualify an expert witness and allow expert opinions on scientific, technical, or other specialized topics beyond the purview of the trier of fact. *Notoa v. Am. Samoa Power Auth.*, CA No. 81-06 (Trial Div. Jan. 22, 2014) (am. order den. mot. for recons.).

The Court withheld ruling on whether a witness was an expert because it is a decision is better left for trial where Defendants may conduct *voir dire* regarding the expert's qualifications. *Am. Samoa Gov't v. Kim & Samani*, CR Nos. 86-10 & 88-10 (Trial Div. Apr. 30, 2014) (order deferring ruling on admissibility of expert test.).

The evidentiary process includes ruling on the qualification and content of the proposed expert testimony. With respect to the chain of custody over the DNA sample and the weight of this evidence, these are questions for the jury to determine as the trier of fact. *Am. Samoa Gov't v. Kim & Samani*, CR Nos. 86-10 & 88-10 (Trial Div. Apr. 30, 2014) (order deferring ruling on admissibility of expert test.).

FAMILY LAW

Marriage[22]

Divorce

The Trial Division lacks the authority to issue interim orders pertaining to child custody and support before a petition for divorce, separation, or annulment is granted. *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

With the enactment of the Family, Drug and Alcohol Court Act, A.S.C.A. §§ 3.0501 et seq., the *Fono* not only established the Family, Drug and Alcohol Division of the High Court, but vested this division with the authority to address all matters affecting families, from juvenile offenses to domestic violence and adoptions to divorce and child support. This broad grant of jurisdiction clearly authorizes the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendente lite* concerning child custody and support. *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

In American Samoa, married parents have joint custody of their minor children unless and until a court orders otherwise. *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

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[22] *See* CRIMINAL LAW—Specific Crimes

Under the Domestic and Family Violence Act, a determination by the Court that domestic or family violence occurred raises a presumption of fitness against the perpetrator(s). *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

Children & Minors

The Juvenile Justice Act of 1980, nor any other statutes relating to Guardianships, Reciprocal Enforcement of Child Support, Divorce or Illegitimate Children, provide a cause of action for a Petitioner who wishes to secure custody and protection of his child against the child's natural mother's family. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

Pursuant to the Family, Drug, and Alcohol Court Division Act, the Chief Justice has promulgated rules governing the issuance of Civil Protection Orders, and the Court has developed and published Forms of such Orders, Warnings, Applications, and Consent Agreements. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

Court lacked any clear remedy to apply to Petitioner's filing when Petitioner filed for a protective order against the child's natural mother but in reality sought to protect the child from abuse or neglect by the child's natural mother's family while the mother was outside the Territory. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

When it appears to any police officer that a child may be neglected and therefore subject to the Court's jurisdiction, the law enforcement officer or another person may refer the matter to the Court, which shall have a preliminary investigation made. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

In cases where a child suspected of being abused is taken into police custody, the Court and other appropriate agencies are required to be given immediate notice under A.S.C.A. §§ 45.2005 and 45.2017 so that child protective proceedings may be initiated. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

Mandatory arrests and reports to the Attorney General's Office prosecutors within 72 hours of law enforcement officers responding to allegations of domestic violence are required pursuant to A.S.C.A. §§ 47.0602 and 47.0603. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

[7] When the Court found that authorities failed to follow procedures set forth in the Juvenile Justice Act with respect to neglected or abused children, it referred the case to the Attorney General's Office so that a full investigation could be conducted and the appropriate action undertaken by ASG. *Ve'ave'a v. Uhrle*, FDAJU No. 06-13 (Fam. Drug & Alcohol Div. July 2, 2013) (op. & order).

While the Trial Division is granted jurisdiction under the Juvenile Justice Act, A.S.C.A. §§ 45.0101 et seq., to determine the legal custody of any child who comes within the Court's jurisdiction under provisions of A.S.C.A. § 45.0115, custody determinations under this enactment pertain only to children who are delinquent, in need of supervision, neglected or dependent within the meaning of A.S.C.A. § 45.0103. *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

The Trial Division is empowered under the Domestic and Family Violence Act, A.S.C.A. §§ 47.0101 et seq., to make custody determinations; however, such grant of authority concerns only situations where domestic or family violence has occurred. *See* A.S.C.A. § 47.0302. *Hart v. Hart*, FDADR No. 01-14 & DR No. 31-14 (Fam. Drug & Alcohol Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody).

IMMIGRATION

General Provisions

United States nationality is exclusively defined by the U.S. Congress, s*ee* 8 U.S.C. § 1408, and determination of who qualifies as a United States National is an exclusive function of the federal government. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Under the Supremacy Clause of the United States Constitution, art. VI, cl. 2, the U.S. Constitution, laws made pursuant thereto and treaties made under the authority of the United States shall be the supreme law of the land. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

The U.S. Congress has duly enacted laws specifying persons who are nationals and citizens of the United States at birth, 8 U.S.C. § 1401, and nationals but not citizens of the United States at birth, 8 U.S.C. § 1408. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

Qualified individuals, both citizens who are nationals and nationals who are not citizens, can be issued United States passports upon application to and verification by the United States Department of State. 22 U.S.C. §§ 211a et seq. However, passports for individuals who are only nationals contain specific language indicating that "THE BEARER IS A UNITED STATES NATIONAL AND NOT A UNITED STATES CITIZEN." *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

United States nationality does not require birth in a possession of the United States. *See* 8 U.S.C. § 1408. Birth records alone, therefore, may not be determinative of U.S. nationality. *Bartley v. Fruean*, AP No. 12-14 (App. Div. Oct. 6, 2014) (op. & order).

INSURANCE

Automobile Insurance

Rental car companies do not fall under the insurance mandate of A.S.C.A. § 22.2003(3) because the plain and ordinary meaning of "transportation of passengers for hire" does not encompass rental or leased vehicles, and "driver fare-paying passengers" does not encompass drivers and passengers of rental or leased vehicles. *Progressive Ins. Co. Ltd. v. Estate of Jonathan Tagaloa*, AP No. 16-12 (App. Div. Aug. 4, 2014) (op. & order).

LEGAL PROFESSION

Duty to Court

The Model Rules of Professional Conduct, adopted by the Court pursuant to H.C.R. 104, obligate counsel to exercise diligence, only present meritorious claims, and to practice candor toward the tribunal. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein unless there is a basis in law *and fact* for doing so that is not frivolous. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

Compensation

The trial court may award attorney fees to the prevailing party when an opposing party has acted in bad faith, wantonly, oppressively, or when it is required by statute. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

The trial court did not commit reversible error when it imposed the payment of a portion of Appellees' attorney fees on several of the Appellants after finding that they had deliberately and antagonistically interfered with the Appellees' useful enjoyment of their land by, among other things, polluting a stream in a way that caused flooding, commencing unauthorized development, and obstructing construction. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

MATAI TITLE DISPUTES

Procedural Rules

The Land and Titles Division lacks subject matter jurisdiction in any *matai* title dispute until the Samoan family has had the meaningful opportunity to consider the selection of a successor. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Jan. 27, 2014) (op. & order).

The Court did not make a manifest mistake of fact in determining that the family had held a proper family meeting to determine a *matai* successor when it found that there were two distinct descent groups within the family and that all clans were represented at the meeting. *Ioapo v. Fa'alevao*, MT No. 02-02 (Land & Titles Div. Mar. 11, 2014) (order on mot. for new trial and/or stay).

A Samoan family must at first instance convene to meaningfully consider the selection of a successor *matai* in accordance with the traditions the family. It is only after the family has had the opportunity to do so that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., can be invoked and, in the event of an unresolved dispute, the Land and Titles Division can assert subject matter jurisdiction. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Aug. 29, 2013) (order).

Under A.S.C.A. § 3.0242(b), the Land and Titles Division is accorded the procedural flexibility to "act in each case in such manner as it considers to be most consistent with natural justice and convenience." *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Aug. 29, 2013) (order).

When the parties only offer hearsay and other self-serving testimony that does not include details of any family meetings on the issue, an informed and substantially based finding on prior meaningful family meetings, such as would provide support for the Court asserting subject matter jurisdiction, cannot be made. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Aug. 29, 2013) (order).

When the record is not substantially based to warrant a finding of prior meaningful family meetings, the Court may give the parties the benefit of the doubt and find that the extent of the record before it is not so much the product of the absence of evidence, but rather the absence of effort to make a substantially based record. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Aug. 29, 2013) (order).

Appellate Review

The Appellate Division has made clear that the statutory *matai* title registration process, under A.S.C.A. §§ 1.0401 et seq., can only be invoked after the family has, at first instance, convened as a Samoan family to consider the selection of a successor *matai* in accordance with the traditions of the family. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Jan. 27, 2014) (op. & order).

Statutory Qualifications for Title[23]

Priority of Statutory Criteria

Family preference, as expressed in terms of the weight of clan opinion, is the second weightiest criterion for the court to consider in determining a disputed *matai* case. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Aug. 29, 2013) (order).

Determination of Prevailing Candidate

When one side of the Samoan family favors one *matai* candidate and another side favors a different *matai* candidate, neither prevails on the issue of family clan support. *Ma'ataua v. Puia'i*, MT No. 05-11 (Land & Titles Div. Jan. 27, 2014) (op. & order).

[23] *See* MATAI TITLE DISPUTES—Procedural Rules

REAL PROPERTY

Public Lands[24]

Under the Coastal Zone Management Act, the Territory of American Samoa is defined as a coastal state. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

The "coastal zone" includes the entire Territory and territorial sea limits. *Avamua v. Am. Samoa Gov't*, AP No. 06-13 (App. Div. Aug. 26, 2014) (op. & order).

Communal Lands

In order for the High Court to have jurisdiction over communal land disputes, the parties must first submit to mediation through the Office of Samoan Affairs and provide the court with a Certificate of Irreconcilable Dispute. *Soliai v. Ito*, LT No. 22-13 (Land & Titles Div. Jan. 22, 2014) (order den. motion to dismiss & grant. prelim. inj.).

A.S.C.A. § 43.0302(a) requires an accompanying Certificate of Irreconcilable Dispute from the Secretary of Samoan Affairs to be filed with a party's complaint before any action relating to controversies over communal land can be commenced in the Land and Titles Division, even if the Clerk issues his Summons *pro forma* without one. *Ifopo v. Am. Samoa Gov't*, LT No. 14-04 (Land & Titles Div. Feb. 26, 2014) (order of conditional dismissal).

Although a case is technically amenable to dismissal for want of subject matter jurisdiction when there is no Certificate of Irreconcilable Dispute, the practice of this Court has been to stay proceedings pending A.S.C.A. § 43.0302 proceedings, purely on considerations of "equity and convenience." *Ifopo v. Am. Samoa Gov't*, LT No. 14-04 (Land & Titles Div. Feb. 26, 2014) (order of conditional dismissal).

Where Plaintiffs had failed to obtain a Certificate of Irreconcilable Dispute over a period of 10 years, during which the Court had stayed the proceedings, the Court ordered a conditional dismissal. *Ifopo v. Am. Samoa Gov't*, LT No. 14-04 (Land & Titles Div. Feb. 26, 2014) (order of conditional dismissal).

The obligation to file an accompanying Certificate of Irreconcilable Dispute is clearly on Plaintiffs, as the complaining party. *Ifopo v. Am. Samoa Gov't*, LT No. 14-04 (Land & Titles Div. Feb. 26, 2014) (order of conditional dismissal).

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[24] *See* ENVIRONMENTAL LAW—Coasts and Waters

There is no precedential value in a Court-approved stipulation purporting to convey communal land simply because a single justice signed off on it. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Individually Owned Land[25]

Evidence of Ownership

Where each party has presented evidence to the trial court that supports his or her claim to land ownership, the trial division's findings will not be disturbed on appeal unless clearly erroneous. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

Alienation of Land

A religious community is capable of holding an interest in land in American Samoa under A.S.C.A. § 37.0204 even though it is not registered as a separate entity. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Without gubernatorial participation in the conveyance process or gubernatorial approval of the concluded exercise, a document is effectively a nullity insofar as it purports to be a conveyance of communal land. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Legislative restrictions against the alienation of communal lands are self-evident and they are clearly protective measures to ensure the preservation of the "*fa`a Samoa*" or Samoan way of life, as reserved under the Cessions Instruments with the United States and as further entrenched in Revised Constitution of America Samoa, article I, section 3. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Registration of Land

A.S.C.A. § 43.0302 does not mandate any sort of certificate of irreconcilable dispute "format" as the predicate for the assertion of jurisdiction by the Land and Titles Division. Rather, the statute's clear substantive import is merely the requirement that parties to any inter/intra Samoan family dispute must first submit to an extrajudicial settlement proceeding, at the neutral setting of the Office of Samoan Affairs, to see if they can iron out their differences before the courthouse

[25] *See* REAL PROPERTY—Registration of Land

doors will be opened to them. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

A.S.C.A. § 43.0302 contemplates more than a merely perfunctory proceeding; rather a serious attempt to resolve the controversy is needed to satisfy the aims of the statute. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

While compliance with the requirements of A.S.C.A. § 43.0302 would ordinarily be expected to be detailed in the certificate of irreconcilable dispute, a certificate found wanting in detail so as to sufficiently evince compliance with the requirements of § 43.0302, may otherwise be supplemented by documentation tending to confirm that compliance. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

An attempted registration of title to a parcel of land ten years after the initial registration of title to that parcel was inimical to the statutory registration process, which unambiguously admits only land not previously registered. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Sept. 12, 2014) (op. & order).

The Court does not consider review of the registration process to be a question of statutory interpretation. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Oct. 29, 2014) (order on pet. for reh'g).

The Court has to assume and, absent compelling proof to the contrary, conclude that the Territorial Registrar recorded a title only after complying with his or her obligations under the law. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Oct. 29, 2014) (order on pet. for reh'g).

Attacking the registration of land years after the land was initially registered and after failing to object to the initial registration, by subsequently attempting to register substantially the same land was inimical to the registration process and is not a procedure provided for by statute. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Oct. 29, 2014) (order on pet. for reh'g).

There is no indication in the land registration statutes that the *Fono* intended to create a special judicial review process to review final decisions of the Territorial Registrar. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Oct. 29, 2014) (order on pet. for reh'g).

The alleged absence of documents within the Territorial Registrar's records is of no import whatsoever on appeal as appellate review is limited to the record of the trial court and focuses on the documents

before the trial court rather than the documents before the Territorial Registrar. *Aiono v. Territorial Registrar*, AP No. 13-12 (App. Div. Oct. 29, 2014) (order on pet. for reh'g).

Rights of Co-Owners

Partition by sale relief is more a creature of statute rather than common law. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Jan. 29, 2014) (order den. req. for partition of real property by sale).

No American Samoa statute on partitions by sale exists. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Jan. 29, 2014) (order den. req. for partition of real property by sale).

Court denied a motion for partition by sale when many of the defendants lived off-island, some of the defendants were minors, and plaintiff had only attempted A.S.C.A. § 43.0501-0502 substituted service by publication in American Samoa. *Samuelu v. Patu*, CA No. 34-13 (Trial Div. Jan. 29, 2014) (order den. req. for partition of real property by sale).

The Land and Titles Division has exclusive jurisdiction over all controversies relating to land, which includes petitions for partition of real property. A.S.C.A. § 3.0208(b)(2). *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

Petition to partition property that was filed in the Trial Division was improperly filed and thus transferred to the Land and Titles Division. *Tuumalo v. Salesa*, CA No. 23-14 (Trial Div. Oct. 10, 2014) (order of transfer to land & titles div.).

It has been long established that in American Samoa, co-owners of non-communal land holding an undivided interest are tenants in common. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

A tenant in common is equally entitled to the use and possession of the common property and has an interest in the possession of every part of the property. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

It was not reversible error for the trial court to conclude Appellees could legally act on their own behalf and on behalf of one another regarding certain land parcels that they held as tenants in common. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

Landlord-Tenant

No lease exists when the individuals who signed the lease documents did not have authority to do so thus the trial court correctly invalidated the lease. *Puletu v. Kneubuhl*, AP No. 11-09 (App. Div. Oct. 17, 2014) (op. & order).

RELIGION

Congregational Church

A religious congregation of persons has no separate existence as a legal entity apart from those of its current congregation or membership pursuing the ends of its organic existence, viz., worship in accordance with the tenets of its religion. *Tua'au v. Pa'aga*, LT No.06-12 (Land & Titles Div. Dec. 9, 2014) (op. & order).

Dedication of Land[26]

SAMOAN CUSTOMS

Impact on American Samoa Laws

The High Court has previously identified the *matai* title system, communal land ownership, and Samoan language as the "pillars of *fa'a* Samoa." *Ala'ilima v. Am. Samoa Gov't*, CA No. 22-09 (Trial Div. Apr. 11, 2014) (order den. pls.' & defs.' mots. for recons.).

Property Rights[27]

Matai[28]

TORTS

Joint and Several Liability

The common law rules of joint and several liability are subject to judicial modification in American Samoa, provided the modification is consistent with American Samoan law. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial

[26] *See* REAL PROPERTY—Alienation of Land
[27] *See* REAL PROPERTY—Alienation of Land
[28] *See* AMERICAN SAMOA GOVERNMENT—The Judiciary

Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

In either a traditional joint and several liability regime or a modern comparative liability regime, a court has authority to make adjustments based on the circumstances in order to assure that contribution does not work an injustice. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).

This Court is not bound to immediately declare joint and several liability, especially where the law provides another, more apt, avenue for relief. *Leulua'i v. Galea'i*, CA No. 86-04 (Trial Div. Sept. 23, 2014) (order den. mot. to name garnishee jointly and severally liable for j.).