# AMERICAN SAMOA
# SLIP OPINIONS

2015 Decisions

Covering Certain Opinions
From the Divisions of the
High Court of American Samoa
From January to December 2015

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

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*August 24, 2016*

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 2015. 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 a report's transcript of an order on a criminal matter issued from the bench in 2008.

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 2015 Slip Opinions follows the style used in the 2014 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. A page number on a given slip opinions is indicated by a number in bold font and enclosed on either by two asterisks and a bracket (e.g., "[**2**]"). The page numbers reported in a slip opinion are imbedded in the body of the slip opinion in correspondence with the actual page breaks of the original decision physically 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**

**(2015)**

**Cite As:** *Am. Samoa Gov't v. Whitehorn Constr., Inc.*, AP No. 09-14, slip op. at [page number] (App. Div. Jan. 28, 2015) (order den. pet. for reh'g)

**AMERICAN SAMOA GOVERNMENT, OFFICE OF PROCUREMENT AND CHIEF PROCUREMENT OFFICER TIAOTALLAGA J.E. KRUSE, Petitioners,**

**v.**

**WHITEHORN CONSTRUCTION, INC., Respondent.**

High Court of American Samoa
Appellate Division

AP No. 09-14

January 28, 2015

[1] A rehearing is not a matter of right, but it is a privilege granted at the discretion of the appellate court.

[2] The Court denied respondent's petition for a rehearing when the respondent failed to address how and why the Court's decision misapprehended and misapplied the statute pertaining to the ALJ's authority to hear procurement disputes.

[3] Private construction company lacked authority to speak for the Office of Procurement and the Office of the Administrative Law Judge and thus, could not argue that the Court's decision had wronged said agencies.

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

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

ORDER DENYING PETITION FOR REHEARING

On December 18, 2014, this Court issued its Opinion and Order dismissing without prejudice Petitioners' request for judicial review of a

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

procurement dispute. We held that, procedurally, we lacked jurisdiction to grant immediate judicial review because the procurement dispute was administratively incomplete. **[**2**]**

On January 2, 2015, Respondent filed a Petition for Rehearing, contending that the Appellate Division's decision 1) "misapprehended and misapplied the law" regarding the ALJ's role in hearing procurement disputes; 2) was, "inconsistent with the fundamental principals [sic] of due process, inconsistent with the adversarial process and an abuse of discretion"; 3) "impermissibly infringed on the relevant agencies' rights to interpret their own enabling statutes and regulations." Although the Respondent cites three allegations of error, the arguments presented in the Petition specifically address only the second and third allegations of error.

**[1-3]** "A rehearing is not a matter of right, but it is a privilege granted at the discretion of the appellate court." *Fanene v. Fanene*, 30 A.S.R.2d 115, 116 (App. Div. 1996). Here, Respondent's first allegation of error raises but fails to specifically address how and why our decision "misapprehended and misapplied" the statute pertaining to the ALJ's authority to hear procurement disputes. Furthermore, Respondent's remaining arguments advocate how our decision has wronged the other agencies: the Office of Procurement and the Office of the Administrative Law Judge. Respondent, however, lacks authority in the matter before us to speak for those government agencies. **[**3**]**

The Court, having considered the arguments of counsel contained in the Petition, and being fully advised in the premises, will exercise its discretion against granting the petition for rehearing.

The Petition is DENIED.

It is so ordered.

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**Cite As:** *Fa'asala v. O'Brien*, AP No. 03-13, slip op. at [page number] (App. Div. Jan. 29, 2015) (op. & order)

**NIKOLAO FA'ASALA, ADRIENNE D. FA'ASALA AND ALTON FA'ASALA, Appellants,**

**v.**

**CLIFF U. O'BRIEN and AMERICAN SAMOA GOVERNMENT, Appellees.**

High Court of American Samoa
Appellate Division

AP No. 03-13

January 29, 2015

[1] On appeal, the trial court's decision is reviewed under the abuse of discretion standard established by the 9th Circuit in 2009 in *U.S. v. Hinkson*, 585 F.3d 1247.

[2] A two-part test is applied to determine if the trial court abused its discretion on appeal: (1) whether, when considered de novo, the trial court identified the correct legal rule to apply to the relief requested; and (2) whether the trial court's application of the correct legal standard was illogical, implausible, or without support in the record.

[3] If the trial court failed to identify the correct legal rule to apply to the relief requested, the appellate court must conclude it abused its discretion.

[4] If the trial court's application of the correct legal standard was illogical, implausible, or without support in the record, then the trial court erred and abused its discretion.

[5] When the trial court decided to dismiss appellants' case with prejudice instead of applying lesser sanctions, it did not abuse its discretion because the order was neither illogical, implausible, nor without support in the inferences that could be drawn from the facts in the record.

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

Counsel: For Appellants, Mark F. Ude
For Appellee Cliff U. O'Brien, Fiti A. Sunia
For Appellee American Samoa Government, Assistant Attorney General Mark Jesperson

OPINION AND ORDER

**Background**

On January 16, 2009, Defendant Cliff O'Brien ("O'Brien"), the Fire Chief of American Samoa, allegedly crashed a government vehicle into a vehicle owned by Appellants Nikolao Fa'asala, Adrienne Fa'asala, and Alton Fa'asala (collectively, "the Fa'asalas"), all of whom were present in the vehicle at the time of the crash. The **[**2**]** Fa'asalas filed their civil action on January 19, 2011, against O'Brien and American Samoa Government ("ASG").

During the next two years after the Fa'asalas filed their action, a series of discovery disputes prompted trial court hearings and resulted in various orders being issued, as described by the trial court in its 15 January 2013 Order of Dismissal with Prejudice.[1]

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

[1] The trial court's detailed findings are as follows: "At the outset, we note that we have previously issued a direct contempt order on February 21, 2012, holding the Fa'asalas' counsel in contempt for: (1) including this Court in an unwarranted discovery dispute; (2) disobeying a court order demanding production of evidence; and (3) flagrantly attempting to mislead this Court about a previous court order that the Fa'asalas' counsel knew or should have known about. The contempt order concerned the second set of discovery requests filed on September 27, 2011. For more than four months, the Fa'asalas' counsel avoided providing ASG with the requested relevant documents. At a hearing conducted on November 21, 2011, the Fa'asalas' counsel informed the Court that they could provide the requested documents by November 28, 2011. However, the Fa'asalas' counsel failed to produce those documents and denied in open court that we ever issued such an order. ASG filed a Motion to Compel on January 13, 2012, and the Court issued an Order Granting Defendant ASG's Motion to Compel (which included the direct contempt order) and warned the Fa'asalas' counsel with threats of more severe sanctions, including dismissal with prejudice.

After considering the protracted procedural history in this matter, the Trial Court dismissed the case with prejudice on January 15, 2013. The Fa'asalas filed a **[**3**]** subsequent motion for reconsideration which was denied by the Trial Court. The Fa'asalas timely filed the notice of appeal. They contend on appeal that the Trial Court's dismissal of the entire civil action was excessive and an abuse of discretion.

## Standard of Review

We review the Trial Court's decision on appeal under the abuse of discretion standard established by the 9th Circuit in 2009 in *U.S. v. Hinkson*, 585 F.3d 1247. Under this standard, a two-part test is applied to determine if the Trial Court abused its discretion.

**[1-4]** "[T]he first step of our abuse of discretion test is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested. If the trial court failed to do so, we must conclude it abused its discretion." "[T]he second step of our abuse of discretion test is to determine whether the trial court's application of the correct legal standard was (1) 'illogical,' (2) 'implausible,' or (3) without 'support in

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Nevertheless, Defendant ASG's second Motion to Compel filed on October 9, 2012, avers to issues that are vexingly similar to the issues stated in its first Motion to Compel. ASG issued its third set of discovery requests, including four requests for production of documents ("RFP(s)") and eight interrogatories, on July 18, 2012. On August 22, 2012, the Fa'asalas requested an extension, and ASG agreed to extend the deadline to September 21, 2012. On September 21, 2012, the Fa'asalas requested another extension until September 24, 2012, which ASG granted. On September 24, 2012, Plaintiff Adrienne Fa'asala responded to the interrogatories but provided no responsive documents. Plaintiffs Nikolao Fa'asala and Alton Fa'asala did not provide any interrogatories or responsive documents. The Fa'asalas' counsel claimed that Plaintiff Alton Fa'asala was not required to serve any responses because he is in the military and protected by the Servicemembers Civil Relief Act ("SCRA"). On October 1, 2012, the Fa'asalas' attorney discovered Plaintiff Nikolao Fa'asala's interrogatory responses in his possession. ASG allowed the Fa'asalas additional time to serve the responses so that the Fa'asalas could provide complete written responses and documents. . . . However, the Fa'asalas' attorney served Plaintiff Nikolao Fa'asala's interrogatory responses anyway and did not provide any responsive documents. Furthermore, the Fa'asalas untimely objected to the RFPs, and furnished ASG with HIPAA authorization forms, which were not adequate for discovery purposes." *See Fa'asala v. O'Brien*, CA No. 08-11, slip op. at 2-3 (Trial Div. Jan. 15, 2013) (order of dismissal with prejudice).

inferences that may be drawn from the facts in the record.' If any of these three apply, only then are we able to have a 'definite and firm conviction' that the district court reached a conclusion that was a 'mistake' or was not among **[**4**]** its 'permissible' options, and thus that it abused its discretion . . . ." *Hinkson*, 585 F.3d *at 1261-62*.

**Discussion**

With respect to the first part of the abuse of discretion test, we note that the Fa'asalas do not argue that the trial court failed to apply the correct legal rule; rather they argue that less severe sanctions allowed under that rule should have been applied.[2]

There being no dispute over the legal rule applied by the trial court, we proceed to the second step: whether the record as a whole demonstrates that the trial court's application of the correct legal standard was illogical, implausible, or without support in inferences that may be drawn from the facts.

The Fa'asalas contend that the trial court could have applied lesser sanctions available under Rule 37 T.C.R.C.P. instead of dismissing the action with prejudice. By **[**5**]** adopting this position, the Fa'asalas are inviting the Appellate Division to hold, upon review of the record, that if our view of the facts could support the imposition of a lesser sanction, we must overrule the trial court's discretionary decision to impose the more severe sanction it applied.[3]

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[2] The Trial Court applied Rule 37(b)(2)(C) T.C.R.C.P. which reads:

> (b) Failure to Comply with Order.
>
> (2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under 30(b)(6) or 31(a) TCRCP to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or 35 TCRCP, or if a party fails to obey an order entered under 26 (f) TCRCP, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

[3] As such, the Fa'asalas are asking this Division to effectively substitute our subjective review as to the most appropriate, permissible sanction rather than to objectively evaluate the discretion exercised by the Trial Court in reaching the sanction it applied. It was precisely this issue that

**[5]** Our review of the record reveals that the trial court's application of the correct legal standard was neither illogical nor implausible, nor without support in the inferences that may be drawn from the facts. Although we are not unsympathetic to the Fa'asalas' arguments on appeal, our review is confined to the objective evaluation of the trial court's discretionary acts.

The sanction chosen by the trial court based upon its first instance evaluation of the conduct of the parties and counsel in this matter was within the range of permissible sanctions to be applied for repeated violations of discovery practice pursuant to the T.C.R.C.P. Although severe, this exercise of discretion was not abused by the trial court.

## Conclusion

We hold the trial court's order dismissing this civil action with prejudice applied the correct legal rule and was not illogical, implausible, or without support in inferences that may be drawn from the facts in the record.

## Order

The trial court's decision dismissing this civil action with prejudice is AFFIRMED.

So ordered.

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caused the Ninth Circuit sitting en banc to develop the two-step objective review test in appeals involving a trial court's exercise of its discretion.

**Cite As:** *Solomuli v. Am. Samoa Gov't*, AP No. 15-12, slip op. at [page number] (App. Div. Feb. 6, 2015) (op. & order)

**LUAIVA SOLOMULI AND VAITAGALOA TUIOLEMOTU,**
**Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT AND DEPARTMENT OF HEALTH, Respondents.**

High Court of American Samoa
Appellate Division

AP No. 15-12

February 6, 2015

[1] The Appellate Division has jurisdiction over appeals from administrative decisions pursuant to A.S.C.A. § 4.1041.

[2] Administrative hearings on appeals and grievances of government employees are conducted by the Administrative Law Judge as hearings officer of the Personnel Advisory Board.

[3] When the outcome of an administrative hearing is appealed pursuant the Administrative Procedures Act, the High Court must confine its review of the administrative decision to the record and decision as developed and issued by the agency, unless the Court receives evidence necessary to supplement the record.

[4] The High 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 competence, and specialized knowledge.

[5] The court may reverse, remand, or modify an ALJ decision if substantial rights of an aggrieved party have been prejudiced and the decision was: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (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.

[6] American Samoa follows the "American Rule," which states that in

the absence of statute, contract, or other legal basis to the contrary, each party bears the burden of his or her own attorney's fees.

[7] American Samoa does not have an equivalent to the federal Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and thus awards of attorney's fees must be based on the "American Rule."

[8] The Back Pay Act, 5 U.S.C. § 5596, did not apply to petitioners, who were ASG employees, because they were not agency employees who had been affected by an unjustified or unwarranted personnel action and they were not appointed to the civil service or supervised by an individual named in 5 U.S.C. § 2105(a)(1).

[9] The ALJ exceeded his statutory authority when he found an exception to the well-established American Rule in a federal statute that the judicial branch has not found applies in American Samoa.

[10] It is emphatically the province and duty of the judicial department to say what the law is, not the executive branch.

[11] Because petitioners' positions with the American Samoa Government were abolished due to lack of funds, petitioners' only administrative remedy is enrollment on the Reduction-in-Force Register and effectuation of territory-wide Reduction in Force procedures.

[12] While an employee fully reinstated after an appeal to the PAB is entitled to back pay, the employee is not entitled to full back pay when his position has been abolished and there is no funding.

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

Counsel: For Petitioners, Mark Frederick Ude
For Respondents, Assistant Attorney General Cecilia Reyna

OPINION AND ORDER

Per curiam.

Before the Court is Petitioners Luaiva Solomuli and Vaitagaloa Tuiolemotu's petition for review of a final decision by the Administrative Law Judge ("ALJ").[1] On October 30, 2014, the Court heard oral

[1] The parties incorrectly filed a notice of appeal and briefs instead of a petition for review of an agency decision under the Administrative Procedures Act, A.S.C.A. §§ 4.1001, *et seq*. ("APA"). Judicial review of

arguments on the merits of Solomuli and Tuiolemotu's petition and took the submitted matter under **[**2**]** advisement. For the reasons set forth below, the Court hereby reverses the award of attorney's fees by the ALJ and remands this case to the ALJ for further proceedings.

## Jurisdiction

**[1]** The Appellate Division has jurisdiction over appeals of administrative decisions pursuant to A.S.C.A. § 4.1041. *Island's Choice, Inc. v. Am. Samoa Gov't*, 5 A.S.R.3d 3, 5 (App. Div. 2001).

## Standard of Review

**[1-5]** Administrative hearings on appeals and grievances of government employees are conducted by the Administrative Law Judge ("ALJ") as hearings officer of the Personnel Advisory Board ("PAB"). A.S.C.A §§ 7.0104, 4.0602(b). When the outcome of these hearings is appealed pursuant the Administrative Procedures Act, the High Court must confine its review of the administrative decision to the record and decision as developed and issued by the agency unless the Court receives evidence necessary to supplement the record. A.S.C.A. § 4.1043(a). 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 competence and specialized knowledge." *Nat'l Pac. Ins. Co. v. Comm'r*, 5 A.S.R.3d 183, 189 (Trial Div. 2001) (cited in *Wall v. Governor*, AP No. 09-08, slip op. at 8 (App. Div. Jan. 18, **[**3**]** 2013)); *see* A.S.C.A. § 4.1043(b). If a reviewing court finds that substantial rights of an aggrieved party have been prejudiced by the ALJ's decision, the court may reverse, remand, or modify the decision if the decision was:

> (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.

## Background

The Appellate Division has heard matters pertaining to this dispute twice

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an agency decision is governed by A.S.C.A. §§ 4.1040-.1044. The APA and 15 ACR require the filing of a petition for review rather than a notice of appeal and briefs.

before on appeal from proceedings before the ALJ. *See Solomuli v. Am. Samoa Gov't*, AP No. 04-10 (App. Div. May 17, 2011); *Solomuli v. Am. Samoa Gov't*, AP. No. 06-08 (App. Div. May 14, 2009).

As we explained in AP No. 06-08, the American Samoa Government ("ASG") employed Petitioners as Administrative Assistants in the Department of Health ("DOH"). DOH and ASG terminated Petitioners after funding ceased to exist for their positions. Until their termination, Petitioners were career service employees.

On March 16, 2006, the Director of the Criminal Justice Planning Agency sent a notice to the Director of the Department **[**4**]** of Public Health explaining that the federal grant funding for Petitioners' positions would end in fiscal year 2007. Petitioners received copies of the notice more than one year before their termination. Petitioners' immediate supervisor informed DOH's personnel office by letter, dated May 3, 2007, that Petitioners were being terminated due to a lack of funds effective April 30, 2007. Petitioners also received copies of this letter.

Following their termination, Petitioners met with DOH's Director and Deputy Director, the Lieutenant Governor, and Governor to contest their termination. Eventually, Petitioners filed a complaint with the ALJ seeking back wages and consequential damages.

On March 6, 2008, the ALJ found that Petitioners had no right to appeal because a termination for lack of funding is not one of the appealable employment decisions provided in A.S.A.C. § 4.0901. In AP No. 06-08, the Court reversed the ALJ's decision and remanded the case. *Solomuli v. Am. Samoa Gov't*, AP. No. 06-08 (App. Div. May 14, 2009).

On November 24, 2009, the ALJ held an evidentiary hearing. On December 14, 2009, the ALJ issued an amended decision awarding Petitioners two weeks' wages and "reasonable attorney's fees." Petitioners again appealed. In AP No. 04-10, Petitioner's petition was dismissed as premature. **[**5**]**

The ALJ then held an evidentiary hearing on the issue of whether or not ASG had exhausted all possibilities in placing Petitioners in positions within the DOH and, if unsuccessful, had placed Petitioners' names on the re-employment registry. On September 5, 2012, the ALJ found that ASG had exhausted all attempts to place Petitioners because Tuiolemotu "did not want a job anymore and . . . was retired" and Solumuli "was not sure he wanted to be re-employed again."[2] The ALJ also held that ASG

[2] The ALJ order from which we glean this information, styled an "Order Exhausting Possibilities Placing Employees," was omitted from the record despite multiple requests from the Court for this Order and even

placed Petitioners' names on ASG's re-employment registry and that Petitioners "are not entitled to back pay except for the two weeks back pay first ordered in the Amended Decision of December 14, 2009."

**Discussion**

I. Attorney's Fees

Petitioners argue that the ALJ impermissibly cut their claimed attorneys' fees in half, resulting in an unreasonable award of attorneys' fees. (Appellants' Br. 22, 23-25.) **[**6**]**

**[6]** American Samoa follows "the 'American Rule,' whereby in the absence of statute, contract, or other legal basis to the contrary, each party bears the burden of his or her own attorney's fees." *TCW Special Credits, Inc. v. F/V Kassandra Z*, 3 A.S.R.3d 163, 183 (Trial Div. 1999). To award attorney's fees, therefore, the ALJ must have found a statute, contract, or other legal basis to authorize Petitioners to recover these fees from the government.

**[7]** The ALJ's December 14, 2009 order does not state the basis for awarding attorney's fees. As a preliminary matter, we note that there is no equivalent to the federal Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, in American Samoa.[3] The ALJ's award of attorney's fees must, therefore, be based on another exception to the American Rule.

At oral argument, Petitioners argued that they are entitled to attorney's fees under the federal Back Pay Act, 5 U.S.C. § 5596. By its terms, attorney's fees may only be awarded under the Back Pay Act to "employee[s] of an agency" who "have been affected by an unjustified or unwarranted personnel action." 5 U.S.C. § 5596(b)(1). 5 U.S.C. § 2105(a) states that "employee" **[**7**]** means an officer and an individual who is--

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though this Order is one from which Petitioners appeal. Petitioner's counsel is reminded that his ethical duties include diligence and candor toward the tribunal and that he shall not knowingly disobey an obligation under the rules of a tribunal. MODEL RULES OF PROF'L CONDUCT R. 1.3, 3.3-3.4; 104 HCR.

[3] The Equal Access to Justice Act provides for limited attorney's fees to be awarded in an administrative adversary adjudication to a prevailing party other than the United States "unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1).

> (1) appointed in the civil service by one of the following acting in an official capacity--
>
> (A) the President;
>
> (B) a Member or Members of Congress, or the Congress;
>
> (C) a member of a uniformed service;
>
> (D) an individual who is an employee under this section;
>
> (E) the head of a Government controlled corporation; or
>
> (F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;
>
> (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
>
> (3) subject to the supervision of an individual named by paragraph (1) of this subsection while engaged in the performance of the duties of his position.

The Back Pay Act's definition of "agency" includes "an Executive agency." 5 U.S.C. § 5596(a)(1). 5 U.S.C. § 105 defines "Executive agency" as "an Executive department, a Government corporation, and an independent establishment." "Executive departments" include the Department of the Interior. 5 U.S.C. § 101.[4]

Petitioners argue that the Back Pay Act applies to ASG employees because they are employees of an agency within the meaning of 5 U.S.C. § 5596. (Appellants' Reply Br. 3-13.) In support of this proposition, Petitioners cite to *Bell v.* **[**8**]** *Comm'r*, 278 F.2d 100, 103 (4th Cir. 1960), a taxation case interpreting 26 U.S.C. § 251(j), and *Tien Lop Lee v. United States*, 549 F.2d 154, 154-55 (9th Cir. 1977), an immigration case interpreting 8 U.S.C. § 1430(b).

**[8]** Petitioners have failed to show that they are employees of an agency who have been affected by an unjustified or unwarranted personnel action within the meaning of the Back Pay Act. There is no evidence that Petitioners were appointed in the civil service or supervised by an individual named in 5 U.S.C. § 2105(a)(1). Petitioners also presented no evidence that they were engaged in the performance of a Federal function under the authority of law or an executive act. Furthermore, the *Bell* and *Tien Lop Lee* cases are distinguishable from the present case because they were decided before several major developments in the relationship between ASG and the Department of the Interior and interpreted tax and immigration statutes rather than the Back Pay Act. We are not aware of any previous case applying the Back Pay Act to ASG employees. The Back Pay Act does not, therefore, apply to Petitioners in this case.

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[4] In other sections of Title 5, Congress has indicated that territorial governments are not included in the definition of "agency." *See, e.g.*, 5 U.S.C. § 551(1).

**[9-10]** In impliedly deciding that the Back Pay Act applies to Petitioners, the ALJ acted in excess of his statutory authority. *See* A.S.C.A. § 4.1044(2). In conducting hearings in this case, the ALJ acts as a hearings officer assuming the responsibilities of the PAB. *See Segi v. Am. Samoa Gov't*, AP No. 07-12, slip op. **[**9**]** at 10-11 (App. Div. Aug. 22, 2013). In this type of case, these responsibilities are limited to hearing and disposing of administrative appeals of government employees. A.S.C.A. § 7.0104; A.S.A.C. § 4.0902. These narrow responsibilities do not include finding an exception to the well-established American Rule in a federal statute that the judicial branch has not found applies in American Samoa. Such a finding would be an exercise of the judicial power, which is vested in the High Court, REV. CONS. AM. SAMOA art. III, § 1, and not executive branch appointees like the PAB, A.S.C.A. § 7.0101, and ALJ. A.S.C.A. § 4.0602. In the U.S. Supreme Court's words, "[i]t is emphatically the province and duty of the judicial department to say what the law is," not the executive branch. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

For the foregoing reasons, we reverse the ALJ's award of attorney's fees pursuant to A.S.C.A. § 4.1044.

II. Back Pay

**[11-12]** Petitioners argue that they "are entitled to their full back pay" rather than the two weeks awarded by the ALJ. (Appellants' Br. 13.) Because their positions were abolished due to lack of funds, Petitioners' administrative remedy is enrollment on the Reduction-in-Force Register and effectuation of territory-wide Reduction in Force procedures. A.S.C.A. § 7.0806; A.S.A.C. § 4.0309, 4.0315, 4.0808. The ALJ **[**10**]** found that Petitioners' names were placed on the Reduction-in-Force registry. While an employee fully reinstated after appeal to the PAB is entitled to back pay, A.S.A.C. 4.0902(k), Petitioners cannot be reinstated to their previous positions because the positions have been abolished and there is no funding. Petitioners have, therefore, already received their remedy and are not entitled to full back pay.

## Order

The ALJ's decision is reversed with respect to its award of attorneys' fees. This case is remanded to the ALJ for further proceedings consistent with this Opinion and Order.

It is so ordered.

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**Cite As:** *Solomuli v. Am. Samoa Gov't*, AP No. 15-12, slip op. at [page number] (App. Div. Mar. 3, 2015) (order den. pet. for reh'g)

**LUAIVA SOLOMULI AND VAITAGALOA TUIOLEMOTU,**
**Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT AND DEPARTMENT OF HEALTH, Respondents.**

High Court of American Samoa
Appellate Division

AP No. 15-12

March 3, 2015

[1] The function of a rehearing is to correct errors of law or fact that the appellate court may have overlooked, leading to material errors and will not be granted merely for the purpose of reargument that has already been fully briefed, argued, and decided.

[2] Merely disagreeing with the court's reading of the applicable statutes, rules, and case law is not a basis for granting a rehearing.

[3] A rehearing will not be granted for issues raised for the first time in a petition for rehearing.

[4] In a motion for rehearing, the petitioner must set forth with particularity the points of law or fact that, in the opinion of the petitioner, the court has overlooked or misapprehended.

[5] 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.

[6] When petitioners offered no new information or argument and failed to explain why they believed opinions in other cases and the decision of the A.L.J. should be considered extraordinary circumstances, the Court denied the petition for rehearing.

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

Counsel: For Petitioners, Mark F. Ude
For Respondents, Assistant Attorney General Cecilia Reyna

ORDER DENYING PETITION FOR REHEARING

Appellants Luaiva Solomuli and Vaitagaloa Tuiolemotu petition for rehearing. For the reasons set forth below, we deny the petition.

## Standard of Review

**[1-2]** "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 den. 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 **[**2**]** 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 issues raised for the first time in a petition for rehearing." *Fuavai*, 2 A.S.R.3d at 57.

**[3-5]** 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 must be set forth with particularity. 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 recon.).

## Discussion

**[6]** Petitioners' Counsel proffers no new information or argument requiring further explanation. Counsel is asking that the first eleven (11) pages of his brief be reviewed "due to a renewed need." (*See* Pet. for Reh'g 9.) The Appellate Division has already done this and will not be doing it again; especially considering no new information **[**3**]** is presented. Counsel claims the Appellate Division "has taken at face value the finding of the A.L.J. that the Petitioners were 'terminated' and properly treated." *Id.* at 6. As stated in the February 6, 2015 Opinion and Order, after reviewing the evidence, we found the A.L.J.'s actions to

be in compliance with A.S.A.C. § 4.0808. Furthermore, Counsel believes opinions in other cases and the decision of the A.L.J. should be considered "extraordinary circumstances"; yet he does not explain why or how beyond the fact that these prior cases are "similarly situated." *Id.* at 13.

## Conclusion

In conclusion, we will not exercise our discretion to grant Appellant the privilege of a rehearing. Appellants have failed to demonstrate any error or misapprehension of the applicable law in the Court's February 6, 2015 Opinion and Order.

## Order

Petition for Rehearing is denied.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14, slip op. at [page number] (App. Div. Aug. 19, 2015) (order granting pet. for reh'g)

**AMERICAN SAMOA GOVERNMENT, Petitioner,**

**v.**

**RICHARD SEUMANUTAFA AND THE ADMINISTRATIVE LAW JUDGE, Respondents.**

High Court of American Samoa
Appellate Division

AP No. 10-14

August 19, 2015

[1] A petition for rehearing is analogous to a motion for reconsideration or new trial before the trial court and may be granted where: the record shows the court has made a manifest error of law or fact; the decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law.

[2] Where the Court was concerned that its previous decision materially and erroneously affected petitioner's right to appeal, the Court granted the petition for a rehearing.

Before KRUSE, Chief Justice; RICHMOND, Associate Justice; WARD, Associate Justice; SU'APAIA, Associate Judge; and SATELE, Associate Judge.

Counsel: For Petitioner, Assistant Attorney General Elana Rivkin-Haas
For Respondent Richard Seumanutafa, Mark F. Ude

ORDER GRANTING PETITION FOR REHEARING

RICHMOND, Associate Justice:

Petitioner American Samoa Government (ASG) timely petitioned pursuant A.C.R. Rule 40 for rehearing of the Court's decision entered on March 10, 2015, dismissing ASG's petition initiating this appellate proceeding to review certain orders issued by the Administrative Law Judge in ALJ No. 9-12. We grant ASG's rehearing petition and schedule argument on the issue identified below.

## Standard of Review

**[1]** A petition for rehearing is analogous to motions for reconsideration or new trial before the trial court and may be granted where: the record shows the court has made a manifest **[**2**]** error of law or fact; the decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law. *See, e.g.*, *Clifton v. Voyager*, 31 A.S.R.2d 12, 16 (Trial Div. 1996); *see also TCW Special Credits, Inc. v. F/V Cassandra Z*, 4 A.S.R.3d 225, 229 (Trial Div. 2000).

## Discussion

**[2]** The Court is principally concerned about whether the Court's decision materially and erroneously affected ASG's right to appeal. The following issues specifically impact this overall issue. First, the decision may misapply the principle that statutory provisions prevail over inconsistent administrative rules. Second, the decision may ignore or misinterpret ASG's qualification to seek judicial review of an administrative ruling as a person under the definition set forth in A.S.C.A. § 4.1001(f). Third, the decision may contravene sound public policy by precluding ASG from an inherent right to appeal administrative rulings when an opposing party can appeal a decision contrary to that party's claimed interests on the same issue before the administrative tribunal.

## Order

ASG's petition for rehearing is granted. A hearing for oral reargumentsons the rehearing issues is scheduled on October 30, 2015, at 1:30 p.m. Respondents Richard Seumanutafa and the Administrative Law Judge may file written **[**3**]** answers to the petition no later than 4:00 p.m. on September 25. 2015.

It is so ordered.

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# SLIP OPINIONS

**OF THE**

# TRIAL DIVISION

**OF THE**

# HIGH COURT OF AMERICAN SAMOA

**(2015)**

**Cite As:** *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13, slip op. at [page number] (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**HANIPALE MALAE, Defendant.**

High Court of American Samoa
Trial Division

CR No. 100-13
CR No. 188-13

January 27, 2015

[1] A motion for a new trial must be filed within 10 days after the announcement of the judgment or sentence.

[2] The formal style of the motion for new trial—for new trial, reconsideration, amendment of judgment, arrest of judgment, vacation of sentence, etc.—has never been held essential to the fulfillment of the statutory requirement.

[3] The court, on a defendant's motion, may grant a new trial if required in the interest of justice.

[4] When the court considers a motion for new trial, the burden is on a convicted defendant to show that some error was committed and that error was prejudicial to him.

[5] The decision to grant a motion for new trial is within the sound discretion of the trial court though it will not do so unless it has clearly erred in its findings or conclusions during the original trial.

[6] The Court expressed no personal prejudice, bias or ill-will toward the criminal defendant when it merely recognized that he was not the entirely good person defense counsel made him out to be.

[7] The Court did not express any personal prejudice, bias or ill-will toward the criminal defendant when it referred to the victims as "sex slaves" because the defendant failed to provide any testimony or independent information to refute the similar statements contained in the presentence report and the victims themselves characterized their

treatment as that of sex slaves.

[8] The Court did not abuse its discretion when it decided that institutional confinement was necessary for the protection of the public and did not consider probation when the defendant never expressly or impliedly argued for probation.

Before PATEA,* Acting Associate Justice; LOGOAI, Chief Associate Judge; and FA'AMAUSILI, Associate Judge.

Counsel: For Plaintiff, Deputy Attorney General Mitzie Jessop
For Defendant, Sharron I. Rancourt

ORDER DENYING MOTION TO RECONSIDER SENTENCE/MOTION FOR NEW SENTENCING

**Background and Case History**

In CR No. 100-13, Defendant Hanipale Malae ("Malae") was charged with several felonies involving sexual offenses against two victims (15-year old and 20-year old females): Rape (Counts 1 & 2), Sodomy (Counts 3 & 4), Deviate Sexual Assault (Counts 5 & 6), Sexual Assault (Count 7), and Sexual Abuse in the First offenses involving the same two victims: Endangering the Welfare of the Child (Count 10), Assault in the Third Degree (Court 12). In CR No. 188-13, Malae was charged with Tampering with a Witness (Count 1) and Concealing an Offense (Count 2). **[**2**]**

Pursuant to a plea agreement, Malae plead guilty to Deviate Sexual Assault (Count 6), Sexual Assault (Count 7), and Endangering the Welfare of a Child (Count 10) in CR No. 100-13. Malae also plead guilty to an amended charge of Conspiracy to Commit Tampering with a Witness in CR No. 188-13.

By his pleas of guilty, Malae specifically:

> Admit[ted to] sponsoring 15-year old F.P. and 20-year old S.S. to come to American Samoa from Samoa in the spring of 2013, to do housework for him and his family. [Malae] admit[ted] that on a date between February and May of 2013, at his home in Ili'ili, he kissed F.P., caressed her body, and penetrated her vagina with his penis. At that time, F.P. was 15 years old . . . and [Malae] was 57 years old . . . [Malae] admit[ted] that his actions created a substantial risk to the life, body, or health of

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

> F.P. [Malae] also admit[ted] that on a date in April 2013, at his home in Ili'ili, [Malae] told S.S. to remove her clothes. When S.S. refused, [Malae] pulled clothes again, and licked her vagina. He also told S.S. to suck his penis, which she did. S.S. cried during the sexual acts. [Malae] admit[ted] the sexual acts were done without S.S.'s consent. [Malae] also admit[ted] that after his arrest in HCCR No. 100-13, his wife . . . brought him a cell phone in jail, which he used to call [another person] to tell her to ask F.P. and S.S. to recant their statements to police. . . . [Malae] admit[ted] that his conduct on those dates was without legal justification or excuse.

(Not. of Plea Agreement ¶¶ 6-7.) Furthermore, the parties agreed that each side was "free to make their own sentencing recommendations." (Not. of Plea Agreement ¶ 8.)

After the change-of-plea proceedings, a presentence investigation and report were ordered by the Court and sentencing **[**3**]** was set for November 5, 2014. At the sentencing hearing, defense counsel limited her remarks to Malae's exemplary background, post-arrest conduct, health conditions, lack of prior criminal history, and propensity for rehabilitation. The Court also heard from Malae and his elderly mother. Defense counsel concluded her presentation by asking the Court not to sentence Malae to consecutive terms of imprisonment but to instead sentence Malae to concurrent terms.[1]

The prosecutor, on the other hand, argued that Malae should be sentenced to consecutive terms of imprisonment on all charges, or to the maximum term of detention if the Court places Malae on probation. In her remarks, the prosecutor also emphasized a statement from the presentence report indicating that Malae "used the victims as sex slaves during the few months that they lived with him." In rebuttal, defense counsel argued that the statement was the "pure opinion" of the person who wrote the presentence report. In response, the prosecutor pointed out that the opinion was based on the verbal statements of the victims to the author of the presentence report.

The Court, after considering all the information before it, remarked that there is another side to the "exemplary" Malae: a sinister person who used two young girls as his sex slaves. The Court sentenced Malae to a term of imprisonment of 7 years for Deviate Sexual Assault, 7 years imprisonment for Sexual Assault, 1-year imprisonment for Endangering the Welfare of a Child, and 1-year imprisonment for Conspiracy to

[1] Because A.S.C.A. § 46.2207 mandates that multiple terms of *probation* shall run concurrently, then, logically, defense counsel was impliedly arguing for concurrent *prison* terms and not probation.

Commit Tampering with a Witness. The Sexual Assault charge and the Endangering the Welfare of a Child charge involved the same 15-year old victim, and the imprisonment terms, 7 years and 1 year, respectively, **[**4**]** were run concurrent to each other. However, these concurrent terms and the remaining terms of imprisonment (involving a different victim and a subsequent offense) were ordered to be served consecutively.

On November 17, 2014, Malae filed a Motion to Reconsider the Sentence/Motion for New Sentencing. Malae asserts 3 grounds for his motion(s): 1) the Court relied on an impermissible factor at sentencing; 2) the Court exhibited personal bias, prejudice, and ill will toward Malae; and 3) the Court abused its discretion in concluding that Malae was not suitable for probation. On December 5, 2014, the Government filed its opposition. During the hearing on the motion(s) on December 10, no evidence was presented and the parties submitted on their pleadings. The Court raised the issue of the legal basis of Malae's motion(s). On that same date. Defense counsel submitted supplemental briefing on the issue.

## Jurisdiction and Standard of Review

**[1-2]** A.S.C.A. § 46.2402(a) provides that "a motion for a new trial shall be filed within 10 days after the announcement of the judgment or sentence."

> The formal style of the motion—for new trial, reconsideration, amendment of judgment, arrest of judgment, vacation of sentence, etc.—has never been held essential to fulfillment of the statutory requirement. Nor is it essential that the motion specifically request a new trial rather than some lesser or different form of relief from the judgment or sentence, **[**5**]** provided that the errors asserted by the motion are susceptible of such relief.

*Am. Samoa Gov't v. Falefatu*, 17 A.S.R.2d 114, 119 (Trial Div. 1990).

**[3-5]** "It is fundamental law that a motion for new trial is addressed to the sound discretion of the trial court." *Am. Samoa Gov't v. To'oto'o*, 2 A.S.R.2d 61, 64 (App. Div. 1985). The court, on a defendant's motion, may grant a new trial "if required in the interest of justice." T.C.R.Cr.P. 33. "When the court considers such a motion, the burden is on a convicted defendant to show that some error was committed and that error was prejudicial to him." *Am. Samoa Gov't v. Snow*, 26 A.S.R.2d 78, 80 (Trial Div. 1994). "Although it is within the court's discretion whether to grant a new trial, we will not do so unless we have clearly erred in our findings or conclusions during the original trial. . . . This is a

rigorous standard." *Am. Samoa Gov't v. Suani*, 29 A.S.R.2d 189, 190 9Tiral Div. 1996).

## Discussion

1. Impermissible Sentencing Factor and Personal Prejudice, Bias and Ill-Will towards Defendant

Malae asserts that the Court made a specific finding that the victims were "sex slaves," that such term "is specifically equated with human trafficking," and that such a characterization is based "on unproven and uncharged allegations." Malae also argues "that the court impermissibly injected personal bias into the sentencing" when the Court referred to Malae as "sinister." **[**6**]**

**[6]** First, Malae's interpretation of the Court's assessment of Malae as a sinister person is without merit. Definitions of "sinister" include "threatening harm, evil, or misfortune; ominous; portentous," "wicked, evil, or dishonest, esp. in some dark mysterious way," and "most unfavorable or unfortunate; disastrous." WEBSTER'S NEW WORLD COLLEGE DICTIONARY 1253 (3d ed. 1997). The Court was merely recognizing that Malae was not the entirely good person that defense counsel made him out to be: he had an unfavorable side that the Court could not ignore. There was no "personal prejudice, bias and ill will" in the Court's observation.

**[7]** Second, there was no special finding made or any special meaning attached to the Court's use of the phrase "sex slaves." Of all the comments made by the prosecutor at sentencing, Malae only took issue with the prosecutor quoting this phrase from the presentence report because the quotation expressed the "pure opinion" of the person who wrote the presentence report. As the prosecutor pointed out, however, that "opinion" was based on the verbal statements of the victims.

Malae did not, either at sentencing or the hearing in the instant motion(s), refute the prosecutor's statement or the findings in the presentence report.

T.C.R.Cr.P. 32(c)(2) states, in pertinent part, that:

> The report of the presentence investigation shall contain any . . . information about [the defendant's] characteristics, . . . and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

T.C.R.Cr.P. 32(c)(3)(A) states, in pertinent part, that: **[**7**]**

> Before imposing sentence the court shall upon request permit the defendant, or his counsel . . . to read the report of the presentence investigation . . . and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court, *to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report*.

(Emphasis added). Malae had an opportunity at sentencing to request a continuance to gather testimony and information to refute the prosecutor's statement or the findings in the presentence report. He did not. Malae also had ample opportunity to present such testimony or information during the hearing on these motion(s). He failed to do so and instead chose to "submit on the motion itself." Without any testimony or independent information to refute the statements contained in the presentence report, Malae's present motion(s) provide no basis for this Court to ignore the victims' characterization of their treatment by Malae as his sex slaves.

Furthermore, the victims' characterization of their treatment by Malae as sex slaves finds support in the plea agreement. Malae's own admissions in the plea agreement reflect and amplify his use of the young girls as his sex slaves: he brought the girls from Samoa to do housework; separated from the security of their families, the girls obeyed his demands for sex when and how he wanted it. The victims, according to the presentence report, reluctantly performed the sexual acts demanded of them because they feared Malae. Moreover, Malae's manipulations did not stop after his arrest. While in jail, he continued to exploit the girls' vulnerability by getting others to try and have the young victims retract their statements to the police. Thus, although Malae may disagree with the Court's **[**8**]** recognition of the victims' description of themselves as Malae's "sex slaves," Malae's own admissions in the plea agreement lend credence to the victims' statements contained in the presentence report.

The Court will not, therefore, exercise its discretion to grant a new trial based on the averred impermissible sentencing factor and personal prejudice, bias, or ill will toward the Defendant implied from the Court's use of the phrases "sinister" and "sex slaves" before pronouncing Malae's sentence.

2. Abuse of Discretion

**[8]** Malae's motion(s) maintain that the Court abused its discretion when it found that Malae was not suitable for probation. This argument is disingenuous. During the entire sentencing, Malae never once expressly or impliedly argued for a term of probation. Instead, he urged the Court

to impose concurrent terms of imprisonment. After considering all relevant factors—including the contents of the presentence report, the statements of Malae and his elderly mother, and the arguments of counsels—the Court decided that institutional confinement was necessary for the protection of the public. Once again, rather than presenting evidence during the hearing on these motion(s) to show the Court that confinement was not necessary, Malae instead chose to "submit on the motion itself." And once again, the Court is left with nothing but merely Malae's disagreement with the Court's exercise of its discretion. Given the lack of showing of any prejudicial error, the Court will not now exercise its discretion to grant Malae a new trial. **[**9**]**

## Conclusion and Order

Based on all the information before the Court at sentencing, Malae was sentenced to terms of imprisonment, and the Court exercised its discretion by requiring that all but one of Malae's prison terms be served consecutively. The present motion(s) have provided no basis for this Court to alter its sentence. Malae has failed to meet his burden under the rigorous standard of a motion for a new trial. The Motion to Reconsider the Sentence/Motion for New Sentencing is DENIED.

It is so ordered.

**********

**Cite As:** *Am. Samoa Gov't v. Wright*, CR No. 67-14, slip op. at [page number] (Trial Div. Feb. 9, 2015) (op. & order)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**SAMUELU WRIGHT, Defendant.**

High Court of American Samoa
Trial Division

CR No. 67-14

February 9, 2015

[1] Involuntary confessions cannot be used against a criminal defendant.

[2] A voluntary confession is the product of a rational intellect and free will.

[3] Coercive police conduct may result in a determination that a defendant's will was overborne at the time he confessed, therefore rendering the confession involuntary.

[4] Misrepresentation of the evidence to a person being interrogated does not necessarily make a subsequent confession involuntary and, therefore, inadmissible.

[5] When police deception or misstatement places a suspect in a position where the decision to confess or remain silent is unduly influenced by factors other than the evidence of the crime presented the subsequent statement may be considered an involuntary confession.

[6] When police led the suspect to believe, falsely, that his wife was going to be taken into custody and his children taken away by Social Services the suspect's subsequent confession was involuntary made and, therefore, inadmissible against him in these proceedings.

Before WARD, Associate Justice; SU'APAIA, Associate Judge; and SATELE, Associate Judge.

Counsel: For Plaintiff, Assistant Attorney General Tiffany Oldfield
For Defendant, Assistant Public Defender Michael White

OPINION AND ORDER

This matter came on regularly before the Court on 2 February 2015 for a hearing on the Motion to Suppress the written and oral statements made by Defendant Samuelu Wright ("Wright") to police officers on or about 11 August 2014. Called to testify at this hearing as Plaintiff's witnesses were: Detective F. Amituana'i ("Amituana'i"), Commander T. Sagapolutele ("Sagapolutele"), and Detective A. Te'o ("Te'o"). Wright also testified.

**Finding of Facts**

On 11 August 2015 at a little before 2:00 P.M. Wright was at work at Sadie's By the Sea when Amituana'i and another Detective approached him and advised they wanted him to come to the Central Police Station, some two minutes drive from Wright's **[**2**]** work, for questioning concerning a recent armed robbery. Wright asked to finish work but was advised that he needed to come to the Central Station at the time. Although he was not handcuffed or physically touched by the officers, he was then transported in their police unit to the Central Station. Wright and Amituana'i then entered the station and proceeded to Sagapolutele's office where all three were seated. Sagapolutele then presented to Wright information received during the investigation of the robbery which indicated Wright had participated in that crime. Wright denied these allegations four to five times. At the final denial, Amituana'i, feeling "frustrated," briefly left Sagapolutele's office and returned a few minutes thereafter.

At this point, Sagapolutele again went through the evidence with Wright and when Wright responded that the information was wrong and that he wanted to tell the truth, Sagapolutele immediately stopped the conversation and Wright was then read his Miranda rights. Wright signed the "Warning of Rights" form, which also includes a waiver of counsel section, at 2:32 and 2:35 P.M. respectively.

Amituana'i stated he then escorted Wright to the Interrogation Room where Wright wrote his two-page statement concerning Wright's participation in the robbery, the first page being completed at 4:08 P.M. and the second at 4:24 P.M. **[**3**]** Amituana'i stated Wright was then escorted outside of the Central Station, was picked up by two friends and left.

Te'o testified that he and another police officer went to Sadie's by the Sea on 13 August 2014. Wright was arrested on a warrant on that date.

Wright testified he is married with two daughters, ages 4 years and 6 months, respectively. He is age 41 and has completed 3 ½ years of

college. He is fluent in English and Samoan. Wright also testified he has had some experience with the police and is somewhat "paranoid" of "how things work here."

Wright further testified that he believed he was in police custody during the time at Central Station during the afternoon of 11 August 2015. Wright interpreted the statements of Sagapolutele and Amituana'i to mean that he would not be released unless or until he made a written statement. Wright also acknowledged he had signed the Warning of Rights and Waiver of Counsel form at approximately 2:35 P.M. that day.

Wright testified that after being shown to the Interrogation Room, he was told by the officer, "you are not going home today because your house is about to be raided and your wife is about to be brought down to the state" [and your] "kids will be taken away by the Social Services." Wright asserted that he was "forced" to write the statement "because I did not want nothing to happen to my kids or my wife." **[**4**]**

## Discussion

**[1-3]** Generally, involuntary confessions cannot be used against a criminal defendant. *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964). A voluntary confession is "the product of a rational intellect and freewill." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). Coercive police conduct may result in a determination that a defendant's "will was overborne at the time he confessed," therefore rendering the confession "involuntary." *Lynumn v. Illinois*, 372 U.S. 528, 534 (1962).

In this matter, we consider whether, under the totality of circumstances present during Wright's 11 August 2014 interrogation by Department of Public Safety officers, Wright's written statement was voluntary.[1]

Wright does not dispute that he signed the Warning of Rights and Waiver of Counsel form. What he does assert, however, is that after doing so, he interpreted a statement made by a police officer in the Interrogation Room as a threat to his wife and children, thereby "forcing" him to write the two-page statement that was completed at 4:24 P.M. that day. **[**5**]**

[1] What is conspicuously lacking in the totality of circumstance in this matter is any recording of what was actually said by the D.P.S. officers or Wright during the 2 ½ hour period spent at the Central Station. In felony cases, the availability of recorded police interrogation session would advance the interests of justice and in all likelihood, reduce the uncertainty presented in current motions based solely on the participants' memories.

**[4]** Misrepresentation of the evidence to a person being interrogated do not necessarily make the subsequent confession involuntary and, therefore, inadmissible against that person. *See Frazier v. Cupp*, 394 U.S. 731, 739 (1969). This remains true for the obvious reasons that the suspect generally knows the extent of his or her involvement, what actually occurred, and can evaluate the interrogator's claims or demand proof thereof.

**[5]** When deception by the police can make an otherwise voluntary statement into an involuntary one occurs when the deception or misstatement places the suspect in a position whereby the decision to confess or remain silent is unduly influenced by factors other than the evidence of the crime presented. *See Lynumn*, *supra*, in which the suspect was led to believe her children and welfare benefits would be taken away if she did not make a statement.

**[6]** We find Wright's testimony credible. Regardless of the precise language used by the police officer in the interrogation room, Wright's subsequent written statement was influenced by what he perceived to be necessary to prevent his wife from being taken into custody or his children removed from their home. **[**6**]**

## Conclusion

Based on the foregoing finding of fact and discussion, we hold that Wright's two-page handwritten statement made on 11 August 2014 was, under a totality of the circumstances, involuntarily made, and therefore, inadmissible against him in these proceedings. His Motion To Suppress that statement is hereby granted.

So Ordered.

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**Cite As:** *Vaivai v. Am. Samoa Gov't*, CA No. 53-13, slip op. at [page number] (Trial Div. Feb. 9, 2015) (order den. mot. for j. on the pleadings)

**TAUFUIAVA M. VAIVAI, Plaintiff,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Defendant.**

High Court of American Samoa
Trial Division

CA No. 53-13

February 9, 2015

[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 public duty doctrine is a common law theory that exists in the territory.

[3] The Government Tort Liability Act is a separate doctrine related to, but not in conflict with, the public duty doctrine.

[4] The public duty doctrine is meant to encourage governments to provide public assistance in emergency situations and applies whenever a government responds to an emergency situation.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Assistant Attorney General Cecila Reyna

ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

## Background

According to the Plaintiff, on July 21, 2011, Plaintiff's fishing boat broke down at sea and was unable to be repaired by crew onboard. Plaintiff attempted to seek assistance via call by emergency radio. Plaintiff believes Defendant has the duty to monitor the call line and provide

assistance to distressed vessels. However, Plaintiff's calls to the number apparently went unanswered. Plaintiff's vessel remained adrift until it ran aground on a reef within the Territory of American Samoa. Plaintiff seeks payment of general and consequential damages from Defendant. **[**2**]**

Trial was scheduled on October 1, 2014. However, this case was not assigned to Defendant's present counsel to handle until mid-September 2014, and on September 19, 2014, Defendant promptly filed motions for a judgment on the pleadings, based on asserted inapplicability of the public duty doctrine in American Samoa, and to continue the trial. The Court vacated the trial date in order to give due consideration to this significant substantive issue in this case.

For the reasons stated below, we deny ASG's motion for judgment on the pleadings and allow this case to proceed to trial.

## Discussion

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." *See Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009) (internal citations omitted); *see also Marshall Naify Revocable Trust v. United States*, 672 F.3d 620, 623 (9th Cir. 2012)*; Lyon v. Chase Bank U.S.*, 656 F.3d 887, 883 (9th Cir. 2011).

At this juncture, we will not render a judgment on the pleadings. There are, treating motion as a summary judgment motion pursuant to A.S.R.C.P. 12(c), genuine issues of material **[**3**]** fact concerning the creation and existence of any emergency line, and Defendant's responsibilities with respect to it. Plaintiff deserves the opportunity to present his case. Plaintiff also points out that Defendant is bringing up the public duty doctrine as a specific issue at the very last minute. In this regard, however, Defendant raises a valid issue that is better further developed and resolved at trial.

Public Duty Doctrine

**[2-4]** Despite what Plaintiff thinks, the public duty doctrine is a common law theory that does exist here in the territory. *See Progressive Ins. Co. v. Am. Samoa Gov`t*, AP 10-07 4, n.2 (App. Div. Jan. 25, 2010). The Government Tort Liability Act is a separate doctrine related to but not in conflict with the public duty doctrine. The public duty doctrine is meant to avoid governments from being dissuaded from providing public assistance in emergency situations. Plaintiff misreads and

mischaracterizes the opinion in *Progressive*. The Appeals Court in *Progressive* did not say that the public duty doctrine does not exist. In fact, it said the opposite. *See Progressive, 6 n.3*.

The instant case is distinguishable from *Progressive*. Plaintiff would limit the application of the public duty doctrine, if it exists, only to firefighters responding to a **[**4**]** fire, but that is incorrect. In general, the doctrine applies wherever a government responds to an emergency situation, including the kind of emergency similar to the case at bar. *See Saunders v. United States*, 99 Fed. App'x 814 (2004)*; see also Johnson v. City of Seattle*, No. 05-35319, 2007 U.S. App. LEXIS 1509 (9th Cir. Jan. 18, 2007). Another key difference is that in *Progressive* the firefighters undertook steps that led to a further deterioration of the circumstances. Here Defendant did not create or insert itself into the circumstances leading to Plaintiff's troubles. Even if we were to reject the public duty doctrine, Defendant would still be liable like any private person in this situation. *See United States v. Olson*, 546 U.S. 43 (2005). However, Plaintiff will have the opportunity at trial to present both law and facts against application of the public duty doctrine in this case.

**Order**

Defendant's motion for judgment on the pleadings is denied. A new trial date will be scheduled for a status hearing on February 24, 2015, at 9:00 a.m. It is so ordered.

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**Cite As:** *Fa'asala v. Ainu'u*, CA No. 62-02, slip op. at [page number] (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement)

**NIKOLAO FA`ASALA, Plaintiff,**

**v.**

**SALANI AINU`U, ERIC & FALO JOHANSSON, Defendants.**

High Court of American Samoa
Trial Division

CA No. 62-02

February 10, 2015

[1] A motion for reconsideration or new trial may be granted where: the record shows the court has made a manifest error of law or fact; the decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law.

[2] A judgment will not be set aside except for substantial reasons.

[3] The burden is on the moving party to show substantial reasons with particularity that a motion for reconsideration or new trial should be granted.

[4] Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling.

[5] The defendant has the burden to show that the committed error was prejudicial.

[6] The moving party in a motion for reconsideration or new trial must do more than reiterate the court's previous decision and merely assert that it was incorrect.

[7] The standard for granting a motion for reconsideration is strict and should be denied unless the moving party can point to controlling decisions or data that the court overlooked.

[8] Any error that does not affect substantial rights will be deemed harmless and disregarded.

[9] The court will not grant a motion for reconsideration where the moving party seeks solely to relitigate an issue already decided and will not consider arguments that the moving party failed to raise during the original trial.

[10] Defendant was an agent of the vehicle's owners when he was driving the vehicle with the permission of the owners.

[11] In the legal sense, controlling another's conduct does not mean physically controlling the person; providing orders or giving an individual permission functions as control and can create a principal-agent relationship.

[12] Just because counsel does not agree with the court's decision does not make it inappropriate, improper, excessive or not based on the evidence.

[13] A stay of judgment pending appeal is made under the Court's discretion and as it considers proper for the security of the rights of the adverse party.

[14] The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if stay is denied and irreparable harm to the appellee if stay is granted; and (3) whether the public interest would be affected by the stay.

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

Counsel: For Plaintiff, Mark F. Ude
For Defendants, Asaua Fuimaono

ORDER DENYING MOTION FOR RECONSIDERATION OR NEW TRIAL AND FOR STAY OF ENFORCEMENT

On October 30, 2014, Defendants Eric Johansson and Falo Johansson ("the Johanssons") timely moved for reconsideration or new trial of the Court's decision following trial, issued on October 21, 2014, holding Defendants jointly and severally liable to Plaintiff for his damages in the amount of $37,250, plus costs of suit, less any adjustment to be determined for pretrial payments, resulting from a motor vehicle accident on June 6, 2002. A Stay of Enforcement of the October 21 Judgment was included in the Motion. We heard the motion on December 19, 2014, and now deny it. **[**2**]**

## Standard of Review

**[1-2]** A motion for reconsideration or new trial may be granted where: the record shows the court has made a manifest error of law or fact; the decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law. *See, e.g.*, *Clifton v. Voyager*, 31 A.S.R.2d 12, 16 (Trial Div. 1996); *see also TCW Special Credits, Inc. v. F/V Cassandra Z*, 4 A.S.R.3d 225, 229 (Trial Div. 2000). A judgment will not be set aside except for substantial reasons. *Am. Samoa Gov't v. S. Pac. Island Airsystems, Inc.*, 28 **[**3**]** A.S.R.2d 170, 171 (Trial Div. 1995); *see also Boral Gas of Am. Samoa, Inc. v. Iaulualo*, 7 A.S.R.3d 57, 58 (Trial Div. 2003).

**[3-6]** The burden is on the moving party to show substantial reasons that such relief should be granted. *S. Pac. Island Airsystems*, 28 A.S.R.2d at 171. [Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling. *See Lucky Star, Inc. v. Am. Samoa Gov't*, CA 28-11, slip op. at 1-2 (Trial Div. Dec. 1, 2011) (order denying motion for new trial) (citing *S. Pac. Island Airsystems, Inc*., 28 A.S.R.2d at 171 (Trial Div. 1995); T.C.R.C.P. 61).] Furthermore, it is incumbent on the moving party to state with particularity and detail the grounds for relief; thus affording the trial judge an opportunity to differentiate manifest errors of law or fact from otherwise harmless errors. *Id.* at 171-172; *see also* Rule 7(b)(1) of the Rules of Civil Procedure. The defendant has the burden to show that the committed error was prejudicial, *Am. Samoa Gov't v. Snow*, 26 A.S.R.2d 78, 80 (Trial Div. 1994) (citing *United States v. Simms*, 508 F. Supp. 1188, 1203 (W.D. La. 1980)). The moving party must do more than reiterate the court's previous decision and merely assert that it was incorrect. *G.M. Meredith and Assoc. v. Blue Pac. Mgmt. Corp.*, 28 A.S.R.2d 204, 206 (Trial Div. 1995); *see also Suluai v. Nat'l W. Life Ins. Co.*, 6 A.S.R.3d 216, 217-18 (Trial Div. 2002).

**[7-8]** Lastly, the standard for granting a motion for reconsideration is strict and should be denied "unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp. Inc*., 70 F.3d 255, 257 (2d Cir. 1995.) Any error "which does not affect substantial rights" will be deemed harmless and disregarded. T.C.R.Cr.P. 52(a). **[**4**]**

**[9]** Plainly put, a "motion for reconsideration should not be granted where the moving party seeks solely to relitigate an issue already decided." *Id.*; *see also Glavor v. Shearson Lehman Hutton, Inc.* 879 F. Supp. 1028, 1033 (N.D. Cal. 1994) ("If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived.")

(citations omitted). In addition, the court will ordinarily not consider arguments that the moving party failed to raise during the original trial. *Clifton*, 31 A.S.R.2d at 16; *see also Moea`i v. Alai`a*, 12 A.S.R.2d 91, 93 (App. Div. 1989).

## Discussion

The Johanssons are responsible for the Court's judgment for the following reasons:

### Defendant Ainu'u was an agent of Defendants Johanssons

**[10]** The Johanssons' counsel makes contradictory statements and appears to misunderstand the legal repercussions behind those statements. Counsel states: "The fact that (Defendant Salani) Ainu'u was the driver of the vehicle on the date of the accident is not sufficient to classify him as an agent of the Johanssons." (Mot. for Recons./New Trial at 2.) That statement is correct. However, Ainu'u is not an agent because he was simply driving the vehicle on the date of the accident; it was because he was driving with the Johanssons' permission that **[**5**]** makes him their agent in the context of this action. *Id.* at 3 ("Ainu'u is a relative, he was running an errand on the day of the accident admittedly with the consent of the Johanssons."); *see also id.* at 4 ("it is correct that the Johanssons gave permission to Ainu'u to use their vehicle").

**[11]** Additionally, counsel states that it is 'impossible to control someone who is operating a vehicle.' Counsel misconstrues what it means to 'control the physical conduct' of an individual. *Id* at 2. In the legal sense, controlling another's conduct does not mean physically controlling the person. Providing orders or giving an individual permission can create a principal-agent relationship. *See Columbia Casualty Co. v. Hoohuli, 50 Haw. 212 (1968)* (citing instance where because Defendant Driver had Defendant Owner's permission to operate the vehicle he was covered under the Owner's insurance and was responsible along with the Owner.); *see also C. H. Elle Constr. Co. v. W. Casualty & Sur. Co., 294 F.2d 459 (1961)* (demonstrating that Insurer did not have to pay because Plaintiff Driver did not have permission from Plaintiff Owner to operate the vehicle).

### Defendants' Counsel gives conflicting statements as to who should be responsible and how the Court should have ruled

We ruled the three Defendants jointly and severally liable **[**6**]** to the Plaintiff. Counsel seems to think no one should be held responsible.

Counsel states, "Defendants contend that the Court erred in finding that the defendants are jointly and severally liable for the damages suffered

by the plaintiff." (Mot. for Recons./New Trial at 3.) Then Counsel states, "While it is correct that the Johanssons gave permission to Ainu'u to use their vehicle, *it is not entirely their fault* that Ainu'u drove into the plaintiff's vehicle." *See id*. at 4 (emphasis added). So Counsel admits the Johanssons are responsible to at least some extent; hence supporting our decision which we stand by.

Putting the contradictory statements aside for a moment, counsel attempts to shift the entire blame and responsibility onto his one client who "has left the Territory sometime ago without saying anything" to his relatives; thus, he leaves Plaintiff with no way to attain relief. *Id.* at 4. This is either a dubious manner for an attorney to represent his client or perhaps this is all part of Counsel's outrageous strategy to benefit his clients by weaseling them out of properly, legally, and justly compensating Plaintiff.

**The Court considered all facts at trial to reach its decision**

**[12]** The Johanssons seem to believe our decision was inappropriate, improper, excessive and not based on the **[**7**]** evidence. The Court looked at all the documents submitted at trial including car repair estimates and medical records from LBJ. Just because counsel does not agree with our decision does not make it wrong. Counsel points to no law showing exactly where the decision is wrong; instead stating that it is unfair and we should have gone with a lesser punishment. The fact is that his clients were not insured enough to cover the damage they caused and are now responsible for paying. Plaintiff should not have to suffer because the Johanssons failed to adequately insure themselves.

**In its statutorily granted discretion, the Court denies the Defendants' request for a stay of enforcement of order**

**[13-14]** A stay of judgment pending appeal is made under the Court's discretion and as it considers proper for the security of the rights of the adverse party. *See* T.C.R.C.P. 62. The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if stay is denied and irreparable harm to the appellee if stay is granted; and (3) whether the public interest would be affected by the stay. *Asifo v. Lualemana*, 17 A.S.R.2d 100, 102 (App. Div. 1990).

Based on our reasons supra, the Defendants are not likely to prevail on appeal. Furthermore, there is no irreparable harm **[**8**]** in our original order, as monetary payments are generally fungible, and it does not substantially affect the public interest. Therefore, we deny the Defendants' motion for stay of enforcement of order.

## Order

Along with the above reasons and because the Johanssons only rehash old issues and fail to introduce new facts or information that would warrant reconsideration or a new trial, we deny Defendants' motion for reconsideration or new trial and for stay of enforcement of order.

It is so ordered.

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**Cite As:** *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15, slip op. at [page number] (Trial Div. Feb. 17, 2015) (order denying appl. to register comm'n)

**IN RE: THE APPLICATION BY ADRIATIC SEA FISHERIES, LTD. TO REGISTER CALIFORNIA COMMISSION AND TO ISSUE A SUBPOENA TO THE CUSTODIAN OF RECORDS OF PURSE SEINE SAMOA, INC.**

High Court of American Samoa
Trial Division

FJ No. 01-15

February 17, 2015

[1] The Enforcement of Foreign Judgments Act does not contemplate this Court's involvement in the discovery process of foreign jurisdictions.

[2] The Enforcement of Foreign Judgments Act applies only to a final decision of a foreign tribunal that determines a dispute between the parties, specifying who prevails, as well as clearly articulating what remedy or remedies that is/are being sought to be enforced by this Court.

[3] A foreign court's jurisdiction ends when it enters a final decision.

Before KRUSE, Chief Justice.

Counsel: For Applicant, Marian T. McGuire

ORDER DENYING APPLICATION TO REGISTER COMMISSION

A defendant in a civil lawsuit pending before the Superior Court of California ("Applicant") seeks to depose a third-party American Samoa domiciliary, Purse Seiner Samoa Inc. ("PSS"), believed to be a former employer of the plaintiff. Applicant essentially petitions this court's issuance of its process under the Enforcement of Foreign Judgments Act, A.S.C.A. §§ 43.1701 et seq. ("EFJA"), to enforce a Superior Court issued subpoena duces tecum addressed to PSS. Applicant argues that the Superior Court's compulsory process comes within the definition of "foreign judgment" under A.S.C.A. § 43.1702, which enactment defines foreign judgment as "any judgment, decree or order of a court . . . entitled to full faith and credit in this Territory." Applicant construes the word "order" to include compulsory process of a foreign jurisdiction. No legal analysis is provided by Applicant for the submission.

**[1-3]** We are not persuaded. In our view, the EFJA does not contemplate this Court's involvement with the discovery process **[**2**]** of the courts of California. Rather, we construe the EFJA as speaking only to a final decision of a foreign tribunal that determines a dispute between the parties, specifying who prevails, as well as clearly articulating what remedy or remedies that is/are being sought to be enforced by this Court. In other words, a final decision means the end of the foreign court's jurisdiction. For example, § 43.1704 speaks of a "judgment creditor" and "judgment debtor," which terms only have meaning in the context of a final adjudication. Moreover, §§ 43.1705-06 contemplate stay scenarios pending the potential for appeal or outcome of an ongoing appeal respectively. These are hardly projected sequence of events pertinent to the discovery process.

The application to register commission under the EFJA is denied.

It is so ordered.

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**Cite As:** *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14, slip op. at [page number] (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss)

**AMY BLIZZARD, Plaintiff,**

**v.**

**DEVELOPMENT BANK OF AMERICAN SAMOA, Defendant.**

High Court of American Samoa
Trial Division

CA No. 80-14

March 6, 2015

[1] Notice of dismissal under T.C.R.C.P. 42(a)(1), if timely filed, is an unconditional right.

[2] If an adverse party has served an answer or motion for summary judgment or any party who has appeared declines to stipulate to dismissal, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

[3] A plaintiff, after answer has been served, has no absolute or unqualified right to dismiss his action without prejudice.

[4] When a motion to dismiss without prejudice is considered, the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties.

[5] A District Court, in the exercise of a sound judicial discretion, may require a plaintiff to pay the expenses and reasonable attorneys' fees incurred by the defendant as a condition for permitting dismissal without prejudice.

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

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Gwen F. Tauiliili-Langkilde

ORDER ON PLAINTIFF'S MOTION TO DISMISS

On April 15, 2014, Plaintiff Amy Blizzard avers that she slipped and fell on tiles covered in black mold adjacent to the Lumana`i Building, injuring her knee and wrist. Defendant Development Bank of American Samoa ("DBAS") is alleged to be the landlord of the property where Plaintiff slipped and fell. On November 26, 2014, Plaintiff filed an amended complaint against DBAS asserting a cause of action for negligence. On December 16, 2014, DBAS answered the amended complaint.

On March 2, 2015, Plaintiff filed an *ex parte* motion for voluntary dismissal without prejudice under T.C.R.C.P. 41. The grounds for the Motion are that "Plaintiff has discovered, on her own initiative, that Defendant has insurance coverage over the day of her accident. . . . Plaintiff believes this matter can be better resolved through a non-vindictive [sic] claim process." **[**2**]** (Pl.'s Mot. for Voluntary Dismissal at 2.) Given that the Clerk's file reflects that DBAS filed an answer and took other steps to defend against the action, we set the matter for inter partes hearing to ascertain DBAS's position on the motion.

On March 5, 2015, the Court held the aforementioned hearing. At the hearing, DBAS did not object to dismissal, but asked the Court to grant the dismissal with prejudice because of the time and effort expended defending this matter. The Court granted the motion for voluntary dismissal and took the terms and conditions of such dismissal under advisement.

## Standard of Review

**[1]** T.C.R.C.P. 42(a)(1) provides that

> an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.

Such a dismissal, if timely filed, is an unconditional right. *Eurocompany S.P.A. v. Yurgrettansflot*, 7 A.S.R.3d 76, 78 (Trial Div. 2003).

**[2-5]** If an adverse party has served an answer or motion for summary judgment or any party who has appeared declines to stipulate to dismissal, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper." T.C.R.C.P. 42(a)(2). Therefore, "a plaintiff, after answer

has been served, has no absolute or unqualified right to dismiss his action **[**3**]** without prejudice." *Barnett v. Terminal R. Assoc.*, 200 F.2d 893, 894 (8th Cir. 1953). "When a motion to dismiss without prejudice is considered, the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties." *Barber v. Gen. Electric Co.*, 648 F.2d 1272, 1275 (10th Cir. 1981). "A District Court, in the exercise of a sound judicial discretion, may as a condition for permitting a plaintiff to dismiss without prejudice after an answer has been filed, require him to pay the expenses and reasonable attorneys' fees incurred by the defendant." *Barnett*, 200 F.2d at 894.

**Discussion**

Here, Plaintiff no longer has an unconditional right to voluntary dismissal because DBAS has answered the amended complaint and has not signed a stipulation of dismissal. *See* T.C.R.C.P. 42(a)(1). It is, therefore, within the Court's discretion to set conditions to this dismissal to reduce prejudice to Defendant. *See* T.C.R.C.P. 42(a)(2). Accepting as true Plaintiff's representations that DBAS is insured and Plaintiff intends to pursue an insurance claim against DBAS's insurer and may seek to litigate if that claim is not resolved (and assuming that the insurer's liability is derivative, and therefore a dismissal with prejudice against DBAS would operate in favor of the insurer as well), the Court declines to dismiss this case with prejudice, at this time. The parties, however, have expended considerable time and energy prosecuting and defending this case to date; both parties have propounded and **[**4**]** responded to discovery and engaged in motion practice. To lessen Defendant's prejudice, dismissal of this case is granted; however, Plaintiff shall pay Defendant's expenses and reasonable attorneys' fees incurred to date.

**Order**

Plaintiff's motion is granted. This case is dismissed without prejudice on the condition that Plaintiff pay Defendant's expenses and reasonable attorneys' fees incurred to date. Otherwise, dismissal will be *with prejudice*.

Future motion dates in this case are taken off calendar.

It is so ordered.

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**Cite As:** *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10, slip op. at [page number] (Trial Div. Mar. 10, 2015) (op. & order)

**IN THE MATTER OF BEN FA`ASAMOA FANENE, A MINOR CHILD, FA`ASAMOA FANENE AND MATAVIA FANENE, Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Respondent.**

High Court of American Samoa
Trial Division

CA No. 06-10

March 10, 2015

[1] In a negligence action, the plaintiff must, by a preponderance of the evidence, establish the following elements: (1) duty; (2) breach; (3) causation; and (4) damages for injuries to person and property.

[2] There are two types of causation that need to be shown in a negligence action—proximate and factual.

[3] Proximate cause necessitates that the plaintiff first proves that the defendant's conduct, or lack thereof, was a cause in fact of the plaintiff's injuries.

[4] Factual cause is that cause, which in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred.

[5] It is the plaintiff's burden to prove that the defendant's conduct more likely than not was the cause in fact of the plaintiff's injury.

[6] To establish factual causation, the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.

[7] Where the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result is not one within common knowledge, expert testimony may provide sufficient basis for it, but in the absence of such testimony, it may not be drawn.

[8] This Court recognizes the tort theory of negligent infliction of emotional distress as a cause of action available in American Samoa.

[9] Negligent infliction of emotional distress is not an independent tort; it is a tort of negligence.

[10] Whether plaintiffs can recover damages for negligent infliction of emotional distress is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation, and damages that must exist to support the cause of action.

[11] There are two general theories by which a plaintiff may present a negligent infliction of emotional distress claim: the "bystander" theory is based on a breach of duty owed to the public in general, and the "direct victim" theory is based on a breach of a duty of care directly owed the plaintiff by the defendant.

[12] Generally, duty is a question of law which depends on the foreseeability of the risk and a weighing of policy considerations for and against the imposition of liability.

[13] Drivers of ASG school buses have a duty to everyone on the road, just like any other driver.

[14] The Court held it is foreseeable that failing to drive carefully in the rainy, wet conditions may result in injury and thus an ASG bus driver was negligent when he carelessly hit petitioners' vehicle and then again when he left the scene of the crime.

[15] The "direct victim" theory for a negligent infliction of emotional distress claim existed when defendant owed a duty to plaintiff and plaintiff was nearly hit by defendant's vehicle.

[16] Plaintiff fell under the "bystander" theory for a negligent infliction of emotional distress claim when he was the son of the man defendant nearly hit with defendant's vehicle, he was in defendant's vehicle at the time, and defendant left the scene of the crime with plaintiff, letting plaintiff believe his father had been killed.

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

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

OPINION AND ORDER

On September 7, 2010, Petitioners Ben Fa'asamoa Fanene ("Ben"), and in their appointed guardian ad litem and individual capacities Fa'asamoa Fanene ("Fa`asamoa"), and Matavia Fanene ("Matavia") (collectively "Petitioners") filed this action for damages against Respondent American Samoa Government ("ASG") for negligence and negligent infliction of emotional distress ("NIED"). For the reasons set out below, we hold in Petitioners' favor.

Petitioners alleged that Fa`asamoa was injured and his 1993 Toyota pickup was damaged while he and a companion were attempting to remove Fa`asamoa's stalled vehicle out of the public highway when an ASG school bus driven by its employee **[**2**]** collided with his vehicle. Ben, Fa'asamoa and Matavia's son, was in the bus at the time of the accident. ASG's employee did not stop to render assistance but went on to finish his duties before returning to the scene.

## Standard of Review

Negligence

**[1-7]** In a negligence action, the plaintiff must, by a preponderance of the evidence, establish the following elements: (1) duty; (2) breach; (3) causation; and (4) damages for injuries to person and property. *Lang v. Am. Samoa Gov't*, 1 A.S.R.3d 148, 150 (Trial Div. 1997). There are two types of causation that need to be shown—proximate and factual. Proximate cause necessitates that the plaintiff first proves that the defendant's conduct, or lack thereof, was a cause in fact of the plaintiff's injuries. *See Ostrowski v. Azzara*, 111 N.J. 429, 431 (N.J. 1988); Prosser and Keeton on the Law of Torts § 30 (W. Page Keeton et al. eds., 5th ed. 1984). Factual cause is "that cause, which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *See Fischer v. Red Lion Inns Operating L.P.*, 972 F.2d 906 (8th Cir. 1992); *Elledge v. Staring*, 939 P.2d 1163 (Okla. 1996); *Heavrin v. Shop'N Save*, 922 S.W.2d 463 (Mo. Ct. App. 1996); *Ostrowski*, 111 N.J. 429; *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227 (1984); **[**3**]** *Taylor v. Wyeth Lab., Inc.*, 139 Mich. App. 389 (1984); *Pacht v. Morris*, 107 Ariz. 392 (1971); *Lucas v. Hesperia Golf & Country Club*, 255 Cal. App. 2d 241 (1967). It is the plaintiff's burden to prove that the defendant's conduct more likely than not was the cause in fact of the plaintiff's injury. *Pasquale v. Miller*, 599 N.Y.S.2d 58, 59-60 (App. Div. 1993). Specifically, to establish factual causation, the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. Where the conclusion is not one within common

knowledge, expert testimony may provide sufficient basis for it, but in the absence of such testimony it may not be drawn.

Negligent Infliction of Emotional Distress

**[8]** This Court recognizes the tort theory of NIED as a cause of action available to the denizens of the Territory. However, we also are aware that NIED remains an evolving tort whose range of application is largely unexplored and clouded in uncertainty. *Klein v. Children's Hosp. Med. Ctr. of N. Cal.*, 46 Cal. App. 4th 889, 893 (1996). *See Id.* This has consequently created a great deal of confusion at the trial level in other jurisdictions. *See, e.g., Golstein v. Superior Court*, 273 Cal. Rptr. 270 (Ct. App. 1990); *Hurlbut v. Sonora Cmty. Hosp.* 254 Cal. Rptr. 840 (Ct. App. 1989); *Newton v.* **[**4**]** *Kaiser Found. Hosps.*, 228 Cal. Rptr. 890 (Ct. App. 1986); *Martinez v. County of L.A.*, 231 Cal. Rptr. 96 (At. App. 1986); *Goodwin v. Reilley*, 221 Cal. Rptr. 374 (Ct. App. 1985).

**[9-10]** Nonetheless, enough groundwork has been laid for us to recognize that "[NIED] is not an independent tort"; it is a tort of negligence." *Klein*, 46 Cal. App. 4th at 894. 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.*

**[11]** There are two general theories by which a plaintiff may present a NIED claim. The "bystander" theory is based on a breach of duty owed to the public in general. *Christensen v. Superior Court*, 54 Cal. 3d 868, 884 (1991). Under the "direct victim" theory, the damage sought is one for emotional distress resulting from a breach of a duty of care directly owed the plaintiff by the defendant. *Molien v. Kaiser Found. Hosps.*, 27 Cal.3d 916, 922-23 (Cal. 1980); *Marlene F. v. Affiliated Psychiatric Med. Clinic, Inc.*, 48 Cal. 3d 583, 590 (1989).

**[12]** Generally, "duty is a question of law which depends upon the foreseeability of the risk and a weighing of policy considerations for and against the imposition of liability." *Jacoves v. United Merchandising Corp.*, 9 Cal. App. 4th 88, 108 **[**5**]** (1992). *But see Christensen*, 54 Cal. 3d 868*; see also Thing v. La Chusa*, 48 Cal. 3d 644, 663 (1989) ("foreseeability of the injury alone is not a useful 'guideline' or a meaningful restriction on the scope of the NIED [negligent infliction of emotional distress] action").

## Discussion

Petitioners ask for damages resulting from two counts of negligence and two counts of NIED.

**[13-14]** Under the provisions of A.S.C.A. § 43.1203, ASG is liable for the consequences of the negligent operation of ASG's school bus by an ASG employee in the course and scope of his employment. ASG's employee driver of the school bus had a duty not only to the Petitioners but to everyone on the road, just like any other driver. It is foreseeable that failing to drive carefully in the rainy, wet conditions existing in this case may result in injury. ASG breached that duty when its bus driver carelessly hit Petitioners' vehicle, while Fa`asamoa was attempting to avoid being further injured or possibly killed, and then again by leaving the scene of the crime. Causation, both proximate and actual, of the resulting personal and property injury damages is self-explanatory for both negligence claims. **[**6**]**

Petitioners did not provide evidence of the cost of Fa`asamoa's medical care related to his injuries sustained in the accident. PPI's estimated $2,754.75 cost to repair his vehicle is in evidence.

**[15-16]** As for the NIED claims, the same elements of duty, breach, causation (proximate and factual), and damages apply. Furthermore, though Petitioners did not specify which NIED theory applies, it is readily identified in the present case. For Fa'asamoa the "direct victim" theory clearly applies as the duty was directly owed to him. For Ben, the more general "bystander" theory readily applies. In cases such as *Thing*, 48 Cal. 3d 644, and *Ochoa v. Superior Court*, 39 Cal. 3d 159 (1989), the bystander theory was limited because essentially it applied to anyone and therefore anyone who claimed to have seen the accidents could have a case, making the number of claims limitless. Courts have gone further to limit the bystander theory to family members, those in close proximity, and first-hand witnesses. In the instant case, Ben was in the bus that nearly killed his father Fa`asamoa. In fact, Ben was left to believe that his father had died since the ASG's driver drove the bus away from the scene. The detrimental effect this event had on Ben is well detailed in his medical report; from separation anxiety and 'clinginess' to not speaking. **[**7**]**

As for Matavia, Ben's mother, there is no proof in evidence that she suffered damages to either her person or property from the negligent operation of ASG's school bus. Also, while she was undoubtedly distressed as a Ben's mother and Fa`asaoma's spouse by the bus accident, there is again no proof in evidence to quantify her NIED damages other than a nominal amount.

## Order

Based on the findings of fact and conclusions of law set forth above, ASG's motion to dismiss is denied, and ASG held liable to petitioners as set forth below.

ASG shall pay Petitioner Fa'asamoa Fanene the total principal amount of $10,754.75 itemized as follows: (a) for his personal injury claim: $4,000 as general damages for his pain and suffering (b) for his vehicle injury claim: $2,754.75 as damages based on the estimated cost of repair; and (b) for or his negligent infliction of emotional distress claim: $4,000 for pain and suffering.

ASG shall pay the total principal amount of $4,000 to the Clerk of Courts to be held in trust in the Court's Registry, subject to withdrawal only by court order, on behalf of Petitioner Ben Fa`asamoa Fanene for his negligent infliction of emotional distress claim.

Lacking evidence to find or quantify her damages, Matavia recovers nothing for either her negligence or NIED claims. **[**8**]**

ASG shall also pay Petitioners their costs of suit to be stated in an affidavit submitted to and approved by the Court, plus post-judgment interest at the rate of 6% per annum on the unpaid balance of each of the total principal amounts set forth above.

It is so ordered.

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**Cite As:** *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07, slip op. at [page number] (Trial Div. Apr. 8, 2015) (op. & order)

**PATOLOMEO FULU, Plaintiff,**

**v.**

**MOBIL OIL AMERICAN SAMOA, TUTUILA SATAUA, AND DOES I THROUGH X, Defendant.**

High Court of American Samoa
Trial Division

CA No. 29-07

April 8, 2015

[1] The determination of whether an employee is wrongfully terminated depends on whether the person's employment is a just cause or an at-will relationship.

[2] An "at-will" employee may be fired without just or good cause unless there exists an express or implied contractual provision restricting the employer's right to terminate the employee.

[3] Any non-performance of a contractual duty constitutes a breach of contract.

[4] When another party materially breaches, the injured party may terminate the contract and sue for damages.

[5] When there were no contractual employment provisions or external misrepresentations restricting the employer's ability to terminate the employee and the employer had fired the employee for violating company policies, the employee had not been wrongfully terminated.

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

Counsel: For Plaintiff, Mark F. Ude
For Defendants, Fiti A. Sunia

OPINION AND ORDER

This order and opinion finds for the Defendant Mobil Oil American Samoa ("Mobil") against claims by Plaintiff Fulu ("Fulu") for wrongful

termination related to Mobil's termination of Fulu's employment in 2004. Simultaneously, we find for Fulu for Mobil's breach of contract when Mobil failed to pay Fulu for annual leave and sick leave time accrued.

## 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 Tutuila Sataua (Sataua), after Fulu was seen smoking next to the tanker pumping fuel delivered **[**2**]** 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. Fulu 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 tortious interference claiming 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. In May 2011, we dismissed the tortious interference claim, and Sataua was **[**3**]** dropped as a defendant. Mobil attempted to have the case decided on summary judgment which was denied by this Court.

## Procedural Background

Fulu initiated a small claims action against Mobil related to his termination in the District Court on June 30, 2004. (*See* Pl.'s Opp'n to Mot. for Summ. J., at Ex. A.) 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 id.*, at Ex. B.) 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 this 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**]**

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 a 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 which was denied by this Court. The Court here now is deciding this case after consolidating the claims into two: wrongful termination and breach of contract. **[**5**]**

## Standard of Review

Wrongful Termination

**[1-2]** The determination of whether an employee is wrongfully terminated depends on whether the person's employment is a just cause or an at-will relationship. *Tuika v. Am. Samoa Dev. Corp.*, 3 A.S.R.3d 155, 157. An "at-will" employee may be fired without just or good cause unless there exists an express or implied contractual provision restricting the employer's right to terminate the employee. *Velega v. Legislature of Am. Samoa*, 4 A.S.R.3d 145, 150 (Trial Div. 2000).

Breach of Contract

**[3-4]** Any non-performance of a contractual duty constitutes a breach of contract. Restatement of Contracts (Second) § 235 (1979). When another party materially breaches, the injured party may terminate the contract and sue for damages. *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 376 (3rd Cir. 1992).

## Discussion

Wrongful Termination

The determination of whether an employee is wrongfully terminated depends on whether the person's employment is a just cause or an at-will relationship. *Tuika*, 3 A.S.R.3d at 157. An "at-will" employee **[**6**]** may be fired without just or good cause unless there exists an express or implied contractual provision restricting the employer's right to terminate the employee. *Velega*, 4 A.S.R.3d at 150.

**[5]** Looking at the employee contract, Fulu was an at-will employee of Mobil. Therefore, he was subject to termination of employment at anytime without cause. *See id*. There is no evidence that his termination was for a reason that improperly violated some constitutional right. *See Banks v. Am. Samoa Gov't*, 4 A.S.R.2d 113, 120 (Trial Div. 1987). Fulu was actually fired for cause, allegedly smoking in an area in violation of company policies. The circumstantial evidence clearly established that Fulu violated Mobil's policies in violation of Paragraph 10 of Fulu's Employee Agreement and that Mobil did not need to provide notice. ("This contract may be terminated by the Company *without notice* if the Contractor commits . . . smoking in any of the Company's facilities.") (emphasis added). The four (4) weeks' notice Fulu believes he is owed only applies if the termination is *without cause*. *See* Employee Agreement ¶ 18 ("Termination of the Contract may be initiated by either party without cause but with 4 weeks [sic] notice . . . . Contractor may be terminated *immediately* upon breach of this agreement or any Company policy.") (emphasis **[**7**]** added). In this case, there was clear cause. Contrary to Fulu's claim, there is persuasive circumstantial evidence that he was smoking. There was no contractual employment provision or external misrepresentations restricting Mobil's ability to terminate him. *See Velega*, 4 A.S.R.3d at 150; *Faumuina v. Am. Samoa Gov't Emps. Ret. Fund*, 1 A.S.R.3d 45, 49 (Trial Div. 1997). Fulu has failed to prove that he was wrongfully terminated by Mobil.

Breach of Contract

Mobil did breach Fulu's contract by failing to pay Fulu for accrued annual leave and sick leave after terminating Fulu's employment, in accordance with paragraph (8)(a), (b) of the Employee Agreement.

**Order**

Mobil was within its right to terminate Fulu's employment without notice. However, Mobil is required to pay Fulu all accrued annual leave and sick leave in accordance with paragraph 8(a), (b) of the Employee Agreement.

It is so ordered.

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**Cite As:** *Manu v. Am. Samoa Gov't*, CA No. 04-15, slip op. at [page number] (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss)

**AKELI MANU, Plaintiff,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Defendant.**

High Court of American Samoa
Trial Division

CA No. 04-15

June 11, 2015

[1] The Workmen's Compensation Act applies to inmates confined to public institutions in certain circumstances outlined in A.S.C.A. § 32.0525.

[2] Under the Workmen's Compensation Act, an inmate is only entitled to an award upon being released from the institution on parole or final discharge, and the time for filing a claim begins at release.

[3] If an inmate sustains a permanent partial disability while doing work that falls under the Workmen's Compensation Act, he is entitled to compensation equal to 66 2/3 percent of his average weekly wages for the amount of time-based on the disabled body part.

[4] In American Samoa a contract of hire is not required for the payment of worker's compensation to an inmate.

[5] "Public works activity" under A.S.C.A. § 32.0525 includes doing work to maintain public places and their physical infrastructure, such as a flag pole that is part of a police substation.

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

Counsel: For Plaintiff, M. Talaimalo Uiagalelei
For Defendant, Assistant Attorney General Cecilia Reyna

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff Akeli Manu ("Manu") is an inmate at the Territorial

Correctional Facility who was allegedly injured when a flag pole he was moving with another inmate hit a power line and electrocuted him, causing him to lose two toes and be permanently scarred. On February 10, 2015, Defendant American Samoa Government ("ASG") moved to dismiss Manu's complaint on the basis that it is barred by A.S.C.A. § 43.1203(b)(4), which provides that the government is not liable for "any claim for which a remedy is provided elsewhere in the laws of the government," because Manu has a remedy under the Workmen's Compensation Act. On April 8, 2015, Plaintiff objected to the motion to dismiss on the basis that his injuries are not compensable under the Workmen's Compensation Act. On April 9, 2015, the Court held a hearing on this matter. For the reasons **[**2**]** set forth below, ASG's motion to dismiss is hereby granted.

## Standard of Review

1. Applicable American Samoa Statutes

**[1-2]** The Workmen's Compensation Act applies to inmates confined to public institutions if they are injured in the performance of their "work in connection with the maintenance of the institution, or with any industry maintained therein, or with any highway or public works activity outside the institution." A.S.C.A. § 32.0525. The inmate is only entitled to an award upon being released from the institution on parole or final discharge, and the time for filing a claim begins at release. A.S.C.A. § 32.0525(b)-(c).

**[3]** A.S.C.A. § 32.0609 provides that if there is permanent partial disability, "the compensation shall be 66 2/3 percent of the employee's average weekly wages" for an amount of time-based on the disabled body part; for example, a lost toe other than a great toe is 16 weeks' compensation, the loss of two or more digits "of a hand or foot may be proportioned to the loss of use of the hand or foot," and serious facial, bodily, or head disfigurement is the amount of proper and equitable time up to 200 weeks' compensation.

A.S.C.A. § 32.0621 provides that "the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation" and details how to calculate such weekly wage. "If at the time of the injury an hourly wage had not been fixed or could not be ascertained, the **[**3**]** wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where such services are rendered by paid employees." A.S.C.A. § 32.0621(d)(3).

In their written and oral arguments, Counsel have not cited to any American Samoan case interpreting the above-discussed statutory

provisions in a similar context. In particular, no previous High Court case has interpreted the phrase "public works activity" from A.S.C.A. § 32.0525. This case, therefore, presents an issue of first impression in American Samoa.

2. Persuasive Law from Other Jurisdictions

> Other States have confronted the issue of whether an inmate who is injured while working for the State who holds him in custody is covered by workmen's compensation, with widely varying results. The multitude of cases that address this issue and the variety of legislative and judicial response to it attest to the inherent dilemma created by a government policy encouraging prisoners to work during their incarceration but refusing to make restitution to them for on-the-job injuries.

*Barnard v. State*, 642 A.2d 808, 812 (Del. Super. Ct. 1992) (citations omitted).

**[4]** Historically, "[c]onvicts and prisoners by, [sic] judicial decision, by statute, or sometimes by both, have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions." ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 47.31(a), at 8-317-21 (Matthew Bender **[**4**]** 1998).[1] Recent legislative amendment of compensation acts, however, has made these acts more in "tune with the conditions of modern society" and allowed

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[1] "The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined. The inducements which might be held out to him, in the form of extra food or even money, are in no sense consideration for an enforceable contract for hire." LARSON'S WORKERS' COMPENSATION LAW § 47.31(a), at 8-317-21.

The traditional analysis goes like this:

> a person who works but is not an employee within the statutory meaning of the word is not covered under workmen's compensation laws; that is, when the State has no choice but to hire an inmate who chooses to work and who is found fit to do so, or if the inmate is required to work either by statutory mandate or by a custodial supervisor's direction, there is no voluntary contract, no employer/employee relationship, no issue. Under those circumstances, the result is simple.

*Barnard*, 642 A.2d at 813. In American Samoa, however, a contract of hire is not required for the payment of worker's compensation. *See* A.S.C.A. § 32.0502(f).

inmates to recover worker's compensation in certain situations. *Id.* at § 47.31(f), at 8-327-28.

It appears that A.S.C.A. § 32.0525 was copied with minor modifications from the Council of State Government's *Suggested State Legislation* (1965) (reprinted in LARSON'S WORKERS' COMPENSATION LAW § 47.31(f), at 8-332-33). Though other states have also taken language from this suggested legislation, we have not located any case interpreting the phrase "public works activity" in adopted versions of this legislation.

In other jurisdiction's statutes, however, there are a few definitions of "public works activity." In a New Jersey statute **[**5**]** concerning municipalities, "'[p]ublic works activity' means maintenance of streets, drainage, public buildings and places, water and waste water, solid waste, motor vehicles, or similar items related to the physical plant and infrastructure of a municipality." N.J. Stat. Ann. § 40A:9-154.6a (West 2015). In a Huntsville, Alabama statute concerning sidewalk and mobile vendors, "[p]ublic works activity means any public works project; public building project; infrastructure construction, maintenance, or repair; or other public improvement activity of the state or city." HUNTSVILLE, ALA. CODE § 18-36 (2015).

**Discussion**

**[5]** Here, assuming the allegations in the Complaint are true, Plaintiff was injured in the performance of his work in connection with public works activity. Plaintiff was maintaining a public place at the time he was injured -- the Tafuna police substation B- and the flag pole he was restringing is part of the physical infrastructure of the American Samoa Government. We are persuaded that A.S.C.A. § 32.0525 covers injuries sustained in the course of such maintenance. Additionally, even though Manu was not paid to maintain the police substation, there is still a method to calculate the basis of a worker's compensation award. *See* A.S.C.A. § 32.0621(d)(3). In sum, this case must be dismissed because Plaintiff has a remedy under the Workmen's Compensation Act. *See* A.S.C.A. § 43.1203(b)(4). **[**6**]**

**Order**

Defendant's motion to dismiss is granted.

It is so ordered.

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**Cite As:** *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15, slip op. at [page number] (Trial Div. June 12, 2015) (order denying am. pet.)

# IN RE: THE APPLICATION BY ADRIATIC SEA FISHERIES, LTD. TO REGISTER CALIFORNIA COMMISSION AND TO ISSUE A SUBPOENA TO THE CUSTODIAN OF RECORDS OF PURSE SEINE SAMOA, INC.

High Court of American Samoa
Trial Division

FJ No. 01-15

June 12, 2015

[1] A letter to the presiding justice by counsel is not a proper method of communicating with the Court concerning a pending case.

[2] The court may exercise personal jurisdiction in civil cases over persons residing or found in American Samoa, or who have been duly summoned or voluntarily appear.

[3] The Trial Division is a court of general jurisdiction with the power to hear any matter not otherwise provided for by statute, and the High Court has the power to issue all writs, make rules and orders, and do all acts, not inconsistent with law or with the rules made by the Chief Justice of American Samoa, as may be required for the due administration of justice.

[4] No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.

[5] The extent to which the law of one nation is allowed to operate within the dominion of another nation depends on the "comity of nations."

[6] "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other; it is the recognition that one nation may allow the acts of another nation in regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

[7] Comity applies not only between nations but also among different courts within a nation.

[8] Analyzing whether a foreign jurisdiction's decision will be recognized based on principles of comity is dependent on wide-ranging local policy considerations and involves serious questions of law and public policy.

[9] The Court will analyze whether to apply comity by considering a variety of policy considerations, including historical abuse of American Samoa's "jurisdictional deficiencies" by parties to maritime disputes, "forum manipulation" because of the Court's situation outside of a federal district or circuit, the perceived tendency of the Court to award lower damages than mainland fact finders, and attempts to pit the Court against mainland courts by filing "parallel litigation."

[10] The Court declined to extend comity to foreign non-judicial proceedings, particularly when the commission seeking to be registered had been issued without any judicial review by the California Superior Court.

Before KRUSE, Chief Justice.

Counsel: For Petitioner, Craig Miller

ORDER DENYING AMENDED PETITION

**[1]** On February 6, 2015, Petitioner Adriatic Sea Fisheries, Ltd. applied to register a commission to take deposition outside California and to issue a subpoena to the Custodian of Records of Purse Seine Samoa, Inc. ("PSS"). On its face, the commission indicates that it was issued by the clerk of the Superior Court of California, County of San Diego to counsel for Petitioner in *Tuna Taleni v. Adriatic Seas Fisheries, Ltd.*, Case No. 37-2014-00015328-CU-PO-CTL. On February 17, 2015, the Court denied Petitioner's application. On February 24, 2015, Petitioner filed an amended petition and supporting documents along with a letter from Petitioner's counsel to the Chief Justice.[1] For the reasons set forth below, the Court hereby denies Petitioner's amended petition.

**[2-3]** The "court may exercise personal jurisdiction in civil cases **[**2**]** over persons residing or found in American Samoa, or who have been duly summoned or voluntarily appear." A.S.C.A. § 3.0103(a). The Trial Division is "a court of general jurisdiction with the power to hear any matter not otherwise provided for by statute," A.S.C.A. § 3.0208(a), and the High Court has the "power to issue all writs and other process, make rules and orders, and do all acts, not inconsistent with law or with the

[1] Counsel is reminded that a letter to the presiding justice is not a proper method of communicating with the Court concerning a pending case. *See* T.C.R.C.P. 7; H.C.R. 51-52.

rules made by the Chief Justice of American Samoa, as may be required for the due administration of justice." A.S.C.A. § 3.0202(a).

**[4-7]** As Petitioner acknowledges, "the granting of this Petition remains wholly discretionary with the High Court of American Samoa." (Am. Pet., at 4:10-11).

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call "the comity of nations." . . . "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895). Comity applies not only between nations but also among different courts within a nation. *See Sw. Marine of Samoa, Inc., v. S & S Contracting, Inc.*, 6 A.S.R.2d 62, 64 (App. Div. 1987) (applying comity between High Court and the United States bankruptcy court *arguendo*). **[**3**]**

**[8]** Analyzing whether a foreign jurisdiction's decision will be recognized based on principles of comity "is dependent on wide ranging local policy considerations" and "involve[s] serious questions of law and of public policy." *In re Petition of Puailoa*, 13 A.S.R.2d 22, 24 (Trial Div. 1989).

In lieu of the Court's consideration of wide-ranging local policy considerations, Petitioner urges the Court to adopt the four-factor test employed by the Virginia Supreme Court when analyzing whether comity permits discovery in a California case to occur in Virginia. *America Online, Inc. v. Nam Tai Elecs., Inc.*, 571 S.E.2d 128, 133 (Va. 2002). In Virginia,

> First, the foreign court must have personal and subject matter jurisdiction to enforce its order within its own judicatory domain. Second, the procedural and substantive law applied by the foreign court must be reasonably comparable to that of Virginia. Third, the foreign court's order must not have been falsely or fraudulently obtained. And, fourth, enforcement of the foreign court's order must not be contrary to the public policy of

Virginia, or prejudice the rights of Virginia or her citizens.

*Id*. Analyzing these factors in *America Online, Inc.*, the Virginia Supreme Court affirmed a trial court's refusal to quash a subpoena obtained under a commission for discovery outside of California directed at the Custodian of Records of America Online, Inc. *Id.* at 135.

**[9]** We see no reason to adopt this four-factor test in American Samoa and are not persuaded that the Court should adopt the Virginia Supreme Court's analysis in *America Online, Inc*. to guide the application of comity to this case. America Online is **[**4**]** a corporation that does business worldwide, has many thousands of customers, and, therefore, might anticipate having to respond to discovery in cases from other jurisdictions to which it is not a party. Though there are very few facts and allegations about PSS in the amended petition and its supporting documents, it is doubtful that PSS does business as extensively or has as many customers as American Online. Additionally, *America Online, Inc.* interpreted a previous version of California's statute respecting out-of-state discovery. The Court will, therefore, analyze whether to register the commission and issue the subpoena by taking into account many policy considerations rather than limiting its analysis to the four factors considered in Virginia. These policy considerations include historical abuse of American Samoa's "jurisdictional deficiencies" by parties to maritime disputes, including "forum manipulation" because of the Court's situation outside of a federal district or circuit and the perceived tendency of the Court to award lower damages than mainland fact finders and attempts to pit the Court against mainland courts by filing "parallel litigation." *See Alves v. M/V Koorale*, 7 A.S.R.3d 139, 140-45 (Trial Div. 2003).

Additionally, in California a commission can be issued without any judicial review. *See* CAL. CIV. PROC. CODE § 2026.010(f) (West 2015). The Appellate Division of the Supreme Court of New York has held that a trial court properly refused to fully enforce subpoenas issued by a clerk of the California Superior Court pursuant to principles of comity because of the lack of **[**5**]** prior judicial review of the subpoenas. *Hyatt v. State of Cal. Franchise Tax Bd.*, 962 N.Y.S.2d 282, 291-92 (N.Y. App. Div. 2013). For similar reasons, this Court has previously declined to extend comity to foreign non-judicial proceedings. *Fagaima v. Taylor*, 9 A.S.R.3d 261, 265 (Land & Titles Div. 2004).

PSS does not appear to be a party to the San Diego Superior Court litigation. (*See* Miller Decl., Exh. B, at 1:10-15.) Instead, Petitioner is informed and believes that PSS "was plaintiff's employer at the time of the alleged incident which is the subject of th[e California] litigation." (Miller Decl. & 4, Exh. B.) If PSS were a party to the Superior Court action, Petitioner would presumably serve a notice of deposition rather

than seeking the assistance of this Court. *See* CAL. CIV. PROC. CODE § 2026.010(b).

**[10]** The Court will not exercise its discretion and general powers in this matter. Here, as in *Hyatt*, the commission was issued without any judicial review by the California Superior Court. The public policy concerns highlighted above weigh against granting Petitioner the relief it seeks. In addition to these concerns, the amended Petition asks the Court to require PSS to produce documents and answer questions to be used in litigation to which it is not a party and to which it is only related on information and belief. In sum, the Court declines to register the California commission and issue a subpoena to the Custodian of Records of PSS based on principles of comity.

Petitioner's amended petition is denied. **[**6**]**

It is so ordered.

**********

**Cite As:** *Am. Samoa Gov't v. Latianara*, CR No. 02-15, slip op. at [page number] (Trial Div. July 9, 2015) (order accepting plea agreement)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**JOHN LATIANARA, Defendant.**

High Court of American Samoa
Trial Division

CR. No. 02-15

July 9, 2015

[1] Taking a car without authorization, abandoning it in a remote location, and throwing the keys away is enough to prove "intent to deprive" and sustain a burglary charge.

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

Counsel: For Plaintiff, Assistant Attorney General Jessica Bargmann
For Defendant, Assistant Public Defender Michael White

ORDER ACCEPTING PLEA AGREEMENT

Defendant John Latianara is charged with burglary in the first degree and stealing. On April 14, 2015, pursuant to a plea agreement, Defendant attempted to plead guilty to stealing in exchange for dismissal of the burglary charge. We took Defendant's change of plea under advisement and ordered briefing from counsel on the question of whether the "purpose to deprive" element of stealing means permanent or temporary deprivation.

On June 23, 2015, the matter came on again for hearing, and after considering the parties' submissions, the Court accepted the plea agreement. Our reasons for doing so are hereby reduced to writing.

A.S.C.A. § 46.4103(a) provides that "[a] person commits the crime of stealing if he appropriates property or services of another with the purpose to deprive him of it, either without his **[**2**]** consent or by means of deceit or coercion." This definition of stealing was drawn from and is still substantially similar to MO. REV. STAT. § 570.030(1) (2015) ("A person commits the crime of stealing if he or she appropriates

property or services of another with the purpose to deprive him or her thereof, either without his or her consent or by means of deceit or coercion.").

A.S.C.A. § 46.4101(h), the applicable definition section, states that "'Deprive' means to: (1) withhold property from the owners permanently; (2) restore property only upon payment of reward or other compensation; or (3) use or dispose of property in a manner that makes recovery of the property by the owner unlikely." Again, this statute is drawn from and substantially similar to MO. REV. STAT. § 570.010(8) (2015) ("'Deprive' means: (a) To withhold property from the owner permanently; or (b) To restore property only upon payment of reward or other compensation; or (c) To use or dispose of property in a manner that makes recovery of the property by the owner unlikely.").

**[1]** Here, Defendant admitted to taking keys to a vehicle from Ta`alolo Lodge, starting and driving that vehicle, and later abandoning that vehicle in a banana plantation and throwing the keys into the vegetation. These facts are analogous to those of *State v. St. Clair*, 643 S.W.2d 605, 608 (Mo. Ct. App. 1982), in which a defendant's conviction for stealing was upheld. In *St. Clair*, the defendant used an automobile taken for a test drive to stage a car accident as part of a scheme to get insurance money. *Id.* at 606. On appeal, the Court rejected the defendant's **[**3**]** argument that he had no intent to permanently deprive the car dealership of the car as a matter of law and upheld the conviction, satisfied that the defendant's taking of the car on a test drive intending to crash the car was enough to prove "purpose to deprive." *Id*. at 608.

We find Missouri's interpretation of their substantially similar statutes to be persuasive. Here, we accept, and so find, the defendant's admissions that he took the car without authorization, that did not return it, and that he threw the keys in vegetation thick enough that the keys were never recovered, sufficient to sustain the factual basis of the plea agreement. T.C.R.Cr.P. 11(e).

In light of the foregoing, the Court accepts the plea agreement as filed.

It is so ordered.

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**Cite As:** *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11, slip op. at [page number] (Trial Div. July 13, 2015) (op. & order)

**ANZ GUAM, INC, Plaintiff/Counter-Defendant,**

**v.**

**PAGO PAGO VILLAGE COUNCIL, INC., MAUGA TASI ASUEGA, TUAOLO FRUEAN, FUAAUTOA TAUFAASAU, VAIVAO ETELAGI, ASUEGA LAUVAI, AND THE ESTATE OF MAGEO MALU, Defendants/Counterclaimants.**

High Court of American Samoa
Trial Division

CA No. 33-11

July 13, 2015

[1] Generally gambling is illegal, but bingo for religious purposes is permitted.

[2] When a company has ceased to exist as a legal entity, it has no capacity to prosecute an action.

[3] Notice to the court, which is not submitted as motion, that a party ceased to exist as a legal entity before litigation began and should be substituted with another party is not generally sufficient and shows a blatant disregard for the twin cornerstones of the legal profession, diligence and competence.

[4] The Court substituted a successor company in lieu of the named party in light of the extensive litigation that had already been conducted and on balance of the equities, even though the successor company failed to file a motion for substitution and should have been the originally named party since the named party had been bought by the successor company before the litigation began.

[5] It is axiomatic that a suretyship contract does not require that any consideration flow from the obligee to the surety in order for the surety's promise to be enforceable.

[6] The benefit afforded the principal obligor serves as sufficient consideration to bind the surety's guarantee of the principal's debt.

[7] A novation is an agreement by both parties to a contract to substitute

a new obligation or party for an existing obligation or party.

[8] A novation wholly extinguishes the earlier contract and all of the parties' obligations under that contract, whereas a modification of a term or a provision of a contract alters only certain portions of the contract.

[9] There is no hard and fast rule that establishes when distinct modifications of a contract's terms reach a tipping point to create a superseding novated agreement; instead, the finder of fact must make this determination based on the intent of the parties and the specific factual circumstances of the case.

[10] When two revision agreements only modified the payment schedule and payment amounts set forth in the original loan agreement, the revisions were merely modifications of the original agreement and not a novation.

[11] Cutting short a loan agreement by two years and forcing the borrower to pay such an extremely large sum at once is a material act not conducted in good faith, a basic tenant of contract law.

[12] Generally, any agreement or dealing between a principal to an obligation or debt and the obligee that essentially varies the terms of the contract without the consent of the surety will release him from liability.

[13] When six defendants signed an original loan agreement as sureties but not all of them signed later agreements that modified the original agreement as sureties, the defendants who did not sign the modifications were not bound by the defendants who did sign.

[14] The traditional elements of fraud are: (1) a false representation or concealment of a material fact, (2) made with knowledge of its falsity, (3) with the intent to induce the person to whom it is made to act upon it, and (4) such person acted in reliance upon the representation (5) to his damage.

[15] Fraud is a specialized cause of action that requires specific evidence and is only available where the claimant exercised due diligence in protecting himself from that fraud.

[16] The elements of non-fraudulent or negligent misrepresentation are as follows: (1) the speaker supplied information in the course of his business because of some pecuniary interest; (2) due to the speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false; (3) the speaker intentionally provided information for the guidance of a limited group of persons in a particular business transaction; (4) the listener

justifiably relied on the information; and (5) as a result of the listener's reliance on the statement, the listener suffered a pecuniary loss.

[17] A misrepresentation may take the form of an affirmative statement, a failure to disclose information where one party knows the other harbors a false belief, a failure to correct a prior misstatement, or failure to disclose where one party is entitled to know the information by virtue of the relationship between the parties.

[18] When it was unclear what was explained to all the borrowers, there was no proof that they were provided the opportunity to understand the loan documentation in their native language, multiple loan revisions were signed at different times by only some of the borrowers, the Court found negligent misrepresentation had likely occurred.

[19] The doctrine of objective impossibility provides that the destruction of the subject matter of a contract by an unforeseeable *force majeure* will excuse the parties' continued performance and contractual obligations.

[20] A tsunami that destroyed a building that was the subject matter of the contract was a *force majeure*, releasing the parties from the contract since no one could vividly remember the last tsunami and no one would have predicted or anticipated one would occur.

[21] A contract may be void in whole or in part where the consideration, promise, or performance of the contract is in derogation of the law or public policy.

[22] Where an ostensibly illegal agreement does not explicitly offend public policy, a court may enforce the agreement based on the equitable considerations and the interests of justice.

[23] When it was common knowledge between the parties that the bank loan would be paid out of proceeds of illegal gambling activity, the Court held the loan agreement was void ab initio.

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

Counsel: For Plaintiff, David P. Vargas
For Defendant Pago Pago Village Council, Fiti A. Sunia
For Individual Defendants, Mark F. Ude
For Defendant Estate of Mageo Malu, Matailupevao Leupolu, Jr.

OPINION AND ORDER

This Opinion and Order includes the order substituting Plaintiff ANZ Guam, Inc. (ANZ) as the real party in interest for the original Plaintiff Amerika Samoa Bank, Inc. (ASB). This substitution is further discussed below at pp. 4-5.

The case arises from the Loan Agreement and the subsequent Loan Revision Agreement related to Tautua Hall in Pago Pago between ASB and Defendant Pago Pago Village Council (PPVC), and the separate Continuing Guaranty of repayment of the loan by each of the five individually named Defendants and Defendant Estate's decedent. **[**2**]**

It is alleged in both the original Complaint and the Amended Complaint, respectively filed by ASB on April 21 and 26, 2011, that the loan is in default. ANZ seeks to recover an unpaid loan balance in the principal amount of §$399,350.03 plus interest. Defendants allege in the Counterclaim, filed on June 15, 2011, with the Answer, that ASB negligently and fraudulently entered and administered the loan and revision agreements and seek resulting damages.

For the reasons stated below, we grant judgment in Defendants' favor.

## Background

**[1]** A church organization previously leased the premises from the American Samoa Government and conducted bingo games there to raise funds for church activities. Generally, gambling is illegal, but bingo for religious purposes is permitted. A.S.C.A. §§ 46.4301-.4302. When the church ceased using the premises, it still owed ASB a substantial balance on its existing loan with ASB. ASB searched for another occupant to take over the premises and the still outstanding church loan. ASB and PPVC negotiated and ultimately entered the into the loan transaction, which is subject matter at issue in this litigation. This loan transaction included the balance owed by the church to ASB and provided new funds for PPVC's programs. **[**3**]**

## The Loan Documents

The ANZ/PPVC loan at issue is defined by five types of documents: a loan agreement, a mortgage of land, a loan revision agreement, a promissory note, and six personal repayment guarantees.

The Loan Agreement to provide funds in the principal amount of $558,674.00 for PPVC's planned renovation of the Pago Pago Community Center Hall (Tautua Hall), is dated February 1, 2006, and

was signed on February 2, 2006, by ANZ's and PPVC's authorized representatives. Acting upon the advice of ANZ's loan advisor, and as set forth in the Loan Agreement, PPVC was incorporated under American Samoa law. Pursuant to the authorization of PPVC's corporate resolution, the Loan Agreement was signed by PPVC's officers and board members: Defendants Mauga Tasi Asuega (Mauga), President, Tuaolo M. Fruean (Tuaola), Vice-President, Asuega F. Lauvai (Asuega), Secretary, Vaivao Etelagi (Vaivao), Treasurer, and Board members Fuautoa Taufaasau (Fuautoa), and Mageo Malu (Mageo), who later passed away and is the deceased in Defendant Estate of Mageo Malu. Certain land in Pago Pago was also mortgaged as security for the loan.

In addition, on February 2, 2006, Mauga, Tuaola, Asuega, Vaivao, Fuautoa, and Mageo signed six separate documents **[**4**]** entitled Continuing Guaranty, which made each individually and personally obligated to indemnify ANZ loan in the event PPVC defaulted in payment of the loan. The scope of each Continuing Guaranty extended the six individual Defendants personal indemnification obligation to both past and future indebtedness of PPVC to ASB, now ANZ. Although Mauga's personal obligation was mistakenly dated January 2, 2006, he actually signed his Continuing Guaranty on February 2, 2006, as did the other five guarantors.

Simultaneously, on February 2, 2006, PPVC executed the promissory note, promising to pay ASB the principal amount of $558,674.00, plus interest on the unpaid principal balance from February 1, 2006 until paid in full, with interest calculated at a variable rate starting at 10% per annum and subject to periodic change according to a stated method. The note is payable in full on demand, or if no demand is made in monthly installment payments commencing on March 1, 2006, until February 1, 2016, on which date the unpaid principal and interest are due and payable, possibly requiring a balloon payment. The note was signed by the same six PPVC representatives.

The Revision Agreement was dated and signed on December 21, 2007. At that time, the outstanding balance of the principal was in the amount of $474,947.06, and interest was paid to December 4, *2006 [sic]*. The Revision Agreement modified the **[**5**]** promissory note in the absence of ANZ's demand for payment by reducing the monthly installment payments commencing January 1, 2008, until December 1, 2014, on which date the entire anticipated principal balance of $210,878.87, plus interest, would become due and payable. All other terms in the loan documents remained in full force and effect.

## The Loan Default and Issues Requiring Resolution

On September 29, 2009, a tsunami struck American Samoa in the aftermath of a nearby earthquake and caused deaths, severe personal injuries, and serious property damage. The lower end of Pago Pago Bay was particularly impacted, and Tautua Hall was effectively destroyed.

PPVC defaulted on the loan payments to ASB, which left unpaid the balance of the principal in the amount of $399,350.03 plus interest, and attorney's fees and other costs. ASB, now ANZ, commenced this action in due course to recover its financial losses resulting from the default.

We will identify the pertinent terms in the loan documents and other factors in our discussion of the issues requiring resolution.

In addition to the loan documents signed for PPVC by the individual defendants, each of the six individual Defendants also signed his or her "Continuing Guarantee" to personally indemnify PPVC if the Village Council defaulted on its loan **[**6**]** obligations. The sub-caption and terms of the personal guarantees reference all "past and future indebtedness" and indebtedness "arising under successive transactions which shall either continue the indebtedness or from time to time renew it after it has been satisfied." (Pl. Ex. 6, ¶ 2). The guarantees also "authorize [ASB] to renew, compromise, extend accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness" without notice to the individual defendants. (*Id*. at ¶ 4).

In December 2007, ASB and PPVC signed a "Revision Agreement" which modified the loan repayment terms and timeline. (Pl. Ex. 7). Besides Tuaolo Furean, all of the individual defendants signed the revision agreement both "individually and for [PPVC]." *Id*. The parties executed another revision agreement in November 2009, approved and signed by Defendants Asuega Lauvai and Tuaolo Fruean. (Pl. Ex. 8).]

On September 29, 2009, a tsunami destroyed Tautua Hall. Despite the explicit requirements of the loan and mortgage agreements, PPVC had not insured the Hall against such eventualities and ASB failed to check the Hall was insured through each subsequent loan modification. After the tsunami, PPVC defaulted on the loan agreement and refused to make any additional payments. In response, ASB filed the instant action **[**7**]** on April 21, 2011 (amended April 26). We presided over a three-day trial on January 8 to 9, 2013 and May 15, 2013.

## Discussion

### I. Substitution of ANZ Guam, Inc. for ASB

**[2]** Prior to trial, ASB filed a "Notice of Transfer of Interest"[1] explaining that ASB merged with ANZ Guam, Inc. on January 1, 2011. Thus, at the time of filing, ASB had ceased to exist as a legal entity and had no capacity to prosecute this action. *See* T.C.R.C.P 17. The "notice" was not submitted as a motion nor did the Court issue an order substituting ANZ Guam for ASB. On October 31, 2013, we ordered briefing on whether the suit should proceed with ANZ Guam substituted as the real party in interest.

**[3-4]** It gives the Court pause that Plaintiff's counsel brought and litigated this controversy for well over a year in the name of a non-existent corporation. Further, Plaintiff apparently thought it sufficient to merely submit "notice" of this oversight as opposed to filing a motion and securing an order substituting ANZ Guam for ASB. Such flippant practice of the law and disregard for procedure warrant an admonishment to review the twin cornerstones of the legal profession: diligence **[**8**]** and competence. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (competence), R. 1.3 (diligence); *see generally Vergara v. Am. Samoa Gov't*, CA No. 44-13, slip op. at 6 (Trial Div. May 21, 2014) (order granting mot. to dismiss). Nonetheless, in light of the extensive litigation already conducted and on balance of the equities, pursuant to T.C.R.C.P. 17(a), we substitute ANZ Guam, Inc. as the real party in interest for ASB.[2]

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[1] The full heading was, "Notice of Transfer of Interest and Merger of Amerika Samoa Bank, Inc. with ANZ Guam, Inc. [Rule 25 TCRCP] [sic]."

[2] In addition, ASB's notice filed pursuant to T.C.R.C.P. 25(c) relied on the wrong procedural rule. As explained in *Hilbrands v. Far E. Trading Co.*, a Rule 25 motion is appropriate when the real party in interest changes or transfers "during the pendency of the action." 509 F.2d 1321, 1323 (9th Cir. 1975); *see also Unison Realty Corp. v. RKO Theatres, Inc.*, 35 F.R.D. 232, 233 (S.D.N.Y. 1964). Where "an interest was transferred prior to the commencement of the suit," a Rule 17 motion is the appropriate vehicle to substitute the correct real party in interest. *Hilbrands*, 509 F.2d at 1323. In pertinent part, T.C.R.C.P. 17(a) provides: "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest."

## II. Consideration and Suretyship

**[5-6]** The individually named Defendants claim that there was no consideration for their continuing guarantees of the PPVC loan. These agreements express the individual defendants' third party promises to pay ASB the debt owed by PPVC, the principal obligor, if PPVC failed to pay. Thus, the parties established a surety contract with the individually named defendants as sureties or secondary obligors. *See Ryan, Inc., v. Vaka*, 5 A.S.R.2d 31 (Trial Div. 1987); 74 AM. JUR. 2D *Suretyship* § 7 (1991). It is axiomatic **[**9**]** that a suretyship contract does not require that any consideration flow from the obligee to the surety in order for the surety's promise to be enforceable. *See United States v. Linn*, 40 U.S. 290, 314 (U.S. 1841) ("There was no necessity for any consideration passing directly between the [obligee] and the sureties. It was one entire and original transaction; and the consideration which supported the contract of [the obligor] supported that of his sureties."); *Maples v. Countrywide Home Loans*, No. CV-98-797-RV, 1999 U.S. Dist. LEXIS 14089 (S.D. Ala. Aug. 9, 1999) ("It is . . . well established that no consideration need flow to the surety in order for the suretyship to be established."); *see generally Kraft, LLC v. Greiner*, 429 B.R. 637, 664 (Bankr. N.D. Ind. 2010). Instead, the benefit afforded the principal obligor serves as sufficient consideration to bind the surety's guarantee of the principal's debt. *See* 74 AM. JUR. 2D *Suretyship* § 7 (1991).

## III. Contract Modification and Surety Liability

The primary defense advanced by the individually named defendants is that the December 2007 and November 2009 revision agreements constituted novations of the original loan agreement and discharged their duties as secondary obligors. We agree with the Defendants' ultimate result but do not entirely agree with their reasoning. **[**10**]**

**[7-9]** Concerning the first issue, a novation is an agreement by both parties to a contract to substitute a new obligation or party for an existing obligation or party. *See* BLACK'S LAW DICTIONARY 1095 (8th ed. 2004); *Fanucchi & Limi Farms v. United Agri Prods.*, 414 F.3d 1075, 1081 (9th Cir. 2005). "Whereas a modification of a term or a provision of a contract alters only certain portions of the contract, novation wholly extinguishes the earlier contract" and all of the parties' obligations under that contract. *Fanucchi*, 414 F.3d at 1081; *see also Martin v. Breckenridge*, 14 F.2d 260, 262-263 (4th Cir. 1926) ("A novation . . . is a mutual agreement, between all parties concerned, for the discharge of a valid existing obligation by the substitution of a new valid obligation.") (quotations omitted). There is no hard and fast rule that establishes when

distinct modifications of a contract's terms summit a tipping point to create a superseding novated agreement. Instead, the finder of fact must make this determination based on the intent of the parties and the specific factual circumstances of the case. *See Fanucchi*, 414 F.3d at 1081-82; *Molitorisz v. SBA*, No. 96-35629, 1998 U.S. App. LEXIS 2191, at *2-3 (9th Cir. Feb. 13, 1998); *Olympic Fin. Co. v. Thyret*, 337 F.2d 62, 65-66 (9th Cir. 1964) (holding that whether modifications amount to a novation must be supported by "clear and convincing evidence" and "depends upon all the facts and circumstances of the particular case"). **[**11**]**

In *Fanucchi*, the plaintiff farmers took out a loan from the defendant lending company to cover the farm's operating costs. 414 F.3d at 1078. The lending company secured the loan with a mortgage on the farmers' future crop proceeds. *Id*. When the crops failed and the loan defaulted, the farmers alleged that the lending company agreed to an oral modification of the original contract. *Id*. at 1078-79. Under the modified contract, the farmers claimed that the lending company agreed to subordinate its claim to new third-party crop financing lenders for a period of five years. *Id*. During this time, the farmers would pay the appellee lending company 60% of its proceeds only after first paying its obligations to the new lenders. *Id*. If the outstanding debt after five years was below an agreed threshold, the farmers claimed that the lending company agreed to forgive any remaining debt. *Id*. The lending company disputed this alleged arrangement and instead claimed that agreement described by the farmers was on a year-to-year basis, not a five-year span, and that there was no agreement to abolish any outstanding debt after five years. *Id*. at 1079.

In reversing the lower court's grant of summary judgment for the lending company, the Ninth Circuit held that the facts alleged by the farmers concerning the contract modification amounted to a novation. *Id*. at 1081. The court held that, "the new agreement . . . did more than simply alter the timing and **[**12**]** amount of the payments" but instead was a "drastic" departure from the original contract. *Id*. at 1083-84. The court found it significant that the lending company "release[d] its equity" in the farmers' crops to allow them to obtain new financing from third-party lenders. *Id*. In addition, the court held that the alleged agreement to release outstanding debt after a period of five years further evidenced a novation. *Id*. at 1084. Lastly, the court held that the parties' conduct during at least two of the five years when the lending company accepted the 60% payments also demonstrated the parties had acceded to a novated agreement that superseded the original contract. *Id*. at 1085.

In *Molitorisz v. SBA*, the Small Business Administration (SBA) and an individual debtor entered a modified loan agreement after the debtor default on his initial business loan. 1998 U.S. App. LEXIS 2191, at *2. When the debtor defaulted on the modified agreement, the SBA brought

suit to foreclose on the debtor's property offered as security for the loan. *Id*.

On review of the district court's grant of summary judgment for the SBA, the Ninth Circuit held that the modified loan agreement was not a novation of the original loan. *Id*. at *2-3. The court held that the subsequent agreement could not "be interpreted without reference to the original notes, security agreements, and guarantees" and, therefore, could not be interpreted as novation of the original loan. *Id*. (citing **[**13**]** *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (holding that if the interpretation of a new contract requires reference to a prior contract, the new contract merely modifies the original contract). Consequently, the court held that the unmodified portions of the original contract remained in effect. *Id*. at *3.

We discuss these cases only for illustration and with the understanding that "case precedent is not helpful in assessing whether a novation has been consumed; each case is resolved on the basis of its own fact pattern." *Thyret*, 337 F.2d at 65. Here, we find that though the December 2007 and November 2009 revision agreements only modified specific terms of the original loan, these modifications were severe and drastic enough as to novate the original loan agreement.

**[10-11]** The extent of both revision agreements is to modify the payment schedule and payment amounts set forth in the original loan agreement. In the end, the payment amount was moved up an entire two years causing a large balloon payment over $200,000. Cutting short a loan agreement by two years and forcing the borrower to pay such a large sum at once is a material act not conducted in good faith, a basic tenant of contract law. Plaintiffs will likely want to argue that the Defendant's agreed to it because specifically, the guarantees authorized ASB, "without notice or demand and without affecting [the **[**14**]** guarantors'] liability . . . . to renew, compromise, extend, accelerate or otherwise change the time for payment of, or otherwise change the terms of the indebtedness or any part thereof, including [an] increase or decrease of the rate of interest." (Pl. Ex. 6, ¶ 4.) This is a very dangerous, general, and unfair clause giving ASB near complete control over any future transaction it desires. With this clause, there is effectively nothing stopping ASB from enacting any ridiculous rule on its own whim.

**[12]** In general, "any agreement or dealing between the principal parties to an obligation or debt which essentially varies the terms of the contract without the consent of the surety will release him from liability." 74 AM. JUR. 2D *Suretyship* § 41 (1974); *see Or. Bank v. RSG Forest Prods.*, No. 87-3951, 1989 U.S. App. LEXIS 23319, at *4 (9th Cir. Mar. 24, 1989) (holding that "unconsented modifications discharge

a surety's obligation"). Not only is this an unfair, general clause but from testimony it is unclear if the Defendants were provided the terms in their native language and if they were given enough time to consider the terms.

**[13]** More telling is something which speaks to the lack of consistency and perhaps to the laziness of ASB–the revision agreements themselves. ASB is claiming that it did not need the Defendants' signatures, because the Defendants already agreed to **[**15**]** any changes ASB wanted to make. However the agreements all have signature lines for the Defendants and a notary. Why bother if the Defendants' continuing approval was not needed? Further, the first revision agreement has only five of the six Defendants' signatures and is not even dated by the notary. What gives those five individuals the right to bind another at the individual level? The second agreement has only two signatures and no notary. How can two individuals bind four others individually? For a document that is supposed to be part of an official contract, the ASB has not properly followed through to ensure all Defendant's signed and that the paperwork was properly notarized and dated. Not only was the contract poorly written and executed, but it had distracting basic spelling errors that should not exist in a formal contract. Any entity that fails to take its contracts seriously clearly does not intend for its contracts to be seriously enforced.

## IV. Misrepresentation and Fraud

**[14-15]** At trial and in submissions to the Court, Defendants often conflated negligent misrepresentation and fraud (i.e. a material or intentional misrepresentation).[3] Defendants also failed to **[**16**]** clearly delineate which arguments applied to which groups of defendants. It appears that the fraud argument relates only to ASB's conduct during the six individual Defendants' signing of the continuing guarantees. As evidence of fraud, the individual defendants claim they "were told that the [PPVC] loan agreement was for renovation of the hall and installation

[3] *See* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981):

> (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
> (a) knows or believes that the assertion is not in accord with the facts, or
> (b) does not have the confidence that he states or implies in the truth of the assertion, or
> (c) knows that he does not have the basis that he states or implies for the assertion.
> (2) A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.

of new air conditioners." (Def. Closing Argument at 15). Though not explicitly stated, the individual defendants appear to argue that the continuing guarantees are therefore voidable for fraud in the inducement.[4]

As set forth in *Mailo v. Aumavae*, 30 A.S.R.2d 175, 178 (Land & Titles Div. 1996), "the traditional elements" of fraud are:

> (1) a false representation or concealment of a material fact, (2) made with knowledge of its falsity, (3) with the intent to induce the person to whom it is made to act upon it, and (4) such person acted in reliance upon the representation (5) to his damage. **[**17**]**

(internal citations omitted). However, fraud is a specialized cause of action that requires specific evidence and is only available where the claimant "exercised due diligence in protecting himself from that fraud." *Am. Sam. Power Auth. v. Nat'l Pac. Ins. Co.*, 31 A.S.R.2d 201, 205 (Trial Div. 1997).

Here, the individual defendants' fraud argument does not necessarily hold up, but based on witness testimony, ASB misrepresented the facts concerning the loan. Defendant PPVC and the six individual defendants all argue that ASB did not adequately explain the loan agreement and continuing guarantees and, therefore, that the documents are voidable. There is substantial uncertainty and conflicting evidence as to which ASB employees explained the documents to Defendants, the extent of those explanations, and whether any overview was offered in the Samoan language.

**[16-17]** The elements of "non-fraudulent" or negligent misrepresentation are as follows:

> (1) the speaker supplied information in the course of his or her business because of some pecuniary interest; (2) due to the speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false; (3) the speaker intentionally provided information for

[4] Although the individual defendants do not distinguish between fraud in the factum and fraud in the inducement, they do not present any argument supporting a claim of fraud in the factum of the agreement. *See* 17A AM. JUR. 2D *Contracts* § 230 (1991) (distinguishing between fraud in the factum and fraud in the inducement of an agreement); *Langley v. FDIC*, 484 U.S. 86, 93-94 (U.S. 1987) (Fraud in the factum is "the sort of fraud that procures a party's signature to an instrument without knowledge of its true nature or contents.").

> the guidance of a limited group of persons in a particular business transaction; (4) the listener justifiably relied on the information; and (5) as a result of the listener's reliance on the statement, the listener suffered a pecuniary loss. **[**18**]**

*City of St. Joseph v. Sw. Bell Tel.*, 439 F.3d 468, 478 (8th Cir. Mo. 2006) (quotation omitted); *see also Pennington v. HSBC Bank USA, N.A.*, 493 Fed. App'x 548, 556 (5th Cir. 2012) (quotation omitted). A misrepresentation may take the form of an affirmative statement, a failure to disclose information where one party knows the other harbors a false belief, a failure to correct a prior misstatement, or failure to disclose where one party is entitled to know information by virtue of the relationship between the parties. *See* RESTATEMENT (SECOND) OF *Contracts* §§ 159-164; *see generally Roache v. Uia*, 7 A.S.R.3d 83 (Trial Div. 2003). We find ASB did all of these acts in misrepresenting the true purpose of the loan to the Defendants.

**[18]** What this all simply boils down to is that the Defendants had more credible witnesses. It is unclear what was explained or not explained. There appears to be much discrepancy not only over who was present but also whether documents were adequately explained in the Samoan language for the benefit of the borrowers. Without proof that the borrowers were provided the opportunity to understand the documentation in their native language, there is no telling what the bank may have disclosed or not; thus opening the door for misrepresentation. At trial, testimony concerning who said what, for how long, and in what language was highly conflicted and only added to the ambiguity **[**19**]** surrounding the loan signing procedure. In sum, we cannot find that the evidence preponderates that ASB did not intentionally or negligently misrepresent any information.

## V. Impossibility of Performance of the Contract

Before the loan was fully repaid by Defendants, Tautua Hall was destroyed on September 29, 2009 by the tsunami resulting from the earthquake that day. Under the defense of impossibility or impracticability, Defendants argue that the destruction of the Hall by a purportedly unforeseeable supervening event, "the non-occurrence of which was a basic assumption on which the contract was made," discharged their continued performance under the loan agreement. *See generally* RESTATEMENT (SECOND) OF *Contracts* §§ 261, 263.

**[19-20]** In general, the doctrine of objective impossibility provides that the destruction of the subject matter of a contract by an unforeseeable *force majeure* will excuse the parties' continued performance and contractual obligations. *See Chase Manhattan Bank v. Traffic Stream Infrastructure*, 52 Fed. App'x 528, 530 (2d Cir. 2002); *Opera Co. of*

*Bos., Inc. v. Wolf Trap Found. for Performing Arts*, 817 F.2d 1094, 1099 n.8 (4th Cir. 1987) (distinguishing between subject and objective impracticability/impossibility); *Mid-Am Bldg. Supply, Inc. v. Schmidt Builders Supply, Inc.*, No. 11-4167-KGS, 2013 U.S. Dist. LEXIS 45366, at *19- **[**20**]** 20 (D. Kan. Mar. 29, 2013).[5] For this case, the deciding factor of this standard is the requirement that the supervening event be unforeseeable. *See Taylor-Edwards Warehouse & Transfer Co. v. Burlington N., Inc.*, 715 F.2d 1330, 1336 (9th Cir. 1983) ("The ultimate inquiry for purposes of the impossibility defense is whether the intervening changes of circumstance were so unforeseeable that the risk of increased difficulty or expense should not properly be borne by the promisor.") (citing 18 *Williston on Contracts* § 1963, at182 (3d ed. 1978); 6 *Corbin on Contracts* § 1320, at 322 (1962 ed.)). In September 2009, no one vividly remembered when the last tsunami struck the island. No one would have predicted or anticipated this event happening. Ultimately, we hold that the parties should be excused from being bound to any contractual obligation due to destruction deemed a *force majeure*.

**VI. Contract Legality**

Under A.S.C.A. §§ 46.4301-.4302, all gambling in American Samoa is illegal with a limited exception for "the occasional playing of bingo or the selling of [raffle tickets] when the profits from the bingo game or raffle are used for religious, educational or charitable purposes." *See generally Le Vaomatua v. Am. Samoa Gov't*, 23 A.S.R.2d 11, 12 n.1 (Land & Titles Div. **[**21**]** 1992). Defendants and witnesses claim that at the time the parties entered the loan agreement, ASB was well aware that Tautua Hall had historically operated as a bingo hall and that PPVC intended to continue this use in part to raise funds for repayment of the ASB loan. According to Defendants, because the loan and associated guarantees concerned an illegal subject matter, all of these agreements were void *ab initio*.

**[21-22]** A contract may be void in whole or in part where the consideration, promise, or performance of the contract is in derogation of the law or public policy. *See United States v. Mardirosian*, 602 F.3d 1, 7 (1st Cir. 2010); 17A AM. JUR. 2D *Contracts* §§ 238-239; RESTATEMENT (SECOND) OF CONTRACTS §§ 178-179. A court cannot enforce such an agreement where its judgment would, in effect, condone the parties' illegal conduct. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77-80 (1982); *Bassidji v. Goe*, 413 F.3d 928, 936-37 (9th Cir. 2005). Conversely, where an ostensibly illegal agreement does not explicitly

[5] We note that while some court may maintain a distinction between theories of impracticability and impossibility, the modern trend defines the terms analogously. *See Opera Co. of Boston*, 817 F.2d at 1099.

offend public policy, a court may enforce the agreement based on the equitable considerations and the interests of justice. *See Bassidji*, 413 F.3d at 938; *see also Packard v. OCA Inc.*, 624 F.3d 726, 730 (5th Cir. 2010) ("[T]he question often involved is [whether] the policy against assisting a wrongdoer outweighs the policy against permitting **[**22**]** unjust enrichment of one party at the expense of the other." (internal quotations omitted)).

**[23]** Here, though both the loan agreement and a memorandum summarizing the details of the loan identify the purpose as the renovation of Tautua Hall and installation of air conditioning (Pl. Ex. 1, 3, Art. 6), witnesses in trial identified the true purpose of the loan–illegal bingo operations at the Hall. It was common knowledge with ASB and community members generally that the bank would be paid out of proceeds of illegal gambling activity that made the contract void *ab initio*. In fact, the prior tenant used the Hall for legal gambling to pay its loans to the bank. Banks, before making a loan, know how the loan is going to be repaid; otherwise it would not make the loan in the first place. Also, everyone in the community was aware of the bingo activity that took place at the Hall nearly every night except Sundays. Judicial enforcement of the loan agreement cannot sanction illegal conduct. In *Hunter v. Superior Court*, 97 P.2d 492 (Cal. Ct. App. 1939), the Court explained that where a contract is void "there is nothing which the parties to the action could do which would in any way add to its validity. If the contracts upon which the judgment is based are to that extent void, they cannot be ratified either by right, by conduct or by stipulated judgment." *Id*. at 113, 499. We, therefore, hold that the loan agreement is void *ab initio* and **[**23**]** no lawful contract exists so as to be enforceable against Defendants.

**VII. Lease and Insurance Responsibility**

Lastly, Defendants argue that the expiration of their lease for Tautua Hall, a property owned by the American Samoa Government, "affected the contract" with ASB. According to Defendants, because their insurable leasehold interest expired before the September 2009 tsunami, they could not maintain insurance coverage for damage or destruction of the Hall. On one hand, it was not ANZ's responsibility to ensure Defendants renewed their lease. On the other hand, it is peculiar that ASB would issue new money, especially in the large amount involved, in addition to the outstanding loan balance PPVC inherited, perform contract modifications, and even require the loan repayment guarantees without checking to be sure that the Hall was continually and properly insured.

Under Article 7 of the Loan Agreement, ANZ made insurance a triggering event by requiring PPVC to obtain insurance for Tautua Hall

as a "condition precedent" to the ASB's "initial advance" to PPVC. Similarly, Article 9 specified that PPVC was "to procure and maintain insurance coverage" for the Hall. ASB should have had the foresight to regularly check that the insurance on the Hall was kept in force to cover its risk in making the loan. Ultimately, as underlying events unfolded, the **[**24**]** insurance coverage lapsed and Defendants were unable to pay back the loan when the tsunami destroyed the Hall. In significant measure, both parties lacked foresight and are at least imputed with abject negligence by failing to ensure that PPVC had an insurable interest in the Hall by renewing the lease with the American Samoa Government and maintaining insurance to provide for rebuilding the Hall and avoid the calamitous loan nonpayment default the parties now face after the tsunami natural disaster.

## Order

The original contract between the parties is null and void ab initio. ANZ and Defendants are left where they stand without any pecuniary judgment awarded to any party.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Leafatia*, CR No. 15-15, slip op. at [page number] (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**TUMUATASI LEAFATIA, Defendant.**

High Court of American Samoa
Trial Division

CR No. 15-15

July 15, 2015

[1] The Revised Constitution of American Samoa generally requires the government to obtain a warrant to search the areas enumerated in Article I, Section 5, unless an exception applies.

[2] Police officers may make a warrantless seizure under the "plain view" doctrine when they: (1) are lawfully in a position to observe the item seized, (2) discover the item in plain view, and (3) immediately recognize the incriminating character of the item.

[3] Immediate recognition under the "plain view" doctrine does not mean that a police officer must know the incriminating nature of the evidence. Rather, the officer must have probable cause to believe that the item found in plain view is incriminating.

[4] A reviewing court may consider the police officers' training, experience, and collective knowledge when assessing whether probable cause existed to believe that property found in plain view was incriminating.

[5] The level of evidence needed for "probable cause" is less than that needed for "proof beyond a reasonable doubt."

[6] The exclusionary rule, which prevents the government from using evidence that was not obtained under a warrant or one of the warrantless exceptions, is a prophylactic rule that was designed to deter police misconduct but was not intended to deter objectively reasonable law enforcement activity.

[7] When police officers were lawfully in a position to observe a glass

pipe, cut pink straw, methamphetamine, and cash because they were searching defendant's bedroom pursuant to a search warrant, although the items were not listed in the warrant, they were discovered in plain view and the officers had probable cause to believe the items were incriminating under the circumstances.

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

Counsel: For Plaintiff, Assistant Attorney General Russell D. Smith
For Defendant, Fita A. Sunia

ORDER DENYING MOTIONS TO SUPPRESS EVIDENCE AND TO RELEASE $4,184.00

On March 9, 2015, police officers executed a search warrant on Defendant Tumuatasi Leafatia's residence in Malaeloa. The search warrant listed the items to be searched for as firearms, ammunition, and documentation that would establish ownership or possession of these items. Police seized items from Defendant's bedroom, including a glass pipe, digital scales, scissors with burnt tips, $4,184.00 in cash, bullets, and hundreds of plastic straws, including a pink straw cut in such a way that it could be used as a scoop. The glass pipe was found by officers in the side pouch of a black pool stick case and contained a crystalline substance. The cut pink straw was found under a couch and contained a crystalline substance. The crystalline substances found in the glass pipe and cut pink straw tested positive for methamphetamine in reagent tests performed once the items had **[**2**]** been seized and transported to police stations.

Defendant seeks to suppress introduction of the glass pipe, pink cut straw, and methamphetamine on the grounds that these items were not described in the search warrant. (Mot. 3:2-3). Defendant argues that the "plain view doctrine" does not apply because the incriminating character of these items was not immediately apparent. (Mot. 3:19-20). Defendant also seeks release of the $4,184.00 on similar basis. (Mot. 4:3-6). Plaintiff American Samoa Government opposes these motions, arguing that the plain view doctrine does apply. (Opp. 7:1-3). On June 19, 2015, the Court held a hearing on these motions. For the reasons set forth below, the Court hereby denies Defendant's motions.

## Standard of Review

**[1]** Article I, Section 5 of the Revised Constitution of American Samoa provides that

> The right of the people to be secure in their persons, houses,

> papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. Evidence obtained in violation of this section shall not be admitted in any court.

"Generally, these mandates translate into a warrant requirement for the government to search the areas enumerated in Article I, Section 5. If items are seized without a warrant, the evidence will not be admitted in court" unless an exception applies. *Am. Samoa Gov't v. Kava*, 4 A.S.R.3d 240, 244 (Trial Div. 2000). **[**3**]**

**[2-4]** Police officers may make a warrantless seizure under the "plain view exception" to the warrant requirement when they: (1) are lawfully in a position to observe the item seized, (2) discover the item in plain view, and (3) immediately recognize the incriminating character of the item. *Id.* at 245. Immediate recognition does "not mean that a police officer must `know' the incriminating nature of the evidence." *Am. Samoa Gov't v. Loia*, 16 A.S.R.2d 1, 4 (Trial Div. 1990) (citations omitted). Rather, "the officer must have `probable cause' to believe that the item found in plain view is incriminating." *Id.* A reviewing court may consider the police officers' training, experience, and collective knowledge when assessing whether probable cause existed to believe that such property was incriminating. *Id.* at 5.

**Discussion**

**[5-6]** When considering Defendant's motions, we are mindful that we are in the realm of "probable cause" rather than "proof beyond a reasonable doubt." We also note that the exclusionary rule is a prophylactic rule that was designed to deter police misconduct but was not intended to deter objectively reasonable law enforcement activity. *United States v. Leon*, 468 U.S. 897, 918-19 (1984).

**[7]** Here, the plain view exception to the warrant requirement applies. The police officers were lawfully in a position to observe the glass pipe, cut pink straw, methamphetamine, and cash **[**4**]** because they were searching Defendant's bedroom pursuant to a search warrant. The police officers also discovered these items in plain view: ammunition may have been found under the couch and in the pocket of the pool stick case. Moreover, we are satisfied that the officers had probable cause to believe the items were incriminating in light of their training, experience, and collective knowledge along with the overall picture painted by the items found in Defendant's bedroom. While field tests for the presence of drugs such as methamphetamine are ideally conducted at the scene, it was reasonable for the officers to seize the glass pipe and cut pink straw

and transport them to the police stations for testing given their training, the crystalline substances observed in the pipe and straw, and the other items found in Defendant's bedroom. Because the plain view doctrine applies, Defendant's motions must be denied.

**Order**

Defendant's motions to suppress evidence and to release $4,184.00 seized by Plaintiff are denied.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Lin*, CR No. 12-15, slip op. at [page number] (Trial Div. July 15, 2015) (order granting mot. to suppress evid.)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**HANG SONG LIN, Defendant.**

High Court of American Samoa
Trial Division

CR No. 12-15

July 15, 2015

[1] The Sixth Amendment to the United States Constitution and Article I, section 6 of the Revised Constitution of American Samoa guarantees a defendant a right in all criminal prosecutions to have the assistance of counsel for his defense.

[2] The Sixth Amendment is violated when agents of the government, following an indictment, deliberately elicit incriminating words from the defendant in the absence of counsel.

[3] A defendant has a Fifth Amendment right, under which he cannot be compelled in any criminal case to be a witness against himself.

[4] *Miranda v. Arizona*, 384 U.S. 436 (1966) established prophylactic rights designed to preserve the Fifth Amendment right during custodial interrogations.

[5] Custodial interrogations must cease when a suspect invokes his *Miranda* rights, and further interrogation is then prohibited until the suspect has been provided with counsel.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiff, Assistant Attorney General Russell D. Smith
For Defendant, Fiti A. Sunia

ORDER GRANTING MOTION TO SUPPRESS EVIDENCE

## Introduction

On February 27, 2015, Defendant was charged with three counts of bribing a public official. Defendant is a Chinese national who has limited ability to speak English but does not read or write it. Due to his fluency gap in the English language, Defendant moves to suppress his pre-arrest statements to an Attorney General's investigator, both oral and written. For the reasons stated below, we grant Defendant's motion to suppress evidence.

## Standard of Review

The Sixth Amendment to the United States Constitution and Article I, section 6 of the Revised Constitution of American Samoa guarantees a defendant a right "in all criminal **[**2**]** prosecutions . . . to have the assistance of counsel for his defense." U.S. Const. amend VI; Rev. Const. Am. Sam. art. I, § 6.[1] The Sixth Amendment is violated when agents of the government, following an indictment, deliberately elicit incriminating words from the defendant in the absence of counsel. *Massiah v. United States*, 377 U.S. 201, 206 (1964).

In addition to Sixth Amendment right to counsel protection, defendants have a separate Fifth Amendment right in which "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend V.; *see also* REV. CONST. AM. SAM. art. I, § 6.[2] *Miranda v. Arizona*, 384 U.S. 436 (1966) established prophylactic rights designed to preserve this right during custodial interrogations.[3] *Edwards v.*

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[1] With some important exceptions, a close nexus exists between the United States Constitution and the Revised Constitution of American Samoa. *Am. Samoa Gov't v. Samana*, 1 A.S.R.3d 166, 168 (Trial Div. 1997). Such a nexus exists between the Sixth Amendment of the United States Constitution and Article I, section 6 of the Revised Constitution of American Samoa and therefore our analysis of the Sixth Amendment right to counsel is applicable to Article I, section 6 Revised Constitution of American Samoa right to counsel.

[2] Similar to the Sixth Amendment of the United States Constitution and Article I, section 6 of the Revised Constitution of American Samoa, the Fifth Amendment of the United States Constitution and Article I, section 6 of the Revised Constitution possess a close nexus and therefore our analysis of the Fifth Amendment right against self-incrimination is applicable to Article I, section 6 Revised Constitution of American Samoa right against self-incrimination.

[3] The *Miranda* rule and its progeny apply to American Samoa. *Am. Samoa Gov't v. Pino*, 1 A.S.R.3d 186, 190 (1997).

*Arizona*, 451 U.S. 477, 484-85 (1981), further cemented the right by requiring custodial interrogations to cease when a suspect **[**3**]** invokes his *Miranda* rights, but also prohibits further interrogation until the suspect has been provided with counsel.

**Discussion**

Defendant moves to suppress or exclude his statements on the grounds that his command of the English language is limited. Defendant brings up the fact that none of the questioning by the Attorney General's investigator at the Attorney General's Office was in his native language, and so he could not have waived his rights. Looking at the totality of the circumstances, we agree.

The process of advising Defendant of his constitutional Miranda rights was conducted entirely in English. Though Defendant responded 'yes' to when asked if he understood English and 'no' when asked about an interpreter or a lawyer, it is yet undetermined if he truly understood the question in the first place. It appears as though the proceedings were stopped at multiple points to slow things down and interpret for the Defendant. Also, the Defendant repeatedly provided short, non-clarified statements whenever he spoke.[4]

More important are the circumstances under which Defendant was exposed. The investigator knew Defendant's counsel was on the premise, yet he did not make counsel aware of the situation. And this was after the investigator, because he was unsure, **[**4**]** asked Defendant if he could understand English. This should have been a clear sign to the investigator that he should have brought Defendant's Counsel into the room to assist the ongoing process. Defendant's counsel would have been in a better position to determine if and when an interpreter was needed. Further, Defendant was brought into an inner conference room of the Attorney General's Office for interrogation purposes. Since Defendant may not have understood what was happening or that he was free to leave, even if explicitly told so, the situation can easily make anyone feel he is under arrest and not allowed to leave. "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004).

The complexity of legal terminology is necessarily involved in

[4] *See* Memo. in Opp'n of Def.'s Mot. to Suppress Evidence, at 2 (stating 'I understand English and its okay to go forward with this interview'; 'yes Fiti'; and 'no I work this out with you'). These barely register as full statements and certainly do not clarify full understanding on the part of the Defendant.

explaining and understanding constitutional Miranda rights. Defendant is not law-trained and had not demonstrated enough confidence and command of the English language to warrant he understood his rights at the time he supposedly waived them.

**Order**

Defendant's Motion to Suppress Evidence is granted. It is so ordered.

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**Cite As:** *Vitaliano v. Three Y, Inc.*, CA No. 22-15, slip op. at [page number] (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial)

**PULE IOANE VITALIANO AND LITIA IOANE VITALIANO,**
**Plaintiffs,**

**v.**

**THREE Y, INC., JUNG JI HO AND EUN JOO JUNG SOO,**
**Defendants.**

High Court of American Samoa
Trial Division

CA No. 22-15

August 10, 2015

[1] The Land and Titles Division of the High Court has exclusive subject matter jurisdiction over all controversies relating to land, but the Trial Division has jurisdiction over summary proceedings to recover possession of premises.

[2] When claims and counterclaims in a summary repossession action go beyond the permitted claims under A.S.C.A. § 43.1411 and T.C.R.S.R. 7, the case is a matter properly within the competence of the Land and Titles Division.

[3] A party must be joined to an action when complete relief cannot be accorded among the present parties and disposition may as a practical matter impair or impede their ability to protect their interest in property or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

[4] An attorney is disqualified from participation in a case when he or she formerly represented one party and advised them of their rights in regards to the matter currently before the court, but now represents the other party before the court.

[5] Representing one side in redrafting and renegotiating a lease and then suing to evict those former clients on behalf of the other side without the informed consent of the former clients contravenes ABA Model Rule 1.9, even if the lease agreement is never used.

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

Counsel: For Plaintiffs, Mark F. Ude
For Defendants, Fiti A. Sunia

ORDER ON DEFENDANTS' MOTIONS TO DISQUALIFY PLAINTIFFS' COUNSEL, DISMISS OR REMOVE THIS MATTER FROM SUMMARY PROCEEDINGS, AND VACATE TRIAL

## Introduction

On May 7, 2015, Plaintiffs Pule Ioane Vitaliano and Litia Ioane Vitaliano filed a complaint for summary eviction against Defendants Three Y, Inc., Jung Ji Ho, and Eun Joo Jung Soo, who are alleged to be Plaintiffs' tenants operating a grocery business, Malaeimi Valley Mart, in the village of Malaeimi. On May 20, 2015, Defendants moved the Court to disqualify Plaintiffs' counsel, dismiss or remove this matter from summary proceedings, and vacate trial. On May 21, 2015, the date of the scheduled bench trial on summary eviction, the Court heard oral argument on the instant motions and took the submitted matters under advisement. For the reasons set forth below, the Court hereby transfers this matter to the Land and Titles Division, orders that a necessary party be joined to this action, and **[**2**]** disqualifies Plaintiffs' counsel.

## Background

On February 28, 1991, Plaintiffs aver that they entered in a 55-year lease with Fanene A. Laulu, who was then the *sa'o* (senior *matai*) of the Fanene family of Malaeimi. (Compl., Ex. A.) The lease appears to have been approved by the Acting Governor of American Samoa on May 22, 1991 and recorded at the Territorial Registrar's Office on May 24, 1991. (Compl., Ex. A, at 1.) The lease prohibits subletting without the approval and consent of the lessor, the Fanene family *sa'o*. (Compl, Ex. A, at 5(b)).

Beginning on March 3, 1994, Plaintiffs subleased the property to Defendants. The parties' most recent subleasing agreement expired on or around April 1, 2012. Plaintiffs allege that Defendants paid monthly rent of $2,500 minus advances or groceries obtained by Plaintiffs from the expiration of this written agreement until February 2015, when Defendants began paying only $500 per month. Plaintiffs seek to evict Defendants on the basis that they are not paying the rent in full.

Defendants aver that they have entered into a lease agreement for the property with High Chief Fanene and that Plaintiffs were aware of this fact but did not disclose it to the Court. Under the agreement,

Defendants pay High Chief Fanene $2,500 per month and Plaintiffs $500 per month. Defendants argue that this matter should proceed before the Land and Titles Division as it is a communal land dispute rather than a summary **[**3**]** proceeding.

Defendants also argue that Plaintiffs' Counsel, Mark Ude, failed to disclose several material facts in the Complaint. Among these facts is that Counsel Ude formerly represented the Defendants and advised them on their lease agreement with the Plaintiffs. Defendants allege that their attorney-client relationship with Counsel Ude ended when he sued them for failure to pay attorneys' fees.

In DCCA No. 5-10, the Law Offices of Mark Frederick Ude sued Three Y, Inc. for failing to pay for legal services performed by Counsel Ude for Three Y. It appears these legal services related to a potential claim against Hamburg Sud regarding thawed meat. *Law Offices of Mark Frederick Ude v. Three Y, Inc.*, DCCA No. 5-10, slip op. (Trial Div. June 7, 2010). Counsel Sunia represented Three Y, Inc. in DCCA No. 5-10. This case eventually settled, Settlement Agreement, *Law Offices of Mark Frederick Ude v. Three Y, Inc.*, DCCA No. 5-10 (Dec. 22, 2010), and was dismissed. *Law Offices of Mark Frederick Ude v. Three Y, Inc.*, DCCA No. 5-10, slip op. (Dec. 23, 2010) (Order to Dismiss).

At oral argument, Counsel Ude admitted that he drafted an amended lease agreement between the parties while acting as counsel for the Defendants, but argued that because this agreement was not utilized he should not be disqualified. Defendants represent that they have not consented to Counsel Ude's representation of Plaintiffs and seek his disqualification. **[**4**]**

## Jurisdiction

The Land and Titles Division of the High Court has exclusive subject matter jurisdiction over all controversies relating to land. A.S.C.A. § 3.0208(b)(2); *Am. Samoa Veterans Ass'n v. Am. Samoa Gov't.*, AP No. 08-11, slip op. at 3 (App. Div. Jan 4, 2013). However, the Trial Division has jurisdiction over summary proceedings to recover possession of premises. A.S.C.A. § 43.1402.

## Standard of Review

> A party to a summary repossession action may join claims and counterclaims for money judgment[,] for damages attributable to wrongful entry, detainer or possession, for breach of the lease or contract under which the premises were held, or for waste or malicious destruction to the premises. However, it is within the court's discretion to order separate summary disposition of the

> claim for possession, without prejudice to other claims or counterclaims. The other claims and counterclaims if raised in a summary repossession action can be heard by either the Trial Division or the Land and Titles Division of the High Court of American Samoa.

T.C.R.S.R. 7; *see also* A.S.C.A. § 43.1411.

T.C.R.C.P. 19(a) provides, in pertinent part, that

> A person who is subject to service of process and whose joiner will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, *the court shall order that he be made a party*. **[**5**]**

(emphasis added).

High Court Rule 104 provides that "[t]he conduct of attorneys and legal practitioners shall be governed by the American Bar Association Model Rules of Professional Conduct. Violations of the Model Rules shall result in an appropriate disciplinary action." "A lawyer who has formerly represented a client in a matter *shall not* thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (emphasis added). ABA Model Rule 3.3(a) imposes a duty of candor on lawyers toward a tribunal and, among other things, prohibits a lawyer from knowingly making a false statement, failing to disclose controlling and directly adverse legal authority not disclosed by opposing counsel, and offering evidence the lawyer knows to be false. Only in an *ex parte* proceeding is a lawyer required to "inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." MODEL RULES OF PROF'L CONDUCT R. 3.3(d).

## Discussion

**[1-2]** As the Court indicated at oral argument and as set forth below, this matter involves more complex issues than those typically involved in summary proceedings to recover possession **[**6**]** of real property. While some claims and counterclaims can be joined to and tried with a summary repossession action, *see* A.S.C.A. § 43.1411 and TCRSR 7, the issues raised in this case go beyond the permitted claims and indicate that this proceeding should not be summary. The above-entitled case is, therefore, a matter properly within the competence of the Land and Titles Division, subject to the procedure set out in A.S.C.A. §§ 43.0301 et seq. Accordingly, this case will simply be redocketed with the Land and Titles Division, pending the outcome of prerequisite dispute resolution proceedings before the Office of Samoan Affairs pursuant to A.S.C.A. § 43.0302.

**[3]** High Chief Fanene must be joined to this action. The record before the Court indicates that he must be made a party because in his absence complete relief cannot be accorded among the present parties and disposition may as a practical matter impair or impede their ability to protect their interest in the property or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. *See* T.C.R.C.P. 19(a). Plaintiffs' lease of the land, Ex. A to Compl., indicates that the Fanene family *sa'o*'s approval and consent of the sublease are key issues in this case. Additionally, Defendants argue that they entered into a lease of the property under which they have been paying High Chief Fanene. Because he has not previously been joined to this action, the Court will order that the *sa'o* of the Fanene family of Malaeimi be made a **[**7**]** party.

**[4-5]** Counsel Ude must be disqualified from participation in this case. Counsel Ude formerly represented the Defendants and advised them regarding their lease of the instant property with his current clients. Representing one side in redrafting and renegotiating a lease and then suing to evict those former clients on behalf of the other side without the informed consent of the former clients contravenes ABA Model Rule 1.9. It is of no consequence that the lease agreement drafted by Counsel Ude was never utilized. Additionally, the fact that Counsel Ude once sued these same former clients, *see Law Offices of Mark Frederick Ude v. Three Y, Inc.*, DCCA No. 5-10, seemingly compounds the severity of this unprofessional conduct. While Defendants' allegation that Plaintiffs' Counsel omitted certain material facts from the Complaint is troubling in light of his other conduct respecting the Defendants, it does not present a clear violation of ABA Model Rule 3.3 because this proceeding is not *ex parte*. However, because a violation of Counsel Ude's duties to his former clients is clearly indicated, he must withdraw from representing Plaintiffs in this case. As breaches of the ABA Model Rules constitute

misconduct and grounds for discipline, H.C.R. 155, that shall result in an appropriate disciplinary action, H.C.R. 104, the Court recommends that the Chief Justice, in his administrative capacity, take such action as he deems appropriate in the circumstances. **[**8**]**

## Order

This matter will be redocketed with the Land and Titles Division, in anticipation of pending A.S.C.A. § 43.0302 proceedings before the Secretary of Samoan Affairs.

The *sa'o* of the Fanene family of Malaeimi is joined as a necessary party to this action. A certified copy of this order shall be served personally by Plaintiffs upon High Chief Fanene, with return of service to be filed thereafter with the Clerk of Court.

Counsel Ude shall withdraw from representing Plaintiffs.

It is so ordered.

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**Cite As:** *ExxonMobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14, slip op. at [page number] (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts mot. to bifurcate trial, & den. pet'r's req. for subpoena)

**EXXONMOBIL ASIA PACIFIC PTE, LTD, Petitioner,**

**v.**

**AMERICAN SAMOA GOVERNMENT, DEPARTMENT OF TREASURY, LOLO MATALASI MOLIGA, GOVERNOR, AMERICAN SAMOA GOVERNMENT, AND FALEMA`O M. PILI, TREASURER, AMERICAN SAMOA GOVERNMENT, Respondents.**

High Court of American Samoa
Trial Division

CA No. 38-14

August 17, 2015

[1] The High Court has exclusive original jurisdiction over all judicial proceedings in American Samoa with respect to the American Samoa Income Tax.

[2] If a taxpayer produces credible evidence with respect to any factual issue relevant to their tax liability, the burden shifts to the tax office with respect to such issue.

[3] Burden shifting with regards to tax liability only applies when (1) the taxpayer has complied with the requirements to substantiate any item, (2) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests for information, and (3) in case of partnerships, corporations, or trusts, further special requirements are met.

[4] The Court may order a separate trial of any claim, counterclaim, or of any separate issue in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy.

[5] Bifurcation can occur at any point during a lawsuit in order to minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication.

[6] The decision whether to try issues separately is within the sound discretion of the court.

[7] Without adequately describing the tax deficiency nor formally requesting information, the government cannot expect a petitioner to blindly pay a seemingly arbitrary number.

[8] When the government failed to adequately describe the deficiency and did not formally request any information, and petitioner had provided factual credible evidence under 26 U.S.C. § 7491, the burden was shifted to the government to prove their findings on petitioner's tax liability.

[9] The Court does not issue subpoenas for persons who are not party to a claim and over whom the Court lacks jurisdiction.

[10] The Court only has personal jurisdiction over individuals in American Samoa, which includes the Swains Island and Rose Island.

[11] The Court does not subscribe to the Uniform Interstate Depositions and Discovery Act due to complications unique to our location and the people of our Territory.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Petitioner, Michael W. Weaver and Andrew W. Roberson, Pro Hac Vice
For Defendants, Assistant Attorney General Vincent Kruse

ORDER GRANTING PETITIONER'S MOTION TO SHIFT BURDEN OF PROOF, DENYING RESPONDENTS' MOTION TO BIFURCATE TRIAL, AND DENYING PETITIONER'S REQUEST FOR SUBPOENA

On March 21, 2014, Petitioner petitioned to set aside the determination of tax deficiencies, penalties, and interest owed by Petitioner to Respondent American Samoa Government for tax years 2009-2012. Respondents answered on June 20, 2014.

On July 30, 2014, Petitioner moved to shift the burden of proof to Respondents, which Respondents oppose. On September 15, 2014, Respondents moved to bifurcate the trial on the issue of whether Petitioner's business activities are subject to the tax laws of American Samoa from the issue to determine deficiencies, penalties, and interest. Petitioner opposes this **[**2**]** motion. On April 30, 2015, the Court received Petitioner's request, which was also sent to opposing Counsel, asking the Court to issue a subpoena to Michael Keyser, a former CEO of the American Samoa Power Authority, now residing in Virginia. For the

reasons stated below, we grant Petitioner's motion to shift the burden of proof, deny Respondents' motion to bifurcate trial issues, and deny the Petitioner's request for a subpoena.

## Standard of Review

Motion to Shift the Burden of Proof

**[1]** American Samoa has adopted the income tax rules in force in the United States on December 31, 2000, as the tax rules for the territory. A.S.C.A. § 11.0403(a). The High Court has exclusive original jurisdiction over all judicial proceedings in American Samoa with respect to the American Samoa Income Tax. A.S.C.A. § 11.0408.

**[2-3]** If a taxpayer produces credible evidence with respect to any factual issue relevant to their tax liability, the burden shifts to the tax office with respect to such issue. 26 U.S.C. § 7491(a)(1). This burden shifting only applies when (1) the taxpayer has complied with the requirements to substantiate any item, (2) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests for information, and (3) in case of partnerships, corporations, or **[**3**]** trusts, further special requirements are met. 26 U.S.C. § 7491(a)(2).

Motion to Bifurcate Certain Trial Issues

**[4-6]** Pursuant to TCRCP § 42(b), the Court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, counterclaim, or of any separate issue. Bifurcation can occur at any point during a lawsuit in order to minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication. *Gibbons v. Am. Samoa Gov't*, 6 A.S.R.3d 50, 57 (App. Div. 2002). The decision whether to try issues separately is within the sound discretion of the court. *Helminski v. Ayerst Lab., Div. of Am. Home Prod. Corp.*, 766 F.2d 208, 212 (6th Cir.), *cert. denied*, 474 U.S. 981 (1985); *In re Beverly Hills Fire Litig.*, 695 F.2d 207, 216 (6th Cir. 1982).

Request to Issue a Subpoena for a Non-Party, Non-Resident Person

Issuing a subpoena in American Samoa is done pursuant to T.C.R.C.P. § 45. Simultaneously, A.S.C.A. § 3.0201 provides us the jurisdiction of the Court, "The jurisdiction of the High Court shall extend to the whole of American Samoa, including Swains Island and Rose Island." **[**4**]**

## Discussion

Motion to Shift the Burden of Proof

**[7-8]** Petitioner's motion to shift the burden of proof upon the Respondent turns on the issue of whether the notices issued by Respondent American Samoa Government's Tax Office "described the basis" for the tax deficiencies as stated in accordance with I.R.C. § 6212 and I.R.C. § 7522. More interesting is that Respondents readily admit that the notices are deficient and do not describe the basis for its decision. Respondents do not explain the increase in money owed. Respondents go on to essentially say that there was 'dialogue' and that Petitioner should have asked. Unfortunately, that is not how the statute works. No party, including the American Samoa Government, can make accusations without pointing to specific and sufficient statutes and rules. Without adequately describing the deficiency nor formally requesting information, Respondents cannot expect Petitioner to blindly pay a seemingly arbitrary number. Because Petitioner has complied with all requests, of which there were none of record, and provided factual credible evidence under 26 U.S.C. § 7491, the burden shifts to Respondents to prove their findings. If the 'dialogues' that Respondents refer to are as clear and illuminating as they state, then they should have no problem proving so. **[**5**]**

Motion to Bifurcate Certain Trial Issues

The decision whether to try issues separately is within the sound discretion of the court. *Helminski*, 766 F.2d at 212; *In re Beverly Hills Fire Litig.*, 695 F.2d at 216. This is a simple issue of time, effort, and convenience. Due to the Court's location and the location of the parties, it is most convenient to not bifurcate the issues. Respondents state that bifurcation will save time and effort. However, it is not clear exactly how this is true. In this case, with both parties present at trial, one issue can be tried and the second issue can be readily tried immediately thereafter. Having a long break where the Petitioner returns to the mainland does not save time and effort and stands opposite of Respondents' point about 'elongating' the trial. (*See* Mot. to Bifurcate at 2.)

Also, as we are already shifting the burden to the Respondents, there should be "intensive and complicated assessment of validity and reasonability of the numerical figures." *Id.* All Respondents need to do is show the work it has already done. If indeed the Petitioner is made to pay taxes, there is not much to discuss. It involves as **[**6**]** a tax computation which the tax office should be prepared to calculate prior to trial fairly quickly based on the tax laws. There will be very little, if any, room for the Petitioner to argue. As Petitioner points out, any

calculations are "purely administrative." (*See* Pet.'s Opp'n to Resp't's Mot. to Bifurcate at 2.) If anything, the party that most benefits from bifurcation, Petitioner, is the party opposing bifurcation. Furthermore, as Petitioner points out, there is already a built-in bifurcation process in deciding the issues and no need to do if formally. *Id.* at 3.

Request to Issue a Subpoena to be Served on a Non-Party, Non-Resident Person

**[9-11]** The Court does not issue subpoenas for persons who are not party to a claim and over whom the Court lacks jurisdiction. The Court has personal jurisdiction over individuals in American Samoa only, to include Swains Island and Rose Island. As Mr. Keyser is not a party to this action and resides in Virginia, he falls outside this Court's jurisdiction. Others have previously attempted to get this Court to issue subpoenas under the Uniform Interstate Depositions and Discovery Act, yet we do not subscribe to this Act due to complications unique to our location and the people of our Territory. Therefore, we deny this request to issue a subpoena for Mr. Keyser. **[**7**]**

**Order**

1. Petitioner's Motion to Shift the Burden of Proof is granted.

2. Respondents' Motion to Bifurcate the trial of certain issues is denied.

3. Petitioner's request to issue a subpoena to be served on a non-party person residing outside of American Samoa is denied.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Peric*, CR No. 05-15, slip op. at [page number] (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evid.)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**APRIL PERIC, Defendant.**

High Court of American Samoa
Trial Division

CR No. 05-15

August 21, 2015

[1] The search warrant was not defective when it used the word "spotlight" instead of "headlight" because it does not materially change the affidavit or circumstances.

[2] It is well settled that a warrantless search violates the Fourth Amendment unless it comes within one of the few specifically established and well-delineated exceptions to the warrant requirement.

[3] The Fourth Amendment of the United States Constitution and the Revised Constitution of American Samoa protect the rights of people to be secure from unreasonable searches and seizures.

[4] The Revised Constitution of American Samoa provides that no person shall be deprived of life, liberty, or property without due process of law.

[5] Article I, Section 5 of the Revised Constitution of the American Samoa does not require that every search and seizure be made pursuant to a warrant; it prohibits only unreasonable searches and seizures.

[6] Police officers may conduct a temporary investigative stop of a vehicle if the stop is based upon reasonable suspicion.

[7] Reasonable suspicion is based on an objective standard that looks to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop.

[8] It is reasonable for the police to pull someone over for failing to have working headlights, and this failure meets the requisite reasonable suspicion requirement needed to stop the vehicle.

[9] If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798 (1982) authorizes a search of any area of the vehicle in which the evidence might be found.

[10] If police have probable cause to believe a vehicle contains evidence of criminal activity, they may search it on the road or at the police station.

[11] A search may qualify as incident to lawful arrest—even if the search precedes a formal arrest—so long as probable cause to arrest existed prior to the search.

[12] A valid search incident to arrest is not limited to instances where the defendant is told prior to the search that he or she is formally under arrest.

[13] Probable cause is a nontechnical, fluid concept, so a totality of the circumstances approach is used when determining if it exists in a particular situation.

[14] Probable cause to search does not require there be probable cause to believe the owner or possessor of the property searched committed a crime.

[15] If there is probable cause to search the premises themselves for evidence of criminal activity, there is probable cause to justify detention of an occupant of those premises.

[16] Once probable cause is confirmed and contraband is found on the premises, the occupant's person may be searched as well.

[17] Police had probable cause to search defendant's person when police properly searched the vehicle and found drugs on the passenger side of the vehicle.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Plaintiff, Assistant Attorney General Russell D. Smith
For Defendant, Public Defender M. Douglas Fiaui and
Assistant Public Defender Karen Shelley

ORDER DENYING MOTIONS TO DISMISS AND TO SUPPRESS EVIDENCE

## Introduction

The information filed in this action on January 8, 2015, accuses Defendant April Peric of committing two offenses: Unlawful Possession of the Controlled Substance Methamphetamine (Count 1), and Unlawful Possession of the Controlled Substance Methamphetamine with Intent to Distribute (Count 2).

On February 12, 2015, Defendant moved to suppress all statements she made to the police on December 27, 2014, and to suppress all physical evidence seized by the police resulting from their search of her and the Nissan automobile she was driving on December 27, 2014. On February 17, 2015, Defendant filed a motion to dismiss all charges against her on the grounds **[**2**]** of (1) a defective arrest warrant and (2) the arrest warrant does not fall under one of the warrantless arrest exceptions under A.S.C.A. § 46.0805. The Court heard both motions on March 19, 2015, and took the matter under advisement.

We deny in part the motion to dismiss and the motion to suppress statements and evidence.

## Discussion

### Motion to Dismiss

Defendant requests all charges against her to be dismissed because of a defective warrant and an unauthorized warrantless arrest not falling under one of the exceptions as outlined in A.S.C.A. § 46.0805.

**[1]** First, the warrant was not defective. Use of the word "spotlight" in place of "headlight" is a mere oversight and does not materially change the affidavit or circumstances. It is clear the police report is referring to the non-functioning headlight.

**[2]** Second, the warrantless arrest is valid under two of the exception as outlined in A.S.C.A. § 46.0805.[1] It is well **[**3**]** settled that a

[1] According to A.S.C.A. § 46.0805 – Authority to arrest without a warrant when:

> A police officer is authorized, and it is his duty, to make an arrest without a warrant, in the following cases:
> (1) when a felony is committed in his presence;
> (2) to prevent the commission of a felony;
> (3) of persons found near the scene of a felony and suspected of

warrantless search violates the Fourth Amendment unless it comes within one of the "few specifically established and well-delineated exceptions" to the warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). The arrest was valid under points one (1) and three (3) of the warrant exceptions in A.S.CA. § 46.0805. In the present case, possession of controlled substances is a felony, A.S.C.A. § 13.1022, which was committed in the presence of police as controlled substances were found in the car, specifically the passenger side. Defendant was a passenger in the vehicle at the time it was stopped and thus near the scene of the felony. The arrest occurred within a short time of the crime. As discussed below, this was a valid search and seizure of the evidence.

The warrantless arrest was lawful.

**Suppression of Evidence**

Defendant claims that both the physical evidence seized as a product of the police searches after the vehicle was stopped and **[**4**]** the taking of her statements to the police were unlawful and this evidence must be suppressed.

**[3-4]** The Fourth Amendment of the United States Constitution and the Revised Constitution of American Samoa protect the rights of people to be secure from unreasonable searches and seizures. U.S. CONST. amend. IV; AM. SAMOA CONST. art. I, § 5. Both Constitutions also provide that no person shall be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V.; AM. SAMOA CONST. art. I, § 2.

For clarity, we are dividing this discussion into two parts: (a) search of the automobile in which Defendant was a passenger, and (b) the interrogation and search of Defendant herself.

**The Automobile**

Defendant seeks to suppress all physical evidence seized as a consequence of the search of the Nissan automobile on December 27,

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committing it, where such suspicion is based on reasonable grounds and the arrest follows the crime by a short time;
(4) when a misdemeanor is committed in his presence;
(5) to prevent a breach of the peace when he has reasonable grounds to believe that a breach of the peace is about to be committed;
(6) of persons who obstruct justice by assaulting him or otherwise interfering with him while he is discharging his duty;
(7) of persons who are in danger of life or limb and whose arrest is necessary for their protection.

2014. We disagree. Article I, Section 5 of the Revised Constitution of American Samoa provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effect, against unreasonable searches and seizures, shall not be violated and no warrant shall issue, but upon probable cause . . . .[2] **[**5**]**

Article I, Section 5 further provides that evidence obtained in violation of this provision cannot be admitted in court.

**[5]** However, Article I, Section 5 does not require that every search and seizure be made pursuant to a warrant. Article I, Section 5 prohibits only *unreasonable* searches and seizures. *Am. Samoa Gov't v. Ve'ave'a*, 2 A.S.R.3d 109, 113 (Trial Div. 1998).

**[6-8]** The vehicle was not unreasonably searched. Defendant recognizes her lack of expectation of privacy to search of a vehicle that does not belong to her. However, her argument that the vehicle was unreasonably searched is weak in its reliance on the word "spotlight" used in the police report rather than the more proper term "headlight." It is clear from context that the vehicle was pulled over due to a nonfunctioning headlight in violation of A.S.C.A. § 22.1101. Police officers may conduct a temporary investigative stop of a vehicle if the stop is based upon reasonable suspicion. *Fuimaono v. Am. Samoa Gov't*, 6 A.S.R.3d 67, 75 (App. Div. 2002) (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). "Reasonable suspicion is based on an objective standard that looks to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the stop]." *Id.* (quoting *Terry*, 392 U.S. at 21). It is reasonable for the police to pull someone over for failing to have working headlights. This failure meets the requisite **[**6**]** reasonable suspicion requirement needed to stop the vehicle.

**[9-10]** Defendant also claims that the police had no reason to search the vehicle. Again, we disagree. After the vehicle was properly pulled over, it was discovered the driver had no driver's license and no identification. This is not only against the law under A.S.C.A. § 22.0201 but also highly suspicious. The Territory is known to have many people here illegally who are involved in the trafficking of people and drugs. Someone in the Territory with no identification, who is breaking the law and driving a vehicle, not in their name can certainly expect to have the vehicle

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[2] Because this provision of our Constitution is identical to the Fourth Amendment of the U.S. Constitution, cases applying the Fourth Amendment provide relevant guidance in applying Article I, Section 5 of the Revised Constitution of American Samoa.

impounded and searched by the police. Furthermore, if there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. *See Ross*, 456 U.S. at 807 n.9 ("If an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded."). The vehicle could have been searched on the road, and it can be searched at the police station. For a passenger, who is not the vehicle's owner, to say that the vehicle cannot be searched is just wrong. We deny suppressing any evidence found in the truck. **[**7**]**

**The Defendant**

Defendant moves to suppress all statements obtained as a consequence of the interrogation of her and all physical evidence seized as a consequence of the search of her person on December 27, 2014. Simultaneously, on February 17, 2015, Defendant filed a motion to dismiss all charges against her on the grounds of (1) a defective arrest warrant and (2) the arrest warrant does not fall under one of the warrantless arrest exceptions under A.S.C.A. § 46.0805.

**[11-16]** We note that a search may qualify as incident to lawful arrest—even if the search precedes a formal arrest—so long as probable cause to arrest existed prior to the search. *See generally*, 2 W. LaFave, Search and Seizure 4.9(b) (1978). Moreover, a valid search incident to arrest is not limited to instances where the defendant is told prior to the search that he or she is formally under arrest. *Id.*; *see also State v. Banks*, 720 P.2d 1380, 1384 (Utah 1986) (holding that "[a] search is not invalid, despite the fact that it precedes a formal arrest, so long as the arrest and the search are substantially contemporaneous and probable cause to effect the arrest exists independent of the evidence seized in the search") (*citing Buick v. United States*, 396 F.2d 912, 915 (9th Cir. 1968), *cert. denied*, 393 U.S. 1068 (1969)). Probable cause is a nontechnical, fluid concept, so a **[**8**]** totality of the circumstances approach is used when determining if it exists in a particular situation. *Illinois v. Gates*, 462 U.S. 213, 231 (1983). Probable cause to search does not require there be probable cause to believe the owner or possessor of the property searched committed a crime. *Zurcher v. Stanford Daily*, 436 U.S. 547, 560 (1978); *accord Wyoming v. Houghton*, 526 U.S. 295, 301-02 (1999). If there is probable cause to search the premises themselves for evidence of criminal activity, there is probable cause to justify detention of an occupant of those premises. *Michigan v. Summers*, 452 U.S. 692, 705 (1981). Once the probability is confirmed and contraband is found on the premises, the occupant's person may be searched as well. *Id.*

**[17]** Here, regardless whether consent was given or not, the police had probable cause to search Defendant's person. As previously discussed,

the police properly searched the vehicle and found drugs. More importantly, the police found drugs on the passenger side of the vehicle. Upon discovery of drugs on the passenger side of the vehicle, the police had probable cause to search Defendant. Consent to this search is inconsequential.

At no point was the evidence tainted nor were the Defendant's constitutional rights violated in obtaining the evidence. Therefore, we deny suppression of the evidence. **[**9**]**

**Order**

Defendant's motion to dismiss is denied. Defendant's motion to suppress physical evidence and her statements is also denied.

It is so ordered.

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**Cite As:** *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13, slip op. at [page number] (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.)

**TAPAI TERVOLA, AND THE ESTATE OF IUPATI C. TERVOLA, Plaintiff,**

**v.**

**ANZ AMERIKA SAMOA BANK, Defendant.**

High Court of American Samoa
Trial Division

CA No. 14-13

September 1, 2015

[1] T.C.R.C.P. Rule 15(a) provides leave to amend shall be freely given when justice so requires at the court's sound discretion.

[2] Courts have particularly broad discretion to grant or deny leave to amend when leave has previously been granted.

[3] Leave to amend may be denied if the court finds undue delay, bad faith or a dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment.

[4] While the bias is in favor of granting leave, the liberal amendment policy of Rule 15(a) is not without limits.

[5] Verbosity or length by itself is not typically a basis for dismissing a complaint; however, a pleading cannot be of unlimited length and opacity.

[6] A party proposing an amended petition that violates TCRCP 8(a), which requires a short and plain statement of the claim, can be denied leave to amend.

[7] Leave to amend can be denied due to the prolixity of a proposed amended complaint because it could prejudice the opposing party or may also show bad faith on the part of the movant.

[8] Plaintiff was denied leave to file a second amended petition when it

was 99 pages long, set forth 57 causes of action, and was convoluted and difficult to understand.

[9] Among the reasons for denying a motion for leave to amend, an amendment's potential prejudice to the opposing party carries the greatest weight.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiff, Matailupevao Leupolu, Jr.
For Defendant, Craig Miller

ORDER DENYING MOTION FOR LEAVE TO AMEND COMPLAINT

## Background

Plaintiff Tapai Tervola (Tervola) seeks to again amend her complaint against ANZ Amerika Samoa Bank (ANZ). The original complaint was filed on May 9, 2013. Tervola offered a first amended complaint on July 12, 2013, and was ultimately granted leave of court to file it. On April 28, 2015, Tervola offered the amended complaint now at issue. Though styled "Third Amended Complaint," we will refer to this second amended complaint by this misnomer in this order for consistency. ANZ claims that granting leave to amend the complaint would be unjust because it violates **[**2**]** T.C.R.C.P. 8(a), [1] which requires a short and plain statement of the claim.

## Standard of Review

**[1-2]** T.C.R.C.P. 15 governs amended pleadings. Rule 15(a) provides leave to amend "shall be freely given when justice so requires," at the court's sound discretion. *Id.*; *see also RDL, Inc./CIDA Inc. v. Am. Samoa Cmty. Coll.*, 6 A.S.R.3d 256, 256 (Trial Div. 2002). Courts have particularly broad discretion to grant or deny leave to amend when leave has previously been granted. *See Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996).

**[3- 4]** Leave to amend may be denied if the court finds "undue delay, bad

[1] "A Pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim shall contain (1) *a short and plain* statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded." T.C.R.C.P. 8(a) (emphasis added).

faith or a dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *RDL, Inc./CIDA Inc.*, 6 A.S.R.3d at 256 (internal citations omitted); *see also Ape v. Am. Samoa Gov't*, 25 A.S.R.2d 106, 108 (Trial Div. 1993). Thus, while the bias is in favor of granting leave, "the **[**3**]** liberal amendment policy of Rule 15(a) is not without limits." *Ape* at 108.

**[5-6]** Verbosity or length by itself is not typically a basis for dismissing a complaint; however, a pleading cannot be of "unlimited length and opacity." *Dowkin v. Honolulu Police Dep't*, No. 10-00087, 2012 U.S. Dist. LEXIS 92133, at *16 (D. Haw. July 3, 2012) (quoting *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011)). Parties proposing amended petitions that violate Federal Rule of Civil Procedure 8(a)(2),[2] which also requires a short and plain statement of the claim, have been denied leave to amend. *See Dowkin*, 2012 U.S. Dist. LEXIS 92133, at *16 (denying leave to amend a fourth time after plaintiffs had already been cautioned about their complaint and proposed complaint was 134 pages with 37 attached exhibits); *Casfasso*, 637 F.3d at 1058-59.

**[7]** Furthermore, the Ninth Circuit has held that leave to amend can be denied due to the prolixity of a proposed amended complaint because it could prejudice the opposing party. *See, e.g., Cafasso*, 637 F.3d at 1058. Excessive prolixity may also show bad faith on the part of the movant. *See, e.g., id.* **[**4**]**

**Discussion**

Tervola's Third Amended Complaint is 99 pages long and sets forth 57 causes of action. While the length alone would not be enough to deny Tervola's Motion for Leave to Amend, the Third Amended Complaint is, on the whole, even more convoluted than the First Amended Complaint.

**[8]** The Third Amended Complaint clearly violates T.C.R.C.P. 8(a). It is the exact opposite of a short and plain statement of the claims: its 99 pages and 57 claims are often confusing and conclusory. S*ee Hatch v. Reliance Ins. Co.*, 758 F.2d 409, 415 (9th Cir. 1985) (upholding a dismissal based on F.R.C.P. 8(a) when complaint was longer than 70 pages and was confusing and conclusory).

**[9]** In addition to violating T.C.R.C.P. 8(a), the Third Amended

[2] Fed. R. Civ. P. 8(a)(2) is similar to T.C.R.C.P. 8(a) (2) and provides "[a] pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief."

Complaint, through its prolixity and opaqueness, prejudices the opposing party and may show bad faith on Tervola's part. Both of these are valid grounds to deny leave to amend. *See, e.g.*, *Dowkin*, 2012 U.S. Dist. LEXIS 92133, at *19-20. Among the reasons for denying a motion for leave to amend, "an amendment's potential prejudice to the opposing party 'carries the greatest weight.'" *See Samonte v. Maglinti*, Civ. No. 05-00598, 2007 U.S. Dist. LEXIS 41350, at *7 (D. Haw. June 6, 2007) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. **[**5**]** 2003)). Here, rather than directly stating her claims and allegations, Tervola would burden ANZ with the task of combing through 99 pages just to prepare an answer that admits or denies the allegations in 57 claims, on top of which ANZ would still be left with the problem of determining what exactly Tervola is arguing. Overall, Tervola's Third Amended Complaint would be quite challenging for ANZ to answer.

**Order**

Plaintiff's present Motion for Leave to Amend Complaint is denied.

It is so ordered.

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**Cite As:** *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10, slip op. at [page number] (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b))

**IN THE MATTER OF BEN FA`ASAMOA FANENE, A MINOR CHILD, FA`ASAMOA FANENE AND MATAVIA FANENE, Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Respondent.**

High Court of American Samoa
Trial Division

CA No. 06-10

September 3, 2015

[1] Reconsideration is appropriate if the court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.

[2] The decision whether to grant a motion for reconsideration is within the broad discretion of the trial court, but a judgment will not be set aside except for substantial reasons.

[3] Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling.

[4] It is incumbent on the moving party to state with particularity and detail the grounds for relief; thus affording the trial judge an opportunity to differentiate manifest errors of law or fact from otherwise harmless errors.

[5] The court will ordinarily not consider arguments that the moving party failed to raise during the original trial.

[6] When defendant directly testified to the manifested symptoms of emotional distress suffered as a result of the accident by himself and his minor son and medical reports confirmed the son's symptoms, the evidence sufficiently established real injuries and supported a claim for negligent infliction of emotional distress.

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

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

ORDER DENYING RESPONDENT'S MOTIONS FOR RECONSIDERATION AND/OR NEW TRIAL, AND FOR RESPONDENT'S MOTION FOR STAY UNDER T.C.R.C.P. 62(b)

Pending are Defendant American Samoa Government's two timely-filed motions: (1) Motion for Reconsideration and/or a New Trial of the Court's Opinion and Order of March 10, 2015 awarding judgment in favor of Petitioners Ben Fa'asamoa Fanene, Fa'asamoa Fanene, and Matavia Fanene, and (2) Motion for Stay Under T.C.R.C.P. 62(b) until the Court rules on the reconsideration/new trial motion. Defendant principally questions the Court's application of the tort of negligent infliction of emotional distress ("NIED") in this action.

## Background

A statement of facts concerning this action is fully set forth in the Court's March 10, 2015 Opinion and Order. In the **[**2**]** March 10, 2015 Opinion and Order Defendant was ordered to pay $10,754.75 to Fa'asamoa Fanene for pain and suffering, NIED, and property damage, and $4,000 to the Clerk of Courts on behalf of Ben Fanene. On March 20, 2015, Defendant timely moved for reconsideration and/new trial and for stay under T.C.R.C.P. 62. For the reasons stated below, we deny Defendant's motions.

## Standard of Review

**[1-2]** Reconsideration is appropriate if the court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *TCW Special Credits, Inc. v. F/V Cassandra Z*, 4 A.S.R.3d 225, 229 (Trial Div. 2000). A party moving for reconsideration must do more than merely reiterate the trial court's reasons and then blindly assert that the court was incorrect. *G.M. Meredith & Assocs. v. Blue Pac. Mgmt. Corp.*, 28 A.S.R.2d 204, 206 (Trial Div. 1995). The decision whether to grant a motion for reconsideration is within the broad discretion of the trial court. *Pulu v. Pulu*, 8 A.S.R.3d 230, 231 (Land & Titles Div. 2004). A judgment will "not be set aside except for substantial reasons." *Am. Sam. Gov't v. S. Pac. Island Airsystems, Inc.*, 28 A.S.R.2d 170, 171 (Trial Div. 1995).

**[3-4]** The burden is on the moving party to show substantial reasons that such relief should be granted. *S. Pac. Island* **[**3**]** *Airsystems*, 28 A.S.R.2d at 171. Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling. *See Lucky Star, Inc. v. Am. Samoa Gov't*, CA 28-11, slip op. at 1-2 (Trial Div. Dec. 1, 2011) (citing *S. Pac. Island Airsystems, Inc*., 28 A.S.R.2d at 171); T.C.R.C.P. 61. Furthermore, it is incumbent on the moving party to state with particularity and detail the grounds for relief; thus affording the trial judge an opportunity to differentiate manifest errors of law or fact from otherwise harmless errors. *Airsystems,* 28 A.S.R.2d at 171-72; *see also* T.C.R.C.P. 7(b)(1).

**[5]** The standard for granting a motion for reconsideration is strict and should be denied "unless the moving party can point to controlling decisions or data that the court overlooked." *Shrader v. CSX Transp. Inc*., 70 F.3d 255, 257 (2d Cir. 1995). Any error "which does not affect substantial rights of the parties" will be deemed harmless and disregarded. T.C.R.C.P. 61. Plainly put, a "motion for reconsideration should not be granted where the moving party seeks solely to relitigate an issue already decided." *Shrader*, 70 F.3d at 257. In addition, the court will ordinarily not consider arguments that the moving party failed to raise during the original trial. *Clifton v. Voyager, Inc.*, 31 A.S.R.2d 12, 16 (Trial Div. 1996); *Glavor v.* **[**4**]** *Shearson Lehman Hutton, Inc.*, 879 F. Supp. 1028, 1033 (N.D. Cal. 1994) ("If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived.").

**Discussion**

Defendant does not present newly discovered evidence or an intervening change in controlling law. Defendant also fails to show the Court committed clear error or that the initial decision was manifestly unjust. Rather, they essentially restate the arguments advanced in their closing arguments and fail to prove substantial rights were affected.

1. The Evidence Supports NIED Findings.

**[6]** As we explained in our Opinion and Order, there were two instances of NIED, under both the bystander theory and the direct victim theory. Defendant claims a dearth of information exists to prove there was an injury. (*See* Def.'s Mot. for Recons. and/or New Trial at 5.) However, Fa`asomoa Fanene directly testified to the manifested symptoms of emotional distress suffered as a result of the accident by himself and his minor son Ben Fanene. Medical reports confirmed the symptoms and clinginess Ben suffered. The evidence sufficiently established real injuries and formed the underlying basis for this Court's decisions on the

NEID claims. **[**5**]**

2. The Decision Is Based On Precedent And Does Not Expand Case Law.

Defendant implies there is a dearth of case precedent recognizing NIED in American Samoa. However, our decision is certainly not without precedent—precedent Defendant should recall. In *Filoiali'i v. Am. Samoa Gov't*, CA No. 07-08, slip op. (Trial Div. Nov. 1, 2011), the Court recognized NIED and awarded monetary damages, to include attorney's fees. We did not determine the exact award in *Filoiali`i* as the parties then worked out a settlement agreement. (*See* Parties' Joint Notice of Settlement, *Filoiali'I v. Am. Samoa Gov't*, CA No. 07-08, slip op. (Trial Div. Dec. 31, 2013). Despite that, Defendant cannot say there is no precedent for NIED awards in the Territory, especially when it stems from one of its own cases.

## Conclusion

Our March 10, 2015 decision provides factual and legal grounds to support the judgment in Petitioners' favor. Therefore, we will deny Defendant's Motion for Reconsideration and/or a New Trial. Defendant's Motion for Stay under T.C.R.C.P. 62(b) is now moot.

## Order

Defendant's motions for reconsideration and/or new trial and for a stay under T.C.R.C.P. 62(b) are denied.

It is so ordered.

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**Cite As:** *Tualau v. Am. Samoa Gov't*, CA No. 82-14, slip op. at [page number] (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b))

**KAILI TUALAU, Plaintiff,**

**v.**

**AMERICAN SAMOAN GOVERNMENT, Defendant.**

High Court of American Samoa
Trial Division

CA No. 82-14

September 3, 2015

[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. 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. Prong two instructs the Court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief.

[3] While the pleading does not need to include detailed factual allegations, it demands 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: the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true and should not be dismissed because a court does not believe that a plaintiff will prevail on the claim.

[5] The court should liberally construe pleadings to avoid injustice but should not refashion a plaintiff's theory of relief.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Plaintiff, Mark F. Ude

For Defendants, Assistant Attorney General Cecila Reyna

ORDER DENYING MOTION TO DISMISS UNDER RULE 12(b)

## Introduction

On December 4, 2014, Defendant American Samoa Government (ASG) filed this pre-answer motion to dismiss. ASG argues that: (1) Plaintiff Kaili Tualau's incarceration at the Territorial Correctional Facility did not result from negligence of ASG's employee negligence but instead was false imprisonment, for which ASG has immunity from under the Government Tort Liability Act (GTLA), and (2) 'overcrowding' at the TCF is not a cause of action, particular when no damages are shown.

On March 11, 2015, Plaintiff filed his opposition which sheds more light on the case at bar, particularly that Plaintiff may have been incarcerated longer than scheduled and may have suffered health injuries which may or may not have been due **[**2**]** to the 'overcrowded' conditions at the TCF. Because many questions that have yet to be answered, we deny the ASG's Motion to Dismiss at this time.

## 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. 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 *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 v. Am. Samoa Gov't*, CA No. 86-11, slip op. at 4-5 (Trial Div. Feb. 9, 2012). 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 allegations "plausibly give rise to an entitlement to relief." *Id*. at 679. **[**3**]**

**[4-5]** 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). Overall, 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).

**Discussion**

First, ASG contends that the alleged actions of its employees were not negligent but rather that it is merely false imprisonment. Plaintiff points out that this is not exactly the case because Plaintiff was properly and legally imprison, which puts false imprisonment in question. Also, as an element of false imprisonment, Plaintiff's was awareness of the expiration **[**4**]** of his five years of sentenced imprisonment was up. Plaintiff's awareness, or lack thereof, is an element of false imprisonment. This needs to be resolved in Court.

Second, while ASG correctly complains that Plaintiff's Complaint makes 'naked' assertions without disclosing damages resulting from 'overcrowding' at the TCF, documents before us indicate Plaintiff suffered a stroke that may or may not have been caused by conditions at the TCF. Such allegations raise questions requiring answers, and Plaintiff deserves the opportunity to present answering evidence in Court. For justice purposes, the case should have the chance to play out before any drastic measure such as dismissal is considered. Without more information, it is inappropriate to dismiss Plaintiff's claim at this time.

**Order**

ASG's Motion to Dismiss is denied. It is so ordered.

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**Cite As:** *Heraliti v. Am. Samoa Gov't*, CA No. 67-14, slip op. at [page number] (Trial Div. Sept. 3, 2015) (order den. resp't's mot. for recons.)

**MUHAMMAD IQBAL HERALITI, HERMANTO (NO LAST NAME), ADE RASTA, AND ANTON SUNATO, Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Respondent.**

High Court of American Samoa
Trial Division

CA No. 67-14

September 3, 2015

[1] As soon as a party raises a point in an official court document that the opposing party has access to, the opposing party is put "on notice."

[2] Ignoring and not complying with proper discovery requests are sanctionable actions.

[3] The American Rule does not serve as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. This Court has long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

[4] Respondent's actions were wanton and reckless when respondent failed to the claim for attorney's fees and was on notice of such claim immediately upon being served with process in this action; respondent failed to follow the Court's discovery protocols and failed to comply with A.S.C.A. § 41.0510(c); and respondent arrested and confined plaintiffs without providing justification.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Plaintiffs, Mark F. Ude
For Defendant, Assistant Attorney General Vincent Kruse

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

Respondent moves for reconsideration in response to the Court's award of attorney's fees and costs to Petitioners. Both Respondent's and Petitioners' counsel provide varied reasons as to why this award should be rescinded or should stand, respectively. However, on most points, both parties are astray.

Attorney's fees and other costs are not awarded here because Respondent arrested and held Petitioners in opposition to the U.S. Constitution, the Government Tort Liability Act, or other inapplicable law in this case, contrary to what Petitioners claim are at issue. Respondent was within its rights to arrest and hold Petitioners, contrary to what Respondent claims is at issue. Put simply, Respondent is liable **[**2**]** for the attorney's fees and costs we granted by our September 8, 2014, because Respondent violated applicable law and repeatedly ignored court procedure.

For the reasons stated below, we deny Respondent's motion for reconsideration.

## Discussion

Respondent states: "As there was no notice or hearing on the issue of attorney's fees prior to the Court's order . . . Respondent can only **assume** what those justifications were." *See Mtn., pg. 2, lines 22-25* (emphasis added). As the old adage goes, we all know what happens when we assume. Respondent is responsible for the awarded attorney's fees and costs for the following reasons:

### I. Respondent was on Notice for Attorney's Fees

**[1]** In the original petition, Petitioners asked for attorney's fees. (*See* Pet'rs's Pet. at 5.) As soon as a party raises a point in an official court document that the opposing party has access to, the opposing party is put 'on notice'. Respondent could have objected to this request at any point thereafter, yet it never did as prescribed in the Trial Court Rules of Civil Procedure. In fact, the day it was awarded, Defendant failed to even show up on time before the Court at the hearing on this issue to object. Despite its opportunities to counter the award of attorney's fees and costs, **[**3**]** Respondent slept on its rights in our view until it filed the present motion for reconsideration.

## II. Respondent Failed to Follow Discovery Protocol and Made Petitioners Defend Something Petitioners Should Never Have Been Required to Undertake

Respondent states that there was 'no determination that Respondent has violated the Trial Court Rules of Civil Procedure in any way'. (*See* Mot. for Recons. at 3.)

**[2]** One of the first and most important item, particularly in an immigration detainment case such as this, that Petitioners sought was the affidavit required under A.S.C.A. § 41.0510(c).[1] Instead of cooperating with Petitioners, Respondent repeatedly ignored Petitioners' requests for anything. Ignoring and not complying with proper requests is sanctionable action. Respondent is provided substantial leeway when acting under A.S.C.A. §§ 41.0201 and 41.0207. However, this berth does not override statutory requirements. Respondent is expected to follow statutory mandates at all times.

Moreover, due to Respondent's failure, if not outright refusal, to cooperate with opposing counsel, Petitioner's counsel was effectively forced had to do a lot of work to chase down what was happening with Petitioners as his clients; legal services for which he should be properly compensated. His **[**4**]** request for attorney's fees and costs in the amount of $2,190 for his legal services to Petitioners are not excessive.

Especially poignant is that at the end of this real life episode, Respondent simply threw up its hands and released Petitioners without a word–no explanation or apology–under the misguided view that it can do whatever it wants in these cases. Respondent has no right or authority to expect other people do unnecessary work to cancel its undertakings and not expect to be accountable for those actions.

## III. Respondent Violated the Law

A.S.C.A. § 41.0510(c) states:

> The person making the arrest without a warrant in accordance with this section shall immediately thereafter make an affidavit and apply to a member of the Board for an order of arrest and commitment, until the Board's next meeting, of the person under arrest.

[1] A.S.C.A § 41.0510(c) states: "The person making the arrest without a warrant in accordance with this section shall immediately thereafter make an affidavit and apply to a member of the Board for an order of arrest and commitment, until the Board's next meeting, of the person under arrest. "

Though Respondent has significant leeway when implementing A.S.C.A. § 41.0510 generally, it must still follow the mandates required by this statute. Respondent did not prepare the affidavit after Petitioners' warrantless arrests. Despite Petitioners' requests, it was not provided either to their counsel or to the Court. Respondent could not present the required affidavit after the arrests or in its defense, because one was never created and does not exist. Though not dispositive of the lawfulness of awarding of attorney's fees and **[**5**]** costs in the instant situation, this outright violation of the law was certainly factored into our decision.

## IV. The Law Provides the Court Means to Allow Granting of Attorney's Fees and Costs

Respondent correctly points out that this action does not involve a Government Tort Liability Act claim—but Petitioners do not attempt to try to spin this case as one.[2] If this were a claim under that Act, the issue of attorney's fees would be specifically authorized clearly and subject to straightforward calculation.

Respondent also directs us to TCRCP 54(d) which Respondent claims the order awarding attorney's fees violates. (*See* Mot. for Recons. at 3.) Respondent specifically quotes from TCRCP 54(d):

> "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs; **but costs against the American Samoa Government…their officers, and agencies shall be imposed <u>only</u> to the extent permitted by law**." (emphasis added by Defendant)

**[3]** Though we generally follow the American Rule[3] when it comes to attorney's fees, there are exceptions. **[**6**]**

> The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously,

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[2] See Mot. for Recons. at 4 (Petitioners' case is not brought under GTLA"); *see also* Opp'n to Resp't's Mot. for Recons. at 4.

[3] The "American Rule" holds that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing award of these fees. *Fleschmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

> wantonly, or for oppressive reasons . . . . *See Fiaui v. Faumuina*, 27 A.S.R.2d 36, 42 (1994) (attorney's fees granted when opposing party has acted in bad faith, wantonly, oppressively, or when a statute dictates); *see also F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1973).

**[4]** Here, we find Respondent was wanton and reckless in its actions. As previously stated, Respondent failed to fight Petitioners' claim for attorney's fees when Respondent was on notice of such claim immediately upon being served with process in this action. Respondent failed to follow the Court's discovery protocols, and failed to comply with A.S.C.A. § 41.0510(c). Respondent arrested and confined Plaintiffs without providing justification. The only reason the Respondent released Petitioners to avoid taking responsibility only after Respondent knew that Petitioners had counsel pursuing proper corrective action. Then Respondent hastily released Petitioners without explanation and acted as if it had done nothing wrong. Incarcerating individuals and denying them their rights without explanation, only to attempt to hide the actions later is wanton and reckless behavior; behavior sanctionable by the awarding of attorney's fees and costs. We stand by our previous order. **[**7**]**

## Order

Respondent's Motion for Reconsideration is denied. It is so ordered.

**********

**Cite As:** *In re the Estate of Aperaamo Mamani*, PR No. 19-15, slip op. at [page number] (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel)

**IN THE MATTER OF THE ESTATE OF APERAAMO MAMANI, BY: HARIPA MAMANI, Petitioner.**

High Court of American Samoa
Trial Division

PR No. 19-15

September 10, 2015

[1] Potential claimants to an estate's proceeds must be joined as necessary parties when the complete relief granted by the court would affect their property rights and they are not presently parties to the action.

[2] In probate, an attorney for an estate forms an attorney-client relationship with a personal representative of the estate.

[3] An executor or administrator of the estate is a personal representative of the estate.

[4] If a decedent dies intestate and leaves no surviving spouse, the High Court shall grant letters of administration to the next of kin in the order of their degree of relationship to the deceased, and the administrator is selected in the discretion of the Court.

[5] If an infant does not have a duly appointed representative, the court shall appoint a guardian ad litem for the infant or make other orders it deems proper for the protection of the infant.

[6] Any person who is over 21 years, resides in American Samoa, and is mentally competent can be a guardian ad litem.

[7] In governing attorneys' professional conduct, the High Court of American Samoa follows the ABA Model Rules of Professional Conduct.

[8] A concurrent conflict of interest includes a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person.

[9] A minor is a necessary party when they are not currently a party in the matter and have property interests in the estate because they are first in line to inherit decedent's estate.

[10] A minor may appear as a party in a probate preceding that affects his property interests through his guardian ad litem.

[11] The Court may appoint a minor's parent to serve as their guardian ad litem if the parent meets the statutory requirements.

[12] The Court may order a minor and his guardian ad litem to hire an attorney or seek help from the legal aid office in order to protect the minor's interests.

[13] Counsel cannot represent decedent's brother, decedent's minor child, and the estate because it results in a conflict of interests in violation of Rule 1.7 of the ABA Model Rules of Professional Responsibility.

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

Counsel: For Petitioner, Sharron I. Rancourt

ORDER TO JOIN NECESSARY PARTY, APPOINT GUARDIAN AD LITEM FOR MINOR, DIRECT GUARDIAN AD LITEM TO RETAIN COUNSEL

Decedent Aperaamo Mamani ("Decedent") died intestate on November 26, 2013, in American Samoa. Decedent is survived by his minor son Paul Junior Sauaga ("Minor") and four adult siblings, including his brother Haripa Mamani ("Petitioner") who seeks to be appointed as Administrator of Decedent's estate. On August 25, 2015, Petitioner's application for letters of administration came on for hearing before this Court. Petitioner appeared with attorney Sharron I. Rancourt, who claims to represent the estate, not any specific heir.

Although Petitioner concedes in his petition that Decedent "was in a sexual relationship [with Minor's mother] Faasu Mattaty Sauaga" and that "[p]rior to his death Decedent acknowledged that Ms. Sauaga was pregnant with Decedent's child and was aware of the pregnancy," Pet. for letters of administration, && 8-9, Petitioner elected nonetheless to omit service of process upon Minor. Petitioner testified at the hearing on his application for letters that he and his siblings propose to contest Minor's **[**2**]** inheritance rights by way of a separate paternity action. Under the circumstances, Minor's absence as a party-claimant in this matter immediately evoked due process and other concerns for the Court as

parens patriae.

In addition, counsel Rancourt's posture taken in these proceedings further puzzles the Court with her curious submission and insistence that she merely represents Decedent's estate, not any specific heir. At the hearing, and upon the Court's inquiry, counsel admitted to her being retained by Petitioner. However, counsel attempted to assuage the Court's concerns and justify her stance by arguing that Minor's mother was notified of the hearing, was present in court, and does not oppose administration.[1] Counsel's representation of both the estate and Petitioner implicates ethical concerns. Consequently, the Court summarily concluded and continued the proceedings and ordered, inter alia, the joinder of Minor as a party to this matter.

For the reasons set forth below, the Court orders joining Minor as a necessary party to this matter through his guardian ad litem, appointing Minor's mother Faasu M. Sauaga as Minor's guardian ad litem, and directing Minor's guardian ad litem to retain an attorney for Minor. The Court further cautions counsel **[**3**]** Rancourt as to a conflict of interests between Minor and Petitioner.

## Jurisdiction

This is a matter relating to the administration of estates. Accordingly, this Court has exclusive subject matter jurisdiction pursuant to A.S.C.A. § 3.0208(a). Furthermore, Minor was born and lives in American Samoa. Because he is domiciled in American Samoa, the Court exercises subject matter jurisdiction over his guardianship and personal jurisdiction over him. A.S.C.A. § 40.0402(b), § 3.0103(a). *Pene v. Bank of Hawaii*, 19 A.S.R.2d 52 (App. Div. 1991).

## Standard of Review

T.C.R.C.P. 19(a) provides that:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the

[1] Counsel seems to overlook the fact that it is Minor, not his mother, who is beneficially interested in Decedent's estate. Until the Court appoints the mother as Minor's guardian ad litem, however, she can neither prosecute Minor's inheritance claims nor enter into any kind of binding stipulation about "administration" on Minor's behalf.

> action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. . . .

**[1]** In *Jennings v. Jennings*, the Court stated that "[p]otential claimants to an estate's proceeds were to be joined as necessary parties when the complete relief granted by the court would affect the property rights of persons who were not presently parties to the action." 22 A.S.R.2d 10 (Land & Titles Div. **[**4**]** 1992).

**[2-4]** In probate, an attorney for an estate forms an attorney-client relationship with a personal representative of the estate. *See Trask v. Butler*, 872 P.2d 1080, 1083 (Wash. 1994). A personal representative is an executor or administrator of the estate. *See Saufo`i v. Am. Samoa Gov't*, 16 A.S.R.2d 71, 72 (Trial Div. 1990). If a decedent dies intestate and leaves no surviving spouse, the High Court "shall" grant letters of administrator to "the next kin in the order of their degree of relationship to the deceased," and "the administrator is selected in the discretion" of the Court. A.S.C.A. § 40.0305(a)(2).

**[5-6]** If an infant does not have a duly appointed representative, he may "sue . . . by a guardian ad litem." T.C.R.C.P. 17(c). The Court "shall appoint a guardian ad litem for an infant [] not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant." *Id.* Any person who is over 21 years, resides in American Samoa, and is mentally competent can be a guardian ad litem. A.S.C.A. § 40.0403.

**[7-8]** In governing attorneys' professional conduct, the Court follows the ABA Model Rules of Professional Conduct. H.C.R.104. Rule 1.7(a) of the ABA Model Rules of Professional Conduct states that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Model Rules of Prof'l Conduct R. 1.7(a). A concurrent conflict of interest includes "a significant risk that the representation of one or more clients **[**5**]** will be materially limited by the lawyer's responsibilities to another client, a former client or a third person." *Id.*

**Discussion**

**[9]** Here, Minor is a necessary party to this matter. Minor, currently not a party in this matter, has property interests in the estate because he is first in line to inherit Decedent's estate. *See* A.S.C.A. §§ 40.0201(b), 40.0202(a). His property interests will be affected if the Court appoints

Petitioner as an administrator of the estate. Because Minor's property interests are at stake in this matter, the Court cannot accord complete relief unless Minor joins as a party. *Jennings*, 22 A.S.R.2d 10.

**[10-12]** Minor may appear as a party in this proceeding through his guardian ad litem since he is an infant. T.C.R.C.P. 17(c). The Court has power to appoint Minor's guardian ad litem and choose Minor's mother as Minor's guardian ad litem. *Id.* His mother, a resident of American Samoa who is mentally competent and over the age of 21, is qualified to serve as his guardian ad litem. "[F]or the [further] protection of the infant," the Court may also order Minor and his guardian to hire an attorney or resort to the help of the legal aid office if they cannot hire a private attorney. *Id.*

If Minor appears as a party in this matter, counsel Rancourt will have two clients of conflicting interests. Counsel represents an administrator of the estate as an attorney for the estate. Minor's guardian ad litem will likely be appointed as an administrator of the estate because Minor, as the "next kin" to **[**6**]** Decedent, stands in priority over Petitioner to the issuance of letters of administrators. *See* A.S.C.A. § 40.0305(a)(2). Ignoring such fact and the law governing letters of administration, counsel Rancourt chose to represent Petitioner whose interest is adverse to Minor's. Petitioner, as a brother of Decedent, is to inherit the estate only if Minor does not.

**[13]** Counsel Rancourt's representation of both Petitioner and the estate will involve a conflict of interest in violation of Rule 1.7 once Minor's guardian ad litem becomes an administrator of the estate. Counsel cannot represent both Minor and Petitioner because "the representation of one client will be directly adverse to another client." Model Rules of Prof'l Conduct R. 1.7(a) (2013). Even if counsel terminates her attorney-client relationship with Petitioner, she is under a significant risk that her representation of Minor will be materially restricted by her duty to a former client, Petitioner. *Id.* Hence, Rule 1.7 of the Model Rules of Professional Conduct prohibits counsel's representation of Minor in future proceedings.

## Order

Wherefore, the Court orders:

1. Minor is hereby joined as a necessary party to this matter through his guardian ad litem;
2. Minor's mother Faasu M. Sauaga is hereby appointed as Minor's guardian ad litem; and
3. Minor's guardian ad litem is directed to retain an attorney for Minor. **[**7**]**

4. The Clerk of Courts shall cause a certified copy hereof to be personally served upon Minor, through his guardian ad litem Faasu M. Sauaga.

The Court further cautions counsel Sharron I. Rancourt as to a conflict of interests between Minor and Petitioner.

It is so ordered.

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**Cite As:** *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13, slip op. at [page number] (Trial Div. Sept. 14, 2015) (order den. def.'s mot. for summ. j.)

**PACIFIC PRINCESS PARTNERSHIP, LTD., A NEVADA LIMITED PARTNERSHIP, AND OCEANS UNLIMITED, INC., A NEVADA CORPORATION, Plaintiffs,**

**v.**

**PACIFIC STEVEDORING SERVICES, Defendant.**

High Court of American Samoa
Trial Division

CA No. 52-13

September 14, 2015

[1] 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.

[2] The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact. If the movant meets this burden, the non-moving party must then affirmatively show there is a genuine issue for trial.

[3] 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 fact finder 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.

[5] All inferences are construed in a light most favorable to the non-moving party when the Court decides a motion for summary judgment.

Before RICHMOND, Associate Justice; MAMEA, Associate Judge; and TUNUPOPO, Associate Justice.

Counsel: For Plaintiffs, Roy J.D. Hall, Jr.
For Defendant, Gwen Tauiliili Langkilde

ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

## Background

This case arises from the death of Papu Ulisese Fa'alele (Fa'alele), a fish unloader aboard F/V Pacific Princess docked at the Star-Kist Cannery in Pago Pago. Multiple lawsuits in California, Singapore, and American Samoa have been brought as a result of Fa'alele's death. Plaintiffs Pacific Princess Partnership, Ltd. and Oceans Unlimited Inc. (together Pacific Princess) filed indemnity and contribution claims in American Samoa against Defendant Pacific Stevedoring Services (Pacific Stevedoring) based on a wrongful death suit brought in the Superior Court for the State of California by Fa'alele's family. **[**2**]** Pacific Princess's remedies rely in significant part on whether the Longshore and Harbor Workers' Compensation Act (LHWCA), a federal act, applies to American Samoa.

On May 14, 2015, Pacific Stevedoring filed a motion for summary judgment, arguing LHWCA does not apply to American Samoa and that American Samoa Worker's Compensation Act (ASWCA) is the proper compensation regime to apply. Pacific Stevedoring further argued that even if the LHWCA does apply, Pacific Stevedoring should be excused from the LHWCA compensatory regime due to the alleged impossibility of obtaining LHWCA compliant insurance in American Samoa. We heard on the motion on August 6, 2015, and because the motion presents questions of material fact, we deny Pacific Stevedoring's motion for summary judgment.

## Standard of Review

**[1-3]** 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 this burden, "the non-moving party must then affirmatively show there is a genuine issue for **[**3**]** 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). "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 fact finder 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).

**[4-5]** 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**

Pacific Stevedoring's motion for summary judgment argues that LHWCA does not apply in American Samoa because (1) it is an unincorporated and unorganized territory, (2) ASWCA adequately addresses the problems LHWCA was designed to correct, and (3) it is impracticable to apply LHWCA in American Samoa since it is alleged impossible to obtain LHWCA compliant insurance in **[**4**]** American Samoa. However, this motion presents several issues of material fact that need to be addressed before this Court can make a final ruling.

LHWCA is a federal act that establishes a workers' compensation program for certain land-based maritime employees who are injured on or adjacent to navigable waters. 33 U.S.C. § 901 et seq.; s*ee also Peru v. Sharpshooter Spectrum Venture LLC*, 493 F.3d 1058, 1061 (9th Cir. 2007). The LHWCA applies to navigable waters, which is defined as "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902(9). However, the term "territory" does not have a fixed meaning, and a territory "may be found to be included within one act whose coverage extends to the territories of the United States and excluded from another." *Garcia v. Friesecke*, 597 F.2d 284, 293 (1st Cir. 1979); *see also United States v. Standard Oil Co.*, 404 U.S. 558, 560 (1972).

The First Circuit has held that LHWCA does not apply to Puerto Rico. *See Garcia v. Friesecke*, 597 F.2d 284, 293 (1st Cir. 1979). On the other hand, the Ninth Circuit has held that LHWCA applies to the Commonwealth of Northern Mariana Islands. *See Saipan Stevedore Co., Inc. v. Dir.*, 133 F.3d 717 (9th Cir. 1998). The fact that the First Circuit and the Ninth Circuit have come to **[**5**]** opposite conclusions regarding the application of LHWCA to different territories makes this issue a material fact that cannot be decided by summary judgment. Furthermore, while Pacific Princess maintains that its research indicates

that LHWCA insurance coverage can be obtained in American Samoa, the availability of this insurance is not yet firmly established.

These are material issues that definitively determine the outcome of this case. As a trial is needed to answer these questions and others, the motion for summary judgment is denied.

**Order**

Defendant Pacific Stevedoring Services' motion for summary judgment is denied.

It is so ordered.

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**Cite As:** *Nomura v. Jones*, CA No. 50-06, slip op. at [page number] (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions)

**RICKY NOMURA, DBA SKYVIEW STORE & TENT RENTAL,**
**Plaintiff,**

**v.**

**TIMOTHY JONES, DBA EXTREME POWER SAMOA,**
**Defendant.**

High Court of American Samoa
Trial Division

CA No. 50-06

September 15, 2015

[1] A defendant may move for dismissal of an action if the plaintiff fails to prosecute or comply with the rules or any order of the court.

[2] Dismissal for failure to diligently prosecute is a drastic measure, so the facts of each individual case are important in determining whether to dismiss.

[3] In deciding a motion to dismiss, the court must consider the competing policies: the court's need to manage its docket, the public interest in expeditious resolution of the litigation, and the risk of prejudice to defendants from any delay versus the law's strong bias in favor of disposition of claims on their merits.

[4] The pertinent question in a motion to dismiss is whether there has been delay and prejudice to the defendant sufficient to justify a dismissal with prejudice.

[5] This Court has adopted a five-factor test to assess the propriety of dismissal for failure to prosecute: (1) the duration of plaintiff's failures or a history of dilatoriness; (2) whether conduct of plaintiff was willful or in bad faith; (3) whether plaintiff had received notice that further delays would result in dismissal; (4) whether defendant was likely to be prejudiced by further delay; and (5) the efficacy of lesser sanctions.

[6] Plaintiff was the main cause of delay when the case had been in pre-trial for approximately nine years, during which time plaintiff had not made any discovery requests, settlement offers, or motions to set trial,

even though defendant had changed counsel during that time and promised plaintiff outside of court he would pay plaintiff.

[7] The passage of time alone generally does not dictate dismissal of an action for want of prosecution.

[8] Willful delay, even if done without malice or bad faith, may provide sufficient grounds to grant dismissal if the delay is determined to be unreasonable under the circumstances.

[9] Where the plaintiff willfully delays prosecution for reasons other than bad faith, the proper inquiry is whether such delay is reasonably excusable in light of the circumstances.

[10] The burden is on the plaintiff to provide a reasonable excuse for the delay.

[11] Plaintiff's claims that he delayed prosecution for more than seven years because defendant had changed counsel during that time and promised plaintiff multiple times outside of court he would pay plaintiff were unreasonable, and thus, the court found plaintiff willfully delayed prosecution.

[12] A court is not required to expressly warn the plaintiff of the possibility of dismissal prior to an actual dismissal pursuant to a noticed motion; however, dismissals are rarely granted without adequate notice and an opportunity to be heard.

[13] Previous indications by the Court of its desire to see pending matters resolved expeditiously does not constitute actual or implied notice that further delay will result in dismissal.

[14] Plaintiff had ample opportunity to be heard as evidenced by his written brief in opposition to the motion to dismiss and thus was on notice dismissal of his action was a possibility.

[15] Unreasonable delay creates a presumption of prejudice to defendant's case.

[16] A party may suffer prejudice in the form of extra costs and added burdens that arise out of the repeated delays and filing of motions that accompany a failure to prosecute.

[17] Irreparable prejudice weighs heavily in favor of granting dismissal for failure to prosecute.

[18] The defendant must produce evidence that the delay has prejudiced

his case only when the plaintiff provides an unfrivolous excuse. If such prejudice is shown, the plaintiff must then establish that the force of its excuse outweighs any prejudice to defendant.

[19] Defendant did not suffer irreparable harm to his case even though plaintiff had failed to prosecute the case for more than seven years because there were few witnesses and little evidence to begin with and defendant had also had ample opportunity to depose necessary witnesses and collect essential evidence early on in the case and failed to do so.

[20] Involuntary dismissal of a case with prejudice is a drastic measure that should only be authorized in extreme circumstances. The court, therefore, can look at whether lesser alternative sanctions will satisfy the interest of justice (e.g., assessment of fines, dismissal without prejudice, conditional dismissal, and reprimands).

[21] Because plaintiff's lack of prosecution did not cause irreparable harm to defendant's case and dismissing a matter with prejudice is an extreme measure, the court imposed sanctions.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Justice.

Counsel: For Plaintiffs, M. Talaimalo Uiagalelei
For Defendant, Gwen Tauiliili-Langkilde

ORDER DENYING MOTION TO DISMISS AND IMPOSING LESSER SANCTIONS

Before the Court is the motion of Defendant Timothy Jones (Jones) to dismiss for failure to prosecute pursuant to T.C.R.C.P. 41(b). We heard the matter on February 10, 2014. For the reasons set forth below, the motion to dismiss is denied; however, we impose sua sponte lesser sanctions.

## Background

On June 5, 2006, Plaintiff Ricky Nomura (Nomura) filed this action against Jones for breach of contract. The action arose out of Jones's alleged failure to pay Nomura the full price of a generator Jones purchased from Nomura in December 2004. Jones filed an answer on June 26, 2006, arguing Nomura had verbally agreed to give Jones more time to pay. **[**2**]**

On July 3, 2006, Nomura served Jones with interrogatories and requests for production. Jones responded to the first set of interrogatories and requests for production on August 23, 2006.

On December 5, 2013, Jones filed a stipulated motion for substitution of counsel, which the court granted.

On January 21, 2014, Jones filed a motion to dismiss under T.C.R.C.P. Rule 41(b) for Nomura's failure to prosecute the claim. Jones asserted that Nomura has allowed the case to "languished for an extended time without action." Jones further claims that Nomura has been warned of the dismissal for failure to prosecute this matter since Nomura's counsel has previously delayed prosecuting other cases.

Nomura filed a response opposing Jones' motion to dismiss on February 7, 2014. Nomura argued the delay is not unreasonable because Jones and his counsel are "greatly responsible" for the delay "by making repeated promises" to pay Nomura and then breaking these promises. Alternatively, Nomura argued that even if the delay is unreasonable, the other factors weigh against granting Jones's motion to dismiss.

**Discussion**

**[1-4]** T.C.R.C.P. 41(b) provides in relevant part, "[f]or failure of the plaintiff to prosecute or comply with these rules or any order of court, a defendant may move for dismissal of an action **[**3**]** or of any claim against him." Dismissal for failure to diligently prosecute is a drastic measure. *Nat'l Credit Union Admin. Bd. v. Gurr*, AP 08-05, slip op. at 6 (App. Div. Aug. 30, 2006). In determining whether to dismiss for lack of prosecution, the facts of each individual case are important. *Ace Novelty Co. v. Gooding Amusement Co.*, 664 F.2d 761, 763 (9th Cir. 1981). The court must consider competing policies, such as the court's need to manage its docket, the public interest in expeditious resolution of the litigation, and the risk of prejudice to defendants from any delay versus the law's strong bias in favor of disposition of claims on their merits. *Nat'l Credit Union Admin. Bd.*, AP 08-05, slip op. at 6. The pertinent question is whether there has been delay and prejudice to the defendant sufficient to justify a dismissal with prejudice. *Mir v. Fosburg*, 706 F.2d 916, 918 (9th Cir. 1983).

**[5]** This Court has adopted a five-factor test to assess the propriety of dismissal for failure to prosecute:

(1) the duration of plaintiff's failures or a history of dilatoriness;
(2) whether conduct of plaintiff was willful or in bad faith;
(3) whether plaintiff had received notice that further delays would result in dismissal;
(4) whether defendant was likely to be prejudiced by further delay; and
(5) the efficacy of lesser sanctions. **[**4**]**

*Nat'l Credit Union Admin. Bd.*, AP 08-05, slip op. at 6. We will now consider these factors as they apply to the instant case.

1. Duration of Nomura's Failures or History or Dilatoriness

**[6]** This case has been languishing in the pre-trial stages for approximately nine years now. During this time, Nomura has failed to make any additional discovery requests, settlement offers, or motions to set trial. His only action has been to oppose Jones's motion to dismiss in February 2014. Nomura acknowledges that he "stopped prosecuting the action in court"; however, he claims this was only because of Jones's promises to pay Nomura. (*See* Ricky Nomura Aff. in Opp'n to Mot. to Dismiss at 2). This claim lacks credibility—at some point in the seven and half years between June 2006 and December 2013, Nomura surely realized Jones's promises, even if well-meaning, were empty.

Nomura also claims that Jones has "contributed to additional delay" because Jones "recently changed counsel multiple times in the last few months." (Pl.'s Opp'n to Mot. to Dismiss at 3.) While it is true that Jones changed counsel in December 2013, he has not changed counsel "multiple times" as Nomura claims. Furthermore, Nomura had failed to pursue prosecution of his case for more than seven **[**5**]** years by the time Jones filed a motion to substitute counsel. It is evident that Nomura has been the primary cause of delay.

2. Presence of Willful or Bad Faith Conduct to Delay on Nomura's Part

**[7-10]** "The passage of time alone does not dictate dismissal of an action for want of prosecution." *Patterson v. Newspaper & Mail Deliveries' Union of N.Y.C. & Vicinity*, 884 F. Supp. 869, 873 (S.D.N.Y. 1995). Willful delay, even if done without malice or bad faith, may still provide sufficient grounds to grant dismissal if the delay is determined to be unreasonable under the circumstances. *See, e.g., Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1281 (9th Cir. 1980). Where the plaintiff willfully delays prosecution for reasons other than bad faith, the proper inquiry is whether such delay is reasonably excusable in light of the circumstances. The burden is on the plaintiff to provide a reasonable excuse for the delay. *See Laurino v. Syringa Gen. Hosp.*, 279 F.3d 750, 753 (9th Cir. 2002).

**[11]** There is no evidence that Nomura delayed the process out of a bad faith effort to confound Jones's case. We do, however, find that Nomura willfully delayed prosecution.

As discussed above, Nomura claims that (1) he stopped prosecuting the case because Jones promised he would pay Nomura, and (2) Jones's

change in counsel caused additional delay. **[**6**]** Neither of these arguments reasonably excuses Nomura's failure to prosecute his case for more than seven years.

First, it is hard to believe that Nomura would continue to believe Jones's promises to pay over a period of seven years after the first few promises went unfulfilled. Surely if Jones was sincere about paying, the parties could have entered into a settlement agreement or dismissed the case.

Second, Jones did not change counsel until December 2013. By then more than seven years had passed during which Nomura had failed to take any action. Furthermore, it is not uncommon for parties to change counsel during litigation, yet not every case suffers from such a long delay in prosecution. As such, Jones's change in counsel is not a reasonable excuse for delaying prosecution.

Consequently, we find that Nomura acted willfully in delaying the case and that his reasons for such delay are unreasonable.

3. Notice to Nomura That Further Delay Would Result in Dismissal

**[12-13]** A court is not required to expressly warn the plaintiff of the possibility of dismissal prior to an actual dismissal pursuant to a noticed motion. *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 652 (9th Cir. 1991). Nevertheless, dismissals are rarely granted without adequate notice and an opportunity to be heard. *Link v.* **[**7**]** *Wabash R.R. Co.*, 370 U.S. 626, 632 (1962). "Previous indications by the Court of its desire to see pending matters resolved expeditiously [does] not constitute actual or implied notice . . . that further delay would result in dismissal." *Patterson*, 884 F. Supp. at 873.

**[15]** We find nothing in the record indicating that Jones warned Nomura of his intention to seek dismissal for failure to prosecute or that Nomura had notice from the court that his case could be dismissed pursuant to a noticed motion. However, as the case law indicates, such forewarning is not a pre-requisite for granting Jones's dismissal motion. Moreover, Jones adequately notified Nomura when he filed his motion to dismiss. Nomura also had ample opportunity to be heard as evidenced by his written brief in opposition to the motion.

4. Prejudice to Jones

**[14-17]** "Unreasonable delay creates a presumption of prejudice to defendant's case." *Estate of Pua'auli v. LBJ Tropical Med. Ctr.,* 4 A.S.R.3d 103, 105 (Trial Div. 2000). A party may suffer prejudice in the form of extra costs and added burdens that arise out of the repeated delays and filing of motions that accompany a failure to prosecute.

*Andrews v. Gov't of the V.I.*, 132 F.R.D. 405, 412 (D.V.I. 1990). Irreparable prejudice weighs heavily in favor of granting dismissal for failure to prosecute. *See Estate of Pua'auli*, 4 A.S.R.3d at 105. **[**8**]**

**[18]** The defendant must produce evidence that the delay has prejudiced his case only when the plaintiff provides an unfrivolous excuse. *Nealy*, 662 F.2d at 1281. If such prejudice is shown, the plaintiff must then establish that "the force of its excuse outweighs any prejudice to defendant." *Raiford v. Pounds*, 640 F.2d 944, 945 (9th Cir. 1981).

Nomura has not provided any reasonable explanation for why he has failed to prosecute his case. Therefore, it is presumed that the delay has prejudiced Jones's case. The question then becomes whether Jones has suffered irreparable harm as a consequence of the delay such that dismissal is justifiable. We are not convinced that the harm the delay caused to Jones's case irreparably prejudices his case.

According to Jones, his case has been sufficiently prejudiced merely by the passage of time since "memories fade and evidence is lost." (Mot. to Dismiss & Mem. of P. & A. at 5.)

**[19]** While it is true that memories fade over time and evidence can be lost, Jones's response to Nomura's First Set of Interrogatories on August 23, 2006, suggests there were few witnesses and little evidence to begin with. (*See* Def.'s Answer to First Reqs. to Produc. & First Set of Interrogs) (stating the only document Defendant intended to produce was the "original invoice of sale" and the only persons with knowledge were Defendant's attorney and Nomura). Furthermore, Jones had ample opportunity to depose necessary witnesses and collect essential evidence early on in the case and failed to do so. As a result, we fail to see how any prejudice Jones has suffered from the delay has irredeemably damaged his case.

5. Efficacy of Lesser Sanctions

**[20]** Involuntary dismissal of a case with prejudice is a drastic measure that should only be authorized in extreme circumstances. *See Dahl v. City of Huntington Beach*, 84 F.3d 363, 367 (9th Cir. 1996). The court, therefore, can look at whether lesser alternative sanctions will satisfy the interest of justice (e.g., assessment of fines, dismissal without prejudice, conditional dismissal, and reprimands). *Sturgeon v. Airborne Freight Corp.*, 778 F.2d 1154, 1159 (5th Cir. 1985).

Although Nomura's dilatoriness prejudiced Jones's case, it did not cause irreparable harm. Therefore, dismissing the matter with prejudice would be an extreme measure and would not further the interests of justice, which strongly favors disposing claims on their merits.

However, we must also consider our responsibility to the public interest in having an efficient judiciary. There are **[**10**]** times when a court must impose sanctions, however harsh they may be, to ensure that litigation is expeditiously resolved. Thus, the present case requires us to take action.

**[21]** Rather than dismissing the matter, we find that justice would be more appropriately served by imposing lesser sanctions. We order an award against Nomura of the fees incurred by Jones in connection with this dismissal motion. To prevent any additional delay that the denial of this motion to dismiss may cause, we also order the parties to complete discovery no further than 45 days from entry of this order. Lastly, we order Nomura's counsel to move to set a trial date no later than 30 days after the end of the 45-day discovery period.

Jones's counsel shall provide proof by affidavit of the fees incurred by his client in connection with this motion.

## Order

Jones's Motion to Dismiss is denied. However, we award *sua sponte* against Nomura reasonable attorney's fees and costs incurred by Jones in connection with this dismissal motion. Jones shall provide proof by affidavit of such fees and costs for payment by Nomura.

It is so ordered.

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**Cite As:** *Conference of Samoan Adventist Church (Am. Samoa), Inc. v. Ekalesia Asofitu Tuto'atasi I Amerika Samoa, Inc.*, CA No. 02-15, slip op. at [page number] (Trial Div. Sept. 16, 2015) (op. & order)

**CONFERENCE OF SAMOAN ADVENTIST CHURCH (AMERICAN SAMOA), INC., Plaintiff/Counter-Defendant,**

**v.**

**EKALESIA ASOFITU TUTO'ATASI I AMERIKA SAMOA, INC., Defendant/Counterclaimant.**

High Court of American Samoa
Trial Division

CA No. 02-15

September 16, 2015

[1] The purpose of declaratory relief is to declare the rights or duties of parties to a deed, will, or contract, or to quiet and calm disputes whose entire disposition rests on the respective parties' rights and duties.

[2] The Court has discretionary authority and may refuse to hear a case for declaratory relief where its declaration or determination is unnecessary or where another adequate remedy is provided

[3] Absent a statute requiring attorney's fees or acts of bad faith, wantonness, or oppressiveness, attorney's fees are not generally awarded.

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

Counsel: For Plaintiff, Aaron Thomas and Richard deSaulles
For Defendant, Fiti A. Sunia

OPINION AND ORDER

On January 20, 2015 Plaintiff Conference of Samoan Adventist Church ("COSAC") filed a complaint for declaratory relief against Defendant Ekalesia Asofitu Tuto'atasi ("Ekalesia Asofitu") that COSAC is the sole legal owner of approximately 0.639 acres of individually owned real property, including the buildings and other improvements, in Petesa, American Samoa. The dispute arises out of the following events.

On January 7 and 8, 2015, based on the recorded 1984 deed transferring

ownership of the land to Ekalesia Asofitu, members of Ekalesea Asofitu sought to occupy the disputed real property. However, based on the recorded 2007 deed transferring title to the property from Ekalesia Asofitu to COSAC, their access was **[**2**]** prevented by Taulagi Palu and his wife, COSAC members who were resident caretakers of the property with permission of COSAC members. Then, on January 9, 2015, Ekalesia Asofitu members successfully gained access to and took control of the property when they came there with a police officer.

For the reasons stated below, we hold that as between COSAC and Ekalesia Asofutu, COSAC has the superior right to the property.

**Discussion**

**[1-2]** Declaratory relief is sought to resolve uncertainties and controversies that might result in future litigation. *In re High Chief Title Mauga*, 4 A.S.R. 132, 136 (Land & Titles Div. 1974). Its guiding purpose is to *declare* the rights or duties of parties to a deed, will, or contract, or to quiet and calm disputes whose entire disposition rests on the respective parties' rights and duties. *See* A.S.C.A. § 43.1101; 22A AM. JUR. 2D *Declaratory Judgments* §§ 7-8 (1988). The Court has discretionary authority and may refuse to hear a case where its declaration or determination is unnecessary or where another adequate remedy is provided. A.S.C.A. § 43.1102.

Based on the evidence, the Court finds and concludes that as between the parties, COSAC has the superior right to the disputed property and that Ekalesia Asofitu has no right in or to the property. Ekalesia Asofitu failed to produce any **[**3**]** convincing evidence of fraud or other grounds to invalidate as between COSAC and Ekalesia Asofitu either the 2006 power of attorney used to transfer title to the property from Ekalesia Asofitu to COSAC or the 2007 warranty deed conveying the property to COSAC. Until the immediate situation underlying this case arose in 2015, no one on behalf of Ekalesia Asofitu objected to COSAC's title to and possession of the land. Attorney Murray R. Drake as grantor executed the warranty deed. He acted in this capacity under and in compliance with his special power of attorney given to him by Rev. Namulauulu Moses Wales in his capacity as Ekalesia Asofitu's President and head official.

The power of attorney was legally valid when it was created in 2006. It was in full force and effect in 2007 when the transaction transferring by warranty deed ownership of the property from Ekalesia Asofitu to COSAC was carried out. The warranty deed was a valid instrument when it was legally created and used to implement the title transfer. Therefore, as between COSAC and Ekalesia Asofitu, COSAC has been and is now the owner of the property at all times since the title transfer

transaction from Ekalesia Asofitu to COSAC was completed in 2007. **[**4**]**

## Order

Accordingly, COSAC's petition for declaratory relief recognizing its title to the real property at issue in relation to Ekalesia Asofitu is granted. Ekalesia Asofitu's counterclaim of title to the real property is dismissed with prejudice. Ekalesia Asofitu and its members and associates must immediately and peacefully vacate the premises and shall not harass COSAC's members and associates.

**[3]** Both parties argue for attorney's fees and costs. Absent a statute requiring attorney's fees or acts of bad faith, wantonness, or oppressiveness, attorney's fees are not generally awarded. *Fiaui v. Faumuina*, 27 A.S.R.2d 36, 42 (Trial Div. 1994). As there is no statute requiring attorney's fees in this case and we do not find any acts of bad faith, wantonness, or oppressiveness to justify attorney's fees, we deny both parties' requests for attorney's fees and costs.

It is so ordered.

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**Cite As:** *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15, slip op. at [page number] (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss)

**JOHN NEWTON, DBA PAGO PAGO CONSULTANTS, A SOLE PROPRIETORSHIP, Plaintiff,**

**v.**

**AMERICAN SAMOA TELECOMMUNICATIONS AUTHORITY, Defendant.**

High Court of American Samoa
Trial Division

CA No. 29-15

September 22, 2015

[1] When considering a motion to dismiss for lack of subject-matter jurisdiction, a court must decide if it has the power to hear a case.

[2] The High Court has jurisdiction to hear all civil cases, including breach of contract claims, in which the amount in controversy exceeds $15,000.

[3] Although the pro se plaintiff's complaint made significant reference to Federal Communications Commission rules and alleged defendant was violating those rules, his complaint was primarily a breach of contract complaint, and thus, the Court had subject matter jurisdiction over the case.

[4] The Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted.

[5] A complaint drafted by a pro se litigant is generally afforded more liberal construction than pleadings drafted by an attorney.

[6] 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.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Justice.

Counsel: For Plaintiffs, M. Talaimalo Uiagalelei
For Defendant, Gwen Tauiliili-Langkilde

ORDER DENYING MOTION TO DISMISS

On July 31, 2015, pursuant to T.C.R.C.P. 12(b)(6), Defendant American Samoa Telecommunications Authority (ASTCA) filed a Motion to Dismiss 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). For the reasons set forth below, we deny Defendant's motion.

## Background

The action arises from ASTCA's alleged breach of contract with Plaintiff John Newton, dba Pago Pago Consultants (Newton). Newton filed a pro se complaint on June 30, 2015, alleging that he and ASTCA entered into a memorandum of understanding (Contract) whereby Newton would publish five annual telephone **[**2**]** directories from 2011 to 2015 for ASTCA. Newton claims that ASTCA breached the Contract by consistently refusing to provide Newton with its subscriber list, without which he could not publish any of the five directories.

ASTCA first maintains that Newton's complaint violated T.C.R.C.P. 12(b)(6) by failing to allege any plausible facts in support of damages. ASTCA points out that although a pro se litigant's pleadings are construed more liberally, the pro se litigant must still allege enough plausible facts to sustain a claim, and Newton does not meet this standard. ASTCA argues that Newton's complaint violated T.C.R.C.P. 12(b)(1) because his claim is in actuality a Federal Communications Commission (FCC) consumer complaint. ASTCA claims the "crux" of Newton's dispute is that ASTCA has not complied with FCC policy to serve the public interest in published telephone directories, not that Newton has suffered damage by breach of the Contract.

We heard the matter on August 28, 2015.

## Discussion

1. T.C.R.C.P. 12(b)(1)

**[1]** When considering a motion to dismiss for lack of subject-matter jurisdiction, a court must decide if it has the power to hear a case. *See Purcell v. Schirmer,* 6 A.S.R.3d 276 (Trial Div. 2002). T.C.R.C.P. 12(b)(1) is the more appropriate vehicle for dismissal between T.C.R.C.P 12(b)(1) and (6) as the court cannot **[**3**]** make a ruling if it lacks subject matter jurisdiction. *See Hall v. Am. Samoa Gov't*, CA 43-07, slip op. 3-4 (Trial Div. July 6, 2012).

**[2]** The High Court has jurisdiction to hear all civil cases, including breach of contract claims, "in which the amount in controversy exceeds $15,000." A.S.C.A. § 3.0208(a)(1), (8).

**[3]** ASTCA argues that the court does not have jurisdiction here because Newton's complaint is essentially an FCC consumer complaint instead of a breach of contract claim. ASTCA states that as an FCC consumer complaint, Newton should at least file his complaint with the FCC first. However, ASTCA misconstrues Newton's complaint when it claims that the complaint is essentially an FCC consumer complaint. While Newton makes significant reference to FCC rules and alleges ASTCA is violating those rules, he refers primarily to the FCC to explain ASTCA's motive for breaching the contract.

Newton essentially argues that ASTCA has breached the Contract because ASTCA could distort the number of subscriber land lines it reports to the FCC if public directories were not published to contradict the reported number. (*See* Pl.'s Compl. at 7-9.) Newton further claims that the number of land lines reported to the FCC effects the amount of grant money the Federal government distributes to American Samoa, which goes **[**4**]** directly to ASTCA, for participation in high cost telephone service (i.e., land lines). *See id.* Newton posits that ASTCA was motivated to breach the Contract so that it could secure a more advantageous grant. *See id.*

Despite the significant amount of space Newton devotes to explaining ASTCA's alleged violation of FCC rules, it is clear that Newton's complaint, when taken as a whole, is a breach of contract claim. The paragraphs Newton spends on FCC rules and ASTCA's relationship with the FCC are not an FCC consumer complaint as ASTCA claims, but rather an attempt by Newton to explain ASTCA's motive for breaching the Contract. Since Newton's complaint sets forth a breach of contract claim, the court has power to hear this case.

ASTCA's motion to dismiss for lack of subject matter jurisdiction pursuant to T.C.R.C.P. 12(b)(1) is denied.

2. T.C.R.C.P. 12(b)(6)

**[4]** 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). Under the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this court applies a two-prong analysis. *Vergara v. Am. Samoa Gov't*, CA No. 86-11, slip op. at 4-5 (Trial Div.

Feb. 9, 2012). Prong one directs the court to **[**5**]** accept a complaint's "well-pleaded" factual allegations while disregarding bare legal 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.

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).

**[5-6]** A complaint drafted by a pro se litigant is generally afforded more liberal construction than pleadings drafted by an attorney. *See Ericksson v. Pardus*, 551 U.S. 89, 91 (2007). **[**6**]** Nevertheless, while the court must "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, slip op. at 4-5 (emphasis in original) (quoting *Iqbal*, 556 U.S. at 679).

ASTCA argues for dismissal based on Newton's failure to allege any plausible facts in support of damages. According to ASTCA, the complaint is "filled with allegations that point to damage . . . to the public in general," but not by Newton or his business.

Construed liberally and viewed in the light most favorable to him, however, Newton's complaint adequately, if vaguely, pleads facts alleging damages. Specifically, a claim for lost profits can be made out in his complaint. (*See* Pl.'s Compl. at 3, 5-7) (claiming Plaintiff has made considerable efforts to fulfill the contract, including spending a significant amount of time on attempting to secure the subscriber list).

Newton has also alleged that there was a contract and that ASTCA breached the contract by not providing its list of **[**7**]** subscribers. The complaint therefore states a cause of action. We will not determine

at this time whether a contract did in fact exist, whether it was breached, and if so whether Newton did, in fact, suffer damages. Contract interpretation is not something to be decided in a T.C.R.C.P. 12(b)(6) motion. ASTCA's motion to dismiss for failure to state a claim on which relief may be granted is denied.

**Order**

Defendant's Motion to Dismiss pursuant to T.C.R.C.P. 12 (b)(1) and (6) is denied.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Tasimani*, CR 138-07, slip op. at [page number] (Trial Div. Sept. 30, 2015) (order revoking probation)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**APINERU TASIMANI, Defendant.**

High Court of American Samoa
Trial Division

CR No. 138-07

September 30, 2015

[1] The Court can modify conditions of probation by imposing a fine or changing a period of detention during the entire term of probation.

[2] In a felony case, the Court's power to revoke probation is limited to a term of five years under A.S.C.A. § 46.2204. However, if a defendant violates a condition of probation, the Court can still revoke probation under A.S.C.A. § 46.2209 beyond a term of five years.

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

Counsel: For Plaintiff, Russell Smith, Assistant Attorney General
For Defendant, M. Douglas Fiaui, Public Defender

ORDER REVOKING PROBATION

Defendant Apineru Tasimani pleaded guilty to a count of Felony Stealing and was sentenced to seven (7) years imprisonment on March 24, 2009. The Court suspended the execution of his sentence and placed him on probation for a term of seven (7) years. As conditions of his probation, Defendant was ordered to serve twenty-eight (28) months in detention and to pay a fine of $5,000.

On March 17, 2015, Deputy Probation Officer Chris Peko reported to the Court that Defendant had only paid $100.00 towards the fine. In response to Defendant's non-compliance with the court order, Officer Peko filed a motion for an order to show cause why Defendant's probation should not be revoked. Accordingly, the Court issued the order and held hearings on this matter. At the hearings, the Court confirmed that Defendant had paid only $100.00 towards the fine. For

the reasons set forth **[**2**]** below, we hereby revoke Defendant's probation and order Defendant to serve the remaining terms of his sentence in prison.

## Standard of Review

**[1-2]** The Court can modify conditions of probation by imposing a fine or changing a period of detention during the entire term of probation. A.S.C.A. § 46.2204, § 46.2205. In contrast, in a felony case, the Court's power to revoke probation is limited to a term of five years under A.S.C.A. § 46.2204. *See Am. Samoa Gov't v. Alo*, 2 A.S.R.3d 91 (Trial Div. 1998). However, if a defendant violates a condition of probation, the Court can revoke probation under A.S.C.A. § 46.2209 beyond a term of five years. A.S.C.A. § 46.2209 states that

> if the defendant violates a condition of probation at any time prior to the expiration or termination of the probation term, . . . [and] *if the continuation, modification, or enlargement is not appropriate*, [the Court] may revoke probation and order that any sentence previously imposed be executed. . . . The Court may mitigate any sentence of imprisonment by reducing the prison or jail term by all or part of the time the defendant was on probation. (emphasis added).

## Discussion

In this case, the Court's power to modify or revoke probation derives from A.S.C.A. § 46.2209, not § 46.2204. The Court's authority to revoke Defendant's probation is under A.S.C.A. § 46.2209 because Defendant has violated the condition of his probation. The Government and Defendant's counsel fail to address the relevant statute in their opposition to the probation's motion as they argue that the Court's power to revoke probation has expired based on another statute, A.S.C.A. § **[**3**]** 46.2204. Their arguments are without merit as they ground their opinions on another statute that is not relevant here.

The Court can revoke Defendant's probation here because the continuation, modification, or enlargement of his probation is not appropriate as defined in A.S.C.A. § 46.2209. It is in the interest of justice that Defendant should suffer consequences of his non-compliance. However, while on probation, Defendant cannot serve more time in detention since he has already served the maximum period of detention authorized by the statute.[1] Alternatively, ordering Defendant to pay a

[1] A.S.C.A. § 46.2206 states that in a felony case, a defendant can serve up to "one third of the maximum prescribed term of imprisonment for the crime of which the defendant has been convicted." Here, Defendant was

greater amount or number of fine will likely be futile as his past behavior demonstrates his unwillingness to pay a fine. Neither can the Court lengthen the period of Defendant's probation since a term of probation is determined at the time of sentencing. A.S.C.A. § 46.2204. The Court's only resort is, under A.S.C.A. § 46.2209, to revoke probation and impose a previous sentence suspended on Defendant.

**Order**

The Court hereby revokes Defendant's probation and imposes the previously suspended sentence of seven (7) years imprisonment on Defendant as follows: Defendant shall serve the remaining fifty-six (56) months of his sentence at the Territorial **[**4**]** Correctional Facility forthwith.

The Marshal shall serve a copy of this order upon Defendant in person and thereafter commit Defendant to the custody of the Warden of the Territorial Correctional Facility.

The Clerk shall otherwise cause copies hereof to be served upon counsel and the Chief Probation Officer in the normal course.

It is so ordered.

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convicted of a class C felony. The maximum prescribed term of imprisonment for a class C felony is seven (7) years. Defendant can serve up to one-third of 7 years, 28 months, in detention as a condition of probation.

**Cite As:** *Am. Samoa Gov't v. Asi*, CR No. 69-14, slip op. at [page number] (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**FALEFATU ASI, Defendant.**

High Court of American Samoa
Trial Division

CR. No. 69-14

October 1, 2015

[1] When a defendant pleads guilty to a charge, the Court must address the defendant personally in open court and inform him of, and determine that he understand the warnings in T.C.R.Cr.P. 11(c).

[2] The Court has an obligation to determine that the defendant's plea is voluntary.

[3] If the defendant can intelligently answer the Court's questions and gives every indication that he understands both the Court's questions and other statements during the plea taking proceedings, the defendant can be said to have entered the plea agreement voluntarily and intelligently.

[4] Because the Court gave all the appropriate warnings required by statute and by the Constitution and the defendant demonstrated his clear understanding of the proceedings by articulating the facts of his crime in court, defendant waived his constitutional right to a trial by pleading guilty.

[5] When the defendant voluntarily and intelligently pled guilty, the Court denied his motion to withdraw his guilty plea.

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

Counsel: For Plaintiff, Assistant Attorney General Tiffany W. Oldfield
For Defendant, Public Defender M. Douglas Fiaui

ORDER DENYING MOTION TO WITHDRAW PLEA OF GUILT

Defendant Falefatu Asi was accused of planning, organizing, and planning an armed robbery on April 30, 2014. On December 19, 2014, the Government presented a written plea agreement to Defendant, who was then represented by Counsel Sharron I. Rancourt. Three weeks later, on January 12, 2015, Defendant pleaded guilty to a count of Conspiracy to Commit Robbery in the First Degree, and the Court accepted his plea of guilty.

Associate Justice John L. Ward II presided at Defendant's plea hearing and conducted a plea colloquy with the Government, Defendant's counsel, and Defendant. At the hearing, Defendant stated that he understood the plea agreement, the nature of the charges against him, and the consequences of pleading guilty. He further affirmed that he understood "[he] will not be allowed to withdraw from [his] agreement if [he is] disappointed." (Plea **[**2**]** Hr'g Tr. at 9.) He acknowledged that he has discussed the matter with his attorney and that his decision to plead guilty is voluntary. Based on Defendant's responses in court, the Court found that Defendant "has knowingly, voluntarily, and intelligently entered a plea of guilty," and Defendant did not object. *Id.* at 15.

For the reasons set forth below, we hereby deny Defendant's motion to withdraw guilty plea.

## Standard of Review

**[1]** When a defendant pleads guilty to a charge, the Court must address the defendant personally in open court and inform him of, and determine that he understand the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and, if applicable, that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
(4) that if he pleads guilty, there will not be a further trial of any kind, so that by pleading guilty he waives the right to a trial; and
(5) that if he pleads guilty, the court may ask him questions about the offense to which he has pleaded, and if he answers

> these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

T.C.R.Cr.P. 11(c).

**[2-3]** In addition, the Court has an obligation to determine that the defendant's plea is voluntary. T.C.R.Cr.P. 11(d). The Court **[**3**]** has found that the defendant enters the plea agreement voluntarily and intelligently if the defendant "intelligently answer[s] the Court's questions and [gives] every indication that he [understands] both questions and other statements during the plea taking proceedings." *Am. Samoa Gov't v. Pearson*, 4 A.S.R.3d 56, 62 (Trial Div. 2000).

**Discussion**

**[4]** Here, the Court properly conducted Defendant's plea hearing in accordance with T.C.R.Cr.P 11. First, the Court announced the plea agreement which enumerated the minimum penalty for the offense, 5 years, and the maximum possible penalty, 15 years. (Plea Hr'g Tr. at 5) ("[A] class B felony, punishable by imprisonment for five to fifteen years."); T.C.R.Cr.P. 11(c)(1). When the Court asked Defendant if he understood the agreement, Defendant affirmatively answered "yes." *Id.* at 8.

Second, the Court dutifully reminded Defendant of his constitutional rights as required by T.C.R.Cr.P. 11(c): the right "to the advice of your attorney throughout every stage of these proceedings"; "not to be compelled to testify against yourself in these proceedings"; "to maintain your original pleas of not guilty to all charges against you"; and to "have these matters proceed to a speedy public trial before this Court, including your right to a trial by jury." *Id.* at 10. The Court advised Defendant that in a trial, he would have the right "to be confronted with witnesses" and to cross-examine them. *Id.* at 11. After going through Defendant's constitutional rights, the Court **[**4**]** clearly mentioned to Defendant, by entering a plea of guilty, Defendant is "waiving those rights," and "there will be no trial." *Id.* at 11. Defendant answered "yes" when the Court asked if he understood the Court's questions and statements. *Id.* at 12.

In addition, Defendant demonstrated his clear understanding of the proceedings by articulating the facts of his crime in court. He confessed that he and his co-defendants made "a plan to go rob the Gold Conda Store," and he stayed in the truck, picking up the co-defendants after they committed a robbery and driving them away. *Id.* at 15. He stated that he made a mistake that he wants to take back and that he admits guilty to the charge in the plea agreement. *Id.* at 13 ("I remain my guilty to

Conspiracy plea agreement.").

Based on the facts above, the Court determined and concluded as follows:

> We've listened carefully to the articulation and announcement of this plea agreement. We've considered the allocution of the defendant. We will find that the defendant has knowingly, voluntarily, and intelligently entered a plea of guilty to the amended charge of Conspiracy to Commit Armed Robbery on or about the 1st of May last year here in the Territory. He's done so after speaking with his attorney. He states he's satisfied with his attorney's performance on his behalf and there are facts sufficient to support the accuracy of this entry of plea. Pursuant to the plea agreement, the remaining charge of felony stealing will be dismissed. This individual will be adjudicated guilty of the crime of Conspiracy to Commit Robbery in the First Degree.

*Id*. at 15.

**[5]** It is abundantly clear on the record now before us that **[**5**]** Defendant has appropriately waived his constitutional right to trial by pleading guilty. The presiding Court meticulously followed the procedures outlined in T.C.R.Cr.P. 11 to inform Defendant of his constitutional rights and the consequences of pleading guilty. Defendant gave clear indications that he understood the Court's questions and statements, satisfying the Court that he voluntarily and intelligently pleaded guilty. Hence, this Court does not agree with Defendant's arguments that allowing Defendant to withdraw his guilty plea is in the interest of justice and would protect his constitutional rights.

## Order

Defendant's motion to withdraw his guilty plea is denied, and, therefore, the adjudication of guilt rendered by the presiding Court, as well as the dismissal of the felony stealing count, will stand.

Pursuant to A.S.C.A. § 46.1908, the Probation Office will prepare a presentence report to be filed and made available on or before October 26, 2015, with sentencing on October 30, 2015.

It is so ordered.

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**Cite As:** *Sualua v. Tuifatu*, CA No. 47-15, slip op. at [page number] (Trial Div. Oct. 1, 2015) (j. for possession by summ. proceedings)

**SUALUA MASANIAI, Plaintiff,**

**v.**

**TAITI TUIFATU AND DOES I-X, Defendants.**

High Court of American Samoa
Trial Division

CA No. 47-15

October 1, 2015

[1] Summary proceeding are available to recover possession of premises, including structures such as a Church building, upon termination of the occupant's lawful possession.

[2] Communal land is owned by the family, and the *matai* as the *sa'o* at the head of the family has the *pule*, or control, overuse of the land, including assignments of portions of the land for a family member's use.

[3] When permissive occupation of land is given without a provision for rent or term, either a tenancy at will or a license is created depending on the other circumstances.

[4] When an individual who was assigned a portion of land by the *sa'o* of the family terminates permissive occupation of the land that he granted to a third party, that individual is entitled to restoration of the premises.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Justice.

Counsel: For Plaintiffs, Fiti A. Sunia
For Defendant, Matailupevao Leupolu, Jr.

JUDGMENT FOR POSSESSION BY SUMMARY PROCEEDINGS

This summary proceeding to recover possession of premises, authorized and governed by A.S.C.A. §§ 43-1401-.1416, was filed on September 11, 2015. On September 14, 2015, process was served. On September 17, 2015, as directed by the summons, the parties appeared by counsel and trial was scheduled on September 23, 2015. Trial took place as scheduled.

The Court, having heard and has considered the evidence, makes the following findings of fact and conclusions of law, and awards Plaintiff Sualua Masaniai (Sualua) judgment against Defendant Taiti Tuifatu (Taiti) for possession of the premises at issue. The Court also provides for issuance of the writ of restitution to restore full possession of the premises to Sualua. **[**2**]**

## Findings of Fact

Sualua established the First Samoan Pentecostal Church on his family's communal land in the area known as Lepuapua within the Village of Leone, American Samoa. Church services were initially held in Sualua's residence on this land. In 2001, under Sualua's guidance, construction of a two-story building (Church building) began on the land, the structure principally at issue, to accommodate the Church's growing membership, along with oversight of over improvements to the land made during or after this construction. Construction of the Church building, costing approximately $100,000 and largely financed by Sualua's personal funds and his arranged bank loans, was completed in 2005.

The second story of the new Church building was used for church services. Sualua authorized the Church's pastor at that time, Faasi'u Tuifatu (Faasi'u), to reside on the ground floor with his family, which included his son Taiti Tuifatu (Taiti), who presently resides on the ground floor with his family. Faasi'u, Taiti, and their family members are not blood-related to the family owning the underlying communal land. Neither Sualua nor the Church required Faasi'u or Taiti to pay rent for their residence in the Church building, and none was paid to Sualua. **[**3**]**

In 2010, after he suffered a stroke in American Samoa, Sualua temporarily relocated to California for health care. He is still there, but according to his daughter Meki Masaniai, Sualua at age 93 years wants to return to American Samoa and spend his remaining life here, living in the Church building created by his significant efforts.

Faasi'u died in May 2014. Shortly before his death, Faasi'u designated Taiti to be the Church's pastor. By letter, dated June 16, 2014 and delivered shortly thereafter, Sualua notified Faasi'u's wife Feagaiga Tuifatu (Feagaiga) and her family to vacate the Church building within two (2) months to facilitate Sualua's future use of the building. Feagaiga responded by returning to her family in Manu'a, but Taiti and his family refused to leave and remained in possession and use of the residence in the Church building. By letter dated February 23, 2015, and then delivered, Sualua notified Feagaiga's family still residing in the Church building and the Church to immediately vacate the Church building and

land so that he and his family could proceed with their plans for future use of the Church building and land.

According to Taiti, the Church expended approximately $300,000, derived from various sources from 2005 to the present, on improvements to the Church building and on adjacent portions of the land. While neither extensively detailed nor supported **[**4**]** by any documentary evidence as to the nature or funding source, he claims these expenditures are shown in the Church's available records. He stated that the projects included making improvements to the parking area and modifying another structure where Taiti's sister and her family are residing. Taiti also testified that if the Court evicts Taiti and his family from the Church building and the land, they are prepared to leave but he wants Sualua to pay him $300,000, apparently to fund the relocation.

## Conclusions of Law

**[1]** Summary proceeding are available to recover possession of premises, including structures such as the Church building principally at issue, upon termination of the occupant's lawful possession. A.S.C.A. §§ 43.1401, .1404.

**[2]** The parties do not dispute that the status of the land involved in this action is family communal land. As such, the family owns the land, and the *matai* as the *sa'o* at the head of the family has the pule, or control, over use of land, including assignments of portions of the land for a family member's use, such Sualua's occupancy of the land. *See Seventh Day Adventist Church of Am. Samoa v. Maneafaiga*, 23 A.S.R.2d 150, 154 (Land & Titles Div. 1993). Neither the Church building nor any other improvement on the land has been legally separated from the land pursuant to A.S.C.A. §§ 37.1501-.1506, and therefore, each **[**5**]** improvement is part of the land. Accordingly, the land, the Church building, and any other improvements are communal land. While Sualua does not own the land or the improvements on the land, he is the rightful occupant by the *sa'o*'s designation and involvement with the long-term development and use of land consistent with this assignment.

**[3-4]** Taiti and his predecessor Faasi'u, on the other hand, neither owned nor ever had any legal interest in the land beyond the occupancy and use permitted by Sualua. Their legal interest is essentially best characterized as either a tenancy at will or a license, terminable by either party upon fair notice. *See Wightman v. Vala*, 2 A.S.R. 136, 137 (Trial Div. 1941) (permissive occupation of realty without a provision for rent or term creates tenancy at will); *Lutu Family v. Petelo*, 3 A.S.R. 252, 256 (Trial Div. 1956) (when person not a blood member of the family is permitted to occupy communal land without lease or conveyance, that occupant only has a license, not an interest in the land). Sualua terminated their

authority to occupy and use the Church building and surrounding area used by the Church by his two fairly stated and given notices to Feagaiga Tuifatugi, Faasi'u's wife and Taiti's mother, and Sualua is entitled to restoration of these premises. **[**6**]**

We also hold that Taiti is not entitled to receive payment of any amount by Sualua in connection with restoration of the premises to Sualua.

## Order

Sualua is awarded judgment against Taiti to recover possession of the premises, including the Church building and the surrounding land related to the Church's use of the land. Taiti and his family shall vacate the Church building and surrounding land within 15 days after Taiti is served with a copy of this decision. He may remove from the premises within this time period his and his family's personal property and the Church's removable personal property acquired by Faasi'u and Taiti during their lawful occupancy of the Church building and surrounding land.

Pursuant to A.S.C.A. § 43.1413, if Taiti and his family fail to vacate within 15 days after Taiti receives this decision, a writ of restitution shall issue commanding the Marshal of the Court to cause Sualua to be restored and put in full possession of the premises.

It is so ordered.

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**Cite As:** *Fisher v. Am. Samoa Gov't*, CA No. 14-11, slip op. at [page number] (Trial Oct. 7, 2015) (order dismissing action)

**SILOI FISHER, Plaintiff,**

**v.**

**AMERICAN SAMOA GOVERNMENT, AND DOES I THROUGH X, Defendants.**

High Court of American Samoa
Land & Titles Division

CA No. 14-11

October 7, 2015

[1] Under T.C.R.C.P. 41(b) and its inherent power, the Court can dismiss a case for lack of prosecution.

[2] The factors the Court considers when determining whether to dismiss a case for lack of prosecution include the Court's need to manage its docket, the public interest in the expedient resolution of litigation, and the risk of prejudice to the defendant.

[3] In examining the factors for dismissal under T.C.R.C.P 41(b), the Court considers unreasonable delay as a prerequisite for dismissal for failure to prosecute.

[4] A plaintiff causes an unreasonable delay if there is a significant period of total inactivity on the part of the plaintiff.

[5] To prevent the case's dismissal for failure to prosecute, the plaintiff has the burden of showing that the delay was justified or excusable.

[6] In assessing a pleading in light of T.C.R.C.P. Rule 8, this Court has applied the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, 555 U.S. 662 (2009).

[7] The pleading standard requires complaint's factual allegations to be more than an "unadorned, the-defendant-unlawfully-harmed-me" accusation and have to plausibly give rise to an entitlement to relief.

[8] If the complaint only allows 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.

[9] If a pleading does not meet with the requirements of T.C.R.C.P. Rule 8, the Court may *sua sponte* invoke T.C.R.C.P. Rule 12(b)(6) and dismiss a case.

[10] The public interest in quick resolution of litigation, the Court's need to manage its docket, and the risk of prejudice to the defendant weighed heavily in favor of dismissing the case when plaintiff had allowed long interim periods between his motions and answers, such as a lapse of two years to file a second set of interrogatories, during the four years since the filing of his complaint.

[11] Plaintiff's complaint failed to meet the Court's pleading standards under T.C.R.C.P. Rule 8 and current case law when it loosely argued LBJ Hospital owed plaintiff a duty of care without being able to clarify what the exact duty of care owed was and did not set forth any contract between the parties in its contract claim.

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

Counsel: For Plaintiff, Mark F. Ude
For Defendant American Samoa Government, Assistant Attorney General Douglas Juergen

ORDER DISMISSING ACTION

On February 1, 2011, Plaintiff's counsel, Mark F. Ude, filed a complaint against LBJ Tropical Medical Center ("LBJ") on three counts: negligence, breach of contract, and negligent infliction of emotional distress. Counsel Ude filed an amended response to the Government's request for production of documents on December 15, 2011, but failed to take any action for the next two years. On October 23, 2013, Counsel Ude filed a second set of interrogatories and waited another half a year to move on a motion for an order to compel on March 31, 2014. The case again sat idle until June 15, 2015, when the Court finally held a status hearing on this matter and urged the parties to take an action. On October 1, 2015, four years after the case was first filed, the Court held a hearing on the motion for summary judgment. During the hearing, the Court inquired into the legal grounds of Plaintiff's claim, but Counsel Ude failed to answer the Court's questions on what duty of care and contract Plaintiff's claims are based on. Mot. Hr'g Tr., Oct. 1, 2015.

For the reasons set forth below, we hereby dismiss the action with prejudice.

## Standard of Review

**[1-2]** Under T.C.R.C.P. 41(b) and its inherent power, the Court can dismiss a case for lack of prosecution. *Estate of B. Fa'afetai Pua'auli v. LBJ Tropical Med. Ctr.*, 4 A.S.R.3d 103, 105 (Trial Div. 2000). The Court has dismissed a case for lack of prosecution when the following factors weigh in favor of dismissal: "the Court's need to manage its docket, the public interest in the expedient resolution of litigation, [and] the risk of prejudice to the defendants." *Id.*

**[3-5]** In examining these factors, the Court considers unreasonable delay as a "prerequisite for dismissal for failure to prosecute." *Id.* A plaintiff causes an unreasonable delay if "there is a significant period of total inactivity on the part of the plaintiff." *Id.* To prevent the case's dismissal for failure to prosecute, the plaintiff has "the burden of showing that the delay was justified or excusable." *Id.*

**[6-9]** In addition, under T.C.R.C.P. Rule 8, the Court must assess whether a pleading sets forth a claim to which relief may be granted. In assessing a pleading, this Court has applied the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, 555 U.S. 662, 678—79 (2009) (quoting *Bell Atlantic Crop. V. Twombly*, 550 U.S. 544, 570 (2007)). *Barlow v. Am. Samoa Gov't*, CA No. 45-14, slip op. at 3 (Trial Div. July 2, 2014) (order grant. def.'s mot. to dismiss). The pleading standard requires complaint's factual allegations to be "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 4. In addition, "the well-pleaded allegations [have to] plausibly give rise to an entitlement to relief." *Id.* If the Court's analysis reveals that the complaint only allows 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." *Id.* at 5. If a pleading does not meet the Court's test, the Court "may invoke T.C.R.C.P. Rule 12(b)(6) on its own motion" and dismiss a case. *Pene v. Am. Samoa Power Auth.*, 4 A.S.R.2d 152, 153 (Trial Div. 1987).

## Discussion

**[10]** Here, Plaintiff has unreasonably delayed prosecuting a case without providing any justification for the delay. During the four years since filing of the complaint, Counsel Ude failed to diligently prosecute this case, shown by long interim periods between his motions and answers: he waited two years to file a second set of interrogatories, six months to compel the Government to answer, and finally one year until the Court held a status hearing. Counsel Ude, however, has never provided this Court with explanations as to why such delays were necessary. Given the facts set above, the Court finds that the public interest in a quick resolution of this litigation, the Court's need to manage its docket, and

the risk of prejudice to Defendant weigh heavily in favor of dismissal of this case for lack of prosecution.

**[11]** Moreover, Plaintiff's complaint, in conjunction with Counsel Ude's inability to explain grounds for relief in court, fails the Court's pleading standards. Counsel Ude loosely argues that Plaintiff has a cause of action based on negligence against LBJ because LBJ owes a duty of care to Plaintiff. (Compl. ¶ 15. ) However, it is not at all clear from the facts here what duty of care LBJ owes to Plaintiff. The murkiness of the claim seems to confuse not only the Court but also Plaintiff's counsel himself as Counsel Ude could not explain to the Court just exactly what is LBJ's duty of care running to Plaintiff. (Mot. Hr'g Tr.) Plaintiff's second cause of action on breach of contract is just as meritless since the complaint does not set forth any contract between Plaintiff and LBJ. (Compl. ¶¶ 22-32.) The third cause of action based on negligent infliction of emotional distress is equally deficient because it also does not address the elements of LBJ's duty to Plaintiff. *Id.* ¶ 35. The complaint tries to circumvent this problem by asserting that the hospital owes an amorphous duty of "reasonable care so as not to cause unreasonable harm to others." *Id.* This allegation does not identify LBJ's duty while asking this Court to articulate that element here. Hence, the complaint's failure to meet the pleading standard invokes this Court's power to dismiss this case under T.C.R.C.P. Rule 12(b)(6). *Estate of B. Fa'afetai Pua'auli*, 4 A.S.R.3d.

## Order

For the reasons set forth above, we dismiss this case with prejudice.

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. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel produc. of docus. & records & impose sanctions)

**BINACO TEXTILES, LTD., Plaintiff,**

**v.**

**ALAMAI CORPORATION, CAROL GALEA'I, AND ESTATE OF ALEX GALEA'I, Defendants.**

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**BINACO TEXTILES, LTD., Garnisher,**

**v.**

**FITI AND SONJA GALEA'I, ROSAMANA GALEA'I HOPKINSON, ANZ GUAM, INC. DBA ANZ AMERIKA SAMOA BANK, Garnishees.**

High Court of American Samoa
Trial Division

CA No. 101-07

October 14, 2015

[1] The Court has authority to compel answers to interrogatories under T.C.R.C.P. 37.

[2] It is well established that the court enjoys broad discretion in managing discovery.

[3] In ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties.

[4] The scope of discovery is vastly broad permitting the discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence.

[5] Trial rules governing discovery are to be liberally construed in favor of discovery.

[6] Due to the broad scope of allowable discovery and to prevent abusive discovery requests, the Court may issue a protective order where "good

cause" is shown.

[7] Good cause requires a showing that the protective order is required to prevent clearly defined and serious injury, harassment, or the abuse of court processes; mere inconvenience and expense are not enough.

[8] Given the liberal construction which favors discovery, parties opposing discovery shoulder a heavy burden when arguing why discovery should be denied.

[9] Sanctions for a successfully raised motion to compel are within the court's discretion to impose and usually take the form of the attorney fees it cost to raise the motion.

[10] Court dismissed garnishees' motion to dismiss when garnishees' arguments went to the merits and were more properly a subject for summary judgment motion after discovery was complete.

[11] Garnisher's discovery questions, which asked for the names of every person who had anything to do with any transaction since 2000, were overly broad and unduly burdensome.

[12] Parties can be made to share in or be responsible for all of the costs of production to discovery requests.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiff/Garnisher, Charles V. Ala'ilima
For Defendants, Marie A. Ala'ilima
For Garnishees Fiti and Sonja Galea`i and Rosamana Galea`i Hopkinson, Fiti A. Sunia
For Garnishee ANZ Guam, Inc., Craig Miller

ORDER DENYING MOTION TO DISMISS, AND MOTION TO COMPEL PRODUCTION OF DOCUMENTS AND RECORDS AND IMPOSE SANCTIONS

**Background**

Essentially, this long, ongoing case arose out of the arrearage of Defendant Alamai Corporation's (Alamai) on three accounts with Plaintiff/Garnisher Binaco Textiles, Ltd. **[**2**]** (Binaco). Binaco is a general merchandise wholesaler based in Fiji and ships 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. The Garnishees are individuals Fiti and Sonja

Galea`i, Rosamana Galea`i, and ANZ Bank Inc. (ANZ Bank) having various relationships with Alamai and Defendants Carol Galea`i and Estate of Alex Galea`i.

On January 27, 2015, Binaco sent discovery requests to the individual Garnishees and ANZ Bank. On February 20, 2015, ANZ Bank responded with discovery requests to Binaco and a 12(b)(6) motion to dismiss. However, ANZ Bank responded unsatisfactorily to Binaco's interrogatories; leading Binaco to request a deposition. After a series of back-and-forth responses with the parties expressing their unhappiness with the other's conduct, we deny both motions for the reasons set forth below.

## Standard of Review

Motion to Dismiss

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, **[**3**]** 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, slip op. at 4-5. 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*, 556 U.S. 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 allegations "plausibly give rise to an entitlement to relief." *Id*. at 679.

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 **[**4**]** 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). Overall, 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).

Motion to Compel

**[1-2]** The Court has authority to compel answers to interrogatories under T.C.R.C.P. 37. It is also well established that the court enjoys broad discretion in managing discovery. *Lefiti v. Ford Motor Co.*, CA No. 90-04, slip op. at 3 (Trial Div., May 31, 2006) (ord. dir. disc); *see also Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 199 (E.D. Mich. 2002).

**[3-4]** The Court's discretion includes decisions on whether to compel discovery. *See Pizel v. Monaco Coach Corp*., 224 F.R.D. 642, 643-44 (N.D. Ind. 2004). Indeed, in ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties. *Id.* The right to discovery is provided for by court rule, which states that "any matter, not privileged, which is relevant to **[**5**]** the subject matter involved in the pending action whether it relates to the claim or defense" is discoverable. T.C.R.C.P. 26(b)(1). The scope of discovery is "vastly broad permitting the discovery of information that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Progressive Ins. Co. v. S. Star Int'l*, 5 A.S.R.3d 20, 22 (Trial Div. 2001) (citing T.C.R.C.P. 26(b)(1).

**[5-8]** Trial rules governing discovery are to be liberally construed in favor of discovery. *Nua v. Sunia*, 4 A.S.R.3d 234, 237 (Trial Div. 2000). Due to the broad scope of allowable discovery and to prevent abusive discovery requests, the Court may issue a protective order where "good cause" is shown. *Progressive Ins. Co.*, 5 A.S.R.3d at 22; T.C.R.C.P. 26(c). Good cause requires a showing that the protective order is required to prevent clearly defined and serious injury, harassment, or the abuse of court processes; mere inconvenience and expense are not enough. *Nua*, 4 A.S.R. at 237. Given the liberal construction which favors discovery, "parties opposing discovery must shoulder a heavy burden when arguing why discovery should be denied." *Id.*

**[9]** Sanctions for a successfully raised motion to compel are also within our discretion to impose and usually take the form of the attorney fees it cost to raise the motion. *See Pago* **[**6**]** *Petroleum Prods., Inc. v. Ye Ahn Moolsoan, Ltd.*, 27 A.S.R.2d 94, 95-6 (Trial Div. 1995); *Johnson v. Coulter*, 25 A.S.R.2d 84, 88-9 (Trial Div. 1993); T.C.R.C.P. 37(a).

## Discussion

### I. ANZ Provides No Reason To Be Dismissed From The Case

**[10]** ANZ points to issues it has with the way Binaco has attempted to controvert the pleadings, but it presents no real argument as to why it should be dismissed from the case. The fact is there are still many questions that should be answered about the Bank's involvement with the transactions and location of assets belonging to Defendants. Why ANZ believes it should be dismissed is unclear. Instead ANZ gives generalized objections and half answers to point-blank questions. If ANZ truly feels it should be dismissed and has nothing to hide, then it should work with Binaco to get these questions properly answered; and only then can the Court even consider granting ANZ's motion to dismiss. As Binaco poignantly and accurately states, "ANZ Bank's arguments go to the merits and are more properly a subject for a summary judgment motion *after* discovery is complete and are not appropriate for a 12(b)(6) motion. (*See* Mem. on ANZ Mot. to Dismiss & Compel ANZ Discovery at 3) (emphasis added). With **[**7**]** no more Motion to Dismiss to hide behind, ANZ Bank can properly answer the interrogatories without having to be compelled.

### II. Garnisher Binaco's Interrogatories are Overbroad and Unduly Burdensome

**[11-12]** ANZ Bank complains about the interrogatories Binaco has presented. Instead of objecting and refusing to answer in accordance to the rules, it provides half answers and generalizations which this Court will not allow in the future. However, ANZ Bank is correct in stating that the questions are overbroad and unduly burdensome. Binaco is unfairly asking for the names of every person who had anything to do with any transaction since 2000. (*See* Disc. Req. to Garnishee ANZ Guam Inc.) Unless Binaco can prove to this Court that it plans for and has the resources to follow up and interview with every possible person and investigate every possible issue; then it cannot in good faith expect ANZ Bank to go back and find such information. Binaco needs to ascertain what individuals and information it needs access to and draft specific interrogatories that can be responded to and it can follow up on in a reasonable amount of time. This "everything but the kitchen sink" approach is ridiculous and not in good faith. In fact, Binaco should keep **[**8**]** in mind costs as it can be made to share in or be responsible for all of the costs of production.

Lastly, we admonish both parties to be civil with one another and caution them both not to file arbitrary and petty motions as they may well result in appropriate penalties and sanctions. Going forward, we expect the parties to work together to best quickly resolve any outstanding issues in

this near-decade long case. We also note that any more violations and failure to adequately follow procedures will be met with sanctions; however, we decline to issue any at this time.

**Order**

1. Garnishee ANZ's Motion to Dismiss is denied without prejudice.

2. Garnisher Binaco's Motion to Compel Production of Documents and Records and Sanctions is denied without prejudice.

3. Garnisher Binaco is to submit a new set of interrogatories, more specific and not unduly burdensome, to Garnishee ANZ. Garnishee ANZ is to properly answer these interrogatories in full and provide the necessary documentation without delay. Any objections must be specified exactly to specific requests.

4. Any request for a deposition will be postponed until **[**9**]** after the interrogatories have been responded to by Garnishee ANZ.

5. At this time, there will be no award of attorney's fees or other sanctions.

It is so ordered.

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**Cite As:** *Fa'ai'u v. Seigafao*, CA No. 74-10, slip op. at [page number] (Trial Div. Oct. 16, 2015) (op. & order)

**TAUO'O FIU FA'AI'U, Plaintiff,**

**v.**

**AGA IEREMIA SEIGAFAO, QUALITY PAINT, INC., AND DOES I THROUGH X, Defendants.**

High Court of American Samoa
Trial Division

CA No. 74-10

October 16, 2015

[1] A breach of contract cause of action requires a contract, a breach, and consequential damages resulting from the breach.

[2] In a breach of contract claim, the plaintiff has the burden of establishing the elements of his claim by a preponderance of the evidence. This means the plaintiff must show that it is more likely than not he should prevail.

[3] Plaintiff failed to meet his burden when he merely presented his own testimony about the oral contract without any other evidence that defendants accepted the offer and independent evidence offered by the defendant corroborated the defendant's testimony.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Plaintiff, Mark F. Ude
For Defendants, Fiti A. Sunia

OPINION AND ORDER

Plaintiff Tauo'o Fiu Fa'ai'u (Fiu) brought this breach of contract action against Defendants Hudson Aga Ieremia Seigafao (Ieremia), Quality Paint, Inc. (Quality Paint), and Does I through X (collectively Defendants) for alleged failure to pay for goods and materials provided by Fiu. The court heard the matter on March 19 and 20, 2014. For the reasons below, we find for Defendants.

## Background

Around July 15, 2009, Plaintiff and Defendants entered into a contract (Contract I) under which Plaintiff was to perform electrical work for Defendants. Contract I was a subcontract **[**2**]** for a building renovation contract Defendants were completing in Kananafou, American Samoa.

Around December 9, 2009, Plaintiff and Defendants entered into another contract (Contract II). Contract II was a subcontract concerning the same project as Contract I. Both contracts were oral contracts.

The parties agree that that Plaintiff fulfilled his obligations under both contracts. They also agree that Defendants paid Plaintiff $600 toward Contract I, and at least $7,800 toward Contract II; however, the parties' agreement ends there.

Plaintiff filed his complaint on September 7, 2010. Plaintiff claims that he incurred a total of $2,980 in completing Contract I. He states the parties agreed in Contract II that Defendants would pay Plaintiff $2,000 a week and that the work took 24 weeks to complete, totaling $48,000. Plaintiff also claims that he entered into "Change Orders" with the Defendants to make some changes to the original scope of the work. He states that the change orders required an electrical plan, which Defendants never provided, and he had to create himself. Plaintiff asserts that the agreed price for each Change Order was $5,000, for a total of $10,000, of which the Defendants have completely failed to pay. **[**3**]**

Defendants filed their Answer on February 4, 2011. In it, Defendants assert that $600 was the agreed upon price for Contract I, and thus Contract I is paid in full. Defendants also state that $9,000 was the agreed price of Contract II and that they have paid Contract II in full as well. In addition, Defendants completely deny that they entered into change order agreements with Plaintiff.

## Discussion

**[1-2]** A breach of contract cause of action requires a contract, a breach, and consequential damages resulting from the breach. *See Evergreen Eng'g, Inc. v. Green Energy Team LLC*, 884 F. Supp. 2d 1049, 1059 (D. Haw. 2012). The plaintiff has the burden of establishing the elements of his claim by a preponderance of the evidence. *See TCW Special Credits v. F/V Cassandra* Z, 7 A.S.R.3d 3, 12 (App. Div. 2003). The preponderance standard means evidence to show that plaintiff more likely than not should prevail. *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir. 1996). The standard does not focus on the

quantity of evidence. Instead, it focuses on the quality of the evidence.

**[3]** Plaintiff failed to carry his burden. Here, Plaintiff merely presented his own testimony about the offer he made of $2,980 for Contract I without any evidence that Defendants accepted the offer beyond paying $600. In fact, Defendants deny ever receiving or accepting such an offer. **[**4**]**

Similarly, Plaintiff presented no more than his own testimony about the alleged Contract II for $2,000 a week for 24 weeks. Defendants deny agreeing to these terms for Contract II. The fact that Plaintiff took his $48,000 offer directly to the building owner is evidence that corroborates Defendant Ieremia's testimony and substantiates Ieremia's claim that he did not accept an offer of $48,000. Given the state of the evidence, the court cannot conclude that it was more likely than not that Plaintiff had a contract for $2,980 and another for $48,000. The same deficiency is fatal to the change orders.

The evidence is undisputed that Plaintiff had a contract for $600 and another for $9,000. Defendant Ieremia testified that Plaintiff offered to do the work for $600 on Contract I and for $9,000 on Contract II and that he accepted those offers. In fact, Plaintiff never disputed that testimony. The evidence, therefore, preponderates in favor of a finding that the parties' contracts were for $600 and $9,000 respectively.

Independent evidence presented by Defendants also corroborates Ieremia's testimony. Johnny Acuna testified that Ieremia contacted him for a bid on the electrical work, and he offered to do the electrical work on Defendants' project for $11,000. It defies common sense for Defendants to reject Mr. Acuna's offer and accept Plaintiff's offer of nearly four times **[**5**]** more. On the whole, Plaintiff's claims are uncorroborated and not credible.

The court also observed the demeanor of the witnesses and found that the Plaintiff lacked credibility. Plaintiff's recent criminal history and release from incarceration at the Tafuna Correctional Facility was not lost on the court at all. It appeared to the court that Plaintiff changed his mind about the deal he made with Defendants and demanded more money after possibly learning of the total cost of Defendants' contract with the building owners. In fact, Plaintiff took the unusual and desperate step of taking his $48,000 proposal to the owner, an act suggesting that Plaintiff was ignoring his actual contract and trying to manufacture a new one. Of course, this played well to Plaintiff's case since there was no written record of the parties' contracting relationship. Even without a written contract, however, the evidence here preponderates in favor of finding that the parties' contracts were for $600 and $9,000. The evidence further established that Plaintiff performed the work he was hired to

perform for Defendants and that Defendants paid Plaintiff in full for both contracts.

**Order**

Plaintiff failed to prove any breach or consequential damages and therefore takes nothing. **[**6**]**

It is so ordered.

**********

**Cite As:** *Dev. Bank of Am. Samoa v. Hunt*, CA No. 34-14, slip op. at [page number] (Trial Div. Oct. 20, 2015) (order granting am. samoa gov't's mot. to dismiss third-party compl.)

**DEVELOPMENT BANK OF AMERICAN SAMOA, Plaintiff,**

**v.**

**KALILIMOKU A. HUNT AKA KALILI HUNT AND TUPUTAUSHI H. HUNT AKA TUPU HUNT, Defendants.**

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**KALILIMOKU A. HUNT AKA KALILI HUNT AND TUPUTAUSHI H. HUNT AKA TUPU HUNT, Third-Party Plaintiffs,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Third-Party Defendant.**

High Court of American Samoa
Trial Division

CA No. 34-14

October 20, 2015

[1] A party cannot bring a cross-claim against a party that is not already a part of the suit.

[2] Negligence requires allegations of duty, breach, causation, and damages.

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

Counsel: For Plaintiff, Sharron I. Rancourt
For Defendants/Third-Party Plaintiffs, Mark F. Ude
For Third-Party Defendant, Assistant Attorney General Elana Rivkin-Haas

ORDER GRANTING AMERICAN SAMOA GOVERNMENT'S MOTION TO DISMISS THIRD-PARTY COMPLAINT

## Background

Third-party Defendant American Samoa Government (ASG) moves to dismiss Third-Party Plaintiffs' third-party complaint under **[**2**]** T.C.R.C.P. 12(b). The issue is straightforward and does not require much explanation.

Defendants/Third-Party Plaintiffs (the Hunts) have loan issue with the Plaintiff Development Bank of American Samoa (DBAS). The Hunts blame their loan issues on the fact that Third-Party Plaintiff Kalilimoku Hunt (Kalili) does not hold a higher pay career service position with ASG. They maintain that ASG is responsible for their problems and should have to answer to the problems.

For the following reasons, we grant ASG's motion to dismiss the cross-claim.

## Standard of Review

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 maybe 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 *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, slip op. at 4-5. Part one directs the Court to accept a complaint's "well-pleaded" factual allegations while **[**3**]** 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 allegations "plausibly give rise to an entitlement to relief." *Id*. at 679.

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). Overall, 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 **[**4**]** relief." *Mackenzie v. Lutali*, 24 A.S.R.2d 75, 76 (Trial Div. 1993).

## Discussion

### I. Defendant Failed to Properly Add a Third Party

**[1]** The Hunts' counsel seems not to know how to properly bring in a third party. The Hunts are trying to cross-claim against a party that is not part of the suit. It makes no sense. Hunts' counsel needs to carefully read and correctly apply the rules to properly engage a third party.

### II. Defendant Fails to Properly Plead Negligence

**[2]** Hunts' counsel is reminded that he was previously sanctioned for improperly pleading negligence—wasting the Court's and opposing counsel's time. Once again counsel fails to properly plead negligence. Negligence requires allegations of duty, breach, causation, and damages. Here there is no duty. The pleading makes a blanket assertion, with no details, that ASG owes a duty to the Hunts. (*See* Answer & Countercl. & Cross-cl. at 9.) We fail to see how and why that makes any sense. ASG has deeper pockets and may seem to be an easy target, but that is no reason to bring it in when it has absolutely nothing to do with Hunts' issues with the DBAS. One cannot blame their employer when they fail to realize a loan they are entering into with another party. The loan and **[**5**]** Kalili's salary are completely separate and have nothing to do with each other. ASG and DBAS have not entered into any sort of surety contractual agreement involving the Hunts. With no duty to the Hunts, the issue of negligence does not exist. Therefore, the negligence claim is without merit.

### III. These Issues Have Already Been Litigated

As ASG points out, the issues raised with it have already been litigated in *Kalilimoku Hunt v. American Samoa Government, ALJ No. 02-14.* The Hunts do not get a second bite at the proverbial apple. Claim preclusion prevents the re-litigation of issues that have already been decided. The Court will not allow an attempt to rehash old issues from another case.

## Special Commentary

The Hunts' counsel is skating on thin ice this time. In this case, he has failed to read the rules and properly engage a third party and has again failed to properly plead negligence for which he has been sanctioned in the past. This is a waste of the Court's time and resources; as well as those of the Territory and its people. We encourage the Hunt's counsel to think smarter about future issues he brings to this Court.]

## Order

Cross-Defendant American Samoa Government's motion to strike and dismiss the third-party complaint is granted. **[**6**]**

It is so ordered.

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**Cite As:** *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08, slip op. at [page number] (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. reqs.)

**BINACO TEXTILES, LTD., Plaintiffs,**

**v.**

**SPENCER, INC., Defendants.**

High Court of American Samoa
Trial Division

CA No. 36-08

October 21, 2015

[1] Discovery is a critical stage of pre-trial designed to make relevant information available to all the litigants since mutual knowledge of relevant facts gathered by both parties is essential to proper litigation.

[2] The High Court of American Samoa in its treatment of the Territory's discovery rules has followed the U.S. Supreme Court's broad and liberal treatment of discovery rules.

[3] Under a liberal approach, the scope of discovery is very broad, allowing parties to obtain discovery regarding any matter that is not and is relevant to the subject matter involved in the pending action.

[4] To properly comply with Territory discovery rules, parties who receive requests to produce documents must not just produce what it agreed to produce or what it was ordered to produce, but must fully answer all interrogatories and all requests for production.

[5] Plaintiff failed to properly comply with discovery rules when it denied defendant's requests to examine invoices on the ground that the requests were not specific enough. By insisting that defendant must pick and choose specific invoices on plaintiff's list of invoices, plaintiff failed to uphold their responsibility to produce relevant, unprivileged documents.

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

Counsel: For Plaintiff, Charles V. Ala'ilima
For Defendant, Richard DeSaulles

ORDER COMPELLING PLAINTIFF TO COMPLY WITH DEFENDANT'S DISCOVERY REQUESTS

This case is essentially a collection matter on an open account basis, dating back several years. On May 30, 2008, Plaintiff Binaco Textile, Ltd. filed a complaint with this Court, alleging that Defendant Spencer, Inc. failed to pay Plaintiff after buying goods from Plaintiff. A bench trial on this matter was scheduled to take place on October 9, 2015. However, just prior to trial, Defendant received a number of invoices, which Plaintiff proposed to introduce into evidence but had failed to produce earlier, notwithstanding Defendant's outstanding pretrial discovery demands. At the outset, therefore, Defendant objected to Plaintiff's intended use of these invoices. Plaintiff's response was to essentially blame Defendant for the non-production of invoices, arguing that Plaintiff could not provide these invoices because Defendant did not pick ones they needed from a list of invoices Plaintiff had provided to Defendant. Because the matter was quite clearly not ready for trial, the Court continued the matter until discovery was complete.

For the reasons set forth below, the Court will enter an order compelling Plaintiff to comply with its continuing duty to timely respond to any and all discovery requests by Defendant.

**Discussion**

**[1]** Discovery is a pre-trial mechanism designed to make "relevant information available to the litigants." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 838 P.2d 1054, 1077 (Wash. 1993). Discovery is a critical stage of litigation because "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 496, 507 (1947).

**[2-4]** This Court, in its approach to the Territory's discovery rules, has followed the U.S. Supreme Court's "broad and liberal" treatment of discovery rules. *Id.*; *Johnson v. Coulter*, 25 A.S.R.2d 84, 87 (1993) ("Discovery is a liberal process."). Pursuant to the liberal approach, the scope of discovery is very broad, allowing parties to obtain "discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." T.C.R.C.P. 26(a). To properly comply with the rules, parties who receive requests to produce documents must not just produce "what it agreed to produce or what it was ordered to produce," but "fully answer all interrogatories and all requests for production." *Fisons Corp.*, 838 P.2d at 1083. Hence, parties cannot simply deny requests on the ground that "the requests were not specific enough." *Id.* at 1084 (ruling that the drug company cannot deny

the doctor's requests for documents regarding a specific drug because "the requests were not specific enough").

**[5]** Here, Plaintiff failed to properly comply with discovery rules by denying Defendant's requests to examine invoices on the ground that Defendant's requests were not specific enough. By insisting that Defendant must pick and choose specific invoices on the list of Plaintiff's invoices, Plaintiff dodged their responsibility to produce relevant, unprivileged documents. Such tactic defeats the purpose of discovery by blocking the formation of "[m]utual knowledge of all the relevant facts gathered by both parties." *Taylor*, 329 U.S. at 507. Plaintiff's approach to discovery narrows the scope of discovery in defiance of this Court's liberal and broad treatment of the discovery rules.

## Order

Plaintiff shall comply with its continuing duty to timely respond to any and all of the Defendant's discovery requests, in accordance this Court's rules on discovery, T.C.R.C.P. 26-37, including, without limitation, any and all exhibits Plaintiff seeks to introduce at trial.

It is so ordered.

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**Cite As:** *Tilo v. Tilo*, DR No. 42-14, slip op. at [page number] (Trial Div. Nov. 9, 2015) (interim order)

**TA'AFULISIA TILO, JR., Petitioner,**

**v.**

**NOREEN TUIOFEA TILO, Respondent.**

High Court of American Samoa
Trial Division

DR. No. 42-14

November 9, 2015

[1] The Court may continue a matter if it is clear the parties have failed to conduct pre-trial discovery and prepare for trial.

[2] A.S.C.A. § 3.0502 encompasses a broad grant of jurisdiction that authorizes the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendent lite* concerning child custody and support.

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

Counsel: For Petitioner, M. Talaimalo Uiagalelei
For Respondent, Sharron I. Rancourt

INTERIM ORDER

**[1]** On August 21, 2014, Petitioner Ta'afulisia Tilo, Jr. petitioned to divorce Respondent Noreen Tuiofea Tilo. On November 2, 2015, this matter came on for trial. However, as the proceedings evolved, it soon became abundantly clear to us that the case was nowhere near ready for trial. In terms of proof, relating to the ancillary issues of property division and child custody and support, the testimony elicited responses that were peppered with estimations largely bereft of any substantial basis in facts. Quite obviously, the parties had failed to conduct pre-trial discovery, making the Court sit through an exercise better suited for depositions and production requests.

We accordingly continued the matter until the parties sufficiently delimit the issues for trial. Notwithstanding, the testimony we heard on November 2, 2015, was indicative enough to warrant an interim order,

especially one that protects the minor's interests, because Petitioner has for some time now **[**2**]** neglected to support his child.

Wherefore, the following order shall enter:

**[2]** 1. This Court will recommend to the Chief Justice to assign this matter to the Family Drug and Alcohol Division, pursuant to the authority vested in him under A.S.C.A. § 3.0502, invoking the flexibility of the Family Drug and Alcohol Division's process "to comprehensively address all matters affecting families, from juvenile offenses to domestic violence and adoptions to divorce and child support." A.S.C.A. § 3.0501. Recently in *Hart v. Hart*, FDA DR No. 01-14 & DR No. 31-14 (FDA Div. Sept. 9, 2014) (order den. mot. for prelim. inj. & interim order on custody), we construed this provision to encompass a "broad grant of jurisdiction clearly authorize[ing] the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendent lite* concerning child custody and support."

2. Upon transfer to the Family Drug and Alcohol Division, the following interim order shall be entered: that pending the final disposition of this petition, both parties should be enjoined from disposing of any property that they had access to during marriage, including, but not limited to, structures that both parties inhabited during their marriage, and any vehicles and bank accounts owned by any party, except to satisfy ongoing, immediate necessities. Furthermore, Petitioner shall pay $200.00 per month for each minor child to Respondent before the Court renders its final decision on this matter. Petitioner shall make **[**3**]** such payments to the Court's registry each month. The first payment shall begin immediately.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Maiava*, CR No. 66-10, slip op. at [page number] (Trial Div. Nov. 10, 2015) (j. & sentence for contempt of ct.)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**PELENATO MAIAVA, Defendant.**

High Court of American Samoa
Trial Division

CR No. 66-10

November 10, 2015

[1] The Court has the power to punish contempt of its authority by fine or imprisonment at its discretion, which includes disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

[2] Failure to appear without an adequate excuse to obey a court order or subpoena served may be punished as a contempt of the court.

[3] Defendants were found in contempt of court when they failed to appear in court as ordered by the Court and did not have adequate excuses for their absence because they failed to appear for purely personal reasons.

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

Counsel: For Plaintiff, Deputy Attorney General Mitzie Jessop Ta'ase
For Defendant, Public Defender M. Douglas Fiaui
For Dennis Fuimaono, Pro se
For Lawrence Apo, Pro se

JUDGMENT AND SENTENCE FOR CONTEMPT OF COURT

On July 9, 2015, the two witnesses, Dennis Fuimaono ("Fuimaono") and Lawrence Apo ("Apo"), were subpoenaed to attend court. The hearing was continued to July 30, 2015, and the Court ordered the witnesses to return. However, Fuimaono and Apo were absent from the hearing on July 30, 2015. The Court ordered them to show cause why they should not be held in contempt of court for their failure to appear in court, and held a hearing on this matter on October 16, 2015.

Apo testified on October 16, 2015, that when he came to court on July 9, 2015, he heard the Court's order summoning the witnesses to return on July 30, 2015. According to him, he left on a trip to a family reunion instead of attending court because he did not understand the consequences of disobeying the court order to attend court.

Fuimaono, on the other hand, testified on August 26, 2015, that he received a subpoena to attend court on July 9, 2015, was present in court on said date,[1] and heard from the legal assistant of the Attorney General's Office that the hearing was continued. Even though Counsel Miztie Jessop Ta'ase notified him that he was ordered to appear[2], he chose to go off-island on a personal trip with Apo because he "was unaware when the rescheduling of the date was." (OSC Hr'g Tr. at 9.)

**[1]** The Court has "power to punish by fine or imprisonment, at its discretion, contempt of its authority." A.S.C.A. § 3.0203. Contempt of the Court's authority includes "disobedience or resistance to its lawful writ, process, order, rule, decree, or command." *Id.* The Court can cite "absence or tardiness in appearing for a proceeding" with contempt because it constitutes disobedience to the Court's order. *See Senate Select Investigation Comm. v. Fue*, 8 A.S.R.3d 153, 160 (Trial Div. 2004).

**[2]** Failure to appear "without adequate excuse" to obey a court order or subpoena served may be punished as "a contempt of the court." T.C.R.Cr.P. 17(g). The Court has full discretion to refuse or accept an excuse for such absence. For instance, the Court did not find a person in contempt when "a person was reasonably unaware or believed in good faith that he had no obligation to appear." *Fue*, 8 A.S.R.3d at 157.

**[3]** Here, both Apo and Fuimaono did not have adequate excuse to disobey the court order to attend court. The personal testimonies and the government counsel's advice undoubtedly prove that Apo and Fuimaono were well-informed of their obligation to appear. Both of them were present in court when the Court ordered the witnesses to return on July 30, 2015. Apo further testified that he clearly heard the Court ordering the witnesses to return on July 30, 2015. Moreover, Counsel Ta'ase advised Fuimaono and Apo that they were ordered to appear in court.

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[1] On August 26, 2015, Fuimaono testified in court under oath. The Court asked him, "were you here at the previous court hearing except the one you missed?" He answered, "I believe I was." (Aug. 26, 2015 Hr'g Tr. at 38.) The Court again asked, "were you served a subpoena?" He confirmed, "I believe I was, sir." *Id.* at 39.

[2] Counsel on July 30, 2015, advised, in response to the Court's inquiry, that "I had let him know the court order." (Jul. 30, 2015 Hr'g Tr. at 38.)

In addition, they failed to appear for purely personal reasons. Fuimaono acknowledged that this trip was personal and did not involve any government expense. (OSC Hr'g Tr. at 8.) He recognized both of them could have returned or stayed to attend the hearing on July 30, 2015. *Id.* However, they assumed that the hearing "will be postponed until [they] get" back from the trip and chose to proceed with the trip. *Id.* at 4.

The Court is satisfied that no cause has been shown by either Fuimaono or Apo and in failing to attend to the Court's process, each is hereby found and held in contempt of court.

Sentence is as follows:

Imposition of sentence is suspended for a period of two years on the following conditions:

1. Fuimaono and Apo shall remain law-abiding.

2. Fuimaono shall pay the fine of $1,000. The Court does not accept Fuimaono's premise of laying blame elsewhere for his own failure to attend; the Court's process runs personal.

3. Apo shall pay the fine of $500. In mitigation, Apo's was more forthcoming in accepting responsibility.

It is so ordered.

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**Cite As:** *Am. Samoa Gov't v. Blake*, CA No. 08-15, slip op. at [page number] (Trial Div. Nov. 20, 2015) (order continuing proceedings)

**AMERICAN SAMOA GOVERNMENT, Petitioner,**

**v.**

**ARTHUR BLAKE, Respondent.**

High Court of American Samoa
Trial Division

CA No. 08-15

November 20, 2015

[1] A defendant who has been civilly committed under A.S.C.A. § 13.1501 is under the care of the Director of Health who is to insure an on-going program of medical and psychiatric treatment as required for the patient's disability.

[2] A defendant who has been civilly committed is entitled to periodic review hearings by the Court at nine-month intervals following the date of original commitment.

[3] The Court will not tolerate counsel for the government failing to follow statutory commands and acting inattentive and indifferent to what the law requires.

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

Counsel: For Petitioner, Assistant Attorney General Aaron Thomas
For Respondent, Assistant Public Defender Michael White

ORDER CONTINUING PROCEEDINGS

We preface this order with the observation that this matter is not, to our irritation, being diligently prosecuted or defended. On July 3, 2013, in CR No. 123-13, Defendant Arthur Blake was charged with Murder in the First Degree. The government subsequently moved to dismiss the criminal charge upon doctors' evaluation that Defendant was a suitable candidate for civil commitment under A.S.C.A. § 13.1501 et seq. After holding a hearing on this matter, the Court committed Defendant to the LBJ Tropical Medical Center ("LBJ") under the custody of the Department of Health and scheduled a status hearing on this matter to

take place on August 28, 2015.

On August 28, 2015, the Court learned that Defendant had not been able to access new medication because the LBJ Hospital has refused to pay for Defendant's medical bills. The Court ordered **[**2**]** Assistant Attorney General Aaron Thomas to prepare an order compelling the Director of Health to cover Defendant's medical expenses (as mandated by A.S.C.A. § 13.1501). A month later, at another status hearing, Counsel Thomas appeared in court, not having subpoenaed any treating physicians, who have examined Defendant, to attend the hearing. Finally, at a review hearing on November 9, 2015, Counsel Thomas did not even bring the Defendant, who is under the Government's custody. To the Court's inquiry about the missing defendant, counsel simply responded with the astounding and nonchalant "I don't know." (Review Hr'g Tr. at 1.) Again, Counsel Thomas did not subpoena any physicians to testify in court.

**[1-2]** A committed defendant is under the care of the Director of Health who is to "insure an on-going program of medical and psychiatric treatment as required for the patient's disability." A.S.C.A. § 13.1501. The defendant is also entitled to periodic review hearings by the Court at nine-month intervals following the date of original commitment. A.S.C.A. § 13.1507. The review hearing must comply with A.S.C.A. § 13.1503, which requires "the person about whom the court is considering commitment" and "the physicians who completed the first and second certificates of medical need for commitment" to testify in open court. A.S.C.A. § 13.1507.

**[3]** Here, the Government has consistently failed to follow the statutory commands on civil commitment. Against the statutory commands, Counsel Thomas did not provide the testimony of the **[**3**]** physicians and Defendant as required by A.S.C.A. § 13.1503. Furthermore, when the Director of Health did not pay for Defendant's medical expenses in violation of A.S.C.A. § 13.1501, Counsel Thomas did not attempt to enforce the statutory mandate until the Court directed him to draft an order.

Counsel's blissful inattention and seeming indifference to his responsibilities as counsel for the government in this matter is alarming and will not be tolerated. Rather than providing the Court with research and relevant legal authority, counsel has instead sought counsel from the Court not realizing that "[he] didn't realize [Defendant's] presence was required today." (Review Hr'g Tr. at 1.) His ignorance of relevant law shifts the burden of work to the Court as well as putting Defendant's due process rights at risk.

Under the circumstances, this matter is continued for further hearing on November 25, 2015, and counsel is directed to be accordingly prepared, or be sanctioned.

It is so ordered.

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**Cite As:** *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10, slip op. at [page number] (Trial Div. Dec. 4, 2015) (order den. pet'rs' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal)

**IN THE MATTER OF BEN FA`ASAMOA FANENE, A MINOR CHILD, FA`ASAMOA FANENE AND MATAVIA FANENE, Petitioners,**

**v.**

**AMERICAN SAMOA GOVERNMENT, Respondent.**

High Court of American Samoa
Trial Division

CA No. 06-10

December 4, 2015

[1] An order in aid of judgment shall be guided by considerations of justice and equity and may be issued any time after the judgment has been entered and before the judgment has been fully satisfied.

[2] Whether to grant a stay pending appeal is within the court's discretion, though it should not be automatically or casually granted.

[3] The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if the stay is denied and irreparable harm to the appellee if stay is granted; and (3) whether the public interest would be affected by the stay.

[4] Even if it is unclear whether an appellant will prevail on appeal, a stay pending appeal may still be appropriate if the law is not settled and it will be extremely difficult for a party to recover sums already paid out.

[5] When the Court had acknowledged in a prior order that the state of the law in the case was largely unexplored and clouded in uncertainty, the state of the law favors granting a stay.

[6] The irreparable harm respondent may suffer favors granting a stay when it would be very difficult for respondent to recover any sums paid to the petitioner if a stay was not granted.

[7] Public interest favors granting a stay pending appeal when

government time and resources would have to be used to recover any paid sums if the government won on appeal.

[8] Even if all the factors in determining whether to grant a stay pending appeal favors granting a stay, the Court may still order a party to deposit the full judgment amount with the Court registry for the duration of the stay.

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

Counsel: For Plaintiff, Mark F. Ude
For Defendant, Assistant Attorney General Aitofele B. Sunia

ORDER DENYING PETITIONERS' MOTION FOR AN ORDER IN AID OF JUDGMENT AND GRANTING RESPONDENT'S MOTION FOR STAY PENDING APPEAL

Pending is Petitioners Ben Fa'asamoa Fanene's, Fa'asamoa Fanene's, and Matavia Fanene's Motion for an Order in Aid of Judgment and Respondent American Samoa Government's Motion for Stay Pending Appeal. We deny Petitioners' motion and grant Respondent's motion for the reasons below.

## Background

A statement of facts concerning this action is fully set forth in the Court's March 10, 2015 Opinion and Order (March Opinion). The March Opinion ordered Respondent to pay $10,754.75 to Fa'asamoa Fanene for pain and suffering, negligent infliction of emotional damage (NIED), and property damage, and **[**2**]** $4,000 to the Clerk of Courts on behalf of Ben Fanene. Respondent then moved for reconsideration or a new trial and for a stay of judgment under T.C.R.C.P. 62, both of which we denied on September 3, 2015.

On September 28, 2015, Petitioners filed a Motion for an Order in Aid of Judgment, stating Respondent has failed to timely pay the ordered amount. In response, Respondent filed a Motion for Stay Pending Appeal on October 23, 2015, arguing that if it is required to pay before its appeal has been heard it will suffer irreparable harm. We heard the present motions on October 30, 2015.

## Standard of Review

Motion in Aid of Judgment

**[1]** An order in aid of judgment shall be "guided by considerations of justice and equity." *Carpenters Fiji, Ltd. v. Pen*, 29 A.S.R.2d 58, 60 (Trial Div. 1995). The court may issue an order in aid of judgment any time after the judgment has been entered and before the judgment has been fully satisfied. A.S.C.A. § 43.1501(a).

Motion for Stay of Judgment

**[2-4]** Whether to grant a stay pending appeal is within the court's discretion. T.C.R.C.P. 62. However, the court should not automatically or casually grant a stay of judgment pending **[**3**]** appeal. *Alamoana & Yu-Tong Co. v. Am. Samoa Gov't*, 4 A.S.R.3d 3, 6 (App. Div. 2000). The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if stay is denied and irreparable harm to the appellee if stay is granted; and (3) whether the public interest would be affected by the stay. *Asifo v. Lualemana*, 17 A.S.R.2d 100, 102 (App. Div. 1990). Even if it is unclear whether an appellant will prevail on appeal, a stay may still be appropriate if the law is not settled and it will be extremely difficult for a party to recover sums already paid out. *TCW Special Credits, Inc. v. F/V Kassandra Z*, 4 A.S.R.3d 225, 227-28 (Trial Div. 2000).

## Discussion

Petitioners state that Respondent has failed to pay the amounts ordered in the March Opinion, and there is no reason why Respondent cannot pay the judgment. Respondent argues the court should grant its motion for a stay because it is likely to prevail on appeal on the issue of negligent infliction of emotional distress. Respondent claims that even if it is not likely to prevail on appeal, a stay should be granted since the law is unsettled and it would be very difficult for Respondent to recover sums it has already paid out. Respondent states that **[**4**]** Petitioners will endure little harm if the stay is granted; however, Respondent argues it suffers great harm if the motion is not granted because it will be near impossible to recover money that has already been paid out.

**[5]** While it is unclear whether Respondent will prevail on appeal, this Court acknowledged in its March Opinion that "NIED remains an evolving tort whose range of application is largely unexplored and clouded in uncertainty." *Fanene v. Am. Samoa Gov't*, CA No. 06-10, slip op. at 3 (Trial Div. Mar. 10, 2015). We also recognized that uncertainty surrounding NIED has created "a great deal of confusion at

the trial level in other jurisdictions." *Id.* On the whole, the uncertain and unsettled state of the law in this area favors granting a stay.

**[6]** Second, the irreparable harm Respondent may suffer is much greater than that Petitioner may suffer if a stay is not granted. If a stay is granted, Petitioners would only suffer a short delay in receiving the ordered sum. Furthermore, Respondent clearly has the funds available to pay the ordered amount, and this is unlikely to change. On the other hand, it would be very difficult for Respondent to recover any sums already paid if Respondent wins on appeal. **[**5**]**

**[7]** Finally, the public interest favors granting a stay because if Respondent wins on appeal, Respondent would have to use more government time and resources to recover the paid sums.

**[8]** Despite the fact that all three factors favor granting a stay, the Court does not take Petitioners' concerns about receiving the ordered amount in a timely fashion lightly. Consequently, Respondent is ordered to deposit the full judgment amount with the Court registry.

## Order

Respondent's Motion for Stay Pending Appeal is granted. Respondent is ordered to deposit the full judgment amount, $14,754.75, with the Court registry.

Petitioners' Motion for an Order in Aid of Judgment is denied.

It is so ordered.

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**Cite As:** *In re the Estate of Joyce Sawyer*, PR No. 26-15, slip op. at [page number] (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate)

**IN THE MATTER OF THE ESTATE OF JOYCE SAWYER,**

**BY: ALEX BRISKI, Petitioner.**

High Court of American Samoa
Trial Division

PR No. 26-15

December 7, 2015

[1] Daughter was ineligible to serve as executrix of her mother's will when she was not a resident of the Territory under A.S.C.A. § 40.0306, which looks to one's place of domicile to determine residency.

[2] Although it is prevalent in many state jurisdictions, the notion of self-authenticating or self-proving wills does not apply in American Samoa.

[3] American Samoa has not adopted the Uniform Probate Code, nor its self-proving will provision.

[4] The issue of whether to adopt the Uniform Probate Code is a matter for the legislature and not the court.

[5] T.C.R.Pr. Rule 11 requires that one of the attesting witnesses must testify as to the validity of the will, the capacity of the testator, and the voluntariness of the execution.

[6] T.C.R.Pr. Rule 11 states that an affidavit may be substituted for an attesting witness if none of the attesting witnesses are available.

[7] If the attesting witnesses to a will are dead or cannot be located after the exercise of due diligence, the Court may accept whatever extrinsic evidence as to the validity of the will the court deems appropriate.

[8] T.C.R.Pr. Rule 11 does not impliedly embrace the self-proving standard by allowing proof of a will by other evidence when witnesses are unavailable.

[9] T.C.R.Pr. Rule 8 requires a petitioner to file an original will or codicil in the case of a petition for letters testamentary.

[10] If a codicil has been delivered to a testator, but cannot be found after the testator's death, the common law presumes that the codicil was destroyed with the intention to revoke it.

[11] The presumption that a will or codicil was destroyed with the intent to revoke it if it cannot be found after the testator's death is not conclusive and may be overcome by clear and convincing evidence that the testator did not destroy the original with the intent to revoke it.

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

Counsel: For Petitioner, Charles V. Ala`ilima

ORDER ON PETITION TO ADMIT WILL TO PROBATE

Decedent Joyce Loa Sawyer of Pago Pago, American Samoa, passed away in California on September 6, 2015. Decedent is survived by her daughter Ramona Sawyer Pear ("Ramona") of El Cajon, California. Ramona is unable to travel to the Territory for these proceedings, but in lieu of attendance she has filed an affidavit producing an original writing purporting to be her mother's Last Will and Testament (the "Will"), as well as two other photocopy-writings purporting to be separate codicils to the Will (the "Codicils"). The Will facially bears an execution date of 5th of May 2006, with signatures of testator "Joyce Loa Sawyer," and two witnesses. The Will appoints Ramona as an executrix of Decedent's estate; however, in the event she is unable or declines to serve, the Will also provides that another executor is to be appointed by "a court of competent jurisdiction."

**[1]** The Codicils as modifying or supplemental instruments curiously bear the same execution date as that of the Will's, 5th of May 2006. The Codicils also appear to have been attested by **[**2**]** two entirely different witnesses. One of the Codicils styled "second Codicil," names Petitioner Alex Briski ("Petitioner") as an alternate executor in the event Ramona is unable or declines to serve.[1] At Ramona's insistence, Petitioner, who is Decedent's on-island nephew and Ramona's first cousin, consequently filed his petition to probate the Will and Codicils

[1] As it happens, Ramona is by virtue of A.S.C.A. § 40.0306 ineligible to serve as executrix, since she is not a resident of the Territory. The enactment's residency requirement speaks to one's place of domicile, *In re Estate of Levi*, PR No. 07-91, (Trial Div. Aug. 6, 2006) (order den. pet. for appointment of administrator), which in Ramona's case is California.

In contrast, the UPC does not have a preclusive residency requirement for personal representatives, administrators, or executors of a will.

and for letters testamentary. On November 5, 2015, the matter came on for hearing.

At the hearing, Petitioner only called one of the Codicils' subscribing witness, Scopa Solofa to show Decedent's testamentary capacity. None of the attesting witnesses to the Will itself were called nor was there any attempt to explain their absence. Upon the Court's inquiry as to the whereabouts of the Will's attesting witnesses, Petitioner's counsel insisted that the Will is "self-executing" which obviates the need to present any witness to the Court. For reasons given, this matter is briefly continued to give Petitioner an opportunity to make a showing consistent with this Order.

## Discussion

**[2-3]** At the outset, we declare, and so hold, that the notion of **[**3**]** self-authenticating or self-proving wills, now prevalent in many state jurisdictions, does not, as yet, apply in American Samoa. Those jurisdictions that recognize self-proving wills in probate proceedings have done so through legislative action. Thus, a number of states have adopted the Uniform Probate Code ("UPC") and its self-proving will provision, *see* UPC § 2-504, whereby a will becomes self-proved when properly executed and attested before a notary public, in the form prescribed by statute. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.1 cmt. r (1999).

The effect of a self-proved will varies among jurisdictions. *Id.* In some jurisdictions, a self-provided will conclusively establishes that all formalities have been met. *Id.* In others, only the signature requirements are deemed conclusively established while a rebuttable presumption arises that all other requirements for a valid will have been met. *Id.* A self-proved will also serves to eliminate the need for having the witnesses testify upon the filing of the will to prove its authenticity. *Id.* Hence, the touted underlying policy for self-proving recognition is the easing of will proof formalities.

**[4]** Notwithstanding, the Territory remains one of the few hold-out America jurisdictions that has yet to adopt the UPC's self-proving will measure. However, whether to adopt the UPC is a matter for the legislature and not the courts. Until the American Samoa *Fono* sees fit to do so, it behooves this Court to **[**4**]** adhere to local law and practice.[2]

[2] In an analogous situation, the Appellate Division in *Kim v. Chang*, AP No. 15-08, slip op. at 4-6, (App. Div., Aug. 18, 2009), rejected the contention that the Uniform Commercial Code was applicable law in American Samoa even without legislative adoption. In lieu of the

**[5-7]** Rule 11 of the Trial Court's Rules of Probate Procedure ("TCRPr") requires that "one of the attesting witnesses to the will must testify as to [the valid execution of a will, the capacity of the testator to execute the will and the voluntariness of the execution] at the hearing on the probate of the will." The rule further provides that "[i]n the event that neither attesting witness is available, an affidavit may be substituted." *Id.* Moreover, if the attesting witnesses are dead or cannot be located, "the Court may accept whatever extrinsic evidence as to the validity of the will the court deems appropriate." *Id.* Thus, in *In re Estate of Poiali'i*, the Court observed:

> Provisions such as that of our Rule 11, to the effect that wills may be proved by other evidence when the subscribing witnesses are unavailable, have been uniformly interpreted to require a showing that witnesses could not have been located by the exercise of due diligence.

15 A.S.R.2d 111, 113 (Trial Div. 1990). Therefore, the self-proving method cognizant in most state jurisdictions, does not, in this jurisdiction, eliminate the continuing need to prove a will's validity either by direct evidence from at least one of the subscribing witnesses or by way of extrinsic evidence upon a **[**5**]** due diligence showing that the subscribing witnesses are either dead or cannot be found. *Id.*

**[8]** Here, Petitioner clearly did not meet his evidentiary burden. Against Rule 11, Petitioner seeks to interpose an inapplicable standard of proof, the UPC's self-proving procedure. Alternatively, Petitioner contends that Rule 11 embraces the self-proving standard by "allow[ing] proof of a will by other evidence when witnesses are unavailable." (Pet.'r's Mem. on Admission of Wills to Probate. at 3.) This is a novel, and erroneous, construction of Rule 11. *See In re Estate of Poiali'i*, 15 A.S.R.2d.

**[9-11]** Furthermore, Petitioner has failed to provide the Court with original codicils. T.C.R.Pr. 8 requires Petitioner to file an original in the case of petition for letters testamentary. If a codicil has been delivered to a testator, but cannot be found after the testator's death, the common law presumes that the codicil was destroyed with the intention to revoke it. *In re Estate of Moffat*, 158 N.Y.S.2d 975, 977 (N.Y. 1956); *In re Estate of Griffis*, 330 So. 2d 797, 800 (Fla. 1976). The presumption of revocation is controlling if a party fails to establish that the codicil "was accidentally destroyed, misplaced by the testatrix, unintentionally discarded by her or wrongfully abstracted from her possession by another." *In re Estate of Moffat*, 158 N.Y.S.2d at 977. "The presumption, however, is not

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rejected contention, the Appellate Division resorted to pertinent American Samoa statutory law, as supplemented by the common law.

conclusive and maybe overcome by clear and convincing evidence that the testator did not destroy the original with the intent to revoke it." *In re* **[**6**]** *Estate of Aveina*, PR No. 21-83, slip op. at 4 (Trial Div. Mar. 21, 2001) (order on mot. for probate).

Here, the record bears no "clear and convincing evidence" that can overcome the presumption of revocation. *Id.* In addition, the inexplicable absence of the original versions of the Codicils against the established existence of the Will original, separately executed and differently witnessed on the same day as the Codicils, immediately signals questions as to Decedent's intent. However, Petitioner urges this Court to override both TCRPr Rule 8 and applicable common law by citing to the *American Jurisprudence* treatise. *See* Pet.'r's Mem. on Admission of Wills to Probate, 5. *American Jurisprudence* is a secondary source that has no binding effect on this Court. The Court cannot defer to a secondary source when we have dictating law on point.

For the reasons, set forth above, this matter is continued to another hearing day, to be set upon Petitioner's motion. Clearly Petitioner's onus of proving the Will and Codicils in accordance with local law and practice requires further evidentiary development.

It is so ordered.

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# SLIP OPINIONS

**OF THE**

# LAND AND TITLES DIVISION

**OF THE**

# HIGH COURT OF AMERICAN SAMOA

**(2015)**

**Cite As:** *Suafo'a v. Savane*, LT No. 16-14, slip op. at [page number] (Land & Titles Div. Mar. 12, 2015) (order den. defs.' mot. for judge recusal)

**SUAFO'A ALESANA SUAFO'A, LUTIA MISIPELE FOMA`I, AND MASINAAFIAFI SEAFA SEAFA, AS MEMBERS OF THE AGASIVA COMMUNAL FAMILY, AND FOR THE AGASIVA COMMUNAL FAMILY, Plaintiffs,**

**v.**

**MAUGAOTEGA SAVANE, AS SENIOR MATAI OF THE MAUGAOTEGA COMMUNAL FAMILY, SINIVA ALAIMANU LEANO, DOES 1-10, THEIR FAMILY MEMBERS, AGENTS, AND REPRESENTATIVES, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 16-14

March 12, 2015

[1] The doctrine of res judicata applies to any attempt to relitigate the title to the underlying land in a case.

[2] While A.S.C.A. § 3.1007 deals with disqualification of judges, nothing in it requires judges to recuse themselves in a later case dealing with a potential violation of prior title decision that they participated in.

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

Counsel: For Plaintiffs, M. Talaimalo Uiagalelei,
For Defendants, Matailupevao Leupolu Jr.

ORDER DENYING DEFENDANTS' MOTION FOR JUDGE RECUSAL

## Background

Defendants moved for recusal of Associate Justice Richmond and Associate Judge Mamea[1] from sitting on this case. The motion stems

[1] After this motion was filed and heard, Judge Mamea was elevated to the position of Chief Associate Judge.

from the decision in an earlier case between members of the Agasiva and Maugaotega communal families. In that case, Justice Richmond and Associate Judge Sagapolutele Malaeola A.A. for the majority held that the Agasiva family communally owned the land involved in this case. *Maugaotega v. Agasiva*, 10 **[**2**]** A.S.R.3d 379, 380-83 (Land & Titles Div. 2005) (the 2005 title decision case). Judge Mamea dissented. *Id.* at 383-85. In the case at bar, Plaintiffs seek relief because Defendants allegedly proposed to bury a deceased family member on the land at issue in violation of the Court's 2005 title decision that Agasiva family owned the land. Defendants maintain that fairness requires recusal of the two judges who participated in the 2005 title decision case.

For the reasons stated below, we deny the Defendants request.

## Discussion

Defendants focus on their perception that they have an opportunity in this action to relitigate the title to that land on which the burial occurred. They maintain fairness requires recusal of the two judges who participated in the 2005 title decision case.

**[1]** Defendants fail to recognize, however, that representatives of both the Agasiva and Maugaotega communal families, including Maugaotega Savane, the *sa`o* at the head of the Maugaotega family, were the parties in both the 2005 title decision case and the present case. Title to underlying land in the present case was the principal issue in the 2005 title decision case, in which the Court held was the Agasiva family's communal land. **[**3**]** The decision in 2005 title decision case is final. The Maugaoatega family's representatives who were parties in the 2005 title decision case, including Maugaotega Savane, did appeal that case, and did not pursue any alternative to legally set aside the 2005 title decision in favor of the Agasiva family. The doctrine of res judicata applies to any attempt to relitigate the title to the underlying land in the present case. The party and issue identified in both cases precludes the Maugaotega family from revisiting and seeking the Court's redetermination of the land title issue in this present action.

**[2]** Defendants cite no law—or relevant underlying facts—requiring the two judges to recuse themselves. While A.S.C.A. § 3.1007 deals with disqualification of judges,[2] nothing in it touches upon the present issue.

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[2] A.S.C.A. § 3.1007 states:

> (a) No judge shall sit in any case in which he, or a family of which he is a member, has a substantial interest, or in which he has been counsel, or is or has been a material witness, or is a member of the same family with any party to the case.
> (b) Neither the Chief Justice, nor the Associate Justice, nor any

After reviewing the High Court Rules and the Cannons of Judicial Ethics referenced in the Rules, nothing specifically requires the judges to recuse themselves. **[**4**]**

**Order**

For the aforementioned reasons, we deny Defendants' judge recusal motion.

It is so ordered.

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associate judge of the High Court shall sit in the appellate division of that court in the hearing and determination of any appeal from the decision of a case or question decided by him, or the decision of which he joined in the trial court.

**Cite As:** *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14, slip op. at [page number] (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss but granting dismissal for duplicity)

**THE ESTATE OF LELEO SOLAITA AND HEIRS OF LELEO SOLAITA, Plaintiffs,**

**v.**

**J LEN T'S AND PAGO PRINT SHOP, INC., ANZ GUAM, INC., AND KEPAOA DEVELOPMENT CORPORATION, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 01-14

March 25, 2015

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

[2] The majority view holds that the same claim is involved if both claims arise out of the same transaction—the claim in the prior judgment must include all rights of the plaintiff to remedies against the defendant with respect to all or part of the transaction out of which the action arose.

[3] A judgment will have preclusive effect if the same parties are involved or if a non-party was in privity with a party to the previous action.

[4] Privity is essentially a conclusory term that describes the relationship between a party and a non-party that is deemed close enough to warrant the application of claim or issue preclusion to the party.

[5] When the same issues were raised in three different cases, the first cases had been dismissed for lack of prosecution, and the additional parties in the first case had been added to the second case as a necessary party, the third, recently-filed case was not dismissed by the court based on res judicata or claims preclusion grounds but instead dismissed for its duplicate subject matter.

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

Counsel: For Plaintiffs. Matailupevao Leuolu Jr.,
For Defendants J Len T's and Pago Print Shop, Inc., Roy J.D. Hall, Jr.
For Defendant Kepaoa Development Corporation, Mark F. Ude

ORDER DENYING MOTIONS TO DISMISS UNDER T.C.R.C.P. RULE 12(b)(6) BUT GRANTING DISMISSAL FOR DUPLICITY

**Background**

Plaintiffs commenced this action to regain use of real property occupied by Defendants J. Len T's and Pago Print Shop, and Kepaoa Development Corporation (KDC) (collectively Defendants). Plaintiffs voluntarily dismissed Defendant ANZ Guam, Inc. from this action without prejudice pursuant to T.C.R.C.P. Rule 41(a)(1)(i). Defendants' separately filed motions to dismiss under T.C.R.C.P. Rule 12(b)(6) are now pending. **[**2**]**

The real property is currently included in probate proceedings, PR No. 5-75 and at issue in another land action, LT No. 3-03. The issues presented in this action are substantially the same as those contained in yet another land action, LT No. 57-91, *Solaita v. Lagafuaina.* Defendants argue in support of their pending motions to dismiss that this action should be decided on res judicata claim preclusion grounds arising from the decision in LT No. 57-91. The Court will not grant at this time a Rule 12(b)(6) dismissal but dismisses this action for its duplicity with the issues LT No. 57-91.

**Standard of Review**

**[1-2]** 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. *See Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990); 18 James Wm. Moore, Moore's Federal Practice ¶ 131.01 (3d ed. 1999). Res judicata requires that the subject matter of the earlier case be identical to that of the case at hand. *Tavete v. Estate of Lagafuaina Laisene*, 11 A.S.R.2d 54, 76 (Land & Titles Div. 1989); *Am. Samoa Gov't v. Meredith*, 28 A.S.R.2d 92 (1995) (the sum and substance of the whole doctrine of res judicata is that a matter once judicially decided is finally decided). The **[**3**]** majority view holds that the same claim is involved if both claims arise out of the same transaction—the claim in the prior judgment must "include all rights of the plaintiff to remedies against the defendant with respect to all or part of the transaction . . . out of which the action arose." *Mailei v. Te'o*, 5 A.S.R.2d 266, 268 (Land & Titles Div. 2001) (citing 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 131.20[2]).

**[3-4]** A judgment will have preclusive effect if the same parties are involved or if a non-party was in privity with a party to the previous action. *Tavete v. Estate of Lagafuaina Laisene*, 19 A.S.R.2d 40, 46 (App. Div. 1991). Privity is essentially a conclusory term that describes the relationship between a party and a non-party that is deemed close enough to warrant the application of claim or issue preclusion to the party. *See Ditton v. Bowerman*, 844 P.2d 919, 922 (Or. 1992).

## Discussion

**[5]** This case is unusual in that the same issues have now been raised in three cases: LT No. 57-91, LT No. 3-03, and the instant case, LT. No. 1-14. The current Plaintiffs, as described in LT No. 57-91, "have done nothing to bring this action to trial for well over seven years. There is no reasonable excuse for this inaction for well over seven years." *See LT* No. 57-91, slip op. at 5 (Land & Titles Div. Aug. 3, 2004) (order). In LT No. 57-91 **[**4**]** we dismissed LT No. 57-91 for lack of prosecution and included Plaintiff Leleo Solaita's Estate as a necessary party to LT No. 3-03. In that same Order we pointed out that since all the present parties are privy to the parties in LT No. 3-03, the issues can be resolved in that action. *Id. at 3*.

The issues presented here are identical to the issues in LT No. 57-91. However, we will not dismiss them on res judicata or claims preclusion grounds at this juncture. Instead, similar to LT No. 57-91 we are dismissing this case for its duplicate subject matter with LT No. 3-03, a concurrent ongoing case with all the same parties. As in LT No. 57-91, consolidation is appropriate but unnecessary when the parties and issues in LT No. 1-14 are also the parties and issues in LT No. 3-03. Given this situation, this action is duplicitous.

## Order

Because the same issues in LT No. 1-14 were addressed in LT No. 57-91 and can be resolved in LT No. 3-03 and PR No. 5-75, we dismiss this action for duplicity. It is so ordered.

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**Cite As:** *In re Matai Title "Tuana'itau,"* MT No. 04-14, slip op. at [page number] (Land & Titles Div. Mar. 31, 2015) (order invalidating successor *matai* claim, referring the selection process back to the family & dismissing action)

**MALAKI TOGIOLA, Claimant,**

**v.**

**ANESI POLOA, TOLUAO SEUTAATIA, EVALINE G. AGA, AND ULULOTU AH SUI, Defendants.**

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**In re *Matai* Title "Tuana'itau" of the Village of Pava'ia'i**

High Court of American Samoa
Land and Titles Division

MT No. 04-14

March 31, 2015

[1] A written claim of succession to a *matai* title, filed with the Territorial Registrar, is necessary.

[2] The petition to register a claim of succession to a *matai* title must state 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.

[3] When only a few members of other clans of the family attended the family meetings, members of claimant's clan constituted the majority and dominated the decision-making at the meetings, and notice was not adequately provided to members of the extended family, the claimant's claim with the Territorial Registrar was invalidated and the process to select the successor to the title was referred back to the family to select the successor to the title in the manner provided under family traditions at meetings called for that purpose.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; FA'AMAUSILI, Associate Judge; SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Claimant Malaki Togiola, M. Talaimalo Uiagalelei
For Counterclaimant Anesi Poloa, Sharron I. Rancourt

For Counterclaimant Toluao Seutaatia, Fainu'ulelei Ala'ilima-Utu
For Counterclaimant Ululotu Ah Siu, Fiti A. Sunia
For Counterclaimant Evaline G. Aga, Pro se

ORDER INVALIDATING SUCCESSOR *MATAI* CLAIM, REFERRING THE SELECTION PROCESS BACK TO THE FAMILY, AND DISMISSING ACTION

On March 16, 2015, the initial pretrial conference scheduled in this successor *matai* selection action came before the Court, together with motions filed by Counterclaimants Ululotu Ah Siu and Toluao Seutaatia to invalidate the claim and by Claimant Malaki Togiola to become the registered successor to the vacant *matai* title Tuana'itau of the village of Pavaiai, and to return the successor *matai* selection process to **[**2**]** family. Counterclaimant Anesi Poloa joined in the motions during the hearing. Counterclaimant Evaline G. Aga was not present.

**[1-2]** A written claim of succession to a *matai* title, filed with the Territorial Registrar, is necessary. A.S.C.A. § 1.0405(a). "The petition [to register a claim of succession to a *matai* title] must state 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." A.S.C.A. § 1.0405(b).

**[3]** The evidence adduced during the March 16 hearing established that Claimant's clan[1] in the Tuana'itau family met on several occasions and supported Claimant to become the registered successor to hold the Tuana'itau title. While a few members of other clans of the family attended some meetings, it is clearly evident that members of Claimant's clan constituted the majority of the attendees and dominated the decision-making at these meetings. Notice was not adequately provided to members of the extended Tuana'itau family to attend these meetings to select a successor Tuana'itau titleholder. The **[**3**]** authority within the Tuana'itau family to call or to institute the notice of these meetings is also open to question.

The Court finds, and concludes as a matter of law, that the extended Tauan'itau family did not meet for the purpose of selecting, in accordance with the family's traditions, the successor to the presently vacant Tuana'itau *matai* title before Claimant filed to claim to become the registered successor holder of the Tuana'itau title.

[1] The parties to this action differ about the number and names of the family's clans. However, other than finding the family has more than one clan, the Court does not need to resolve these differences for purposes of ruling on the pending motions.

Accordingly, this *matai* title successor selection process is properly sent back to the family to conduct one or more meetings of the extended family to select that successor titleholder. These meetings must be called and conducted before any person may file a claim with the Territorial Registrar to succeed to the Tuana'itau title. Notice of the meetings should be initiated by the designated *matai* of the Tuana'itau family who traditionally calls meetings for extended family purposes, including the selection of successors to the Tuana'itau title.

**Order**

1. The present Claimant's claim filed with the Territorial Registrar to succeed to the presently vacant Tuana'itau title is invalidated, and the process to select the successor to the title is referred back to the family to select the successor to **[**4**]** the title in the manner provided under family traditions at meetings called for that purpose.

2. This present action to have the Court determine the successor to the Tuana'itau title is dismissed without prejudice.

3. The Clerk of Courts shall have a certified copy of this Order served on the Territorial Registrar.

It is so ordered.

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**Cite As:** *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11, slip op. at [page number] (Land & Titles Div. Apr. 10, 2015) (op. & order)

**PULU AE AE JR., Claimant,**

**v.**

**AMERICAN SAMOA GOVERNMENT, PUIAI TUFELE, LEAOA P., MATA'UTIA, AND TAITO SAM WHITE, Objectors.**

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**In re Registration of Land "Vesiai" in the Village of Pago Pago**

High Court of American Samoa
Land and Titles Division

LT No. 08-11

Apr. 10, 2015

[1] The plain language of Ordinance No. 15, issued by the Commandant of the United States Naval Station in Tutuila on September 3, 1900, states that land along the shore at high water mark of a uniform width of 15 feet distant inland from the shore was condemned and appropriate for public uses.

[2] The Ordinances were an effective and fair means for the government to acquire land and the best way to condemn such a large section of land across the property of so many frequently unregistered, and therefore, unknown owners.

[3] The government has retained property rights after the condemnation of the filled portion of the land contained in the Ordinances from the old shoreline up to and including the new shoreline.

[4] The fact that the government may not have provided receipts showing the compensation given for the land condemned under the Ordinances does not matter because the condemnation was proper since compensation was offered.

[5] The littoral rights to the land contained in the Ordinances were taken in 1900 when the Ordinances were enacted and since the statute of limitations for land actions is 20 years, any claims related to land condemned under the Ordinances is barred by the statute of limitations.

[6] The court applied the doctrine of laches where there was a delay of approximately 110 years in bringing a claim for land because the delay prejudiced the other party and much of the evidence was unavailable after over 100 years.

[7] The fact that records showing a family was compensated for a taking are not available does not defeat a condemnation's legitimacy.

[8] Once the government has properly obtained land through a valid taking, the government owns the condemned land in fee simple and title to the condemned property vests in the condemning authority so it is not required to later return the land to the original owners even if the land is not used for the purpose stated at the time of the taking and was originally communal land.

[9] The government has allowed families to use condemned land that was previously communal land for family purposes as long as any building construction and uses conform to government requirements.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge.

Counsel: For Claimant, Charles V. Ala'ilima
For Objector American Samoa Government, Deputy Attorney General Elesalo V. Ale and Assistant Attorney General Marian M. Rapoza
For Objector Puia'i Tufele, Marie A. Ala'ilima
For Objectors Leaoa P. Mata`utia and Taito Sam White, Fiti A. Sunia

OPINION AND ORDER

**Background**

On April 5, 2011, pursuant to A.S.C.A. § 43.0302, the Territorial Registrar referred for judicial resolution the contested title registration of the land Vesiai in the village of Pago Pago. On May 2, 2011, Claimant Pulu Ae Ae, Jr. ("Pulu") filed his claim of the Pulu family's communal land ownership of Vesiai. On June 8, 2011, Objectors Leaoa P. Mata'utia and Taito Sam White separately filed claims of the Leaoa and Taito **[**2**]** families' respective communal land interests in this land. On June 9, 2011, Objector American Samoa Government ("ASG") filed its claim of sole ownership of this land. On October 10, 2012, Objector Puia'i Tufele filed his claim of the Teo family's communal land ownership of this land. Because ASG's title claim to the land if upheld would be paramount to the competing communal land title claims, the trial was bifurcated to first deal with ASG's title claim.

## The ASG Title Claim

Pulu stated in his title claim that when the United States asserted sovereignty in American Samoa in 1900, there was an existing road through Pago Pago that left four pieces of occupied land to the seaward side of the road. One of those four area was the Pulu family's communal land known as "Vesiai." Pulu further asserts that during World War II, the United States Navy assumed control over portions of this Pulu family's communal land, filled the adjacent water area, and erected and maintained buildings on the land in connection with the war effort.

According to Pulu, in the 1960s ASG undertook an extensive fill of Pago Pago Harbor, resulting in the relocation of the shoreline from the original shoreline that was behind the Pulu communal land. Pulu had surveyed entire area of alleged Pulu communal land on the ocean side of the Pago Pago main road. **[**3**]** Pulu asserts that that the land area encompassed by this survey should be registered as Pulu communal land.

Each Objector claims an interest in Pulu's surveyed land. ASG claims that on September 3, 1900, the Commandant of the United States Naval Station in Tutuila issued Ordinance No. 15, which declared a public highway extending from Blunt's Point on the south side of Pago Pago Harbor towards Observatory Point and around the harbor to Breaker's Point on the harbor's north side, along the shore at high water mark of a uniform width of 15 feet distant inland from the shore. Regulation No. 15 further required all claims to land and payment to be brought to the High Court within three months of the ordinance's issuance. That same day, Regulation No. 16 requires any private buildings built on the ocean side of the road to obtain government approval before construction. Ordinance No. 15 and Regulation No. 16 (collectively "the Ordinances") were later codified by the Legislative Branch of ASG as § 1291 of the Code of American Samoa in 1949 and now are codified as A.S.C.A. §§ 37.2050 and 37.2052 respectively.[1] **[**4**]**

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[1] A.S.C.A. § 37.2050 reads:

> The public highway declared and proclaimed by Regulations No. 15 and No. 16, 1900, enacted 3 September 1900, by B. F. Tilley. Commander, U.S.N., Commandant, and amended by W. Evans, Captain, U.S.N., on 10 May 1921, extending from Blunt's Point on the southern side of Pago Pago Harbor, toward Observatory Point and around the harbor to Breaker's Point on the northern side of the harbor, along the shore at highwater mark, of a uniform width of 15 feet distant inland from the shore, the land included in the description being condemned and appropriated

ASG further stated that for over a century, it had used the property to maintain a public highway, protect shorelines and for public usage. ASG further claimed that Pulu and his associates had constructed a building on the property without ASG's permission and that the Pulu family had not voiced any objections to the condemnation of the subject land from the period of September 1900 through 2010 when Pulu offered to register Vesiai with the Office of the Territorial Registrar.

## Discussion

There does not seem to be much controversy over the parameters of the land surveyed at Pulu's behest. Rather, the controversy here arises over the status of said land. Pulu essentially asserted at trial that the land surveyed and offered for registration was not condemned by the United States Navy and was not lawfully acquired by ASG. Pulu points to the fact that there was evidence presented at trial showing that the Navy **[**5**]** Commandment formally surveyed and condemned leasehold and land interests in the area, but the Navy condemnation list at the Territorial Registrar's office did not include Vesiai or other Pago Pago village lands on the ocean side of the roadway through Pago Pago. According to Pulu, neither the U.S. Navy nor ASG considered the Ordinances to be blanket condemnations of all existing land on the ocean side of the road in the area.

**[1-2]** The plain language of Ordinance No. 15 states that land along the

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> for public uses, is recognized as a public highway, and the rights of the government and the public thereto is asserted.

A.S.C.A. § 37.2052 reads:

> (a) It is unlawful for any person to erect any fence, wharf, boathouse, building or structure of any kind whatsoever to seaward of the public highway established by 37.2050 without special permission of the Governor of American Samoa, to whom there must be presented a written application with plans of the structure intended to be erected.
> (b) Any wharf, fence, building or other structure erected in contravention of this section must be removed upon the order of the Governor at the expense of the person erecting or causing the same to be erected, and in addition, any person so erecting, or causing the same to be erected, is guilty of a class A misdemeanor, and upon conviction, shall be sentenced accordingly.

shore at high water mark of a uniform width of 15 feet distant inland from the shore was "condemned and appropriate for public uses." This court has previously addressed the land described by the Ordinances. In *Anderson v. Am. Samoa Gov't.*, 21 A.S.R. 95 (App. Div. 1992), the appellant made a claim to ownership of land contained within the parameters of the Ordinances. The *Anderson* court noted that according to the Ordinances, the land from Blunt's Point to Breaker's Point along the shore at high-water mark was "condemned." *Anderson*, 21 A.S.R.2d at 100. The appellant in *Anderson* argued that it had never been previously decided whether the Ordinances complied with the Treaty of Cession of Tutuila and Aunu'u. The court rejected this argument and stated that the Ordinances were an effective and fair means for the government to acquire land and noted that such an ordinance "was the best way to condemn such a large section of land across the property of so many frequently **[**6**]** unregistered, and therefore, unknown owners." *Id.* at 102.

The *Anderson* court also addressed the changing shoreline after the fill in the 1960's. The court stated that ASG had previously quitclaimed a parcel of land on the seaward side of the road in the area, but that the remaining portion of land on the seaward side of the road was created when the government filled in the back portion of Pago Pago Harbor beginning in the 1960's. *Id.* at 97. The court ruled that ASG had acquired this filled-in portion of land at the time of the fill and that the accompanying littoral rights moved with the shoreline. Accordingly, ASG properly retained the filled portion from the old shoreline up to and including the new shoreline, as well as its accompanying littoral rights. *Id.* at 103 n.8.

**[3]** Similarly, we find that the Ordinances were valid and that the land within the parameters of the Ordinances was properly condemned. As noted by the *Anderson* court, ASG retained property rights after the condemnation of the filled portion of the land contained in the Ordinances from the old shoreline up to and including the new shoreline. Accordingly, the subject land in this case was condemned even after alterations made to Pago Pago Harbor in the 1960's, and once it was condemned, title vested in the government in fee simple. *See Meredith v. Am.* **[**7**]** *Samoa Gov't*, 2 A.S.R.2d 66, 67 (Land & Titles Div. 1985). Pulu's claim must, therefore, be rejected.

Pulu also asserts that his family was deprived of due process because their communal land was allegedly taken away from them without any legal adjudications to which they were parties and that ASG has failed to provide evidence of just compensation for the taking of alleged Pulu communal land.

**[4]** As noted above, the *Anderson* court held that the Ordinances were an

effective and fair means for the government to acquire land and were thus proper. *Anderson*, 21 A.S.R.2d at 102. Moreover, the fact that ASG may not have provided receipts showing the compensation given for the alleged Pulu communal land does not matter here because, as the *Anderson* court held, the condemnation was proper because compensation was offered "although the records of payments made cannot be located." *Id.* Pulu's argument thus fails.

**[5]** Even if we did not address the argument on the merits, Pulu's claim is barred by the statute of limitations. The *Anderson* court again addressed this and stated that the littoral rights to the land contained in the Ordinances were taken in 1900 when the Ordinances were enacted. *Id.* at 105; *see also Mageo v. Gov't. of Am. Samoa*, 4 A.S.R. 874, 885 (App. Div. 1963). The court noted that the statute of limitations for land actions was 20 years according to A.S.C.A. **[**8**]** § 43.0120(6), and thus any claims to the land should have been brought by 1920. *Anderson*, 21 A.S.R.2d at 105.

**[6]** Additionally, the doctrine of laches applies to the instant action. Again, as noted by the *Anderson* court, the appellant in that case waited nearly 90 years after the issuance of the Ordinances to bring his claim, which showed the classic elements of laches, an unreasonable delay in the assertion of their rights by one party causing undue prejudice to the other party. *Id.* The court ruled that ASG's defense of laches was, therefore, valid.

In the case at bar, there has been a delay of approximately 110 years in bringing this claim for land against ASG. As the *Anderson* court held, ASG has certainly been prejudiced in this delay in Pulu's assertion of rights because much evidence is unavailable after over 100 years. Accordingly, we similarly find that ASG's defense of laches is valid.

Pulu next claims that reversion is appropriate here because the public purpose for which Vesiai was originally condemned no longer exists. Pulu states that at the time of the taking, it was presumed that the land would be used for government buildings and facilities and to protect roads and utilities, but it was not presumed that ASG would have full and absolute title to the property based upon a regulation created to prevent obstruction of a highway along the shoreline. Furthermore, it **[**9**]** was not presumed that the ASG would retain ownership over the land after the location of the shoreline was changed. According to Pulu the changing of the shoreline's location makes the shoreline regulation no longer applicable, and reversion is thus required.

**[7]** Pulu presumes that his family was never compensated for the taking of Vesiai. However, the fact that records showing this compensation may not have been produced does not necessarily mean the family was

not compensated; it only means that there is no record of such compensation. The fact that such records are not available does not defeat the condemnation's legitimacy. *See Anderson*, 21 A.S.R.2d at 102. Moreover the fact that no records are available relates to ASG's laches defense. It has been over 100 years since the original condemnation, and it is clear that ASG is prejudiced by the long delay in bringing this action.

**[8]** Additionally, as *Meredith* makes clear, once land is condemned for a public purpose, as was the case here, ASG owns the condemned land in fee simple. *Meredith*, 2 A.S.R.2d at 67. Title to condemned property vests in the condemning authority so as to give that authority "the opportunity to change its use to meet changing conditions." *Id.* That is exactly the case here. Once the property was condemned, vested in ASG, and ASG **[**10**]** may change the use of said land to meet changing conditions. Pulu's reversion argument fails.

Pulu finally claims that his family is entitled to a quitclaim deed from ASG for the land at issue. In support, Pulu points to other instances where ASG used a quitclaim or other settlement document to clear title to land. Pulu states that as an equitable remedy to ensure the protection of communal lands, ASG should quitclaim its interest in Vesiai. There is no legal support for Pulu's assertion. We will not legally compel ASG to quitclaim its interest because Pulu argues that this is what ASG should do. Pulu's argument in this regard is without merit.

**[9]** A final comment, however, is noted for future purposes. While there is no basis to legally conclude that the Pulu family presently has any legal communal land interest in Vesiai of a reversionary nature, Objector ASG has recognized that the Pulu family originally owned the land as family communal land as it existed in 1900 when ASG condemned the land encompassing the highway around and the land along the Harbor side of the highway to be used for public purposes. Later, ASG allowed the Pulu family to use a portion of the land for the Pulu family guesthouse, which by the may have included an area enlarged by fill and accretions. Indeed, ASG has permitted from time to time families other than the Pulu family use of the original communal land areas, together with any similarly enlarged land **[**11**]** mass, so long as that private use is compatible with the public purposes resulting from ASG's present ownership of these land area. Examples are ASG's permission for the locations the Mauga family's guesthouse, the hall formerly used for church-sponsored bingo games and now controlled by the Pago Pago Village Council, and privately owned food stalls previously in operation there.

In this case, Pulu complied with ASG's building construction requirements and, with ASG's authorization to proceed, had a building

erected on the land. Given the post-condemnation history of ASG's allowing compatible activities on the land by the original family communal landowners, this appears to be an appropriate situation for ASG to permit Pulu to use this building for Pulu family purposes. Pulu and ASG are urged to reach an agreement in this regard.

**Order**

Because the American Samoa Government owns the land, the title registration claim by Pulu Ae Ae, Jr. is denied.

It is so ordered.

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**Cite As:** *Savane v. Elisara*, LT No. 05-15, slip op. at [page number] (Land & Titles Div. Apr. 21, 2015) (order on mot. for prelim. inj.)

**MAUGAOTEGA SAVANE, FOR HIMSELF AND ON BEHALF OF THE MAUGAOTEGA FAMILY, Plaintiffs,**

**v.**

**TOMMY ELISARA AND DOES 1 THROUGH X, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 05-15

April 21, 2015

[1] In matters before the Land and Titles Division, the Court has broad authority to issue interim orders.

[2] In recognition of the unusual nature of the interests often being asserted in Samoan land disputes, the *Fono* has provided that a Justice of the High Court may make preliminary orders to restrain any Samoans from exercising any right or doing any act, matter, or thing concerning or affecting any Samoan land pending the outcome of the litigation, without requiring that any specific irreparable harm be shown.

[3] It is appropriate for the court in the Land and Titles Division to issue an interim restraining order to preserve the status quo, diffuse tensions between the parties, and limit the risk of waste.

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

Counsel: For Plaintiff, Matailupevao Leupolu, Jr.
For Defendant Tommy Elisara, Pro se

ORDER ON MOTION FOR PRELIMINARY INJUNCTION

On February 17, 2015, Plaintiff Maugaotega Savane, for himself and behalf of the Maugaotega communal family, applied to this Court for a temporary restraining order and preliminary injunction to restrain and enjoin Defendant Tommy Elisara from entering onto land known as "Maloso'o" in the village of Asili. On April 2, 2015, the Court held a hearing on this matter. For the reasons set forth below, the Court hereby grants Plaintiffs' application and issues a limited provisional injunction to

preserve the status quo pending a disposition on the merits.

## Background

Defendant Elisara's mother, Alofa Maugaotega, was married to Aukusotino Maugaotega, a blood member of the Maugaotega family, until his death. Elisara and his mother are not blood members of **[**2**]** the Maugaotega family.

On December 8, 1995, Plaintiff Maugaotega Savane on behalf of the Maugaotega family entered into a lease agreement with Aukusotino and Alofa Maugaotega. (Exh. 2). On March 11, 1996, Governor A.P. Lutali signed off on the agreement, signifying gubernatorial approval of the leasing of native land, as required by A.S.C.A. § 37.0221. On March 12, 1996, the Territorial Registrar's Office recorded the lease in volume LA-96 at page 51. The agreement provides for a lease term of 55 years at a monthly rent of $1.00.

As noted above, Aukusotino Maugaotega is deceased. His estate, which may have an interest in the lease at issue, is not currently a party to this proceeding. The Court heard testimony that Alofa Maugaotega has been off-island for medical reasons. On November 14, 2014, Alofa Maugaotega signed a document purporting to give Elisara power of attorney and authorizing him to look after the house on Maloso`o. (Exh. 1). Pursuant to this authorization, Elisara has been renovating the home on Maloso`o. Plaintiff seeks to restrain and enjoin these activities.

Plaintiff testified that he had evicted the prior occupants of the house, whose occupation of the premises was creating a nuisance to surrounding family members. According to Plaintiff, the premises were neither used nor maintained by the prior occupants in a sound and sanitary manner.

## Jurisdiction

This is a controversy relating to land. Accordingly, this **[**3**]** Court will have exclusive subject matter jurisdiction pursuant to A.S.C.A. § 3.0208(b)(2). *Am. Samoa Veterans Ass'n v. Am. Samoa Gov't.*, AP No. 08-11, slip op. at 3 (App. Div. Jan 4, 2013).

## Standard of Review

**[1-2]** In matters before the Land and Titles Division, the Court has broad authority to issue interim orders. A.S.C.A. § 43.0304 (authorizing a justice to "make such interim orders as he thinks appropriate" in proceedings before the Land and Titles Division).

In apparent recognition of the unusual nature of the interests

> often being asserted in Samoan land disputes, the *Fono* has provided that in such disputes a Justice of the High Court may make such "preliminary orders as to him seem just to restrain any Samoans from . . . exercising any right or doing any act, matter, or thing concerning or affecting any Samoan land" pending the outcome of the litigation, without requiring that any specific irreparable harm be shown.

*Talili v. Satele*, 3 A.S.R.2d 36, 38-39 (Land & Titles Div. 1986) (quoting A.S.C.A. § 43.0303); *see also Williams v. Steffany*, 8 A.S.R.3d 335, 336 (Land & Titles Div. 2002); *Mailo v. Nua*, 5 A.S.R.2d 59, 60 (Land and Titles Div. 1987).

**Discussion**

**[3]** Here, it is appropriate to issue a preliminary order pending a hearing on the merits of this matter. First, the highly charged scenario presented here—non-family members openly asserting unrestricted access to family land, to the perceived derogation of *matai pule*—is not lost on us. The resulting tensions, which led to the filing of this case, also highlights the countervailing concern of potential waste to an unattended structure on the leased area. Moreover, a number of other **[**4**]** attendant issues are indicated requiring further factual development before a dispositional hearing. For example, the evidence showed that Aukusotino Maugaotega is also survived by children from a former marriage, which issue are blood-entitled to Maugaotega property and incidents and may also be interested in the leasehold as Aukusotino's heirs. Without more, the ownership of the leasehold is not clear. Additionally, the survey attached to the lease appears, as is atypical in favored family leases, to reveal an isolated piece of land. It is not apparent from the record before the Court at this time if there are any easements over the unleased parts of Maloso`o allowing access to the leasehold. Such issues are, of course, immaterial to family members, but may be relevant in this situation depending on the identity of the lessee. Finally, ownership of the house itself on the leased area is also unclear. While Elisara has presented a partially filled-in Separation Agreement form (attached to Exhibit 2) as evidence of his mother's independent interest in the house, the separation agreement form has no evidentiary value.

Under the circumstances, an interim restraining order preserving the status quo will not only diffuse tensions between the parties but also limit the risk of waste. Such an order will also allow time for discovery and the prerequisite A.S.C.A. § 43.0302 meetings before the Office of Samoan Affairs, before a hearing on the merits of this case.

## Order

**[**5**]**Plaintiff's application for a preliminary injunction is granted to maintain the status quo pending a hearing on the merits.

Defendant Elisara is restrained from entering Maloso'o for any purpose other than weatherproofing the house at issue located thereon and preventing waste from occurring to the leased land and house.

It is so ordered.

**********

**Cite As:** *Melei v. Leasiolagi*, LT No. 24-12, slip op. at [page number] (Land & Titles Div. July 1, 2015) (order granting mot. for default j.)

**MULIPOLA VIANE FILIGA MELEI, Plaintiff,**

**v.**

**FA`ATAUALOFA DOROTHY LEASIOLAGI, Defendant.**

High Court of American Samoa
Land and Titles Division

LT No. 24-12

July 1, 2015

[1] When a defendant has never appeared despite being personally served with documents and has not answered the complaint or asserted any affirmative defenses, a default judgment may be appropriate.

[2] Plaintiff had fully performed pursuant to the parties' agreement, and defendant had never responded, and thus, plaintiff was entitled to a default judgment in his favor.

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

Counsel: For Petitioner, Assistant Attorney General Aaron Thomas
For Respondent, Assistant Public Defender Michael White

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

On August 8, 2012, Plaintiff Mulipola Viane Filiga Melei filed a complaint against Defendant Fa`ataualofa Dorothy Leasiolagi, asserting claims for breach of contract, unjust enrichment, and reasonable interest. In the Complaint, Plaintiff alleged that in 2005, Defendant offered to sell Plaintiff 1/8 of an acre of land in Kokoland, Tafuna for $20,000.00. On May 4, 2005, Plaintiff paid Defendant $10,000.00 in cash. About two months later, Plaintiff made another payment of $10,000.00 in cash. When the land was not conveyed, Plaintiff demanded a refund from Defendant, but Defendant never repaid Plaintiff. Plaintiff, therefore, seeks $20,000.00 and interest in damages.

On September 20, 2012, the Court granted leave to Plaintiff to personally serve Defendant in Hawaii. On July 23, 2013, Defendant was so served. On May 21, 2014, the Clerk of Courts entered Defendant's default. On

April 2, 2015, Defendant was **[**2**]** served notice of her default, the application for default judgment, and the hearing on the default judgment. On May 27, 2015, the Court held a hearing on the motion for default judgment. Defendant failed to appear. Plaintiff served as the sole witness and produced one exhibit: a receipt for $10,000.00 "FOR Parcel of land @ Kokoland" signed by Defendant and showing that the money was received from Plaintiff and the balance due was $10,000.00. Two months thereafter, Plaintiff tendered and paid to Defendant the second installment of $10,000.

At the conclusion of the hearing, the Court requested briefing from Plaintiff's counsel concerning the application of the statute of limitations and statute of frauds to this case. On June 23, 2015, Plaintiff's counsel filed such briefing, and the Court took the submitted matter under advisement. For the reasons set forth below, we hereby grant Plaintiff's motion for a default judgment.

## Jurisdiction

This is a controversy relating to land. Accordingly, this Court has exclusive subject matter jurisdiction pursuant to A.S.C.A. § 3.0208(b)(2). *Am. Samoa Veterans Ass'n v. Am. Samoa Gov't.*, AP No. 08-11, slip op. at 3 (App. Div. Jan 4, 2013).

## Standard of Review

"If, 20 days after the complaint has been served, there has been no answer, . . . a default judgment may be entered upon motion and hearing." T.C.R.L.T. 6(e).

## Discussion

**[1]** Here, Defendant has never appeared despite being personally **[**3**]** served with documents from this case on two occasions. Defendant has not answered the Complaint or asserted any affirmative defenses thereto. A default judgment is, therefore, appropriate.

**[2]** The Court is satisfied based on the evidence and testimony presented at the hearing on the motion for default judgment that the parties entered into an agreement for the purchase of land in Kokoland for $20,000.00. Plaintiff's testimony that he paid Defendant $10,000.00 on May 4, 2005, and $10,000.00 about two months later is credible. We, therefore, find that in or around July 2005, Plaintiff had fully performed pursuant to the parties' agreement.

Plaintiff is entitled to a judgment for $20,000.00, plus prejudgment interest at the rate of 6 percent per year, *see* A.S.C.A. § 28.1501(a), from

September 1, 2005, until the date of entry of judgment; and post-judgment interest thereafter at the rate of 6 percent per year until the judgment is fully satisfied. *See Tu`ufuli v. Am. Samoa Gov't*, 29 A.S.R.2d 56-58 (Trial Div. 1995).

**Order**

Plaintiff's motion for default judgment is granted. Judgment will accordingly enter in favor of Plaintiff against Defendant in the sum of $20,000.00 and prejudgment interest as set forth above. The Judgment, or any unpaid portion thereof, shall accrue interest at the rate of 6 percent per annum until fully satisfied.

It is so ordered.

**********

**Cite As:** *Scanlan v. Kava*, LT No. 04-06, slip op. at [page number] (Land & Titles Div. Jul. 2, 2015) (op. & order)

**FANENE MORRIS SCANLAN, Plaintiff,**

**v.**

**FANENE FETAIAIGA KAVA, Defendant.**

High Court of American Samoa
Land and Titles Division

LT No. 04-06

July 2, 2015

[1] The Land and Titles Division has the power to give declaratory relief such as a binding declaration of the rights of parties respecting property.

[2] The purpose of a declaratory judgment is to liquidate uncertainties and controversies which might result in future litigations.

[3] To bring a declaratory relief action, there must be a justiciable issue based on alleged facts showing, under all the circumstance, that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment. The test generally applied is the relative certainty that litigation will eventually follow if declaratory relief is not granted.

[4] Declaratory relief is appropriate when the Court is relatively certain that litigation will eventually follow if declaratory relief is not granted due to the parties' history of repeated litigation.

[5] It is within the *sa'o*'s *pule*, or authority, to determine what should be done with structures on family lands.

Before KRUSE, Chief Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge.

Counsel: For Plaintiff, Sharron I. Rancourt
For Defendant, Charles V. Ala'ilima

OPINION AND ORDER

This case presents the Court with the next chapter in the long-running dispute between two factions of the Fanene family over land known as

"Lalopua" in Pago Pago. Plaintiff Fanene Morris Scanlan represents what the Court and parties have referred to as the Scanlan, Foster, Filo, or Tile faction of the Fanene family (herein referred to as the "Scanlan faction"). Defendant Fanene Fetaiaiga Kava represents what the Court and parties have referred to as the Kava, Tauveve, or Matamu faction of the Fanene family (herein referred to as the "Kava faction"). Members of both factions of the Fanene family reside on Lalopua, and the parties are before the Court seeking a precise determination of the boundary between the portions of Lalopua under Fanene Scanlan's *pule* and Fanene Kava's *pule*. For the reasons set forth below, we hereby adopt Plaintiff's proposal for this boundary line and issue a declaratory judgment to that effect. **[**2**]**

## Background

In *Fanene v. Fanene*, 6 A.S.R.3d 333 (Land & Titles Div. 2002), the Court discussed the "tortuous evolutionary process" leading to "[t]he modern day situation with the Fanene family." *Id.* at 333-39. While we will not attempt to replicate these efforts in the present case, certain events in the history of the Fanene family and Lalopua are worthy of repeated recitation.

In 1944, Fanene Filo Foster filed an application to register the 44.50 acres that comprise Lalopua as communal land of the Fanene family. *Taofi v. Fanene*, 2 A.S.R. 197, 197 (Trial Div. 1945). Taofi and S.P. Mauga of Pago Pago objected to this registration offer. *Id.* at 198. The competing claims to Lalopua were adjudicated by the High Court, which permitted Fanene Filo to register the land "in the name of the Fanene family as communal land." *Id.* at 200-01. Shortly thereafter, Fanene Filo registered Lalopua with the Territorial Registrar's Office. (Pl.'s Exh. 11).

In 1971, a dispute between the two factions of the Fanene family concerning control over Lalopua was heard by the Court. *Fanene v. Fanene*, LT Nos. 1089 & 1154 (consolidated), slip op. (Land & Titles Div. Nov. 1, 1971). In these consolidated cases, members of the Kava faction objected to the registration of separation agreements in favor of members of the Scanlan faction. *Id.* at 1-2. The Court held that "Lalopu`a is communal land of the Fanene Filo Family." *Id.* at 4. In 1972, these findings were amended to add: **[**3**]**

> Fetaiaiga F. Kava and her children may continue to occupy the premises they have been and are now occupying, by and through the sufferance of the Matai, Fanene Filo, and providing that they render services (tautua) to Fanene Filo; absence and ceasing such tautua, Matai Fanene Filo, in compliance with Samoan customs, may remove said persons from family land.

*Fanene v. Fanene*, 4 A.S.R. 66, 67 (Land & Titles Div. 1972) (findings of facts and judgment nunc pro tunc.).

In 1983, Fanene Su`a Scanlan sued Fetaiaiga Fanene, alleging that the Kava faction was preventing the Scanlan faction from utilizing an access road on Lalopua by putting rocks and garbage on said road. Complaint, *Fanene v. Fanene*, LT No. 56-83 (Land & Titles Div. Sept. 30, 1983). This case was eventually dismissed without prejudice. Minutes, *Fanene v. Fanene*, LT No. 56-83 (Land & Titles Div. June 23, 1986).

In 1991, the Court granted summary judgment to Fanene Scanlan in a case in which Fanene Kava objected to registration of a separation agreement signed by Fanene Scanlan. *Fanene v. Fanene*, 19 A.S.R.2d 69, 70 (Land & Titles Div. 1991). The Court held that "[b]ecause the only issue raised by the objector is identical to the issue she and her predecessor raised in the 1971 case and because that issue was litigated and decided between the parties, there is nothing left for this Court to decide." *Id.* Similarly, in 1994, the Court dismissed Fanene Kava's attempt to assert *pule* over Lalopua based on res judicata. *Fanene v. Fanene*, 26 A.S.R.2d 8, 12 (Land & Titles Div. 1994).

In 2002, the Scanlan faction filed suit to oust or evict the Kava faction from Lalopua. *Fanene*, 6 A.S.R.3d at 334. **[**4**]** In its opinion and order, the Court "opt[ed] to follow the literal holding of the 1945 *Lalopua* land decision and decline[d] to follow the unnecessary interpretation of the 1971 Court in LT Nos. 1089 and 1154." *Id.* at 340. The Court then held that Fanene F. Kava had *pule* over "those portions of *Lalopua*, under occupation and cultivation by defendant's family." *Id.* at 341.

The Court denied reconsideration of its order, explaining that the Court "refused to perpetuate a travesty on the *fa`a Samoa*" by evicting the Kava faction from Lalopua. *Fanene v. Fanene*, LT No. 13-00, slip op. at 1-2 (Land & Titles Div. Dec. 9, 2002) (order denying mot. for new trial). After the Court denied the motion for reconsideration, Fanene Kava's "first priority" was the removal of the structure the parties have referred to as the home of the late Walter Foster, which was adjacent to her residence. Affidavit Supporting Opposition to Motion for Preliminary Injunction, *Fanene v. Fanene*, LT No. 13-00 (Land & Titles Div. Nov. 27, 2002). She "also wanted to complete a rock wall." *Id.*

**Case History**

On March 15, 2006, Fanene H.S. Scanlan (aka "Fanene Su`a Scanlan") sued Fanene Fetaiaiga Kava for removing the Walter Foster house, constructing the rock wall, and digging a grave for her brother on the portion of Lalopua occupied by the Scanlan faction (and, therefore, under

Fanene Scanlan's *pule*). On March 30, 2006, Fanene Kava answered the complaint and counter-claimed, admitting, among other things, that her family removed Walter **[**5**]** Foster's structure, but asserting that said structure was on the old foundation of her family home. On or about April 6, 2006, the parties stipulated to a preliminary injunction.

In 2007, Plaintiff Fanene Morris Scanlan replaced Fanene H.S. Scanlan as *sa`o* (senior *matai*) of the Scanlan faction. On February 19, 2008, this title change was registered with the Territorial Registrar's Office. (Pl.'s Exh. 14.) On September 11, 2009, the Court granted Fanene Morris Scanlan's motion to replace Fanene H.S. Scanlan as the plaintiff in this case over Defendant's objection.

On or about July 13, 2010, the Office of Samoan Affairs issued a certificate of irreconcilable dispute ("CID") in this matter pursuant to A.S.C.A. § 43.0302.

On December 20, 2010, the Court granted Fanene Morris Scanlan's motion to amend the complaint. Defendant did not object to amendment. On January 19, 2011, Defendant answered the amended complaint and again asserted a counter-claim. On February 8, 2011, Plaintiff replied to the counter-claim.

On December 31, 2012, the Court referred the parties back to the Office of Samoan Affairs after Defendant raised questions about the July 13, 2010, CID's compliance with A.S.C.A. § 43.0302. On or about March 31, 2014, the Office of Samoan Affairs issued a new CID.

On April 20 and 21, 2015, the Court conducted a bench trial on this matter. At the conclusion of trial, Counsel sought and were granted 30 days to file final written arguments. On June 3, **[**6**]** 2015, the Court visited Lalopua and took the submitted matter under advisement.

## Jurisdiction

This is a controversy relating to land. Accordingly, this Court has exclusive subject matter jurisdiction pursuant to A.S.C.A. § 3.0208(b)(2). *Am. Samoa Veterans Ass'n v. Am. Samoa Gov't.*, AP No. 08-11, slip op. at 3 (App. Div. Jan 4, 2013). The Court having perused the March 31, 2014, CID and being satisfied that the requirements of A.S.C.A. § 43.0302 have been fully met, concludes that this dispute is properly before us for adjudication.

## Standard of Review

**[1-3]** The Land and Titles Division has the power to give declaratory relief such as a binding declaration of the rights of parties respecting

property. A.S.C.A. §§ 3.0202(b), 43.1101. "The purpose of a declaratory judgment is to liquidate uncertainties and controversies which might result in future litigations." *In re High Chief Title "Mauga*," 4 ASR 132, 136 (Land & Titles Div. 1974). To bring a declaratory relief action,

> [t]here must be a justiciable issue based on alleged facts showing, under all the circumstance, that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment. The test generally applied is the relative certainty that litigation will eventually follow if declaratory relief is not granted.

*Sala v. Am. Samoa Gov't*, 21 A.S.R.2d 50, 56 (Trial Div. 1992).

**Discussion**

**[4]** After the 2002 decision, one might have hoped that the two **[**7**]** factions of the Fanene family could peacefully co-exist side-by-side on Lalopua. Alas, this was not to be. In light of the history of repeated litigation between the parties concerning Lalopua and the current and historical tensions between the two factions over the precise areas under their respective control, the Court is relatively certain that litigation will eventually follow if declaratory relief is not granted. The Court, therefore, sees fit at this time to issue a declaratory judgment.

The parties have produced differing surveys of the portions of Lalopua they claim to be under the *pule* of their faction's *sa`o*. (Pl.'s Ex. 5). Plaintiff's survey follows the description of Lalopua set forth in *Taofi v. Fanene*, 2 A.S.R. at 200-01 and registered with the Territorial Registrar's Office, Pl.'s Ex. 11, but carves out a portion of land that Plaintiff concedes was under the Kava faction's use and cultivation at the time the opinion and order in LT No. 13-00 was issued, as well as additional structures that the Kava faction erected on that land after the conclusion of that case. (Pl.'s Ex. 5; *see* Opinion of Value, attached to Closing Args., *Fanene v. Fanene*, LT No. 13-00 (Land & Titles Div. March 8, 2002) (showing that in 2002 the Kava faction claimed only four homes on Lalopua while now there are additional structures, including a residence and a building used in connection with the Bahai faith)). Plaintiff's survey encompasses 44.278 acres. (Pl.'s Ex. 5.)

As Defendant acknowledges, her survey of Lalopua includes land not within the registered description of Lalopua. (Def.'s **[**8**]** Closing Arg. at 4.) Defendant's survey also moves the boundary line proposed by Plaintiff to the middle of the road to Hans Langkilde's residence that was the subject of the 1983 litigation, traces this line behind Hans Langkilde's

house and continues the line all the way up to the ridge. (Pl.'s Ex. 7.) Defendant's survey encompasses 34.508 acres. *Id.*

On balance, Plaintiff's survey better illustrates the boundary between the parties' *pule*. Defendant's survey includes land that was not under the Kava faction's use and cultivation at the time the opinion and order were announced in 2002. The Kava faction removed the Walter Foster house, completed the rock wall, and buried Fanene Kava's brother after the Court denied the motion for reconsideration in LT No. 13-00. The Court does not find particularly credible the testimony that an old Kava faction structure underlies the area formerly occupied by Walter Foster's house and that the Kava faction is cultivating plantations up to the ridge line.

As between the parties, therefore, we accept the survey contained in Plaintiff's Exhibit 6 as indicative of the boundary between the land under the *pule* of the Scanlan faction's *sa`o* and the land under the *pule* of the Kava faction's *sa`o*.[1] Accordingly, the portion of Lalopua under Plaintiff's *pule* is demarcated as follows: **[**9**]**

> BEGINNING AT A CONCRETE NORTHWEST CORNER OF US NAVAL CEMETERY PROPERTY AT SATALA. WHICH HAS COORDINATES OF X=254418.26 AND Y=308706.67 BASED ON AMERICAN SAMOA DATUM OF 1962. THENCE SAID POINT RUN ALONG THE NORTHERLY BOUNDARY OF SAID LAND ON AZIMUTH 91E30'40" 139.40 FEET TO AN X CARVED ON A BIG ROCK IN THE EXISTING CREEK. THENCE ON NORTHERLY DIRECTION FOLLOWING THE MEANDERINGS OF THE STREAM AND PROLONGATION OF THE STREAM IN A DISTANCE OF 1800 FEET MORE OR LESS TO THE TOP OF THE RIDGE. THENCE FOLLOW THE TOP OF THE RIDGE ON THE WESTERLY DIRECTION, ABOUT 1000.00 FEET MORE OR LESS. THENCE LEAVE SAID POINT ON THE SOUTHERLY DIRECTION ON AZIMUTH OF 182E11'40" 1625.04 FEET TO A POINT. THENCE ON AZIMUTH 90E00'00" 66.59 FEET TO A POINT. THENCE ON AZIMUTH 180E00'00" 63.09 [FEET] TO A POINT. THENCE ON AZIMUTH 93E05'00" 134.86 FEET TO A POINT. THENCE ON AZIMUTH 180E0'00" 271.53 FEET TO A POINT. THENCE ON AZIMUTH 270E0'00" 23.76 FEET TO A POINT. THENCE ON AZIMUTH 180E47'25" 38.99

[1] Nothing in this opinion is intended to be binding upon third parties not privy to this litigation who may have a claim or claims over any previously unregistered portion or portions of land before us.

> FEET TO A POINT NORTH OF MAIN HIGHWAY. THENCE FOLLOW THE MAIN HIGHWAY ON AZIMUTH OF 91E29'37" 144.85 FEET TO A POINT. THENCE FOLLOW MAIN HIGHWAY ON AZIMUTH 68E50'30" 213.56 FEET TO A POINT. THENCE ON AZIMUTH 85E01'10" 186.17 FEET TO A POINT. THENCE ON AZIMUTH 101E10'50" 173.73 FEET TO A POINT. THENCE ON AZIMUTH 19E17'58" 136.29 FEET TO A POINT. THENCE ON AZIMUTH 91E30'40" 139.40 FEET TO THE POINT OF BEGINNING. CONTAINING AN AREA OF 44.278 ACRE[S] MORE OR LESS.

(Pl.'s Exh. 6.) The portion of Lalopua under Defendant's *pule* is that portion of Lalopua, as described in *Taofi v. Fanene*, 2 A.S.R. at 200-01, not contained in the above description of the area under Plaintiff's *pule*.

**[5]** As the area where the rock wall and grave were constructed lie within the *pule* of the Scanlan faction, it is up to Fanene Morris Scanlan to determine what should be done with these structures. *Anoa'i v. Lai*, 8 A.S.R.3d 310, 314 (Land & Titles Div. 2002) ("It is black letter law that the *sa`o* has *pule* or the authority to make decisions about family lands.").

## Order

Judgment shall be entered for Plaintiff accordingly. **[**10**]**

It is so ordered.

**********

**Cite As:** *Holi v. Territorial Registrar*, LT No. 11-12, slip op. at [page number] (Land & Titles Div. July 14, 2015) (op. & order)

**SELEISA LEULUA`IALI`I HOLI AND PITOFANUA UTU,**
**Plaintiffs,**

**v.**

**TERRITORIAL REGISTRAR, TEMUKISA TUIOLOSEGA, AND DOES I-X, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 11-12

July 14, 2015

[1] Land registration in compliance with the statutes creates a strong presumption that those individuals whose names appear on the registration certificate have good title over the registered land described in the certificate.

[2] The presumption of lawful ownership and possession that arises from a proper registration may be rebutted if there is compelling proof that the certificate of registration was fraudulently obtained or if there are fatal irregularities that affirmatively appear upon the face of the registration documents.

[3] When the defendant used her relationship with the plaintiff, and the extenuating circumstances with the illness of plaintiff's spouse, to intentionally misrepresent her familial relationship with plaintiff to obtain the deed to the property in defendant's name, the court held that the deed to the property was null and void ab initio.

Before RICHMOND, Associate Justice; and MAMEA, Chief Associate Judge; and TUNUPOPO ALALAFAGA TUNUPOPO, Associate Judge.

Counsel: For Petitioners, Charles V. Ala'ilima
For Defendant, Sharron I. Rancourt

OPINION AND ORDER

## Background

On May 2, 2012, this case was commenced to codetermine the ownership of individually owned land. Plaintiffs Seleisa Leulua`iali`i Holi ("Seleisa") and Pitofanua Utu ("Pitofanua"), her son, commenced this action on May 2, 2012, to correct and regain recorded ownership of individually owned land resulting from alleged deceit and fraud by Defendant Temukisa Tuiolosega ("Temukisa"). On July 2, 2012, Defendant Territorial Registrar, who oversees the registration and maintains the records of lands in the Territory, was dismissed from this action for failure to **[**2**]** state a claim upon which relief can be granted. Trial was conducted on March 12, 2015.

Plaintiff Seleisa Leulua`iali`i Holi ("Seleisa"), who is now deceased, entered into an agreement with Magdalene V. Craddick ("Craddick") for the purchase of a portion of Craddick's individually owned land in Tafuna. Seleisa and her husband, with Craddick's permission, built and lived in a home on the land and were allowed to pay the purchase price of the property to Craddick in installments with the understanding that they would receive the deed upon full payment. For years Seleisa and her husband made regular payments to Craddick until 2003 when payments were made less frequently due to the illness of Seleisa's husband.

While Seleisa was focused on her husband's illness and was experiencing difficulty in obtaining a visa to travel to the U.S. mainland to be with her husband. During this trying time, Seleisa's children were living outside of the Territory, and Defendant Temukisa Tuiolosega ("Temukisa") assisted Seleisa with several matters. Seleisa and Temukisa are not familiarly related and characterize their relationship differently. Seleisa knew Temukisa as a fellow teacher, but they had no prior personal relationship. Temukisa claims Seleisa was looking for a buyer of the property and, for that purpose, solicited Temukisa through **[**3**]** Temukisa's brother, who attended the same church as Seleisa. Seleisa actually allowed Temukisa to take control of the property for the purpose of safeguarding it for Seleisa's and her children's future use.

Seleisa traveled to California where her husband was then located. Temukisa falsely informed Craddick that Temukisa was Seleisa's daughter. Temukisa paid Craddick $7,000 to complete payment of the purchase price for the land and told Craddick to put the deed to the property in Temukisa's name. Craddick, having seen the Selesisa and Temukisa together before, assumed this familial relationship was true and deeded the property to Temukisa.

After Seleisa's husband passed away in the mainland, Seleisa returned to the Territory. She found that Temukisa controlled land and was evicting Seleisa from the house. Furthermore, much of Selisa's personal property

was removed from the house while Temukisa was ostensibly watching the property in Selisa's absent.

## Discussion

**[1-2]** The statutory procedures for registering land titles are set forth in A.S.C.A. §§ 37.0101-37.0103. Land registration in compliance with the statutes provides notice to the world that those individuals whose names appear on the registration certificate have good title over **[**4**]** the registered land described in the certificate. *Fa`aua`a v. Tauiliili*, 15 A.S.R.2d 71, 72 (Land & Titles Div. 1990). The statutes create a strong presumption that land, which has been properly registered, belongs to those whose names are on the registration certificate. *Ava v. Logoai*, 19 A.S.R.2d 75, 78 (Land & Titles Div. 1991). However, this presumption of lawful ownership and possession may be rebutted if there is compelling proof that the certificate of registration was fraudulently obtained or if there are fatal irregularities that affirmatively appear upon the face of the registration documents. *Ava*, 19 A.S.R.2d at 77.

**[3]** In the present case, Temukisa used her recent association with Seleisa and the extenuating circumstances with the illness of Seleisa's now deceased spouse to intentionally misrepresent her familial relationship with Seleisa to Craddick and obtain the deed to the property in her name. Temukisa deceitfully took advantage of an elderly woman in the wake of a family emergency and caused Seleisa to lose the land and home she had been working towards owning and hopefully passing on to her offspring.

## Order

The deed to the property is null and void ab initio. The Territorial Registrar shall cancel the registration of **[**5**]** the deed putting title to the real property in Temukisa's name. Temukisa shall immediately vacate the premises and shall return Seleisa's appliances and other items she removed from the home to Utu.

Temukisa shall pay Utu the present value of any of Seleisa's missing items which at this time Temukisa is unable to return to Utu. Utu may provide a list of the unreturnable missing items and their present value to enable the Court to assess and order the monetary compensation Temukisa is required to pay to Utu.

Craddick shall refund to Temukisa the $7,000 Temukisa paid for the deed. Craddick may also either return the $3,000 to Seleisa's estate that Seleisa paid her over the years for purchase of the property or complete the sale of the property if Seleisa's family still wants to own the property. In order to complete the sale transaction, Utu and his siblings will need to commence probate proceedings for Selesia's estate.

Because of Temukisa's intentionally fraudulent attempt to acquire ownership of the property, and based on Utu filing an affidavit setting forth the legal services rendered, Temukisa shall pay as punitive damages Plaintiffs' attorney's fees and court costs, plus all costs associated with the transfer of the property to its **[**6**]** rightful owner.

It is so ordered.

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**Cite As:** *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07, slip op. at [page number] (Land & Titles Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction)

**MOLI POUESI JR., Claimant,**

**v.**

**SALILO IOAPO TO`OMATA, Counter-claimant.**

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**[In re *Matai* Title "Ma'aka" aka "To'omata" of Alofau Village]**

High Court of American Samoa
Land and Titles Division

MT No. 02-07

July 14, 2015

[1] Prior compliance with the requirements of A.S.C.A. § 43.0302 is a prerequisite to the Land and Titles Division's proper assertion of jurisdiction over controversies relating to communal land or *matai* titles.

[2] A.S.C.A. § 43.0302 contemplates a serious attempt to resolve the controversy instead of a merely perfunctory proceeding.

[3] When the parties' two meetings at the Office of Samoan Affairs only took a total of 30 minutes and the certificate of irreconcilable dispute lacked detail, the court found the parties had failed to fully comply with A.S.C.A. § 43.0302.

[4] Compliance with A.S.C.A. § 43.0302 should be detailed in the certificate of irreconcilable dispute, but it can be supplemented by documentation tending to confirm compliance if the certificate is found wanting in detail.

[5] *Matai* selection is properly within the purview of the Samoan family, and when the family has not properly met to consider the issue of *matai* succession, the Land and Titles Division lacks subject matter jurisdiction over the *matai* succession dispute.

[6] The Land and Titles Division lacked subject matter jurisdiction over a *matai* succession dispute when there was no evidence to show that the issue was raised at two family meetings, notice of these meetings was likely given by word of mouth through emissaries acting on behalf of

only one of the parties, and key family members were missing as a result of the lack of notice.

[7] It is illegal for individuals to co-hold a *matai* title under A.S.C.A. § 1.0414 and making such proposal could be considered aiding and abetting criminal activity in violation of the law.

Before KRUSE, Chief Justice; SATELE, Associate Judge; MUASAU, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Claimant, Marie Ala`ilima
For Counter-claimant, Matailupevao Leupolu Jr.

ORDER OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

This longstanding matter began on February 2, 2004, when Moli Pouesi Jr. ("Pouesi"), first filed his succession claim to the *matai* title "Ma`aka," from the Village of Alofau. Pouesi's claim drew the timely, and singular,[1] objection from Salilo **[**2**]** Ioapo To`omata ("Ioapo"), who claims that the title at issue is "To`omata" and that "Ma`aka" is a contraction of "To`omata."[2] For reasons unknown, the matter lay unattended at the Territorial Registrar's Office for the next 18 months until it was finally referred to the Office of Samoan Affairs ("OSA") for administrative proceedings before the Secretary of Samoan Affairs under A.S.C.A. § 43.0302(a).[3]

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[1] In accordance with A.S.C.A. § 1.0406, the Registrar duly prepared "notice of filing of the claim," for posting "on the bulletin board at the front the High Court and in two other public places." While our record reveals the Registrar caused a posting of the notice-of-claim in front of the High Court, *see* Affidavit of Posting, for the requisite 60-day statutory time frame, *see* A.S.C.A. § 1.0407(a), we are not as sure that A.S.C.A. § 1.0406's "two other public places" requirement was properly observed. The Registrar's only record in support of this undertaking is a scant form affidavit attested to by the Pulenu`u of Alofau on February 22, 2007—three years after the alleged posting—averring to posting "at two places in the village of Alofau." Unfortunately, this inattentive manner of implementing statutory notice requirements is not an isolated instance. *See e.g. In re Matai Title "Tauese,"* MT No. 02-08, slip op. at 1-2 (Land & Titles Div. Nov. 23, 2009) (order of dismissal without prejudice).

[2] The matai registry kept by the Territorial Registrar for the village of Alofau seems to bear out this contention.

[3] 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

At OSA, it took a further 15 months before the matter was referred as a "disputed claim," A.S.C.A. § 1.0409 for judicial determination. On February 1, 2007, the Deputy Secretary of Samoan Affairs certified in a tersely worded missive ("CID"), an **[**3**]** "irreconcilable dispute" pursuant to A.S.C.A. § 43.0302(a). The CID recites that: the "parties and their respection [sic] representatives were served notices before the hearings were conducted;" both parties had twice appeared and met before the OSA; "the matter could not be resolved among the parties;" and, "[t]hey wish, however, to refer this matter to Court for final disposition."

Following trial herein, counsel were directed to submit their final arguments in writing and upon receipt of which, the Court took the matter under advisement. For the reasons given below, we find and conclude that this Court is without subject matter jurisdiction.

## Discussion

### 1. OSA Meetings—A.S.C.A. § 43.0302(a)

**[1-2]** Prior compliance with the requirements of A.S.C.A. § 43.0302 is a prerequisite to the Land and Titles Division's proper assertion of jurisdiction over controversies relating to communal land or *matai* titles. *Fagaima ex rel. Fagaima Family v. Am. Samoa Gov't.*, AP No. 01-10, slip op. at 5 (App. Div. Nov. 15, 2012) (order vacating order dismissing appeal for lack of subj. matter juris. and order den. pet. for reh'g); *Puletu v. Kneubuhl*, AP No. 11-09, (App. Div. Nov. 30, 2011) (order denying appellants' motion to postpone pending final judgment of outstanding issues). Moreover, "the statute [A.S.C.A. § 43.0302] contemplates more than a merely perfunctory proceeding; rather 'a **[**4**]** serious exercise

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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.

to satisfy the aims of A.S.C.A. § 43.0302; viz, "an attempt . . . to resolve the controversy.'" *Aiono v. Territorial Registrar*, AP No. 13-12, (Opinion and Order) (App. Div. 2014) slip op. at 7 (citations omitted); *Heirs of Hunkin v. Faiivae*, 8 A.S.R.3d 260, 262 (Land & Titles Div. 2004) ("The statute, however, clearly requires something more than the parties simply checking in a couple of times at the Office of Samoan Affairs and advising the Secretary or his deputy they want to go to court.").

**[3]** Of particular note in the CID is the following section 43.0302(a)(3) statement:

> FIRST HEARING: Began at 9:07 a.m. on October 03, 2006. Ended at 9:17 a.m. on the same date.
> SECOND HEARING: Began at 9:00 a.m. on November 16, 2006. Ended at 9:20 a.m. on the same date.

The CID discloses that the parties' initial meeting at OSA took only 10 minutes while the second took all of 20 minutes. Given that the whole purpose and context of these formal proceedings is intra-family conciliatory efforts, the apparent indifference displayed by all concerned is striking. It does not appear that there was time enough for anyone to have bothered with the formalities of salutation and greetings, as customary protocols demand. The rather summary nature of the OSA proceedings undoubtedly suggests, therefore, that neither OSA nor the parties were in any way inclined to seriously attempt the mandates of A.S.C.A. § 43.0302(a). **[**5**]**

**[4]** Additionally, the CID conspicuously neglects to properly

> affirm and state:
> (1) that on at least 2 occasions, the parties have appeared personally before [the Secretary] 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; [and] . . .
> (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.

A.S.C.A. § 43.0302(a). Instead, the CID merely recites that the parties were served notices and were present at the conclusion of the hearings and that the matter could not be resolved. No other details are to be

found in the CID, nor in anywhere elsewhere,[4] to indicate the action taken, if any, with regard to the remaining requirements of A.S.C.A. § 43.0302(a), as outlined in subparagraphs (1), (2), and (4) of the enactment. Again, these glaring omissions manifest the hasty and cursory nature of the administrative exercise at OSA. **[**6**]**

Under the circumstances, we are not satisfied that the prerequisite requirements of A.S.C.A. § 43.0302(a) were followed and, therefore, hold that this Court lacks subject matter jurisdiction over the dispute at this time.[5] *Fagaima, ex rel. Fagaima Family,* AP No. 01-10, slip. op. at 8.

**2. Family Meetings--A.S.C.A. § 1.0405(b)**

Ioapo contends that family meetings upon which Pouesi bases his claim to family support were neither properly convened in accordance with customary family practice nor adequately noticed to assure all clans the opportunity for meaningful participation in family deliberations. Rather, Ioapo submits that these family gatherings were nothing more than "strategic maneuvering and tactical gimmickry," (Final Args. of Objector Salilo I. To`omata at 4) (quoting *In re Matai Title "Levu,"* MT No. 06-04, slip op. at 3 (Land & Titles Div. Jan 30, 2006) (order of dismissal)), employed by Pouesi and his side of the family (the "Pouesi faction") to enhance a particular outcome.

**[5]** The Appellate Division has made clear that *matai* selection is properly within the purview of the Samoan family, and under circumstances where the family has not met to consider the issue of *matai* succession there can be no "*disputed* claim," A.S.C.A. § **[**7**]**

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[4] *Cf. Aiono v. Territorial Registrar*, AP No. 13-12, slip op. at 7-9 (while compliance with the requirements of § 43.0302 would ordinarily be expected to be detailed in the CID, a CID found wanting in detail so as to sufficiently evince compliance with the requirements of § 43.0302, may 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, slip op. at 9 (App. Div. Nov. 30, 2011) (order denying appellants' motion to postpone pending final judgment of outstanding issues) ("ambiguities in the CID maybe rectified through attachments to the CIDs and extrinsic evidence contained within the record.")

[5] Ordinarily, noncompliance with the requirements of A.S.C.A. § 43.0302(a) at the administrative level would give rise to a remand order to OSA. *See Hunkin v. Galea`i*, 8 A.S.R.3d 260, 263 (Land & Titles Div. 2004) (order remanding to office of Samoan affairs). However, for the reasons given below, this matter will be dismissed without prejudice.

1.0409 (emphasis added), properly before the Land and Titles Division. *In re Matai Title "Le`i,"* AP No. 11-11, slip op. at 9 (App. Div. Aug. 7, 2013); *In re Matai Title "Levu,"* MT No. 06-04, slip op. at 3-4 (Lands & Titles Div. Jan. 30, 2006). In the absence of any meaningful opportunity for family exchange and deliberation in the first instance, the Land and Titles Division lacks subject matter jurisdiction over the *matai* succession dispute. *Le`i,* AP No.11-11 at 8-9; *In re Matai Title "Laolagi,"* AP No. 07-04, slip op. at 6-7; *In re Matai Title "Talia`aueafe,"* 3 A.S.R.3d 225, 228-229 (Land & Titles Div. 1999) ("Unless and until a family has had a meaningful opportunity to thoroughly confront the issue of *matai* succession and to decide for itself whether or not it can select a new titleholder, the Lands and Titles Division really has no business entertaining *matai* title cases.").

**[6]** Here, we lack subject matter jurisdiction over this matter at this time. The referenced family meetings took place in Alofau in either 2002, 2003, or 2004, depending on who was on the witness stand. With the passage of time, witness recollection has naturally grown hazy. Nevertheless, we find the evidence to show that there were two meetings convened by Salanoa Soli ("Salanoa")[6] at which the Ma`aka or To`omata vacancy was raised. Notice of these meetings was by word of mouth through emissaries acting on Salanoa's behalf. **[**8**]**

Before the first meeting was called, Ioapo's side of the family (the "Ioapo faction") had separately met and agreed that Faleatua Fa`alogo ("Fa`alogo") would take the vacant Muafono *matai* title of Alofau. Subsequently, they received word from Salanoa of the family meeting. While Fa`alogo and others of the Ioapo faction attended, Ioapo did not; she did not receive notice. The meeting, presided over by Salanoa, did not result in any clear family consensus; rather, the evidence showed that the meeting spawned confusion as well as disquiet, especially within the Ioapo faction. The Ioapo faction's understanding of the meeting's agenda was the vacant Muafono *matai* title, on which they had already taken action. However, as the meeting progressed, the Ioapo faction were completely caught off guard when the Pouesi faction, with whom Salanoa is aligned, threw into consideration the Ma`aka or To`omata title vacancy and presented Pouesi as the next Ma`aka/To`omata titleholder. Consequently, the Ioapo faction was neither ready for dialogue on this issue nor prepared to propose a candidate for family discussion.

Moreover, confusion among the Pouesi faction about the family meetings was very evident on the witness stand. While Pouesi testified that the first meeting was inconclusive, a position with which Fa`alogo agrees,

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[6] Salanoa Soli is a member of the Ma`aka family; however, his matai title "Salanoa" is not appurtenant to the village of Alofau but rather to the village of Tula.

Pouesi's own rebuttal witness Maotaoali`i Salanoa Aumoeualogo Young ("Maotaoali`i"), Salanoa's sister, directly contradicted Pouesi's testimony. Maotaoali`i's understanding of the meeting, as she recounted on the stand, is that Pouesi was actually selected by the family as the next **[**9**]** Ma`aka. She testified that Salanoa had so announced at the conclusion of the meeting.

**[7]** Shortly after the first meeting, Salanoa again sent out word of a family meeting. Again, notice was by way of word of mouth; no public announcements were made in any of the media. Neither Ioapo nor Fa`alogo received word of the second meeting and they did not attend. Pouesi, who did attend, testified that the gathering concluded with his unopposed selection to the Ma`aka title. Additionally, it was also determined that the Muafono title would be co-held by two people—Fa`alogo, of the Ioapo faction, and a young man of the Pouesi faction whom Pouesi could only identify as "the son of a lady named Tauaveave"—and that Tauaveave's son would become the registered titleholder.[7]

We accept Pouesi and Fa`alogo's version of the facts and find that no consensus was reached at the first meeting.[8] **[**10**]** We further find Pouesi's testimony, which is supported by Fa`alogo's, to be credible and factual as to the events of the second meeting.

In our view, the evidence unquestionably points to a process which was heavily driven by, and thus weighted in favor of, one side of the family: the Pouesi faction. Through the vehicle of "word of mouth" notice, this side influenced who got notice and who did not. Furthermore, without any pre-announced agenda, this side was able to set the topic of debate and discussion and, thus, able to steer the discourse in their direction and

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[7] We suspect because Salanoa was a licensed attorney-at-law at the time that the latter proposal was made in apparent cognizance of the illegality of co-holding a matai title. Such a resolution, if implemented, would be tantamount to criminal activity. *See* A.S.C.A. § 1.0414 (use of any unregistered matai title is a class B misdemeanor). Moreover, those aiding and abetting such a scenario—the participants in the second meeting—might equally be in violation of law. *See* A.S.C.A. § 46.3207 (responsibility for the criminal acts of another).

[8] We further make two observations concerning Maotaoali`i's version of events: First, the upshot of her testimony is but a claim, or an argument, that Salanoa had the power to appoint a family matai, as long as no one objects. We see no factual basis, however, on the record for this contention. Second, Maotaoali`i's position is difficult to reconcile with the fact that Salanoa called for a second meeting wherein the Ma`aka or To`omata vacancy was discussed. In Salanoa's mind, the issue must have been in open contention because he called another meeting.

favor. This bias was evident in the Ioapo faction's total unpreparedness to address the Ma`aka/To`omata vacancy. At the same time, it is not lost on us, as implicated in the testimony of Fa`alogo, that Salanoa became the family's self-anointed convener/chairperson on the sheer strength of his high chiefly standing, as well as his status as a lawyer. As the family spokesperson, he positioned himself as the family functionary to pronounce family decisions.

As events unfolded, the process employed did in actuality promote an outcome for the Pouesi faction. It gave rise to the claimed family consensus, as pronounced by Salanoa, declaring the award of both *matai* titles, Ma`aka/To`omata and Muafono, to the Pouesi faction, while making the dubious and empty gesture of sharing the Muafono title with the Ioapo faction. In addition, the family meetings at issue appear to have been all about the Ma`aka/To`omata vacancy and not about the Muafono vacancy because nothing has since been done to date to register the Muafono **[**11**]** title. The whole purpose, therefore, of the family meetings as convened appears to be the seating of a Pouesi faction family member at the Ma`aka/To`omata's post and the thwarting of the Ioapo faction's effort to install Fa`alogo as the Muafono.

On these facts, we conclude that the Ma`aka aka Ma`ata/To`omata family's meetings were neither properly convened in accordance with the customs of the family, nor properly noticed to assure that *all* clans had adequate notice and the chance to meaningfully participate. Consequently, we determine that the opportunity for substantial discussions was not available to the Ioapo faction, whom we find were effectively marginalized at these family meetings.

Because a meaningful opportunity for family exchange and deliberation was not undertaken to select a *matai* successor, we lack subject matter jurisdiction. As such, the matter must be remanded back to the family. *In re Matai Title "Le`i*," AP No. 11-11 at 9.

## Order

Wherefore, it is ordered, adjudged and decreed:

1. All succession petitions currently before the Court are hereby dismissed without prejudice;

2. The matter of a successor to vacant Ma`aka/To`omata *matai* title of Alofau is remanded back to the family; and,

3. The registration offers by the parties pending before the Territorial Registrar shall be canceled and set aside.

It is so ordered.

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**Cite As:** *Momoe v. Leali'iee*, LT No. 04-14, slip op. at [page number] (Land & Titles Div. July 24, 2015) (order joining necessary parties)

**SITULIA AND FILIFILI MOMOE, FOR THEMSELVES AND FOR THEIR HEIRS, Plaintiffs,**

**v.**

**UILI SIMATI LEALI`IEE, OREPA LEALI`IEE, AND TAFAOAGA KIM, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 04-14

July 24, 2015

[1] Plaintiffs' and defendants' children, who were born in American Samoa and were listed as purchasers on the property sale agreements, could have an interest in the subject property and impact the Court's analysis of the issue and thus must be joined as necessary parties.

[2] A party is necessary to an action if complete relief cannot be accorded without them and disposition may, as a practical matter, impair or impede their ability to protect their interest in property or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations.

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

Counsel: For Plaintiffs, Togiola T.A. Tulafono
For Defendants, Fainu`ulelei L.P.F. Ala`ilima-Utu

ORDER JOINING NECESSARY PARTIES

The parties to this case are Plaintiffs Situlia and Filifili Momoe, Defendants Uili Simati and Orepa Lealiiee, and Defendant Tafaoaga Kim. At trial, it was revealed that the property sale agreements at issue (Pl.'s Exh. 1, Def.'s Exh. 12) list Plaintiffs' and Defendant Kim's children (called "heirs" even though living people have no actual heirs) as purchasers. These children were not party to this suit at the time of trial.

TCRCP 19(a) provides, in pertinent part, that

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action *shall be joined* as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by **[**2**]** reason of his claimed interest. *If he has not been so joined, the court shall order that he be made a party.*

(emphasis added).

**[1-2]** Plaintiffs' and Defendant Kim's children are persons to be joined if feasible. The children are listed as purchasers in addition to the current parties on the property sale agreements and, therefore, may have an interest in the subject property. Additionally, the record alludes to the fact that some of the children were born in American Samoa, which may impact the Court's analysis of the issue of A.S.C.A. § 37.0201(c)'s definition of "native." Without the children's joinder, complete relief cannot be accorded and disposition may as a practical matter impair or impede their ability to protect their interest in the property or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. The children, therefore, will be joined as necessary parties to this action.[1] *See Tuana`itau v. Leomiti*, 8 A.S.R.3d 255, 256-57 (Land & Titles Div. 2004) (ordering neighboring landowner to be joined as a necessary party after trial to adjudicate remaining issues). If any of the children are minors, the Court will appoint a guardian ad litem. TCRCP 17(c).

## Order

Matalena T. Momoe, Karotai Momoe, Pollin Momoe, Tupe John **[**3**]** Tito, Pesamino Momoe, Semi Momoe, Anasetasia Momoe, Ripine Momoe, Caroline Momoe, Situlia Jr. Momoe, Dorothy Kim, Sinafoa Kim, Faaga Kim, Faanofo Kim, Josephine Kim, and Masua Kim are joined as necessary parties to this action.

A certified copy of this order shall be served personally by Plaintiffs and Defendant Kim upon each of their respective children, with return of service to be filed thereafter with the Clerk of Court.

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[1] The Attorney General of American Samoa has also been notified of this action pursuant to TCRCP 24(c) and may seek to intervene.

It is so ordered.

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**Cite As:** *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13, slip op. at [page number] (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land)

**ROBIN KNEUBUHL ROUSH, FRANCES K. OPELLE AND BENJAMIN ("BEN") KNEUBUHL, JR., Plaintiffs,**

**v.**

**DOUGLAS CRANE "MIKE" KNEUBUHL, DOUGLAS KNEUBUHL, JR., CARRIE SUE KNEUBUHL LAVIGNE ECKERT, AND KELLY KNEUBUHL NADINE FULTS, Defendants.**

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**FRANCES OPELLE, Plaintiff,**

**v.**

**DOUGLAS C. "MIKE" KNEUBUHL, CARRIE SUE ECKERT (AKA CARRIE SUE LAVIGNE), KELLY NADINE FULTS, MARK KNEUBUHL, AND DOUGLAS C. KNEUBUHL, JR., Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 20-13
CA No. 28-13

August 12, 2015

[1] The High Court has the authority to enjoin the registration of land under T.C.R.C.P. Rule 65 and T.C.R.L.T. Rule 5.

[2] The High Court has the authority to compel answers to interrogatories under T.C.R.C.P. 37.

[3] In ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties.

[4] Trial rules governing discovery are to be liberally construed in favor of discovery since the scope of discovery is broad and permits the discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence.

[5] Given the liberal construction which favors discovery, parties opposing discovery must overcome a heavy burden when arguing why discovery should be denied.

Before RICHMOND, Associate Justice; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiffs, Fiti A. Sunia
For Defendants, Roy J.D. Hall, Jr.

ORDER GRANTING MOTION TO COMPEL DEFENDANT TO ATTEND DEPOSITION AND GRANTING MOTION TO ENJOIN REGISTRATION OF LAND

## Background

This is a land case involving the proper ownership of land between two siblings. Because there are many questions that remain unanswered, we will not attempt to give all the facts at this time. **[**2**]**

On April 9, 2015, Plaintiff Opelle filed a motion to enjoin the sale of 'Fuamete' land. Then on May 8, 2015, Plaintiff Opelle filed a motion to compel Defendant Kneubuhl to attend and testify at his deposition in California scheduled later for this year. After reading briefs of both parties, we grant both of Plaintiff's motions for the following reasons:

## Standard of Review

Preliminary Enjoining of Land Registration

**[1]** We have the authority to enjoin the registration of land under T.C.R.C.P. Rule 65 and T.C.R.L.T. Rule 5. When there are conflicting claims to property, registration is denied under Title 37 of the A.S.C.A.

Motion to Compel

**[2]** We have authority to compel answers to interrogatories under T.C.R.C.P. 37. It is also well established that the court enjoys broad discretion in managing discovery. *Lefiti v. Ford Motor Co.*, CA No. 90-04, slip op. at 3 (Trial Div. May 31, 2006) (ord. dir. disc.), *see also Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 199 (E.D. Mich. 2002).

**[3-5]** The Court has broad discretion when deciding whether to compel discovery. *See Pizel v. Monaco Coach Corp*., 224 F.R.D. **[**3**]** 642, 643-44 (N.D. Ind. 2004). Indeed, in ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties. *Id.* The right to discovery is provided for by court rule, which states that "any matter, not privileged, which is relevant to the subject matter involved in the pending action whether it relates to the claim or defense" is discoverable. T.C.R.C.P. 26(b)(1). The scope of discovery is "vastly broad permitting the discovery of information that 'appears reasonably calculated to lead to the discovery of admissible evidence.'" *Progressive Ins. Co. v. S. Star Int'l*, 5 A.S.R.3d 20, 22 (Trial Div. 2001) (citing T.C.R.C.P. 26(b)(1)). Trial rules governing discovery are to be liberally construed in favor of discovery. *Nua v. Sunia*, 4 A.S.R.3d 234, 237 (Trial Div. 2000). Given the liberal construction which favors discovery, "parties opposing discovery must shoulder a heavy burden when arguing why discovery should be denied." *Id*. at 237.

## Discussion

There are still many questions and answers to be provided before this Court can make a final decision on the land. Due to the importance and severity of not obtaining these answers, the Court will use its power to compel Defendant Kneubuhl to be present for his deposition. The deposition will be taking place **[**4**]** in California near his home and he is expected to be present. It would behoove Plaintiff Opelle and her Counsel to ensure the deposition is as close to Defendant Kneubuhl's current place of residence as possible to minimize costs.

Furthermore, until these questions about the land and its proper ownership are answered, we will be enjoining any registration or sale of the property. It is only logical.

## Order

1. Plaintiff's motion to compel Defendant to attend and testify at his deposition is granted.

2. Plaintiff's motion for a preliminary enjoining of the registration of the property is granted.

3. Plaintiff and her Counsel should do their best to ensure the deposition in California is held as close as possible to the Defendant's current place of residence.

4. At this time, there will be no awarding of costs, but the Court

reserves the right to change this.

It is so ordered.

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**Cite As:** *Sitala v. Blue Sky Corp.*, LT No. 02-15, slip op. at [page number] (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.)

**TAGOILELAGI SITALA, FOR HIMSELF AND ON BEHALF OF TAGOILELAGI FAMILY, Plaintiffs,**

**v.**

**BLUE SKY CORPORATION AND CHIEF GAOTEOTE PALAIE AND AMERICAN SAMOA GOVERNMENT, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 02-15

August 26, 2015

[1] A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

[2] When the moving party sets out a prima facie case for summary judgment, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial.

[3] A party is not entitled to a trial upon the unsubstantiated hope that convincing evidence may be produced at trial.

[4] 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 a reasonable fact finder could return a verdict for the nonmoving party.

[5] A court must resolve any factual issues in a 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.

[6] All inferences in a summary judgment motion are construed in a light most favorable to the non-moving party.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiffs, Matailupevao Leupolu, Jr.
For Defendant Blue Sky Corporation, Craig Miller
For Defendant Chief Gaoteote Palaie, Fiti A. Sunia
For Defendant American Samoa Government, Assistant Attorney General Mark A. Jesperson

ORDER GRANTING BLUE SKY CORPORATION'S MOTION FOR SUMMARY JUDGMENT

On January 23, 2015, Plaintiff Tagoilelagi Sitali (Tagoilelagi), the chief at the head of the Tagoilelagi communal family, filed a complaint against Defendants Blue Sky Corporation (Blue Sky), Chief Gaoteote Palaie (Gaoteote), and American Samoa Government (ASG). On April 10, 2015, Blue Sky moved for summary judgment. Tagoilelagi filed his opposition to the motion on May 11, 2015. This Court heard the matter on that same day. We award Blue Sky summary judgment for the reasons set forth below. **[**2**]**

## Background

Tagoilelagi seeks injunctive relief to prevent Blue Sky from trespassing on the Tagoilelagi family's communal land in the village of Vatia and for Blue Sky's payment of money damages. For the reasons stated below, Blue Sky is awarded summary judgment.

## Standard of Review

**[1-4]** "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." T.C.R.C.P. 56(c). When the moving party sets out a prima facie case for summary judgment, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." T.C.R.C.P. 56(e). A party is not entitled to a trial upon the unsubstantiated hope that convincing evidence may be produced at trial. *Am. Samoa Gov't Emps. Fed. Credit Union v. Galea'i*, 26 A.S.R.2d 74, 76 (Trial Div. 1994). "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 fact finder could return a **[**3**]** verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986).

**[5-6]** A court must resolve any factual issues in a 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**

The following facts are undisputed for purposes of this summary judgment motion. By warranty deed executed in 1963, Tagoilelagi and Gaoteote conveyed family communal land to ASG for educational purposes, subject to termination and reversion to the family communal landowners for non-use for that purpose. ASG presently operates a public school on the land. So long as ASG is fulfilling the terms of the conveyance, neither Tagoilelagi nor Gaoteote has any control over ASG's use of the land.

Blue Sky has equipment attached to a pole erected on the land at issue by ASPA. ASPA is the ASG agency providing public electricity, water, and waste disposal utility services in **[**4**]** Vatia, which includes those services to ASG's public school on the land. Blue Sky's equipment was installed under an agreement between Blue Sky and ASPA used for the installation of Blue Sky equipment on ASPA poles throughout the Territory. Using this equipment, Blue Sky provides communication services in Vatia, which again includes ASG's public school on the land.

Tagoilelagli asserts that Gaoteote may be receiving payments from Blue Sky for its use of ASPA's pole on the land, and he should receive the same amount from Blue Sky. Blue Sky pays only ASPA and not Geoteote or anyone else for use of ASPA's pole—in the nominal amount of $1.00 per month under a standard Blue Sky/ASPA agreement for installing Blue Sky equipment on ASPA's poles throughout the Territory. Blue Sky's only other payments to ASPA cover ASPA's monthly charges for utility services provided to Blue Sky. Tagiolelagi has not explicitly refuted under oath Blue Sky's statement of payment related to Blue Sky's equipment on the land at issue. If Tagoilelagi has any issue with Blue Sky's payments to ASPA, he should address those issues with ASPA.

Tagoilelagi also claims damages to the land resulted from installation of ASPA's pole and Blue Sky's equipment, but his complaint does not allege what those damages are, or what those damages, if any, were caused by Blue Sky. **[**5**]**

Accordingly, there are no genuinely disputed material facts, and Blue Sky is entitled to summary judgment in this action.

**Order**

Blue Sky's Motion for Summary Judgment is granted. Tagoilelagi's claims against Blue Sky are dismissed.

It is so ordered.

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**Cite As:** *Aumavae v. Toloumu*, LT No. 27-14, slip op. at [page number] (Land & Titles Div. Sept. 23, 2015) (op. & order)

**TOLOUMU AUMAVAE AND SINA PECKENAUGH, Plaintiffs,**

**v.**

**LEI`A TOLOUMU AND DOES 1 THOUGH 10, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 27-14

September 23, 2015

[1] There are three primary types of land in American Samoa: communal land, individually owned land, and freehold land.

[2] Communal land is land owned by a Samoan family with a *matai* as the *sa`o* at the head of the family having *pule* over the land in a manner similar to a trustee.

[3] The *sa`o* makes the decisions concerning family communal land, including assignments of land to individual family members.

[4] Communal land may not be alienated to any individual without the Governor's written approval.

[5] Individually owned land is defined as land registered as the individual property of a person or determined to be individual property of a person by a final decision of the High Court of American Samoa.

[6] It must be land cleared in its entirety or substantially so from the virgin bush by an individual through his own initiative and not by, for, or under the direction of his *aiga* or its senior *matai*; cultivated entirely or substantially so by him; and occupied by him, his family, or agents continuously from the time of the clearing of the bush.

[7] Individually owned land may not be alienated to persons with less than half American Samoan blood.

[8] Freehold land is land created by court grant prior to 1900 that has not been returned the status of either communal or individually owned land at the behest of the owner.

[9] Freehold lands may be alienated to any person regardless of his or her ancestry.

[10] Generally, it is only necessary to determine who has the superior right of possession in an action for eviction.

[11] When a person occupies property with permission of the owner but without any provisions for rent, a tenancy at will is created.

[12] In a tenancy at will, the tenant is entitled to reasonable notice to quit, but the owner still retains the right to give the tenant notice to quit.

[13] Substantial improvements made to the property by the tenant do not change the owner's right to request a tenant vacate the premises, though the tenant may be entitled to compensation.

[14] The Court dismissed plaintiffs' complaint in an eviction suit for lack of standing when the owner of the house defendants were living in had died, and her heirs had not been judicially determined yet.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiffs, Matailupevao Leupolu, Jr.
For Defendant, Fiti A. Sunia

OPINION AND ORDER

**Background**

This suit concerns a dispute between Plaintiffs Toloumu Aumavae (Aumavae) and Sina Peckenaugh (Sina) and Defendant Lei`a Toloumu (Lei`a) and Does 1 though 10, relatives of Lei`a who live with her, over the Defendants' rights to continue living on the land known as "Toefisia." After out of court negotiations proved unsuccessful, Aumavae and Peckenaugh brought an action to evict Defendants.

Lei`a was married to Aumavae and Sina's older brother, Ulutoa Toloumu. In 1996, Lei'a and Ulutoa began living at Toefisia in a house constructed by that another of Ulutoa's sisters, Togiva Striplin (Togiva). Ulutoa died in **[**2**]** 1999. Lei'a and her children by Ulutoa continued to live in this house. Aumavae and Sina claim Toefisia was given to Sina and Togiva by their father. As a result, Aumavae and Sina now seek to evict Lei`a. They argue they have the right to evict Lei`a and her family since Toefisia is freehold land given to Sina and Togiva, the family has agreed to the eviction, and the family's present *sa'o* Toloumu Toloumu, Jr. has spoken to evict Lei`a and her family, who caused problems in the

family.

For the reasons below, we deny Aumavae and Sina's requested relief and dismiss the complaint.

**Discussion**

1. Toefisia Is Individually Owned Land

**[1]** There is some confusion as to the legal nature of Toefisia at issue. Aumavae and Sina classify Toefisia as freehold land but also imply that it is communal land. Clarification is in order. There are three primary types of land in American Samoa: communal land, individually owned land, and freehold land. *See* A.S.C.A. §§ 37.0201(b), 37.1111(b).

**[2-4]** Communal land is land owned by a Samoan family with a *matai* as the *sa`o* at the head of the family having *pule* over the land in a manner similar to a trustee. *See, e.g.*, *Seva`aetasi v. Moi*, 1 A.S.R.3d 232, 233 (Land & Titles Div. 1997) (village belongs to family who originally cleared land and occupied it); *Mageo v. Fuga*, 4 A.S.R. 426, 436 (Trial Div. 1963) (land **[**3**]** controlled and cultivated by family is communal land). The *sa`o* makes the decisions concerning family communal land, including assignments of land to individual family members. *See, e.g.*, *Seventh Day Adventist Church of Am. Samoa v. Maneafaiga*, 23 A.S.R.2d 150, 154 (Land & Titles Div. 1994). Communal land may not be alienated to any individual without the Governor's written approval. A.S.C.A. § 37.0204(a).

**[5-7]** Individually owned land is defined as "land registered as individual property of a person or determined to be individual property of a person by a final decision of the [High] Court of American Samoa." A.S.C.A. § 37.1111(b). It must be land:

> (1) cleared in its entirety or substantially so from the virgin bush by an individual through his own initiative and not by, for, or under the direction of his aiga or its senior *matai*; (2) cultivated entirely or substantially so by him; and (3) occupied by him or his family or his agents continuously from the time of the clearing of the bush.

*Lealaimatafao v. Lautele*, 9 A.S.R.2d 39, 46 (Land & Titles Div. 1988) (citations omitted). Individually owned land may not be alienated to persons with less than half American Samoan blood. *See* A.S.C.A. § 37.0204(b).

**[8-9]** Freehold land is land created by court grant prior to 1900 that has not been returned the status of either communal or individually owned

land at the behest of the owner. A.S.C.A. §§ 37.0201(b); *Vaivao v. Craddick*, 14 A.S.R.2d 108, 109 n.1 (Land & Titles Div. 1990). Freehold lands may be alienated to any **[**4**]** person regardless of his or her ancestry. *See* A.S.C.A. § 37.0204(b); *Craddick Dev., Inc. v. Craddick*, 2 A.S.R.3d 20, 24 (App. Div. 1998).

Aumavae and Sina refer to Toefisia as freehold land and even at times imply that it is communal land. As explained above, each type of land has a distinct meaning, and counsel should take care to use the proper terminology. If Toefisia is communal land, only the *sa`o* has authority to make decisions concerning Lei`a and her family's eviction. *See, e.g.*, *Gi v. Temu*, 11 A.S.R.2d 137, 142 (Land & Titles Div. 1989). However, the sa`o would not have authority in this capacity to evict Lei`a and her family if the land is either individually owned land or freehold land. *See* A.S.C.A. § 37.1111(b), .0201.

In *Meredith v. Aumavae*, 4 A.S.R. 680 (Land & Titles Div. 1965), the court held that "Toefisia is the individually owned land of the children of Saiselu and the children of Toloumu by his first wife." *Id.* at 681. This second group, "children of Toloumu by his first wife," included Aumavae T., who was the father of Togiva and Ulutoa. *See id.* at 681-82; *see also* Compl. for Eviction & Injunctive Relief at 1-2. No evidence was presented showing that the nature of Toefisia has changed since *Meredith*, or that the present *sa`o* **[**5**]** Toloumu owns Toefisia as his individually owned land or freehold land. As such, Toefisia is individually owned land, and the *sa`o* may not evict Lei`a and her family from the land.

2. Plaintiffs Do Not Have Standing To Evict Defendants

**[10]** It is not necessary to determine who has title to Toefisia in the present case, merely who has the superior right to possess the house in which Lei`a and her family are currently residing. Generally, it is only necessary in an action for eviction to determine who has the superior right of possession. *See* Prosch v. Gabbard, 1 A.S.R.2d 41 (App. Div. 1980).

**[11-13]** When a person occupies property with permission of the owner but without any provisions for rent, a tenancy at will is created. *Wightman v. Vala*, 2 A.S.R. 136 (Trial Div. 1941). In a tenancy at will, the tenant is entitled to reasonable notice to quit, but the owner still retains the right to give the tenant notice to quit. *Id.* Substantial improvements made to the property by the tenant do not change the owner's right to request a tenant vacate the premises, though the tenant may be entitled to compensation. *Compare Tiumalu v. Levi*, 4 A.S.R.3d 291, 298 (Land & Titles Div. 2000) (when landlord allows tenant to improve property, it is inequitable for owner to deny compensation), *with*

*J.M Gebauer Inc. v. Am. Samoa Power Auth.*, 5 A.S.R.3d 204, 209 (Trial Div. 2001) (improvements made without consent of owner become part of realty). **[**6**]**

**[14]** Here, both parties agree that the wooden house where Lei`a and her family live originally belonged to Togiva. *See* Defendant's Supplemental Final Argument at 3, *Aumavae v. Toloumu*, CA No. 27-14 (Land & Titles Div. July 12, 2015). During their time at the house, Lei`a and now her deceased husband made substantial changes to the house. *See id.* at 3-4, 5. Despite the improvements, as owner of the house, Togiva retained the right to request Defendants leave provided that she gave reasonable notice. *See Wightman*, 2 A.S.R. at 136. However, because Togiva is deceased, only her heirs, or their representative, are able to request Defendants vacate the property. *See Yuhashi v. Lopeti*, 3 A.S.R. 322, 328 (Trial Div. 1958).

Togiva's estate has not been probated, and thus her heirs have not been judicially determined. The evidence is insufficient to determine who are Togiva's heirs, and consequently, who has the right to require Lei`a and her family to vacate the house. Neither Aumavae nor Sina has demonstrated standing to evict Lei`a and her family.

## Order

Plaintiffs' request for relief is denied, and their complaint is dismissed.

It is so ordered.

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**Cite As:** *Nu'usa v. Lalaga*, LT No. 15-02, slip op. at [page number] (Land & Titles Div. Oct. 21, 2015) (order requiring evidentiary hearing on the basis of defs.' rule 60(b) mot. for relief from j.)

**VAINU`UPO NU`USA, Plaintiff,**

**v.**

**MARGARETTE VON DINKLAGE LALAGA AND MAIU`U LALAGA, Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 15-02

October 21, 2015

[1] The Court has discretionary authority to grant or deny a motion for relief from judgment pursuant to T.C.R.C.P. 60(b).

[2] The Court may order an evidentiary hearing based on evidence presented in a motion for relief from judgment under T.C.R.C.P. 60(b) before granting or denying the motion.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Plaintiff, Charles V. Ala'ilima
For Defendants, M. Talaimalo Uiagalelei

ORDER REQUIRING EVIDENTIARY HEARING ON THE BASIS OF DEFENDANTS' RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

**[1]** Defendants Margarette Von Dinklage Lalaga and Maiu'u Lalaga move for relief from the judgment in this action pursuant to T.C.R.C.P. Rule 60(b). The Court has discretionary authority to grant or deny this motion. *Savarese v. Edrick Transfer & Storage*, 513 F.2d 140, 146 (9th Cir. 1975); WRIGHT, MILLER, & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 2d § 2857 (1995).

**[2]** Defendants are presently located outside of American Samoa. Plaintiff's counsel maintains his principal law office outside of American Samoa. Accordingly, upon Defendants' application after Defendants' counsel confers with Plaintiff's counsel regarding a range of dates

suitable to both sides, the Court **[**2**]** will schedule a hearing to obtain an adequate evidentiary basis for the Court to rule on the motion.

It is so ordered.

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**Cite As:** *Scalan v. Kava*, LT No. 04-06, slip op. at [page number] (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.)

**FANENE MORRIS SCANLAN, Plaintiff,**

**v.**

**FANENE FETAIAIGA KAVA, Defendant.**

High Court of American Samoa
Land and Titles Division

LT No. 04-06

November 10, 2015

[1] A motion for reconsideration should not be an attempt to simply relitigate issues that have already been decided.

[2] Defendant failed to meet the burden for her motion for reconsideration when she merely disagreed with the trial court's unfavorable assessment of her evidence.

[3] Assessment of the evidence is an exercise exclusively within the trial court's competence.

[4] Where the trial court's findings are substantially based on the evidence, its determination is not clearly erroneous simply because a dissatisfied litigant feels that his version of events also has substantial support.

[5] A motion for reconsideration does not hinge on whether one party's version of the events offers a "reasonable" outcome that is less likely to result in future litigation.

Before KRUSE, Chief Justice; MAMEA, Associate Judge; and MUASAU, Associate Judge.

Counsel: For Plaintiff, Sharon I. Rancourt
For Defendant, Charles V. Ala'ilima

ORDER DENYING MOTION FOR RECONSIDERATION

The Fanene *matai* title attached to the village of Pago Pago has evolved into a two-holder institution with two distinct subfamily (extended) groupings. One side is represented in this proceeding by Plaintiff Fanene

Morris Scanlan, and the other by Defendant Fanene Fetaiaiga Kava. The two groups have been squabbling for years over a registered[1] tract of communal land, located in the village of Pago Pago, known as "Lalopua."[2] On July 2, 2015, the Court finally put an end to this decades-long controversy by settling a boundary line between the portions of Lalopua under the respective *pule* of Plaintiff and Defendant. The Court accepted Plaintiff's proposal of the boundary line over Defendant's.

Defendant filed a motion for reconsideration or new trial, asserting that the Court's finding of facts is in error. Defendant contends the evidence favors their proposed boundary line because, as counsel argued on the motion, her side's proposal is not only "reasonable" but its adoption "would clearly end future disputes." (Def.'s Mem. on Mot. to Alter or Amend J. at 4.) Conversely, Defendant posits that Plaintiff's line only invites more future litigation.

**[1]** A motion for reconsideration or new trial should only be based upon "manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." *Am. Samoa Gov't v. S. Pacific Island Airsystem, Inc.*, 28 A.S.R.2d 170, 171 (Trial Div. 1995). Moreover, the moving party bears the burden of showing substantial reasons why the requested relief should be granted. A motion for reconsideration should not be simply an attempt to relitigate issues that were already decided.

**[2-4]** Here, Defendant has failed to meet her burden. Rather than presenting clear grounds for reconsideration, Defendant has merely registered her disagreement with the trial court's unfavorable assessment of the Defendant's evidence.[3]

**[5]** Reconsideration does not, in our view, hinge on whether the Defendant's version of events offers a "reasonable" outcome that, allegedly, is less likely to result in future court cases.

The motion for reconsideration is denied.

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[1] *See Taofi v. Fanene*, 2 A.S.R. 197 (Trial Div. 1945).

[2] *See Fanene v. Fanene*, 26 A.S.R.2d (Land & Titles Div. 1994), for a sketch of the Fanene factions' litigation history.

[3] Assessment of the evidence is an exercise exclusively within the trial court's competence. *Nat'l Pac. Ins. Co. v. Oto*, 3 A.S.R.2d 94 (App. Div. 1986). Where the trial court's findings are substantially based on the evidence, its determination is not clearly erroneous simply because a dissatisfied litigant feels that his version of events also has substantial support. *Moea'i v. Ala'iasa*, 12 A.S.R.2d 91, 93 (App. Div. 1989).

It is so ordered.

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**Cite As:** *In re Matai Title "Le'i,"* CA No. 06-14, slip op. at [page number] (Land & Titles Div. Dec. 22, 2015) (op. & order)

**NU`UTAI SONNY THOMPSON, Claimant,**

**v.**

**LEATU SEGILA VAEAO, Counterclaimant.**

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**[In re *Matai* Title "Le`i" of the Village of Ofu]**

High Court of American Samoa
Land and Titles Division

MT No. 06-14

December 22, 2015

[1] The best hereditary right to a title among the candidates is the first and highest priority consideration of the four criteria.

[2] Case law applies two distinct rules to measure candidates' hereditary rights to a judicially contested *matai* title. The original rule looks at each candidate's closest blood relationship to a former titleholder. The newer *Sotoa* rule counts generations from the original titleholder, or at least from a common ancestor.

[3] The second highest priority consideration is the wish of the majority or plurality of the family's customary clans.

[4] A common family tradition holds that the first titleholder's children define the identity of the family clans.

[5] Summary judgment may effectively nullify the statutory authority for an objector to the election or counterclaimant to title to have his or her day in court with a trial on the merits in a judicial *matai* selection proceeding, and thus, should be denied.

[6] While customs and traditions may provide usage in future similar situations when choosing a *matai*, they are still fluid and subject to modification by those who tend to those situations.

[7] The family members' conscientious decision to continue a meeting to select the successor to a vacant title after being appraised of a few family members' concerns of convening family meetings in Tutuila, instead of

the traditional location in Ofu, justifiably modified the custom or tradition of this family for the purpose of successor *matai* selection.

[8] In *matai* title disputes, the third-priority consideration is the forcefulness, character and personality of candidates, and their knowledge of Samoan customs.

[9] Although both the claimant and counterclaimant led admirably constructive lives, the claimant was considered significantly more forceful, in part because he visibly and actively participated in the family, village, and territorial affairs while the counterclaimant had not been openly active in this family's affairs.

[10] The competing candidates' potential value to the family is ranked fourth in priority.

[11] Claimant, who prevailed on second priority consideration of the wish of the family's customary clans, the third priority consideration of personal characteristics, and the fourth priority consideration of his value to the family, and ranked equally on the first priority consideration of best hereditary right, was awarded the title.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; SU`APAIA, Associate Judge; SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Claimant, Afoa L. Su`esu`e Lutu and Matailupevao Leupolu, Jr.
For Counterclaimant, Sharron I. Rancourt

OPINION AND ORDER

Claimant Nu`utai Sonny Thompson (Thompson) and Counterclaimant Leatu Segila Vaeao (Vaeao) are contesting to be registered by judicial selection for the Le`i family's *sa`o matai* title Le`i of the village of Ofu in the Manu`a Islands, American Samoa.

Because the scheduled hearings on the candidates' pretrial motions and trial date were close in hand, evidence introduced to rule on the motion issues would be necessarily submitted at trial, and Thompson's primary counsel had important scheduled travel plans, the Court—with the parties' concurrence—postponed ruling on those motions in favor of discussing and resolving the motion issues in this Opinion and Order. These rulings are appropriately undertaken below. **[**2**]**

The Court, having considered the evidence and counsel's oral and written arguments presented during and after the pretrial and trial

proceedings, awards the *matai* title Le`i to Thompson. The award is based on the Court's evaluations of the four considerations and their priority mandated by A.S.S.A. § 1.0409.

## Discussion

Best Hereditary Right

**[1]** The best hereditary right to a title among the candidates is the first and highest priority consideration of the four criteria. A.S.C.A. § 1.0409(c)(1).

**[2]** Case law applies two distinct rules to measure candidates' hereditary rights to a judicially contested *matai* title. *In re Matai Title "Puailoa,"* 7 A.S.R.3d 228, 229 (Land & Titles Div. 2003). The original rule looks at each candidate's closest blood relationship to a former titleholder. *In re Matai Title "Tuaolo,"* 27 A.S.R.2d 97, 99 (Land & Titles Div. 1995). The newer Sotoa rule counts generations from the original titleholder, or at least from a common ancestor. *In re Matai Title "Sotoa,"* 2 A.S.R.2d 15, 15 (Land & Titles Div. 1984). The Sotoa rule in significant part may level the playing field for candidates from family clans whose members have not held the title for many years. *Id.*

Applying the original rule, Thompson is six generations removed from his closest previous titleholder Le`i E`e, which results in a 1/64th blood connection to the Le`i title. Vaeao presented three different genealogies, two from the titleholder **[**3**]** Le`i Ta`atu and one from Le`i Pule, all of which result in 1/64th blood connections with his closest previous titleholders.

The candidates disagree on the original titleholder, but agree on Le`i E`e as a common ancestor who held the Le`i title. Therefore, under the Sotoa rule, both candidates still present a 1/64th blood relationship to the Le`i title.

We, therefore, find and conclude that the two candidates have equal hereditary rights to the Le`i title.

Wish of the Majority or Plurality of Family Customary Clans

**[3]** The next and second highest priority consideration is the wish of the majority or plurality of the family's customary clans. A.S.C.A. § 1.0409(c)(2).

**[4]** A common family tradition holds that the first titleholder's children define the identity of the family clans. *In re Matai Title "Misaalefua,"* 28 A.S.R.2d 106, 109 (Land & Titles Div. 1995). However, even though

the candidates do not agree on the original titleholder's identity, they are in significant agreement on the present family clans.

Thompson names three clans: Pule and Isumama (as sons of his original titleholder Le`i Ta`atu), and To`afala (as Pule's son). Vaeao lists three clans: Ta`atu (as the son of his original titleholder Le`i Tupuaeleele), Pule, and Isumama. We find that the Le`i family has three currently functioning clans: Pule, Isumama, and To`afala.

The present title registration process began when Chief Vaeena Sofeni, who holds the Le`i family's *matai* title and is responsible for calling family meetings to select Le`i title **[**4**]** successors, scheduled a family meeting for that purpose at 9:00 a.m. on October 19, 2013, at Thompson's guest house located on the island of Tutuila, American Samoa. The notice was disseminated to family members prior to the scheduled October 19 meeting by newspaper publications on six dates in September and October 2013, radio broadcasts, and word of mouth, which provided sufficient time to the members of the operating family clans to prepare for the meeting.

Most living Le`i family members residing in American Samoa now live on the island of Tutuila. Only a few members still reside on the island of Ofu. The October 19, 2013 meeting was well-attended by family members. All the functioning family clans were represented. Vaeao was present when or shortly after the meeting began. He circulated a written statement of his objections to holding the meeting at Thompson's guesthouse and then departed the meeting.

A substantial number of Le`i family members attending the October 19, 2013 meeting, including representatives of the functioning family clans, were fully aware of Vaeao's objections to the meeting and consciously continued with the noticed purpose of selecting the successor to the vacant Le`i title. The members present discussed and considered the title successor selection and by consensus resolved to select Thompson as the next Le`i titleholder. The family attendees presented Thompson with his "ava cup" at this meeting to symbolize his selection as the next Le`i titleholder. **[**5**]**

Thompson filed his claim for registration of the Le`i title in his name with the Territorial Registrar on October 21, 2013. The Registrar and the Clerk of Courts had the required notice of this claim posted to initiate the 60-day period for filing objections to Thompson's proposed registration or counterclaims for registration of the title. On December 13, 2013, Vaeao timely filed his counterclaim for registration of the title in his name.

Chief Vaeena, with Thompson's concurrence, issued notice of another

family meeting concerning Thompson's Le`i claim to be held on December 13, 2014, at Chief Vaeena's guesthouse. The attendees at the December 13 meeting confirmed Thompson's selection to hold the Le`i title. While this meeting was not a required step in the statutory selection process, the result serves to show the attendees' support of Thompson's selection.

At this point in our discussion, it is appropriate to take up and resolve each candidate's pending pretrial motion. Thompson moved to dismiss Vaeao's claim to the title or for a summary judgment to confirm the title registration in his name based on the family's selection of Thompson as the successor Le`i titleholder. Vaeao moved to dismiss Thompson's claim to the title on the grounds that Thompson was selected on October 19, 2013, at Thompson's guesthouse, a meeting place outside of the traditional site in Ofu for the family's selection of Le`i titleholders, and that Thompson's guesthouse was not a neutral location for Thompson's selection. **[**6**]**

**[5]** We deny Thompson's motion. Even though Thompson was selected by consensus as the successor Le`i titleholder at the October 19, 2013 meeting and arguably provided a basis for summary judgment in his favor by the absence of any genuine issue of any material fact, summary judgment effectively nullifies the statutory authority for an objector to the election or counterclaimant to title have his or her day in court with a trial on the merits in a judicial *matai* selection proceeding. We therefore exercise our discretion to deny summary judgment and defer judicial selection of the successor titleholder until after a trial on the merits. *See YKL Japan Ltd. v. F/V Korbee #1*, 25 A.S.R.2d 121, 124-25 (Trial Div. 1994) (citing *United States v. Merchants Nat'l Bank of Mobile*, 772 F.2d 1522, 1524 (11th Cir. 1985) (per curiam)).

**[6-7]** We also deny Vaeao's motion. Although customs and traditions provide usage in future similar situations, they are still fluid and subject to modification by those who tend to those situations. The conscious decision by the family members to hold and continue the October 19, 2013 meeting to select the successor to the vacant Le`i title, which was announced by the person having authority to call family meetings, and was conducted in recognition of the overwhelming majority of family members living outside of Ofu and the difficulty and inconvenience of transportation and other concerns of convening family meetings in Ofu, justifiably modified the custom or tradition of holding this family meeting in Ofu in favor of meeting at a location on the island of Tutuila for the purpose **[**7**]** of successor *matai* selection at issue. *See Toleafoa v. Tiapula*, 7 A.S.R.2d 117, 121 (Land & Titles Div. 1988) (noting the Samoan way of life is dynamic, not static, and is amenable to change). There is no persuasive evidence that holding the meeting at Thompson's guesthouse lacked a neutral setting for the consensus

decision of a substantial number of Le`i family members. Contrary to Vaeao's assertions that Thompson unfairly controlled or gained an advantage by the October 19 meeting location, the attending family members were apprised of the neutrality issue raised by Vaeao and resolutely, without any direct or indirect interference by Thompson, went forward with October 19 meeting.

We find and conclude that Thompson has the wish of the majority or plurality of the Le`i family's customary clans to be the successor Le`i titleholder, and significantly prevails over Vaeao in this second priority consideration.

Forcefulness, Character and Personality, and Knowledge of Samoan Customs

**[8]** The third-priority consideration is the forcefulness, character and personality of candidates, and their knowledge of Samoan customs. A.S.C.A. § 1.0409(c)(3). Both Thompson and Vaeao have led admirably constructive lives.

Thompson's post-high school education includes attending the American Samoa Community College, earning a bachelor's degree from Southern Illinois University and a master's degree from Chapman University, as well as completing a numerous variety of military schools during his service in the United States Air Force. He retired from the Air Force with the officer rank of Major. **[**8**]**

Thompson also has business experience. He is active in his church affairs. Following his more than 20 years of military service, he has also been an effective participant in various territorial government programs, and more significantly in departmental leadership roles with StarKist Samoa in the occupational safety field and with the American Samoa Government in the administrative and human resources areas.

Vaeao has post-high school education at the American Samoa Community College, Chapman University, and the University of Hawaii, and in programs at several in military schools. He has served in both the United States Army and the United States Navy. He has served in Ofu village *aumaga*. He is a co-owner of a retail store in Ofu. He is active in his church affairs, which includes having financial responsibilities. He was employed off-island for several years as a postal clerk with the United States Postal Service. Teaching, however, is his major line of work, as an elementary school teacher before his military service and as a math instructor for more than 20 years since he returned to American Samoa.

**[9]** There is no evidence indicating adverse character traits of either

candidate or other than the pleasing personalities demonstrate by their demeanor during the trial. Clearly, however, Thompson is significantly more forceful, as exhibited not only by his demeanor in court but also by his visibly active participation in family, village, and territorial affairs.

Both candidates were born and raised in American Samoa. They know Samoan customs from lifetime exposure to and **[**9**]** participation in Samoan events. Both also have held *matai* titles outside of the Le`i family. Thompson, however, has actively engaged in Le`i family and Ofu village affairs, as well as undertaking responsibilities in American Samoa Government operations. Although Vaeao has made significant contributions as a teacher and participates in the affairs of another family, he has not been openly active in Le`i family affairs.

We find and conclude that Thompson prevails over Vaeao in the third priority personal traits consideration.

Value to Family, Village and Country

**[10]** The last consideration, fourth ranked in priority, is the competing candidates' potential value to family, village, and country. A.S.C.A. § 1.0409(c)(4).

In this regard, we take into account both candidates' personal histories, provided by the evidence and summarized above in the third consideration discussion. However, Thompson's leadership roles in his military career and participation in Le`i family, Ofu village, and American Samoa Government operations stand out in comparison with Vaeao.

We, therefore, find and conclude that Thompson prevails, again significantly, over Vaeao in potential value as the holder of the Le`i title to family, village, and country.

## Order

**[11]** Having found and concluded that Thompson prevails on the second priority consideration of the wish of the Le`i family's customary clans, the third priority consideration of personal characteristics, and the fourth priority consideration of his **[**10**]** value as the holder of the Le`i title to the Le`i family, Ofu village, and the Territory of American Samoa, and rank equally on the first priority consideration of best hereditary right, we award the Le`i title to Sonny Thompson. The Territorial Registrar is directed to register the Le`i title in Sonny Thompson's name, provided that Thompson has resigned from and no longer holds any other registered *matai* name.

It is so ordered.

**********

# SLIP OPINIONS

**OF THE**

# FAMILY DRUG AND ALCOHOL DIVISION

**OF THE**

# HIGH COURT OF AMERICAN SAMOA

**(2015)**

**Cite As:** *In re a Minor Child*, FDAJR No. 33-14, slip op. at [page number] (Fam. Drug & Alcohol Div. Sept. 18, 2015) (op. & order)

**IN RE: A MINOR CHILD.**

High Court of American Samoa
Family Drug and Alcohol Division

FDAJR 33-14

September 18, 2015

[1] In cases concerning the adoption of a child, the Court is guided in its decision by the best interest of the parties and particularly, the welfare of the child.

[2] The Court considers many factors in making a determination for an adoption petition, and no one factor is controlling.

[3] The factors the Court considers in determining an adoption petition include: the age and health of the prospective adoptive parents; the suitability of the prospective adoptive parents' home; and the prospective adoptive parents' financial situation. All of these factors are compared to those of the natural parent(s) to determine the best interests of the child.

[4] In an adoption petition, the Court also considers whether or not the child is illegitimate and the proposed adoption would remove that stigma by way of an amended birth certificate.

[5] The Court is required to consider the legal effects of a proposed adoption on the child since rights of inheritance, blood entitlement to communal lands or even *matai* titles may be foreclosed to the child by granting an adoption.

[6] The Court denied an adoption petition by the child's grandmother because it found no compelling reason to justify a change and no apparent benefit to the child to legally substitute a single grandmother in her mid-sixties for two fully-employed and well-educated natural parents in their late twenties.

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

OPINION AND ORDER

This matter came on regularly before this Court for a hearing on September 01, 2015. Present were counsel Isa-Lei Iuli for the petitioners (the married, natural parents of the minor child), the prospective adoptive mother, and the minor child (hereinafter "the Child").

## Background

The petitioners are a young married couple. Both husband and wife are 28 years old. They seek to relinquish their parental rights in their first-born—a girl who has been raised by her paternal grandmother since birth, and who is now five years old.

Both petitioners are gainfully employed, and both are currently pursuing bachelor's degrees from the University of Hawaii through course-work in the Co-Hort program that is **[**2**]** administered by the local Department of Education. If given the opportunity, both would like to obtain Masters degrees, and are willing to relocate off-island if necessary. The petitioners have three other children—a four-year-old, a three-year-old, and a new-born—who are living with and raised by the petitioners. Although it has been a struggle for their young family, the petitioners are not destitute.

The prospective adoptive mother is the paternal grandmother. She is 65 years old and single. She is still employed and enjoys good health. She has been taking care of the Child since birth and has provided for all the Child's needs. The prospective adoptive mother has also grown to depend on the Child to perform minor chores around the house.

The Court inquired as to what will happen to the Child in the event that the relinquishment petition is not granted. The prospective adoptive mother responded that nothing will change: she will continue to take care of the Child and provide for all the Child's needs.

## Discussion

**[1-5]** The Court is guided in its decision in this matter "by the best interest of the parties and particularly, the welfare of the (child)." *In Re: Two Minor Children*, JR No. 82-01, JR 85- **[**3**]** 01, slip op. at 2 (Family Drug & Alc. Div., Oct. 01, 2001). The court considers many factors in making such a determination, and no one factor is controlling.

> The age and health of the prospective adoptive parents are weighed to determine if they are physically able to withstand the rigors of parenting the child or children. The suitability of the grandparents' home is also a factor, as is their financial situation.

> All of these factors are compared to those of the natural parent(s) to determine the best interests of the child during, at least, the period before the child reaches adulthood. Also considered is whether or not the child is illegitimate and the proposed adoption would remove that stigma by way of an amended birth certificate revealing married parents.
>
> The Court is also required to consider the legal effects of the proposed adoption by the grandparents on the child. Rights of inheritance, blood entitlement to communal lands or even *matai* titles may be foreclosed to the child by granting an adoption.

*Id.* at 3-4.

**[6]** We have considered all the foregoing factors, and we find no compelling reason to justify a change to what now exists: the customary placement of a child by the natural parents with a grandparent to raise the child. We find no apparent benefit to the Child to legally substitute a single grandmother in her mid-sixties for two fully-employed and well-educated natural parents in their late twenties. Furthermore, the best interest of the five-year-old Child militates against the risk that she may be left parentless at a young age. **[**4**]**

For these reasons, we deny the petition to relinquish the natural parents' parental rights.

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**SUPPLEMENT**

**Cite As:** *Am. Samoa Gov't v. Savali*, CR No. 131-07, slip op. at [page number] (Trial Div. Dec. 16, 2008) (reporter's partial transcript of proceedings)

**AMERICAN SAMOA GOVERNMENT, Plaintiff,**

**v.**

**MATTHEW SAVALI, Defendant.**

High Court of American Samoa
Trial Division

CR No. 131-07

December 16, 2008

Before KRUSE, Chief Justice; LOGOAI, Chief Associate Judge; and SAVE, Associate Judge.

Counsel: For Plaintiff, Aaron Masser, Assistant Attorney General
For Defendant, Fiti A. Sunia

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

**[**3**]** THE COURT: All right. The Court has had the opportunity to review the extensive presentence report prepared by the Probation Office, as well as taken into account the submissions of counsel and the defendant's plea of mitigation and is prepared at this time to render sentence. Before rendering sentence, we wish to make the following comments for the record:

The defendant pled guilty to the offense of acceding to corruption as a public servant, a class D felony, pursuant to a plea agreement, where the Government agreed to dismiss the more serious offense of forgery. The underlying facts giving rise to the offense is that the defendant, while an immigration officer, falsified an alien I.D. for a young Asian lady who appeared to be on island without proper papers.

Defendant admits to receiving $300 for his actions, but a figure of $3,000 was otherwise reported by someone else to the probation officer entailed in the process. For these purposes, we accept that the defendant only received $300. There may well have been a lot more money involving others.

**[**4**]** The Constitution of American Samoa makes it crystal clear that the policy of the Government of American Samoa is to protect persons of Samoan ancestry against alienation of their lands and the destruction of the Samoan way of life and lands. To that end, the Constitution authorized the *Fono* to enact legislation, and I quote, "to protect the lands, customs, culture, and traditional Samoan family organization of persons of Samoan ancestry, and to encourage business enterprises by such persons." That's Article I, Section 3 of the Revised Constitution of American Samoa.

When the *Fono* enacted the Immigration Act of 1984, it reiterated the constitutional protective policy and declared that, and I quote, "the only way to preserve the American Samoa culture and way of life and allow the people of American Samoa to determine their political and economic future is to restrict the entry of non-American Samoans into American Samoa."

The *Fono* resolved that the Immigration Act, and I quote, "must be so construed for the protection of the people of American Samoa, their lands, and their economic and political future." And that's Section 41.0201 of the American Samoa Code Annotated.

The *Fono* established a quota system, which **[**5**]** currently limits the number of non-American Samoans who may enter and reside in American Samoa to five per nationality per fiscal year. American Samoa Code Annotated Section 41.0301, paragraph A.

However, the *Fono* also carved out exceptions to the quota requirement. One such exception applies to, I quote, "to other groups as further waived by Immigration Board order upon a showing of extenuating circumstances." That's Code Section 41.0301, paragraph D. It is this exception that has been woefully misconstrued and stretched beyond the *Fono*'s intent, and is the source of many of the social problems and crimes that are occurring in American Samoa on a regular basis.

The Court has presided over numerous cases prosecuted by the Government in which the foreign defendant has managed to live and work in American Samoa in total disregard of the quota system established by the *Fono*. The Court is usually informed that the foreign defendant came within the purview of the "extenuating circumstances" exception. Yet, upon inquiry, the Government consistently fails to satisfactorily explain the extenuating need that necessitated the foreign nationals who speak no Samoan, little or no English, and who are subsequently, employed **[**6**]** to stock store shelves, or wait on tables, or tend bar, or serve tea. This contorted construction of the exception to the protective policy has deprived able-bodied local residents of the opportunity to apply for such jobs.

Moreover, it has created a cottage industry of individuals in and out of Government who have profited from their ability to maneuver a system that exhibits no sign of fortifying the protective policy announced in our Constitution.

This case is demonstrative of the far-reaching impact resulting of the conduct of these profiteers. The defendant's illegal conduct has, it seems, facilitated the trafficking of single, foreign females.

The presentence report prepared by the Probation Office tells us of a cast of players, which includes an Asian gentleman who is on island running a bar in the notorious Satala/Aunu'u vicinity; an accommodating Samoan taxi operator who fronts as a sponsor, at the request of the Asian bar operator, of young Asian women; and corruption at the Immigration Office.

The young woman involved in this case has apparently left the island, and like her former on-island employee, there were no records at the Immigration Office available for our probation officer **[**7**]** to look at with both of these foreigners.

It seems that we have not learned very much from recent experience that has brought federal authorities into the picture. Sadly, the Government in this matter has entered into a plea agreement that fails to better protect the interests of the people of American Samoa and that offers no solution to this plight. It is therefore incumbent on the Court to impose the deterrent that is needed to prevent the further erosion of the protective policy of the Constitution of American Samoa.

Defendant will rise.

The defendant is sentenced to five years imprisonment. Execution of sentence is suspended, and the defendant is placed on probation for a period of five years under the following conditions:

Condition Number 1. The defendant will undertake a period of detention at the correctional facility of 12 months without any release whatsoever except for bona fide medical emergencies or prior order of the Court. Detention, however, shall commence 60 days; hence, on the 17th of February 2009. The defendant will report to the correctional facility at 6 o'clock on that date in the evening.

The defendant is also fined the sum of $3,000 **[**8**]** payable to the Clerk of Courts.

Upon release from detention, the defendant shall report to the Probation Office at least once a month or more frequent as directed by the Probation Office.

Throughout probation, the defendant shall remain a law-abiding citizen. He shall not leave or attempt to leave the territory without prior approval of the Court. The defendant may not be involved with any employment entailing government law enforcement during the period of probation.

Mr. Savali, you've got 60 days to think about your future. Should you take it upon yourself to provide local or federal authorities with reliable information regarding corruption at the Immigration Office during the period of probation, then the Court is prepared to revisit the condition of detention.

Do you understand what I've said?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. Be seated. Is the judgment and sentence understood?

MR. MASSER: Yes, Your Honor.

MR. SUNIA: Yes, Your Honor.

THE COURT: Ali'iao, are we on Realtime?

**[**9**]** THE REPORTER: Yes.

THE COURT: All right. Print a copy of the Court's comments and judgment and sentence and have that filed. Mr. Probation Officer, your presentence report. Is there anything else at this time?

MR. MASSER: No, Your Honor.

THE COURT: All right. We stand adjourned.

(Conclusion of proceedings)

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# DIGEST OF CASES REPORTED

## ADMINISTRATIVE LAW

**General Provisions**

Private construction company lacked authority to speak for the Office of Procurement and the Office of the Administrative Law Judge and thus, could not argue that the Court's decision had wronged said agencies. *Am. Samoa Gov't v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Jan. 28, 2015) (order den. pet. for reh'g).

On appeal, the trial court's decision is reviewed under the abuse of discretion standard established by the 9th Circuit in 2009 in *U.S. v. Hinkson*, 585 F.3d 1247. *Fa'asala v. O'Brien*, AP No. 03-13 (App. Div. Jan. 29, 2015) (op. & order).

A two-part test is applied to determine if the trial court abused its discretion on appeal: (1) whether, when considered de novo, the trial court identified the correct legal rule to apply to the relief requested; and (2) whether the trial court's application of the correct legal standard was illogical, implausible, or without support in the record. *Fa'asala v. O'Brien*, AP No. 03-13 (App. Div. Jan. 29, 2015) (op. & order).

If the trial court failed to identify the correct legal rule to apply to the relief requested, the appellate court must conclude it abused its discretion. *Fa'asala v. O'Brien*, AP No. 03-13 (App. Div. Jan. 29, 2015) (op. & order).

If the trial court's application of the correct legal standard was illogical, implausible, or without support in the record, then the trial court erred and abused its discretion. *Fa'asala v. O'Brien*, AP No. 03-13 (App. Div. Jan. 29, 2015) (op. & order).

When the trial court decided to dismiss appellants' case with prejudice instead of applying lesser sanctions, it did not abuse its discretion because the order was neither illogical, implausible, nor without support in the inferences that could be drawn from the facts in the record. *Fa'asala v. O'Brien*, AP No. 03-13 (App. Div. Jan. 29, 2015) (op. & order).

**Powers and Proceedings of Administrative Agencies, Officers, and Agents**

Administrative hearings on appeals and grievances of government

employees are conducted by the Administrative Law Judge as hearings officer of the Personnel Advisory Board. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

**Judicial Review of Administrative Decisions**[1]

The Appellate Division has jurisdiction over appeals from administrative decisions pursuant to A.S.C.A. § 4.1041. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

When the outcome of an administrative hearing is appealed pursuant the Administrative Procedures Act, the High Court must confine its review of the administrative decision to the record and decision as developed and issued by the agency, unless the Court receives evidence necessary to supplement the record. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

The High 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 competence, and specialized knowledge. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

The court may reverse, remand, or modify an ALJ decision if substantial rights of an aggrieved party have been prejudiced and the decision was: (1) in violation of constitutional or statutory provisions; (2) in excess of the agency's statutory authority; (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. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

The ALJ exceeded his statutory authority when he found an exception to the well-established American Rule in a federal statute that the judicial branch has not found applies in American Samoa. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

## AGENCY AND PRINCIPAL

**Agency Relationship**

Defendant was an agent of the vehicle's owners when he was driving the vehicle with the permission of the owners. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial

[1] *See* CIVIL PROCEDURE—Post Judgment Motions & Appeals

& for stay of enforcement).

In the legal sense, controlling another's conduct does not mean physically controlling the person; providing orders or giving an individual permission functions as control and can create a principal-agent relationship. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

## AMERICAN SAMOA GOVERNMENT

### The Judiciary[2, 3]

It is emphatically the province and duty of the judicial department to say what the law is, not the executive branch. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

A letter to the presiding justice by counsel is not a proper method of communicating with the Court concerning a pending case. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The Trial Division is a court of general jurisdiction with the power to hear any matter not otherwise provided for by statute, and the High Court has the power to issue all writs, make rules and orders, and do all acts, not inconsistent with law or with the rules made by the Chief Justice of American Samoa, as may be required for the due administration of justice. A.S.C.A. § 3.0208(a), 3.0202(a). *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The Land and Titles Division of the High Court has exclusive subject matter jurisdiction over all controversies relating to land, but the Trial Division has jurisdiction over summary proceedings to recover possession of premises. *Vitaliano v. Three Y, Inc.*, CA No. 22-15 (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial).

When claims and counterclaims in a summary repossession action go beyond the permitted claims under A.S.C.A. § 43.1411 and TCRSR 7, the case is a matter properly within the competence of the Land and

[2] *See* CONSTITUTIONAL LAW—Full Faith and Credit
[3] *See* CRIMINAL PROCEDURE—Pre-Trial Matters

Titles Division. *Vitaliano v. Three Y, Inc.*, CA No. 22-15 (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial).

A.S.C.A. § 3.0502 encompasses a broad grant of jurisdiction that authorizes the Family, Drug and Alcohol Division to invoke chancery's *parens-patriae*-based inherent jurisdiction to provide for relief *pendent lite* concerning child custody and support. *Tilo v. Tilo*, DR No. 42-14 (Trial Div. Nov. 9, 2015) (interim order).

The Court has the power to punish contempt of its authority by fine or imprisonment at its discretion, which includes disobedience or resistance to its lawful writ, process, order, rule, decree, or command. *Am. Samoa Gov't v. Maiava*, CR No. 66-10 (Trial Div. Nov. 10, 2015) (j. & sentence for contempt of ct.).

Failure to appear without an adequate excuse to obey a court order or subpoena served may be punished as a contempt of the court. *Am. Samoa Gov't v. Maiava*, CR No. 66-10 (Trial Div. Nov. 10, 2015) (j. & sentence for contempt of ct.).

Defendants were found in contempt of court when they failed to appear in court as ordered by the Court and did not have adequate excuses for their absence because they failed to appear for purely personal reasons. *Am. Samoa Gov't v. Maiava*, CR No. 66-10 (Trial Div. Nov. 10, 2015) (j. & sentence for contempt of ct.).

While A.S.C.A. § 3.1007 deals with disqualification of judges, nothing in it requires judges to recuse themselves in a later case dealing with a potential violation of prior title decision that they participated in. *Suafo'a v. Savane*, LT No. 16-14 (Land & Titles Div. Mar. 12, 2015) (order den. defs.' mot. for judge recusal).

## CIVIL PROCEDURE

### Jurisdiction

The court may exercise personal jurisdiction in civil cases over persons residing or found in American Samoa, or who have been duly summoned or voluntarily appear. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The Court only has personal jurisdiction over individuals in American Samoa, which includes the Swains Island and Rose Island. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug.

17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

The High Court has jurisdiction to hear all civil cases, including breach of contract claims, in which the amount in controversy exceeds $15,000. *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss).

Although the *pro se* plaintiff's complaint made significant reference to Federal Communications Commission rules and alleged defendant was violating those rules, his complaint was primarily a breach of contract complaint, and thus, the Court had subject matter jurisdiction over the case. *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss).

**Pleadings**

T.C.R.C.P. Rule 15(a) provides leave to amend shall be freely given when justice so requires at the court's sound discretion. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Courts have particularly broad discretion to grant or deny leave to amend when leave has previously been granted. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Leave to amend may be denied if the court finds undue delay, bad faith or a dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

While the bias is in favor of granting leave, the liberal amendment policy of Rule 15(a) is not without limits. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Verbosity or length by itself is not typically a basis for dismissing a complaint; however, a pleading cannot be of unlimited length and opacity. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

A party proposing an amended petition that violates TCRCP 8(a), which requires a short and plain statement of the claim, can be denied leave to amend. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div.

Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Leave to amend can be denied due to the prolixity of a proposed amended complaint because it could prejudice the opposing party or may also show bad faith on the part of the movant. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Plaintiff was denied leave to file a second amended petition when it was 99 pages long, set forth 57 causes of action, and was convoluted and difficult to understand. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

Among the reasons for denying a motion for leave to amend, an amendment's potential prejudice to the opposing party carries the greatest weight. *Tervola v. ANZ Amerika Samoa Bank*, CA No. 14-13 (Trial Div. Sept. 1, 2015) (order den. mot. for leave to amend compl.).

**Pretrial Motions**

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. *Vaivai v. Am. Samoa Gov't*, CA No. 53-13 (Trial Div. Feb. 9, 2015) (order den. mot. for j. on the pleadings).

Notice of dismissal under T.C.R.C.P. 42(a)(1), if timely filed, is an unconditional right. *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14 (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss).

If an adverse party has served an answer or motion for summary judgment or any party who has appeared declines to stipulate to dismissal, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14 (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss).

A plaintiff, after answer has been served, has no absolute or unqualified right to dismiss his action without prejudice. *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14 (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss).

When a motion to dismiss without prejudice is considered, the important aspect is whether the opposing party will suffer prejudice in the light of the valid interests of the parties. *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14 (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss).

A District Court, in the exercise of a sound judicial discretion, may require a plaintiff to pay the expenses and reasonable attorneys' fees incurred by the defendant as a condition for permitting dismissal without prejudice. *Blizzard v. Dev. Bank of Am. Samoa*, CA No. 80-14 (Trial Div. Mar. 6, 2015) (order on pl.'s mot. to dismiss).

A defendant may move for dismissal of an action if the plaintiff fails to prosecute or comply with the rules or any order of the court. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Dismissal for failure to diligently prosecute is a drastic measure, so the facts of each individual case are important in determining whether to dismiss. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

In deciding a motion to dismiss, the court must consider the competing policies: the court's need to manage its docket, the public interest in expeditious resolution of the litigation, and the risk of prejudice to defendants from any delay versus the law's strong bias in favor of disposition of claims on their merits. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

The pertinent question in a motion to dismiss is whether there has been delay and prejudice to the defendant sufficient to justify a dismissal with prejudice. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

This Court has adopted a five-factor test to assess the propriety of dismissal for failure to prosecute: (1) the duration of plaintiff's failures or a history of dilatoriness; (2) whether conduct of plaintiff was willful or in bad faith; (3) whether plaintiff had received notice that further delays would result in dismissal; (4) whether defendant was likely to be prejudiced by further delay; and (5) the efficacy of lesser sanctions. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Plaintiff was the main cause of delay when the case had been in pre-trial for approximately nine years, during which time plaintiff had not made any discovery requests, settlement offers, or motions to set trial, even though defendant had changed counsel during that time and promised plaintiff outside of court he would pay plaintiff. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

The passage of time alone generally does not dictate dismissal of an

action for want of prosecution. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Willful delay, even if done without malice or bad faith, may provide sufficient grounds to grant dismissal if the delay is determined to be unreasonable under the circumstances. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Where the plaintiff willfully delays prosecution for reasons other than bad faith, the proper inquiry is whether such delay is reasonably excusable in light of the circumstances. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

The burden is on the plaintiff to provide a reasonable excuse for the delay. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Plaintiff's claims that he delayed prosecution for more than seven years because defendant had changed counsel during that time and promised plaintiff multiple times outside of court he would pay plaintiff were unreasonable, and thus, the court found plaintiff willfully delayed prosecution. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

A court is not required to expressly warn the plaintiff of the possibility of dismissal prior to an actual dismissal pursuant to a noticed motion; however, dismissals are rarely granted without adequate notice and an opportunity to be heard. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Previous indications by the Court of its desire to see pending matters resolved expeditiously does not constitute actual or implied notice that further delay will result in dismissal. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Plaintiff had ample opportunity to be heard as evidenced by his written brief in opposition to the motion to dismiss and thus was on notice dismissal of his action was a possibility. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Unreasonable delay creates a presumption of prejudice to defendant's case. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order

den. mot. to dismiss & imposing lesser sanctions).

A party may suffer prejudice in the form of extra costs and added burdens that arise out of the repeated delays and filing of motions that accompany a failure to prosecute. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Irreparable prejudice weighs heavily in favor of granting dismissal for failure to prosecute. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

The defendant must produce evidence that the delay has prejudiced his case only when the plaintiff provides an unfrivolous excuse. If such prejudice is shown, the plaintiff must then establish that the force of its excuse outweighs any prejudice to defendant. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Defendant did not suffer irreparable harm to his case even though plaintiff had failed to prosecute the case for more than seven years because there were few witnesses and little evidence to begin with and defendant had also had ample opportunity to depose necessary witnesses and collect essential evidence early on in the case and failed to do so. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Involuntary dismissal of a case with prejudice is a drastic measure that should only be authorized in extreme circumstances. The court, therefore, can look at whether lesser alternative sanctions will satisfy the interest of justice (e.g., assessment of fines, dismissal without prejudice, conditional dismissal, and reprimands). *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

Because plaintiff's lack of prosecution did not cause irreparable harm to defendant's case and dismissing a matter with prejudice is an extreme measure, the court imposed sanctions. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sept. 15, 2015) (order den. mot. to dismiss & imposing lesser sanctions).

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. *Tualau v. Am. Samoa Gov't*, CA No. 82-14 (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b)).

Under the *Twombly-Iqbal* heightened pleading standard, the Court

applies a two-prong analysis. 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. Prong two instructs the Court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief. *Tualau v. Am. Samoa Gov't*, CA No. 82-14 (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b)).

While the pleading does not need to include detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Tualau v. Am. Samoa Gov't*, CA No. 82-14 (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b)).

The *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal: the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true and should not be dismissed because a court does not believe that a plaintiff will prevail on the claim. *Tualau v. Am. Samoa Gov't*, CA No. 82-14 (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b)).

The court should liberally construe pleadings to avoid injustice but should not refashion a plaintiff's theory of relief. *Tualau v. Am. Samoa Gov't*, CA No. 82-14 (Trial Div. Sept. 3, 2015) (order den. mot. to dismiss under rule 12(b)).

When considering a motion to dismiss for lack of subject-matter jurisdiction, a court must decide if it has the power to hear a case. *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss).

The Court may dismiss a complaint in full or in part for failure to state a claim on which relief may be granted. T.C.R.C.P. 12(b)(6). *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss).

A complaint drafted by a *pro se* litigant is generally afforded more liberal construction than pleadings drafted by an attorney. *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. 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. *Newton v. Am. Samoa Telecomms. Auth.*, CA No. 29-15 (Trial Div. Sept. 22, 2015) (order den. mot. to dismiss).

Under T.C.R.C.P. 41(b) and its inherent power, the Court can dismiss a case for lack of prosecution. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

The factors the Court considers when determining whether to dismiss a case for lack of prosecution include the Court's need to manage its docket, the public interest in the expedient resolution of litigation, and the risk of prejudice to the defendant. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

In examining the factors for dismissal under T.C.R.C.P 41(b), the Court considers unreasonable delay as a prerequisite for dismissal for failure to prosecute. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

A plaintiff causes an unreasonable delay if there is a significant period of total inactivity on the part of the plaintiff. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

To prevent the case's dismissal for failure to prosecute, the plaintiff has the burden of showing that the delay was justified or excusable. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

In assessing a pleading in light of T.C.R.C.P. Rule 8, this Court has applied the heightened pleading standard established by the United States Supreme Court in *Ashcroft v. Iqbal*, 555 U.S. 662 (2009). *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

The pleading standard requires complaint's factual allegations to be more than an "unadorned, the-defendant-unlawfully-harmed-me" accusation and have to plausibly give rise to an entitlement to relief. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

If the complaint only allows 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. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

If a pleading does not meet with the requirements of T.C.R.C.P. Rule 8, the Court may *sua sponte* invoke T.C.R.C.P. Rule 12(b)(6) and dismiss a case. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

The public interest in quick resolution of litigation, the Court's need to manage its docket, and the risk of prejudice to the defendant weighed heavily in favor of dismissing the case when plaintiff had allowed long interim periods between his motions and answers, such as a lapse of two years before filing a second set of interrogatories, during the four years since the filing of his complaint. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

Plaintiff's complaint failed to meet the Court's pleading standards under T.C.R.C.P. Rule 8 and current case law when it loosely argued LBJ Hospital owed plaintiff a duty of care without being able to clarify what the exact duty of care owed was and did not set forth any contract between the parties in its contract claim. *Fisher v. Am. Samoa Gov't*, CA No. 14-11 (Trial Oct. 7, 2015) (order dismissing action).

Court dismissed garnishees' motion to dismiss when garnishees' arguments went to the merits and were more properly a subject for summary judgment motion after discovery was complete. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

The Court may continue a matter if it is clear the parties have failed to conduct pre-trial discovery and prepare for trial. *Tilo v. Tilo*, DR No. 42-14 (Trial Div. Nov. 9, 2015) (interim order).

**Parties and Claims**

Notice to the court, which is not submitted as motion, that a party ceased to exist as a legal entity before litigation began and should be substituted with another party is not generally sufficient and shows a blatant disregard for the twin cornerstones of the legal profession, diligence and competence. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

The Court substituted a successor company in lieu of the named party in light of the extensive litigation that had already been conducted and on balance of the equities, even though the successor company failed to file a motion for substitution and should have been the originally named party since the named party had been bought by the successor company before the litigation began. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A party must be joined to an action when complete relief cannot be accorded among the present parties and disposition may as a practical matter impair or impede their ability to protect their interest in property

or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. *Vitaliano v. Three Y, Inc.*, CA No. 22-15 (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial).

The Court may order a separate trial of any claim, counterclaim, or of any separate issue in furtherance of convenience or to avoid prejudice or when separate trials will be conducive to expedition and economy. T.C.R.C.P. § 42(b). *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

Bifurcation can occur at any point during a lawsuit in order to minimize the overlap in evidence between the segmented phases or otherwise promote economy and accuracy in adjudication. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

The decision whether to try issues separately is within the sound discretion of the court. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

Potential claimants to an estate's proceeds must be joined as necessary parties when the complete relief granted by the court would affect their property rights and they are not presently parties to the action. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

A party cannot bring a cross-claim against a party that is not already a part of the suit. *Dev. Bank of Am. Samoa v. Hunt*, CA No. 34-14 (Trial Div. Oct. 20, 2015) (order granting am. samoa gov't's mot. to dismiss third-party compl.).

Plaintiffs' and defendants' children, who were born in American Samoa and were listed as purchasers on the property sale agreements, could have an interest in the subject property and impact the Court's analysis of the issue and thus must be joined if feasible. *Momoe v. Leali'iee*, LT No. 04-14 (Land & Title Div. July 24, 2015) (order joining necessary parties).

A party is necessary to an action if complete relief cannot be accorded without them and disposition may, as a practical matter, impair or impede their ability to protect their interest in property or subject the current parties to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations. *Momoe v. Leali'iee*, LT No. 04-14 (Land & Title Div. July 24, 2015) (order joining necessary parties).

**Discovery**

The Court does not subscribe to the Uniform Interstate Depositions and Discovery Act due to complications unique to our location and the people of our Territory. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

The Court does not issue subpoenas for persons who are not party to a claim and over whom the Court lacks jurisdiction. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

As soon as a party raises a point in an official court document that the opposing party has access to, the opposing party is put "on notice" as to that argument. *Heraliti v. Am. Samoa Gov't*, CA No. 67-14 (Trial Div. Sept. 3, 2015) (order den. resp't's mot. for recons.).

Ignoring and not complying with proper discovery requests are sanctionable actions. *Heraliti v. Am. Samoa Gov't*, CA No. 67-14 (Trial Div. Sept. 3, 2015) (order den. resp't's mot. for recons.).

The Court has authority to compel answers to interrogatories under T.C.R.C.P. 37. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

It is well established that the court enjoys broad discretion in managing discovery. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

In ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

The scope of discovery is vastly broad permitting the discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Trial rules governing discovery are to be liberally construed in favor of discovery. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Due to the broad scope of allowable discovery and to prevent abusive discovery requests, the Court may issue a protective order where "good cause" is shown. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Good cause requires a showing that the protective order is required to prevent clearly defined and serious injury, harassment, or the abuse of court processes; mere inconvenience and expense are not enough. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Given the liberal construction which favors discovery, parties opposing discovery shoulder a heavy burden when arguing why discovery should be denied. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Sanctions for a successfully raised motion to compel are within the court's discretion to impose and usually take the form of the attorney fees it cost to raise the motion. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Garnisher's discovery questions, which asked for the names of every person who had anything to do with any transaction since 2000, were overly broad and unduly burdensome. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Parties can be made to share in or be responsible for all of the costs of production to discovery requests. *Binaco Textiles, Ltd. v. Alamai Corp.*, CA No. 101-07 (Trial Div. Oct. 14, 2015) (order den. mot. to dismiss & mot. to compel production of documents & records & impose sanctions).

Discovery is a critical stage of pre-trial designed to make relevant information available to all the litigants since mutual knowledge of relevant facts gathered by both parties is essential to proper litigation. *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08 (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. requests).

The High Court of American Samoa in its treatment of the Territory's discovery rules has followed the U.S. Supreme Court's broad and liberal treatment of discovery rules. *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08 (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. requests).

Under a liberal approach, the scope of discovery is very broad, allowing parties to obtain discovery regarding any matter, that is not and is relevant to the subject matter involved in the pending action. *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08 (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. requests).

To properly comply with Territory discovery rules, parties who receive requests to produce documents must not just produce what it agreed to produce or what it was ordered to produce, but must fully answer all interrogatories and all requests for production. *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08 (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. requests).

Plaintiff failed to properly comply with discovery rules when it denied defendant's requests to examine invoices on the ground that the requests were not specific enough. By insisting that defendant must pick and choose specific invoices on plaintiff's list of invoices, plaintiff failed to uphold their responsibility to produce relevant, unprivileged documents. *Binaco Textiles, Ltd. v. Spencer, Inc.*, CA No. 36-08 (Trial Div. Oct. 21, 2015) (order compelling pl. to comply with def.'s disc. requests).

The High Court has the authority to compel answers to interrogatories under T.C.R.C.P. 37. *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13 (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land).

In ruling on a motion to compel, the trial court should independently determine the proper course of discovery based upon arguments of parties. *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13 (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land).

Trial rules governing discovery are to be liberally construed in favor of discovery since the scope of discovery is broad and permits the

discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence. *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13 (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land).

Given the liberal construction which favors discovery, parties opposing discovery must overcome a heavy burden when arguing why discovery should be denied. *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13 (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land).

**Summary Judgment**[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. *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13 (Trial Div. Sept. 14, 2015) (order den. def. mot. for summ. j.).

The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact. If the movant meets this burden, the non-moving party must then affirmatively show there is a genuine issue for trial. *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13 (Trial Div. Sept. 14, 2015) (order den. def. mot. for summ. j.).

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. *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13 (Trial Div. Sept. 14, 2015) (order den. def. mot. for 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. *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13 (Trial Div. Sept. 14, 2015) (order den. def. mot. for summ. j.).

All inferences are construed in a light most favorable to the non-moving party when the Court decides a motion for summary judgment. *Pac. Princess P'ship v. Pac. Stevedoring Servs.*, CA No. 52-13 (Trial Div. Sept. 14, 2015) (order den. def. mot. for summ. j.).

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[4] *See* MATAI TITLE DISPUTES—Procedural Rules

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

When the moving party sets out a *prima facie* case for summary judgment, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

A party is not entitled to a trial upon the unsubstantiated hope that convincing evidence may be produced at trial. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

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 a reasonable factfinder could return a verdict for the nonmoving party. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

A court must resolve any factual issues in a 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. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

All inferences in a summary judgment motion are construed in a light most favorable to the non-moving party. *Sitala v. Blue Sky Corp.*, LT No. 02-15 (Land & Titles Div. Aug. 26, 2015) (order granting Blue Sky Corp.'s mot. for summ. j.).

**Injunctions**

In matters before the Land and Titles Division, the Court has broad authority to issue interim orders. *Savane v. Elisara*, LT No. 05-15 (Land & Titles Div. Apr. 21, 2015) (order on mot. for prelim. inj.).

In recognition of the unusual nature of the interests often being asserted in Samoan land disputes, the *Fono* has provided that a Justice of the High Court may make preliminary orders to restrain any Samoans from exercising any right or doing any act, matter, or thing concerning or

affecting any Samoan land pending the outcome of the litigation, without requiring that any specific irreparable harm be shown. *Savane v. Elisara*, LT No. 05-15 (Land & Titles Div. Apr. 21, 2015) (order on mot. for prelim. inj.).

It is appropriate for the court in the Land and Titles Division to issue an interim restraining order to preserve the status quo, diffuse tensions between the parties, and limit the risk of waste. *Savane v. Elisara*, LT No. 05-15 (Land & Titles Div. Apr. 21, 2015) (order on mot. for prelim. inj.).

**Equitable Remedies**

The court applied the doctrine of laches where there was a delay of approximately 110 years in bringing a claim for land because the delay prejudiced the other party and much of the evidence was unavailable after over 100 years. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

**Judgments**

The purpose of declaratory relief is to declare the rights or duties of parties to a deed, will, or contract, or to quiet and calm disputes whose entire disposition rests on the respective parties' rights and duties. *Conference of Samoan Adventist Church (Am. Samoa), Inc. v. Ekalesia Asofitu Tuto'atasi I Amerika Samoa, Inc.*, CA No. 02-15 (Trial Div. Sept. 16, 2015) (op. & order).

The Court has discretionary authority and may refuse to hear a case for declaratory relief where its declaration or determination is unnecessary or where another adequate remedy is provided. *Conference of Samoan Adventist Church (Am. Samoa), Inc. v. Ekalesia Asofitu Tuto'atasi I Amerika Samoa, Inc.*, CA No. 02-15 (Trial Div. Sept. 16, 2015) (op. & order).

An order in aid of judgment shall be guided by considerations of justice and equity and may be issued any time after the judgment has been entered and before the judgment has been fully satisfied. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

The doctrine of res judicata applies to any attempt to relitigate the title to the underlying land in a case. *Suafo'a v. Savane*, LT No. 16-14 (Land & Titles Div. Mar. 12, 2015) (order den. defs.' mot. for judge recusal).

Res judicata, or claim preclusion, applies when there has been a final judgment on the merits in a prior action involving the same parties or their privies and the prior action involved the same claim. *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14 (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss under T.C.R.C.P. rule 12(b)(6) but granting dismissal for duplicity).

The majority view holds that the same claim is involved if both claims arise out of the same transaction—the claim in the prior judgment must include all rights of the plaintiff to remedies against the defendant with respect to all or part of the transaction out of which the action arose. *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14 (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss under T.C.R.C.P. rule 12(b)(6) but granting dismissal for duplicity).

A judgment will have preclusive effect if the same parties are involved or if a non-party was in privity with a party to the previous action. *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14 (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss under T.C.R.C.P. rule 12(b)(6) but granting dismissal for duplicity).

Privity is essentially a conclusory term that describes the relationship between a party and a non-party that is deemed close enough to warrant the application of claim or issue preclusion to the party. *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14 (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss under T.C.R.C.P. rule 12(b)(6) but granting dismissal for duplicity).

When the same issues were raised in three different cases, the first cases had been dismissed for lack of prosecution, and the additional parties in the first case had been added to the second case as a necessary party, the third, recently-filed case was not dismissed by the court based on res judicata or claims preclusion grounds but instead dismissed for its duplicate subject matter. *The Estate of Leleo Solaita v. J Len T's*, LT No. 01-14 (Land & Titles Div. Mar. 25, 2015) (order den. mots. to dismiss under T.C.R.C.P. rule 12(b)(6) but granting dismissal for duplicity).

When a defendant has never appeared despite being personally served with documents and has not answered the complaint or asserted any affirmative defenses, a default judgment may be appropriate. *Melei v. Leasiolagi*, LT No. 24-12 (Trial Div. July 1, 2015) (order granting mot. for default j.).

Plaintiff had fully performed pursuant to the parties' agreement, and defendant had never responded, and thus, plaintiff was entitled to a default judgment in his favor. *Melei v. Leasiolagi*, LT No. 24-12 (Trial

Div. July 1, 2015) (order granting mot. for default j.).

The Land and Titles Division has the power to give declaratory relief such as a binding declaration of the rights of parties respecting property. *Scanlan v. Kava*, LT No. 04-06 (Trial Div. Jul. 2, 2015) (op. & order).

The purpose of a declaratory judgment is to liquidate uncertainties and controversies which might result in future litigations. *Scanlan v. Kava*, LT No. 04-06 (Trial Div. Jul. 2, 2015) (op. & order).

To bring a declaratory relief action, there must be a justiciable issue based on alleged facts showing, under all the circumstance, that there is a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant issuance of a declaratory judgment. The test generally applied is the relative certainty that litigation will eventually follow if declaratory relief is not granted. *Scanlan v. Kava*, LT No. 04-06 (Trial Div. Jul. 2, 2015) (op. & order).

Declaratory relief is appropriate when the Court is relatively certain that litigation will eventually follow if declaratory relief is not granted due to the parties' history of repeated litigation. *Scanlan v. Kava*, LT No. 04-06 (Trial Div. Jul. 2, 2015) (op. & order).

**Post Judgment Motions & Appeals**[5]

A rehearing is not a matter of right, but it is a privilege granted at the discretion of the appellate court. *Am. Samoa Gov't v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Jan. 28, 2015) (order den. pet. for reh'g).

The Court denied respondent's petition for a rehearing when the respondent failed to address how and why the Court's decision misapprehended and misapplied the statute pertaining to the ALJ's authority to hear procurement disputes and argued the decision wronged other government agencies, which respondent did not have authority to speak for. *Am. Samoa Gov't v. Whitehorn Constr., Inc.*, AP No. 09-14 (App. Div. Jan. 28, 2015) (order den. pet. for reh'g).

The function of a rehearing is to correct errors of law or fact that the appellate court may have overlooked, leading to material errors and will not be granted merely for the purpose of reargument that has already been fully briefed, argued, and decided. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (order den. pet. for reh'g).

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[5] *See* ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

Merely disagreeing with the court's reading of the applicable statutes, rules, and case law is not a basis for granting a rehearing. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (order den. pet. for reh'g).

A rehearing will not be granted for issues raised for the first time in a petition for rehearing. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (order den. pet. for reh'g).

In a motion for rehearing, the petitioner must set forth with particularity the points of law or fact that, in the opinion of the petitioner, the court has overlooked or misapprehended. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (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. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (order den. pet. for reh'g).

When petitioners offered no new information or argument and failed to explain why they believed opinions in other cases and the decision of the A.L.J. should be considered extraordinary circumstances, the Court denied the petition for rehearing. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Mar. 3, 2015) (order den. pet. for reh'g).

A petition for rehearing is analogous to a motion for reconsideration or new trial before the trial court and may be granted where: the record shows the court has made a manifest error of law or fact; the decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 19, 2015) (order granting pet. for reh'g).

Where the Court was concerned that its previous decision materially and erroneously affected petitioner's right to appeal, the Court granted the petition for a rehearing. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 19, 2015) (order granting pet. for reh'g).

A motion for a new trial must be filed within 10 days after the announcement of the judgment or sentence. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The formal style of the motion for new trial—for new trial,

reconsideration, amendment of judgment, arrest of judgment, vacation of sentence, etc.—has never been held essential to the fulfillment of the statutory requirement. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The court, on a defendant's motion, may grant a new trial if required in the interest of justice. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

When the court considers a motion for new trial, the burden is on a convicted defendant to show that some error was committed and that error was prejudicial to him. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The decision to grant a motion for new trial is within the sound discretion of the trial court though it will not do so unless it has clearly erred in its findings or conclusions during the original trial. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The Court expressed no personal prejudice, bias or ill-will toward the criminal defendant when it merely recognized that he was not the entirely good person defense counsel made him out to be. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The Court did not express any personal prejudice, bias or ill-will toward the criminal defendant when it referred to the victims as "sex slaves" because the defendant failed to provide any testimony or independent information to refute the similar statements contained in the presentence report and the victims themselves characterized their treatment as that of sex slaves. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

The Court did not abuse its discretion when it decided that institutional confinement was necessary for the protection of the public and did not consider probation when the defendant never expressly or impliedly argued for probation. *Am. Samoa Gov't v. Malae*, CR No. 100-13, CR No. 188-13 (Trial Div. Jan. 27, 2015) (order den. mot. to reconsider sentence/mot. for new sentencing).

A motion for reconsideration or new trial may be granted where: the record shows the court has made a manifest error of law or fact; the

decision is contrary to the clear weight of the evidence; the court is presented with newly discovered evidence; the decision was manifestly unjust; or there is an intervening change in controlling law. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

A judgment will not be set aside except for substantial reasons. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The burden is on the moving party to show substantial reasons with particularity that a motion for reconsideration or new trial should be granted. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The defendant has the burden to show that the committed error was prejudicial. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The moving party in a motion for reconsideration or new trial must do more than reiterate the court's previous decision and merely assert that it was incorrect. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The standard for granting a motion for reconsideration is strict and should be denied unless the moving party can point to controlling decisions or data that the court overlooked. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

Any error that does not affect substantial rights will be deemed harmless and disregarded. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The court will not grant a motion for reconsideration where the moving party seeks solely to relitigate an issue already decided and will not consider arguments that the moving party failed to raise during the original trial. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of

enforcement).

Just because counsel does not agree with the court's decision does not make it inappropriate, improper, excessive or not based on the evidence. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

A stay of judgment pending appeal is made under the Court's discretion and as it considers proper for the security of the rights of the adverse party. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if stay is denied and irreparable harm to the appellee if stay is granted; and (3) whether the public interest would be affected by the stay. *Fa'asala v. Ainu'u*, CA No. 62-02 (Trial Div. Feb. 10, 2015) (order den. mot. for recons. or new trial & for stay of enforcement).

Reconsideration is appropriate if the court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

The decision whether to grant a motion for reconsideration is within the broad discretion of the trial court, but a judgment will not be set aside except for substantial reasons. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

Motions for amended judgment or new trial require a moving party show that an error of the court affected his substantial rights, or that recently uncovered facts would change the court's ruling. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

It is incumbent on the moving party to state with particularity and detail the grounds for relief; thus affording the trial judge an opportunity to differentiate manifest errors of law or fact from otherwise harmless errors. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

The court will ordinarily not consider arguments that the moving party failed to raise during the original trial. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

When defendant directly testified to the manifested symptoms of emotional distress suffered as a result of the accident by himself and his minor son and medical reports confirmed the son's symptoms, the evidence sufficiently established real injuries and supported a claim for negligent infliction of emotional distress. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Sept. 3, 2015) (order den. resp't's mots. for recons. &/or new trial, & for resp't's mot. for stay under T.C.R.C.P. 62(b)).

Whether to grant a stay pending appeal is within the court's discretion, though it should not be automatically or casually granted. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

The decision to grant a stay depends on: (1) the likelihood that the appellant will prevail on appeal; (2) the equitable balance between the irreparable harm to the appellant if stay is denied and irreparable harm to the appellee if the stay is granted; and (3) whether the public interest would be affected by the stay. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

Even if it is unclear whether an appellant will prevail on appeal, a stay pending appeal may still be appropriate if the law is not settled and it will be extremely difficult for a party to recover sums already paid out. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

When the Court had acknowledged in a prior order that the state of the law in the case was largely unexplored and clouded in uncertainty, the state of the law favors granting a stay. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

The irreparable harm respondent may suffer favors granting a stay when it would be very difficult for respondent to recover any sums paid to the

petitioner if a stay was not granted. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

Public interest favors granting a stay pending appeal when government time and resources would have to be used to recover any paid sums if the government won on appeal. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

Even if all the factors in determining whether to grant a stay pending appeal favors granting a stay, the Court may still order a party to deposit the full judgment amount with the Court registry for the duration of the stay. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Dec. 4, 2015) (order den. pets.' mot. for an order in aid of j. & granting resp't's mot. for stay pending appeal).

The Court has discretionary authority to grant or deny a motion for relief from judgment pursuant to T.C.R.C.P. 60(b). *Nu'usa v. Lalaga*, LT No. 15-02 (App. Div. Oct. 21, 2015) (order requiring evidentiary hearing on the basis of defs.' rule 60(b) mot. for relief from j.).

The Court may order an evidentiary hearing based on evidence presented in a motion for relief from judgment under T.C.R.C.P. 60(b) before granting or denying the motion. *Nu'usa v. Lalaga*, LT No. 15-02 (App. Div. Oct. 21, 2015) (order requiring evidentiary hearing on the basis of defs.' rule 60(b) mot. for relief from j.).

A motion for reconsideration should not be an attempt to simply relitigate issues that have already been decided. *Scalan v. Kava*, LT No. 04-06 (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.).

Defendant failed to meet the burden for her motion for reconsideration when she merely disagreed with the trial court's unfavorable assessment of her evidence. *Scalan v. Kava*, LT No. 04-06 (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.).

A motion for reconsideration does not hinge on whether one party's version of the events offers a "reasonable" outcome that is less likely to result in future litigation. *Scalan v. Kava*, LT No. 04-06 (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.).

Assessment of the evidence is an exercise exclusively within the trial court's competence. *Scalan v. Kava*, LT No. 04-06 (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.).

Where the trial court's findings are substantially based on the evidence, its determination is not clearly erroneous simply because a dissatisfied litigant feels that his version of events also has substantial support. *Scalan v. Kava*, LT No. 04-06 (Land & Titles Div. Nov. 10, 2015) (order den. mot. for recons.).

**Conflict of Laws**[6]

## CONSTITUTIONAL LAW

**Full Faith and Credit**[7]

The Enforcement of Foreign Judgments Act does not contemplate this Court's involvement in the discovery process of foreign jurisdictions. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. Feb. 17, 2015) (order denying appl. to register comm'n).

The Enforcement of Foreign Judgment Act applies only to a final decision of a foreign tribunal that determines a dispute between the parties, specifying who prevails, as well as clearly articulating what remedy or remedies that is/are being sought to be enforced by this Court. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. Feb. 17, 2015) (order denying appl. to register comm'n).

A foreign court's jurisdiction ends when it enters a final decision. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. Feb. 17, 2015) (order denying appl. to register comm'n).

**Due Process**[8]

**Individual Rights**

The Revised Constitution of American Samoa provides that no person shall be deprived of life, liberty, or property without due process of law. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

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[6] *See* CONSTITUTIONAL LAW—Full Faith and Credit
[7] *See* INTERNATIONAL LAW—General Provisions
[8] *See* CRIMINAL PROCEDURE—Counsel

## CONTRACTS

### Contract Formation

It is axiomatic that a suretyship contract does not require that any consideration flow from the obligee to the surety in order for the surety's promise to be enforceable. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

The benefit afforded the principal obligor serves as sufficient consideration to bind the surety's guarantee of the principal's debt. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

### Responsibilities and Authority of Parties Forming a Contract[9]

Generally, any agreement or dealing between a principal to an obligation or debt and the obligee that essentially varies the terms of the contract without the consent of the surety will release him from liability. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

When six defendants signed an original loan agreement as sureties but not all of them signed later agreements that modified the original agreement as sureties, the defendants who did not sign the modifications were not bound by the defendants who did sign. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

### Unenforceability

The traditional elements of fraud are: (1) a false representation or concealment of a material fact, (2) made with knowledge of its falsity, (3) with the intent to induce the person to whom it is made to act upon it, and (4) such person acted in reliance upon the representation (5) to his damage. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

Fraud is a specialized cause of action that requires specific evidence and is only available where the claimant exercised due diligence in protecting himself from that fraud. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

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[9] *See* CONTRACTS—Contract Modification

The elements of non-fraudulent or negligent misrepresentation are as follows: (1) the speaker supplied information in the course of his business because of some pecuniary interest; (2) due to the speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false; (3) the speaker intentionally provided information for the guidance of a limited group of persons in a particular business transaction; (4) the listener justifiably relied on the information; and (5) as a result of the listener's reliance on the statement, the listener suffered a pecuniary loss. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A misrepresentation may take the form of an affirmative statement, a failure to disclose information where one party knows the other harbors a false belief, a failure to correct a prior misstatement, or failure to disclose where one party is entitled to know information by virtue of the relationship between the parties. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

When it was unclear what was explained to all the borrowers, there was no proof that they were provided the opportunity to understand the loan documentation in their native language, multiple loan revisions were signed at different times by only some of the borrowers, the Court found negligent misrepresentation had likely occurred. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

The doctrine of objective impossibility provides that the destruction of the subject matter of a contract by an unforeseeable *force majeure* will excuse the parties' continued performance and contractual obligations. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A contract may be void in whole or in part where the consideration, promise, or performance of the contract is in derogation of the law or public policy. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A tsunami that destroyed a building that was the subject matter of the contract was a *force majeure*, releasing the parties from the contract since no one could vividly remember the last tsunami and no one would have predicted or anticipated one would occur. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

Where an ostensibly illegal agreement does not explicitly offend public

policy, a court may enforce the agreement based on the equitable considerations and the interests of justice. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

When it was common knowledge between the parties that the bank loan would be paid out of proceeds of illegal gambling activity, the Court held the loan agreement was void *ab initio*. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

**Contract Modification**[10]

A novation is an agreement by both parties to a contract to substitute a new obligation or party for an existing obligation or party. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A novation wholly extinguishes the earlier contract and all of the parties' obligations under that contract, whereas a modification of a term or a provision of a contract alters only certain portions of the contract. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

There is no hard and fast rule that establishes when distinct modifications of a contract's terms reach a tipping point to create a superseding novated agreement; instead, the finder of fact must make this determination based on the intent of the parties and the specific factual circumstances of the case. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

When two revision agreements only modified the payment schedule and payment amounts set forth in the original loan agreement, the revisions were merely modifications of the original agreement and not a novation. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

**Performance and Breach**

Any non-performance of a contractual duty constitutes a breach of contract. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. Apr. 8, 2015) (op. & order).

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[10] *See* CONTRACTS—Responsibilities and Authority of Parties Forming a Contract

When another party materially breaches, the injured party may terminate the contract and sue for damages. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. Apr. 8, 2015) (op. & order).

Cutting short a loan agreement by two years and forcing the borrower to pay such an extremely large sum at once is a material act not conducted in good faith, a basic tenant of contract law. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

A breach of contract cause of action requires a contract, a breach, and consequential damages resulting from the breach. *Fa'ai'u v. Seigafao*, CA No. 74-10 (Trial Div. Oct. 16, 2015) (op. & order).

In a breach of contract claim, the plaintiff has the burden of establishing the elements of his claim by a preponderance of the evidence. This means the plaintiff must show that it is more likely than not he should prevail. *Fa'ai'u v. Seigafao*, CA No. 74-10 (Trial Div. Oct. 16, 2015) (op. & order).

Plaintiff failed to meet his burden when he merely presented his own testimony about the oral contract without any other evidence that defendants accepted the offer and independent evidence offered by the defendant corroborated the defendant's testimony. *Fa'ai'u v. Seigafao*, CA No. 74-10 (Trial Div. Oct. 16, 2015) (op. & order).

## CORPORATION AND PARTNERSHIP

### Corporate Powers & Prohibitions

When a company has ceased to exist as a legal entity, it has no capacity to prosecution an action. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No. 33-11 (Trial Div. July 13, 2015) (op. & order).

## CRIMINAL LAW

### Specific Crimes

Taking a car without authorization, abandoning it in a remote location, and throwing the keys away is enough to prove "intent to deprive" and sustain a burglary charge. *Am. Samoa Gov't v. Latianara*, CR No. 02-15 (Trial Div. July 9, 2015) (order accepting plea agreement).

Generally gambling is illegal, but bingo for religious purposes is permitted. *ANZ Guam, Inc. v. Pago Pago Village Council, Inc.*, CA No.

33-11 (Trial Div. July 13, 2015) (op. & order).

## CRIMINAL PROCEDURE

### Pleas

When a defendant pleads guilty to a charge, the Court must address the defendant personally in open court and inform him of, and determine that he understand the warnings in T.C.R.Cr.P. 11(c). *Am. Samoa Gov't v. Asi*, CR No. 69-14 (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt).

The Court has an obligation to determine that the defendant's plea is voluntary. *Am. Samoa Gov't v. Asi*, CR No. 69-14 (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt).

If the defendant can intelligently answer the Court's questions and gives every indication that he understands both the Court's questions and other statements during the plea taking proceedings, the defendant can be said to have entered the plea agreement voluntarily and intelligently. *Am. Samoa Gov't v. Asi*, CR No. 69-14 (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt).

Because the Court gave all the appropriate warnings required by statute and by the Constitution and the defendant demonstrated his clear understanding of the proceedings by articulating the facts of his crime in court, defendant waived his constitutional right to a trial by pleading guilty. *Am. Samoa Gov't v. Asi*, CR No. 69-14 (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt).

When the defendant voluntarily and intelligently pled guilty, the Court denied his motion to withdraw his guilty plea. *Am. Samoa Gov't v. Asi*, CR No. 69-14 (Trial Div. Oct. 1, 2015) (order den. mot. to withdraw plea of guilt).

### Pre-Trial Matters

A defendant who has been civilly committed under A.S.C.A. § 13.1501 is under the care of the Director of Health who is to insure an on-going program of medical and psychiatric treatment as required for the patient's disability. *Am. Samoa Gov't v. Blake*, CA No. 08-15 (Trial Div. Nov. 20, 2015) (order continuing proceedings).

A defendant who has been civilly committed is entitled to periodic review hearings by the Court at nine-month intervals following the date of original commitment. *Am. Samoa Gov't v. Blake*, CA No. 08-15

(Trial Div. Nov. 20, 2015) (order continuing proceedings).

**Punishment and Sentencing**

The Court can modify conditions of probation by imposing a fine or changing a period of detention during the entire term of probation. *Am. Samoa Gov't v. Tasimani*, CR 138-07 (Trial Div. Sept. 30, 2015) (order revoking probation).

In a felony case, the Court's power to revoke probation is limited to a term of five years under A.S.C.A. § 46.2204. However, if a defendant violates a condition of probation, the Court can still revoke probation under A.S.C.A. § 46.2209 beyond a term of five years. *Am. Samoa Gov't v. Tasimani*, CR 138-07 (Trial Div. Sept. 30, 2015) (order revoking probation).

**Interrogation and Miranda**

Involuntary confessions cannot be used against a criminal defendant. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

A voluntary confession is the product of a rational intellect and free will. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

Coercive police conduct may result in a determination that a defendant's will was overborne at the time he confessed, therefore rendering the confession involuntary. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

Misrepresentation of the evidence to a person being interrogated does not necessarily make a subsequent confession involuntary and therefore inadmissible. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

When police deception or misstatement places a suspect in a position where the decision to confess or remain silent is unduly influenced by factors other than the evidence of the crime presented the subsequent statement may be considered an involuntary confession. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

When police led the suspect to believe, falsely, that his wife was going to be taken into custody and his children taken away by Social Services the suspect's subsequent confession was involuntary made and therefore inadmissible against him in these proceedings. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Feb. 9, 2015) (op. & order).

A defendant has a Fifth Amendment right, under which he cannot be compelled in any criminal case to be a witness against himself. *Am. Samoa Gov't v. Lin*, CR No. 12-15 (Trial Div. July 15, 2015) (order granting mot. to suppress evidence).

*Miranda v. Arizona*, 384 U.S. 436 (1966) established prophylactic rights designed to preserve the Fifth Amendment right during custodial interrogations. *Am. Samoa Gov't v. Lin*, CR No. 12-15 (Trial Div. July 15, 2015) (order granting mot. to suppress evidence).

Custodial interrogations must cease when a suspect invokes his *Miranda* rights, and further interrogation is then prohibited until the suspect has been provided with counsel. *Am. Samoa Gov't v. Lin*, CR No. 12-15 (Trial Div. July 15, 2015) (order granting mot. to suppress evidence).

**Searches & Seizures**

The Revised Constitution of American Samoa generally requires the government to obtain a warrant to search the areas enumerated in Article I, Section 5, unless an exception applies. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

Police officers may make a warrantless seizure under the "plain view" doctrine when they: (1) are lawfully in a position to observe the item seized, (2) discover the item in plain view, and (3) immediately recognize the incriminating character of the item. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

Immediate recognition under the "plain view" doctrine does not mean that a police officer must know the incriminating nature of the evidence. Rather, the officer must have probable cause to believe that the item found in plain view is incriminating. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

A reviewing court may consider the police officers' training, experience, and collective knowledge when assessing whether probable cause existed to believe that property found in plain view was incriminating. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

The level of evidence needed for "probable cause" is less than that needed for "proof beyond a reasonable doubt."

The exclusionary rule, which prevents the government from using evidence that was not obtained under a warrant or one of the warrantless exceptions, is a prophylactic rule that was designed to deter police misconduct but was not intended to deter objectively reasonable law enforcement activity. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

When police officers were lawfully in a position to observe a glass pipe, cut pink straw, methamphetamine, and cash because they were searching defendant's bedroom pursuant to a search warrant, although the items were not listed in the warrant, they were discovered in plain view and the officers had probable cause to believe the items were incriminating under the circumstances. *Am. Samoa Gov't v. Leafatia*, CR No. 15-15 (Trial Div. July 15, 2015) (order den. mots. to suppress evid. & to release $4,184.00).

The search warrant was not defective when it used the word "spotlight" instead of "headlight because it does not materially change the affidavit or circumstances. *Am. Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

It is well settled that a warrantless search violates the Fourth Amendment unless it comes within one of the few specifically established and well-delineated exceptions to the warrant requirement. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

The Fourth Amendment of the United States Constitution and the Revised Constitution of American Samoa protect the rights of people to be secure from unreasonable searches and seizures. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Article I, Section 5 of the Revised Constitution of the American Samoa does not require that every search and seizure be made pursuant to a warrant; it prohibits only unreasonable searches and seizures. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Police officers may conduct a temporary investigative stop of a vehicle if the stop is based upon reasonable suspicion. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Reasonable suspicion is based on an objective standard that looks to specific and articulable facts which, taken together with rational

inferences from those facts, reasonably warrant the stop. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

It is reasonable for the police to pull someone over for failing to have working headlights, and this failure meets the requisite reasonable suspicion requirement needed to stop the vehicle. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798 (1982) authorizes a search of any area of the vehicle in which the evidence might be found. . *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

If police have probable cause to believe a vehicle contains evidence of criminal activity, they may search it on the road or at the police station. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

A search may qualify as incident to lawful arrest—even if the search precedes a formal arrest—so long as probable cause to arrest existed prior to the search. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

A valid search incident to arrest is not limited to instances where the defendant is told prior to the search that he or she is formally under arrest. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Probable cause is a nontechnical, fluid concept, so a totality of the circumstances approach is used when determining if it exists in a particular situation. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Probable cause to search does not require there be probable cause to believe the owner or possessor of the property searched committed a crime. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

If there is probable cause to search the premises themselves for evidence of criminal activity, there is probable cause to justify detention of an occupant of those premises. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Once probable cause is confirmed and contraband is found on the premises, the occupant's person may be searched as well. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

Police had probable cause to search defendant's person when police properly searched the vehicle and found drugs on the passenger side of the vehicle. *Samoa Gov't v. Peric*, CR No. 05-15 (Trial Div. Aug. 21, 2015) (order den. mots. to dismiss & to suppress evidence).

**Counsel**

The Sixth Amendment to the United States Constitution and Article I, section 6 of the Revised Constitution of American Samoa guarantees a defendant a right in all criminal prosecutions to have the assistance of counsel for his defense. *Am. Samoa Gov't v. Lin*, CR No. 12-15 (Trial Div. July 15, 2015) (order granting mot. to suppress evidence).

The Sixth Amendment is violated when agents of the government, following an indictment, deliberately elicit incriminating words from the defendant in the absence of counsel. *Am. Samoa Gov't v. Lin*, CR No. 12-15 (Trial Div. July 15, 2015) (order granting mot. to suppress evidence).

## EMPLOYMENT LAW

**Hiring and Firing**[11]

The determination of whether an employee is wrongfully terminated depends on whether the person's employment is a just cause or an at-will relationship. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. Apr. 8, 2015) (op. & order).

An "at-will" employee may be fired without just or good cause unless there exists an express or implied contractual provision restricting the employer's right to terminate the employee. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. Apr. 8, 2015) (op. & order).

When there were no contractual employment provisions or external misrepresentations restricting the employer's ability to terminate the employee and the employer had fired the employee for violating company policies, the employee had not been wrongfully terminated. *Fulu v. Mobil Oil Am. Samoa*, CA No. 29-07 (Trial Div. Apr. 8, 2015) (op. & order).

[11] *See* CONTRACTS—Performance and Breach

**Government Employees**[12, 13]

The Back Pay Act, 5 U.S.C. § 5596, did not apply to petitioners, who were ASG employees, because they were not agency employees who had been affected by an unjustified or unwarranted personnel action and they were not appointed to the civil service or supervised by an individual named in 5 U.S.C. § 2105(a)(1). *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

Because petitioners' positions with the American Samoa Government were abolished due to lack of funds, petitioners' only administrative remedy is enrollment on the Reduction-in-Force Register and effectuation of territory-wide Reduction in Force procedures. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

While an employee fully reinstated after an appeal to the PAB is entitled to back pay, the employee is not entitled to full back pay when his position has been abolished and there is no funding. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

**Workmen's Compensation**

The Workmen's Compensation Act applies to inmates confined to public institutions in certain circumstances outlined in A.S.C.A. § 32.0525. *Manu v. Am. Samoa Gov't*, CA No. 04-15 (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss).

Under the Workmen's Compensation Act, an inmate is only entitled to an award upon being released from the institution on parole or final discharge, and the time for filing a claim begins at release. *Manu v. Am. Samoa Gov't*, CA No. 04-15 (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss).

If an inmate sustains a permanent partial disability while doing work that falls under the Workmen's Compensation Act, he is entitled to compensation equal to 66 2/3 percent of his average weekly wages for the amount of time-based on the disabled body part. *Manu v. Am. Samoa Gov't*, CA No. 04-15 (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss).

In American Samoa a contract of hire is not required for the payment of

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[12] *See* EMPLOYMENT LAW—Remedies
[13] *See* AMERICAN SAMOA GOVERNMENT—Government Employees

worker's compensation to an inmate. *Manu v. Am. Samoa Gov't*, CA No. 04-15 (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss).

"Public works activity" under A.S.C.A. § 32.0525 includes doing work to maintain public places and their physical infrastructure, such as a flag pole that is part of a police substation. *Manu v. Am. Samoa Gov't*, CA No. 04-15 (Trial Div. June 11, 2015) (order granting def.'s mot. to dismiss).

## FAMILY LAW

### Children & Minors[14, 15]

In cases concerning the adoption of a child, the Court is guided in its decision by the best interest of the parties and particularly, the welfare of the child. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

The Court considers many factors in making a determination for an adoption petition, and no one factor is controlling. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

The factors the Court considers in determining an adoption petition include: the age and health of the prospective adoptive parents; the suitability of the prospective adoptive parents' home; and the prospective adoptive parents' financial situation. All of these factors are compared to those of the natural parent(s) to determine the best interests of the child. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

In an adoption petition, the Court also considers whether or not the child is illegitimate and the proposed adoption would remove that stigma by way of an amended birth certificate. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

The Court is required to consider the legal effects of a proposed adoption on the child since rights of inheritance, blood entitlement to communal lands or even *matai* titles may be foreclosed to the child by granting an adoption. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

The Court denied an adoption petition by the child's grandmother because it found no compelling reason to justify a change and no

[14] *See* WILLS, TRUSTS AND ESTATES—Fiduciaries
[15] *See* AMERICAN SAMOA GOVERNMENT—The Judiciary

apparent benefit to the child to legally substitute a single grandmother in her mid-sixties for two fully-employed and well-educated natural parents in their late twenties. *In re a Minor Child*, FDAJR No. 33-14 (Trial Div. Sept. 18, 2015) (op. & order).

## INTERNATIONAL LAW

### General Provisions[16]

No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The extent to which the law of one nation is allowed to operate within the dominion of another nation depends on the "comity of nations." *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

"Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other; it is the recognition that one nation may allow the acts of another nation in regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

Comity applies not only between nations but also among different courts within a nation. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

Analyzing whether a foreign jurisdiction's decision will be recognized based on principles of comity is dependent on wide-ranging local policy considerations and involves serious questions of law and public policy. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse*

[16] *See* CONSTITUTIONAL LAW—Full Faith and Credit

*Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The Court will analyze whether to apply comity by considering a variety of policy considerations, including historical abuse of American Samoa's "jurisdictional deficiencies" by parties to maritime disputes, "forum manipulation" because of the Court's situation outside of a federal district or circuit, the perceived tendency of the Court to award lower damages than mainland fact finders, and attempts to pit the Court against mainland courts by filing "parallel litigation." *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

The Court declined to extend comity to foreign non-judicial proceedings, particularly when the commission seeking to be registered had been issued without any judicial review by the California Superior Court. *In re the Application by Adriatic Sea Fisheries, Ltd. to Register Cal. Comm'n & to Issue a Subpoena to the Custodian of Records of Purse Seine Samoa, Inc.*, FJ No. 01-15 (Trial Div. June 12, 2015) (order denying am. pet.).

## LEGAL PROFESSION

### Duty to Client[17]

An attorney is disqualified from participation in a case when he or she formerly represented one party and advised them of their rights in regards to the matter currently before the court, but now represents the other party before the court. *Vitaliano v. Three Y, Inc.*, CA No. 22-15 (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial).

Representing one side in redrafting and renegotiating a lease and then suing to evict those former clients on behalf of the other side without the informed consent of the former clients contravenes ABA Model Rule 1.9, even if the lease agreement is never used. *Vitaliano v. Three Y, Inc.*, CA No. 22-15 (Trial Div. Aug. 10, 2015) (order on defs.' mots. to disqualify pls.' counsel, dismiss or remove this matter from summ. proceedings, & vacate trial).

In governing attorneys' professional conduct, the High Court of American Samoa follows the ABA Model Rules of Professional

[17] *See* WILLS, TRUSTS AND ESTATES—Procedural Issues

Conduct. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

A concurrent conflict of interest includes a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

Counsel cannot represent decedent's brother, decedent's minor child, and the estate because it results in a conflict of interests in violation of Rule 1.7 of the ABA Model Rules of Professional Responsibility. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

**Duty to Court**[18]

The Court will not tolerate counsel for the government failing to follow statutory commands and acting inattentive and indifferent to what the law requires. *Am. Samoa Gov't v. Blake*, CA No. 08-15 (Trial Div. Nov. 20, 2015) (order continuing proceedings).

**Compensation**[19, 20]

American Samoa follows the "American Rule," which states that in the absence of statute, contract, or other legal basis to the contrary, each party bears the burden of his or her own attorney's fees. *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

American Samoa does not have an equivalent to the federal Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412, and thus awards of attorney's fees must be based on the "American Rule." *Solomuli v. Am. Samoa Gov't*, AP No. 15-12 (App. Div. Feb. 6, 2015) (order & op.).

The American Rule does not serve as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. This Court has long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *Heraliti v. Am. Samoa Gov't*, CA No. 67-14 (Trial

[18] *See* AMERICAN SAMOA GOVERNMENT—The Judiciary
[19] *See* AMERICAN SAMOA GOVERNMENT—General Principles
[20] *See* CIVIL PROCEDURE—Pretrial Motions

Div. Sept. 3, 2015) (order den. resp't's mot. for recons.).

Respondent's actions were wanton and reckless when respondent failed to fight the claim for attorney's fees and was on notice of such claim immediately upon being served with process in this action; respondent failed to follow the Court's discovery protocols and failed to comply with A.S.C.A. § 41.0510(c); and respondent arrested and confined plaintiffs without providing justification. *Heraliti v. Am. Samoa Gov't*, CA No. 67-14 (Trial Div. Sept. 3, 2015) (order den. resp't's mot. for recons.).

Absent a statute requiring attorney's fees or acts of bad faith, wantonness, or oppressiveness, attorney's fees are not generally awarded. *Conference of Samoan Adventist Church (Am. Samoa), Inc. v. Ekalesia Asofitu Tuto'atasi I Amerika Samoa, Inc.*, CA No. 02-15 (Trial Div. Sept. 16, 2015) (op. & order).

## MATAI TITLE DISPUTES

### Territorial Registrar Procedures

A written claim of succession to a *matai* title, filed with the Territorial Registrar, is necessary. *In re Matai Title "Tuana'itau,"* MT No. 04-14 (Land & Titles Div. Mar. 31, 2015) (order invalidating successor *matai* claim, referring the selection process back to the family & dismissing action).

The petition to register a claim of succession to a *matai* title must state 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. *In re Matai Title "Tuana'itau,"* MT No. 04-14 (Land & Titles Div. Mar. 31, 2015) (order invalidating successor *matai* claim, referring the selection process back to the family & dismissing action).

When only a few members of other clans of the family attended the family meetings, members of claimant's clan constituted the majority and dominated the decision making at the meetings, and notice was not adequately provided to members of the extended family, the claimant's claim with the Territorial Registrar was invalidated and the process to select the successor to the title was referred back to the family to select the successor to the title in the manner provided under family traditions at meetings called for that purpose. *In re Matai Title "Tuana'itau,"* MT No. 04-14 (Land & Titles Div. Mar. 31, 2015) (order invalidating successor *matai* claim, referring the selection process back to the family & dismissing action).

**Procedural Rules**

Prior compliance with the requirements of A.S.C.A. § 43.0302 is a prerequisite to the Land and Titles Division's proper assertion of jurisdiction over controversies relating to communal land or *matai* titles. *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

A.S.C.A. § 43.0302 contemplates a serious attempt to resolve the controversy instead of a merely perfunctory proceeding. *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

When the parties' two meetings at the Office of Samoan Affairs only took a total of 30 minutes and the certificate of irreconcilable dispute lacked detail, the court found the parties had failed to fully comply with *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

Compliance with A.S.C.A. § 43.0302 should be detailed in the certificate of irreconcilable dispute, but it can be supplemented by documentation tending to confirm compliance if the certificate is found wanting in detail. *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

*Matai* selection is properly within the purview of the Samoan family, and when the family has not properly met to consider the issue of *matai* succession, the Land and Titles Division lacks subject matter jurisdiction over the *matai* succession dispute. *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

The Land and Titles Division lacked subject matter jurisdiction over a *matai* succession dispute when there was no evidence to show that the issue was raised at two family meetings, notice of these meetings was likely given by word of mouth through emissaries acting on behalf of only one of the parties, and key family members were missing as a result of the lack of notice. *In re Matai Title "Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

It is illegal for individuals to co-hold a *matai* title under A.S.C.A. § 1.0414 and making such proposal could be considered aiding and abetting criminal activity in violation of the law. *In re Matai Title*

*"Ma'aka" aka "To'omata,"* MT No. 02-07 (Land & Title Div. July 14, 2015) (order of dismissal for lack of subj. matter jurisdiction).

Summary judgment may effectively nullify the statutory authority for an objector to the election or counterclaimant to title to have his or her day in court with a trial on the merits in a judicial *matai* selection proceeding, and thus, should be denied. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

**Statutory Qualifications for Title**

Case law applies two distinct rules to measure candidates' hereditary rights to a judicially contested *matai* title. The original rule looks at each candidate's closest blood relationship to a former titleholder. The newer *Sotoa* rule counts generations from the original titleholder, or at least from a common ancestor. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

A common family tradition holds that the first titleholder's children define the identity of the family clans. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

While customs and traditions may provide usage in future similar situations when choosing a *matai*, they are still fluid and subject to modification by those who tend to those situations. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

The family members' conscientious decision to continue a meeting to select the successor to a vacant title after being appraised of a few family members' concerns of convening family meetings in Tutuila, instead of the traditional location in Ofu, justifiably modified the custom or tradition of this family for the purpose of successor *matai* selection. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

Although both the claimant and counterclaimant led admirably constructive lives, the claimant was considered significantly more forceful, in part because he visibly and actively participated in the family, village, and territorial affairs while the counterclaimant had not been openly active in this family's affairs. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

Claimant, who prevailed on second priority consideration of the wish of the family's customary clans, the third priority consideration of personal characteristics, and the fourth priority consideration of his value to the family, and ranked equally on the first priority consideration of best

hereditary right, was awarded the title. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

**Priority of Statutory Criteria**

The best hereditary right to a title among the candidates is the first and highest priority consideration of the four criteria. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

The second highest priority consideration is the wish of the majority or plurality of the family's customary clans. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

In *matai* title disputes, the third-priority consideration is the forcefulness, character and personality of candidates, and their knowledge of Samoan customs. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

The competing candidates' potential value to the family is ranked fourth in priority. *In re Matai Title "Le'i,"* CA No. 06-14 (Trial Div. Dec. 22, 2015) (op. & order).

## REAL PROPERTY

**Public Lands**

The plain language of Ordinance No. 15, issued by the Commandant of the United States Naval Station in Tutuila on September 3, 1900, states that land along the shore at high water mark of a uniform width of 15 feet distant inland from the shore was condemned and appropriate for public uses. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The Ordinances were an effective and fair means for the government to acquire land and the best way to condemn such a large section of land across the property of so many frequently unregistered, and therefore, unknown owners. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The government has retained property rights after the condemnation of the filled portion of the land contained in the Ordinances from the old shoreline up to and including the new shoreline. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The fact that the government may not have provided receipts showing the compensation given for the land condemned under the Ordinances does not matter because the condemnation was proper since compensation was offered. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The littoral rights to the land contained in the Ordinances were taken in 1900 when the Ordinances were enacted and since the statute of limitations for land actions is 20 years, any claims related to land condemned under the Ordinances is barred by the statute of limitations. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The fact that records showing a family was compensated for a taking are not available does not defeat a condemnation's legitimacy. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

Once the government has properly obtained land through a valid taking, the government owns the condemned land in fee simple and title to the condemned property vests in the condemning authority so it is not required to later return the land to the original owners even if the land is not used for the purpose stated at the time of the taking and was originally communal land. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

The government has allowed families to use condemned land that was previously communal land for family purposes as long as any building construction and uses conform to government requirements. *In re Registration of Land "Vesiai" in the Village of Pago Pago*, LT No. 08-11 (Land & Titles Div. Apr. 10, 2015) (op. & order).

**Communal Lands**[21, 22, 23, 24]

Communal land is owned by the family, and the *matai* as the *sa'o* at the head of the family has the *pule*, or control, overuse of the land, including assignments of portions of the land for a family member's use. *Sualua v. Tuifatu*, CA No. 47-15 (Trial Div. Oct. 1, 2015) (j. for possession by summ. proceedings).

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[21] *See* COMMUNAL LANDS—Landlord-Tenant
[22] *See* REAL PROPERTY—Public Lands
[23] *See* REAL PROPERTY—Registration of Land
[24] *See* REAL PROPERTY—Alienation of Land

It is within the *sa'o*'s *pule*, or authority, to determine what should be done with structures on family lands. *Scanlan v. Kava*, LT No. 04-06 (Trial Div. Jul. 2, 2015) (op. & order).

Communal land is land owned by a Samoan family with a *matai* as the sa`o at the head of the family having *pule* over the land in a manner similar to a trustee. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

The sa`o makes the decisions concerning family communal land, including assignments of land to individual family members. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

**Individually Owned Land**[25, 26]

Individually owned land is defined as land registered as the individual property of a person or determined to be individual property of a person by a final decision of the High Court of American Samoa. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

Individually owned land must be land cleared in its entirety or substantially so from the virgin bush by an individual through his own initiative and not by, for, or under the direction of his *aiga* or its senior *matai*; cultivated entirely or substantially so by him; and occupied by him, his family, or agents continuously from the time of the clearing of the bush. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

Freehold land is land created by court grant prior to 1900 that has not been returned the status of either communal or individually owned land at the behest of the owner. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

Freehold lands may be alienated to any person regardless of his or her ancestry. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

**Evidence of Ownership**[27]

**Alienation of Land**

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[25] *See* REAL PROPERTY—Registration of Land
[26] *See* REAL PROPERTY—Alienation of Land
[27] *See* REAL PROPERTY—Individually Owned Land

Communal land may not be alienated to any individual without the Governor's written approval. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

Individually owned land may not be alienated to persons with less than half American Samoan blood. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

**Registration of Land**

Land registration in compliance with the statutes creates a strong presumption that those individuals whose names appear on the registration certificate have good title over the registered land described in the certificate. *Holi v. Territorial Registrar*, LT No. 11-12 (Land & Titles Div. July 14, 2015) (op. & order).

The presumption of lawful ownership and possession that arises from a proper registration may be rebutted if there is compelling proof that the certificate of registration was fraudulently obtained or if there are fatal irregularities that affirmatively appear upon the face of the registration documents. *Holi v. Territorial Registrar*, LT No. 11-12 (Land & Titles Div. July 14, 2015) (op. & order).

When the defendant used her relationship with the plaintiff, and the extenuating circumstances with the illness of plaintiff's spouse, to intentionally misrepresent her familial relationship with plaintiff to obtain the deed to the property in defendant's name, the court held that the deed to the property was null and void ab initio. *Holi v. Territorial Registrar*, LT No. 11-12 (Land & Titles Div. July 14, 2015) (op. & order).

The High Court has the authority to enjoin the registration of land under T.C.R.C.P. Rule 65 and T.C.R.L.T. Rule 5. *Roush v. Kneubuhl*, LT No. 20-13, CA No. 28-13 (Land & Titles Div. Aug. 12, 2015) (order granting mot. to compel def. to attend dep. & granting mot. to enjoin registration of land).

There are three primary types of land in American Samoa: communal land, individually owned land, and freehold land. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

**Landlord-Tenant**

Summary proceeding are available to recover possession of premises, including structures such as a Church building, upon termination of the occupant's lawful possession. *Sualua v. Tuifatu*, CA No. 47-15 (Trial Div. Oct. 1, 2015) (j. for possession by summ. proceedings).

When permissive occupation of land is given without a provision for rent or term, either a tenancy at will or a license is created depending on the other circumstances. *Sualua v. Tuifatu*, CA No. 47-15 (Trial Div. Oct. 1, 2015) (j. for possession by summ. proceedings).

When an individual who was assigned a portion of land by the *sa'o* of the family terminates permissive occupation of the land that he granted to a third party, that individual is entitled to restoration of the premises. *Sualua v. Tuifatu*, CA No. 47-15 (Trial Div. Oct. 1, 2015) (j. for possession by summ. proceedings).

Generally, it is only necessary to determine who has the superior right of possession in an action for eviction. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

When a person occupies property with permission of the owner but without any provisions for rent, a tenancy at will is created. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

[In a tenancy at will, the tenant is entitled to reasonable notice to quit, but the owner still retains the right to give the tenant notice to quit. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

Substantial improvements made to the property by the tenant do not change the owner's right to request a tenant vacate the premises, though the tenant may be entitled to compensation. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

The Court dismissed plaintiffs' complaint in an eviction suit for lack of standing when the owner of the house defendants were living in had died, and her heirs had not been judicially determined yet. *Aumavae v. Toloumu*, LT No. 27-14 (Land & Titles Div. Sept. 23, 2015) (op. & order).

## TAXATION

**Procedural Issues**

The High Court has exclusive original jurisdiction over all judicial proceedings in American Samoa with respect to the American Samoa Income Tax. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req.

for subpoena).

If a taxpayer produces credible evidence with respect to any factual issue relevant to their tax liability, the burden shifts to the tax office with respect to such issue. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

Burden shifting with regards to tax liability only applies when (1) the taxpayer has complied with the requirements to substantiate any item, (2) the taxpayer has maintained all records required under this title and has cooperated with reasonable requests for information, and (3) in case of partnerships, corporations, or trusts, further special requirements are met. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

**Deficiency Proceedings**

Without adequately describing the tax deficiency nor formally requesting information, the government cannot expect a petitioner to blindly pay a seemingly arbitrary number. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

When the government failed to adequately describe the tax deficiency and did not formally request any information, and petitioner had provided factual credible evidence under 26 U.S.C. § 7491, the burden was shifted to the government to prove their findings on petitioner's tax liability. *Exxonmobil Asia Pac. PTE, Ltd. v. Am. Samoa Gov't*, CA No. 38-14 (Trial Div. Aug. 17, 2015) (order granting pet'r's mot. to shift burden of proof, den. resp'ts' mot. to bifurcate trial, & den. pet'r's req. for subpoena).

## TORTS

**Negligence**

In a negligence action, the plaintiff must, by a preponderance of the evidence, establish the following elements: (1) duty; (2) breach; (3) causation; and (4) damages for injuries to person and property. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

There are two types of causation that need to be shown in a negligence action—proximate and factual. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Proximate cause necessitates that the plaintiff first proves that the defendant's conduct, or lack thereof, was a cause in fact of the plaintiff's injuries. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Factual cause is that cause, which in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

It is the plaintiff's burden to prove that the defendant's conduct more likely than not was the cause in fact of the plaintiff's injury. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

To establish factual causation, the plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Where the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result is not one within common knowledge, expert testimony may provide sufficient basis for it, but in the absence of such testimony, it may not be drawn. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Generally, duty is a question of law which depends on the foreseeability of the risk and a weighing of policy considerations for and against the imposition of liability. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Drivers of ASG school buses have a duty to everyone on the road, just like any other driver. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

The Court held it is foreseeable that failing to drive carefully in the rainy, wet conditions may result in injury and thus an ASG bus driver was negligent when he carelessly hit petitioners' vehicle and then again when he left the scene of the crime. *In re Ben Fa'asamoa Fanene v. Am.*

*Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Negligence requires allegations of duty, breach, causation, and damages. *Dev. Bank of Am. Samoa v. Hunt*, CA No. 34-14 (Trial Div. Oct. 20, 2015) (order granting am. samoa gov't's mot. to dismiss third-party compl.).

**Negligent Infliction of Emotional Distress**

This Court recognizes the tort theory of negligent infliction of emotional distress as a cause of action available in American Samoa. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Negligent infliction of emotional distress is not an independent tort; it is a tort of negligence. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Whether plaintiffs can recover damages for negligent infliction of emotional distress is dependent upon traditional tort analysis, and the elements of duty, breach of duty, causation, and damages that must exist to support the cause of action. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

There are two general theories by which a plaintiff may present a negligent infliction of emotional distress claim: the "bystander" theory is based on a breach of duty owed to the public in general, and the "direct victim" theory is based on a breach of a duty of care directly owed the plaintiff by the defendant. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

The "direct victim" theory for a negligent infliction of emotional distress claim existed when defendant owed a duty to plaintiff and plaintiff was nearly hit by defendant's vehicle. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

Plaintiff fell under the "bystander" theory for a negligent infliction of emotional distress claim when he was the son of the man defendant nearly hit with defendant's vehicle, he was in defendant's vehicle at the time, and defendant left the scene of the crime with plaintiff, letting plaintiff believe his father had been killed. *In re Ben Fa'asamoa Fanene v. Am. Samoa Gov't*, CA No. 06-10 (Trial Div. Mar. 10, 2015) (op. & order).

**Government Tort Liability Act**

The public duty doctrine is a common law theory that exists in the territory. *Vaivai v. Am. Samoa Gov't*, CA No. 53-13 (Trial Div. Feb. 9, 2015) (order den. mot. for j. on the pleadings).

The Government Tort Liability Act is a separate doctrine related to, but not in conflict with, the public duty doctrine. *Vaivai v. Am. Samoa Gov't*, CA No. 53-13 (Trial Div. Feb. 9, 2015) (order den. mot. for j. on the pleadings).

The public duty doctrine is meant to encourage governments to provide public assistance in emergency situations and applies whenever a government responds to an emergency situation. *Vaivai v. Am. Samoa Gov't*, CA No. 53-13 (Trial Div. Feb. 9, 2015) (order den. mot. for j. on the pleadings).

## WILLS, TRUSTS AND ESTATES

### Execution[28]

### Procedural Issues[29]

In probate, an attorney for an estate forms an attorney-client relationship with a personal representative of the estate. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

Although it is prevalent in many state jurisdictions, the notion of self-authenticating or self-proving wills does not apply in American Samoa. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

American Samoa has not adopted the Uniform Probate Code, nor its self-proving will provision. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

The issue of whether to adopt the Uniform Probate Code is a matter for the legislature and not the court. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

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[28] *See* WILLS, TRUSTS AND ESTATES—Procedural Issues
[29] *See* CIVIL PROCEDURE—Parties & Claims

T.C.R.Pr. Rule 11 requires that one of the attesting witnesses must testify as to the validity of the will, the capacity of the testator, and the voluntariness of the execution. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

T.C.R.Pr. Rule 11 states that an affidavit may be substituted for an attesting witness if none of the attesting witnesses are available. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

If the attesting witnesses to a will are dead or cannot be located after the exercise of due diligence, the Court may accept whatever extrinsic evidence as to the validity of the will the court deems appropriate. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

T.C.R.Pr. Rule 11 does not impliedly embrace the self-proving standard by allowing proof of a will by other evidence when witnesses are unavailable. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

T.C.R.Pr. Rule 8 requires a petitioner to file an original will or codicil in the case of petition for letters testamentary. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

**Modification or Change**

If a codicil has been delivered to a testator, but cannot be found after the testator's death, the common law presumes that the codicil was destroyed with the intention to revoke it. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

The presumption that a will or codicil was destroyed with the intent to revoke it if it cannot be found after the testator's death is not conclusive and may be overcome by clear and convincing evidence that the testator did not destroy the original with the intent to revoke it. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

**Administration**

An executor or administrator of the estate is a personal representative of the estate. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

If a decedent dies intestate and leaves no surviving spouse, the High Court shall grant letters of administraton to the next of kin in the order of their degree of relationship to the deceased, and the administrator is selected in the discretion of the Court. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

Daughter was ineligible to serve as executrix of her mother's will when she was not a resident of the Territory under A.S.C.A. § 40.0306, which looks to one's place of domicile to determine residency. *In re the Estate of Joyce Sawyer*, PR No. 26-15 (Trial Div. Dec. 7, 2015) (order on pet. to admit will to probate).

**Fiduciaries**

If an infant does not have a duly appointed representative, the court shall appoint a guardian ad litem for the infant or make other orders it deems proper for the protection of the infant. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

Any person who is over 21 years, resides in American Samoa, and is mentally competent can be a guardian ad litem. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

A minor is a necessary party when they are not currently a party in the matter and have property interests in the estate because they are first in line to inherit decedent's estate. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

A minor may appear as a party in a probate preceding that affects his property interests through his guardian ad litem. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).

The Court may appoint a minor's parent to serve as their guardian ad litem if the parent meets the statutory requirements. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian

ad litem to retain counsel).

The Court may order a minor and his guardian ad litem to hire an attorney or seek help from the legal aid office in order to protect the minor's interests. *In re the Estate of Aperaamo Mamani*, PR No. 19-15 (Trial Div. Sept. 10, 2015) (order to join necessary party, appoint guardian ad litem for minor, direct guardian ad litem to retain counsel).