

AMERICAN SAMOA SLIP OPINIONS

2016 Decisions

Covering Certain Opinions
From the Divisions of the
High Court of American Samoa
From January to December 2016

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Pago Pago, American Samoa 96799

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The 2016 slip opinion compilation is organized by court division with the opinions listed in chronological order within the court division grouping. There are no page numbers in this volume. 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. A slip opinion page number is indicated by a number in bold font and enclosed on each side by two asterisks and a bracket (e.g., “[**2**]”).

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SLIP OPINIONS
OF THE
APPELLATE DIVISION
OF THE
HIGH COURT OF AMERICAN SAMOA
(2016)

Cite As: *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14, slip op. at [page number] (App. Div. Feb. 19, 2016) (op. & order on reh'g)

AMERICAN SAMOA GOVERNMENT, Petitioner,

v.

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

High Court of American Samoa
Appellate Division

AP No. 10-14

February 19, 2016

[1] American Samoa Government is not a “board, commission, department or officer of the government” and thus, it is not an agency.

[2] The generally accepted understanding is that an “agency” is a branch of the government, not the government itself.

[3] It is clear then under American jurisprudence, “agency” typically does not refer to the government as a whole, but rather to departments of the government, usually under the executive branch, that implement legislation.

[4] American Samoa Government is also not an “individual, partnership, corporation, association, [or] governmental sub-division.” It does, however, fit the definition of public “organization of any character, other than an agency.”

[5] The ordinary meaning of the words in the phrase “public . . . organization of any character” plainly encompasses the government, which is the epitome of a public organization.

[6] There is a presumption that parties, including the government, are entitled to judicial review of administrative action.

[7] American Samoa Government is a “person” for purposes of A.S.C.A. § 4.1040(a) and entitled to judicial review of final agency decisions.

[8] A legislature may delegate some of its legislative power, including

rulemaking authority, to executive branch agencies, but the rules must be consistent with the statutes under which the rules are promulgated and within the legislative delegation.

[9] All an agency is empowered to do under A.S.C.A. § 4.1002(1) is to promulgate rules dealing with matters of agency “practice” and “procedure.”

[10] The legislature did not intend to sanction agency rulemaking on matters of substantive import, such as a party’s right to judicial review.

[11] When administrative code provisions are inconsistent with statutory provisions, the statute prevails.

[12] The Administrative Procedures Act clearly provides for judicial review of final decisions by an agency in American Samoa.

Before KRUSE, Chief Justice; RICHMOND, 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

OPINION AND ORDER ON REHEARING

RICHMOND, Associate Justice:

On August 19, 2015, the Court granted the petition for rehearing filed by Petitioner American Samoa Government (“ASG”) on the dismissal of this proceeding by the Court’s March 10, 2015 order, which held that ASG is precluded from appellate review of the orders made by Respondent Administrative Law Judge (“ALJ”) on April 30, 2014, and June 23, 2014.

On October 30, 2015, the Court reheard arguments on the motions filed by Respondent Richard Seumanutafa (“Seumanutafa”) to: (a) dismiss the petition for rehearing filed by Petitioner ASG and (b) strike ASG’s opposition to the motion to dismiss. For the reasons set forth below, the Court holds for ASG. **[**2**]**

Jurisdiction

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

Standard of Review

Pursuant to statute, we judicially review the record filed by the agency of government issuing the final decision in a contested case. A.S.C.A. §§ 4.1040, .1043. This Court may not substitute its judgment for that of the agency as to the weight of evidence on questions of fact and must afford appropriate weight to the agency's experience, technical competence, and specialized knowledge when reviewing the agency's interpretation of evidence, factual inferences, and conclusions of law. A.S.C.A. § 4.1043. The Court may reverse or modify the agency's decision or remand the case back for further proceedings upon deciding the substantial rights of the person have been prejudiced because the agency's decision is:

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

A.S.C.A. § 4.1044. **[**3**]**

Background and Case History

In July 2011, the Criminal Justice Planning Agency ("CJPA") began the process to terminate Seumanutafa, a career service employee working for CJPA, by placing him on annual leave and recommending to the director of Human Resources ("DHR") that Seumanutafa be terminated. Soon after, Seumanutafa stopped receiving compensation and benefits from ASG. In November 2012, Seumanutafa wrote a letter to the ALJ that was treated as a *pro se* complaint against ASG, seeking reinstatement in the career service and compensation for personal property taken from his office.¹

In August 2013, Seumanutafa was rehired to his old position, though no back compensation was awarded on his reinstatement. Seumanutafa did not timely seek ALJ review of the DHR's final decision not to include back wages in his re-hiring pursuant to A.S.A.C. §§ 4.0901-.0904, nor did he dismiss his claim seeking reinstatement in the ASG career service

¹ The record is not clear on whether Seumanutafa actually filed a separate "complaint" other than his November 2012 letter. A Summons was issued by the ALJ on November 20, 2012, against ASG, the Criminal Justice Planning Agency, and the Department of Human Resources, but the record does not indicate which parties were actually served.

pending with the ALJ.

Despite being reinstated, Seumanutafa's complaint proceeded to a hearing before the ALJ on April 21, 2014. On April 30, 2014, the ALJ decided that Seumanutafa was entitled to back pay **[**4**]** and benefits for 36 pay periods. On June 23, 2014, the ALJ denied ASG's motion for reconsideration.

ASG subsequently filed a petition for review with the Appellate Division of the High Court on July 21, 2014. Seumanutafa filed a motion to dismiss the petition on August 11, 2014. ASG opposed the motion to dismiss, which led to Seumanutafa filing a motion to strike ASG's opposition to the motion to dismiss on October 6, 2014.

On March 10, 2015, the Court issued an order and opinion dismissing ASG's petition for review, holding that only a career service employee could appeal an ALJ decision where the ALJ was acting for the Personnel Advisory Board ("PAB"). ASG timely filed a petition for rehearing pursuant to A.C.R. 40, which the Court granted on August 19, 2015. We heard this matter on October 30, 2015.

Discussion

At issue is the discrepancy between A.S.C.A. § 4.1040(a) and A.S.A.C. § 4.0902(j) when the petitioner is the government in an employment case. Two issues are key to resolving this discrepancy: first, whether ASG is a "person" as defined by A.S.C.A. § 4.1001(f) and thus has a right to judicial review under § 4.1040(a) and second, whether ASG may appeal a PAB order despite A.S.A.C. § 4.0902(j) if it is a "person" for purposes of A.S.C.A. § 4.1040(a). **[**5**]**

1. ASG is a "person" under A.S.C.A. § 4.1001(f) and entitled to judicial review.

The Administrative Procedures Act ("APA") provides that "[a] person who has exhausted all administrative remedies available within an agency and who is aggrieved by a final decision in a contested case shall be entitled to judicial review." A.S.C.A. § 4.1040(a). Section 4.1001(f) defines "person" as "any individual, partnership, corporation, association, governmental sub-division, or public or private organization of any character, other than an agency." An "agency" is defined as "each board, commission, department or officer of the government, other than the legislature or the courts, authorized by law to make rules or to determine contested cases." A.S.C.A. § 4.1001(a).

[1-3] ASG is not a “board, commission, department or officer of the government” and thus, it is not an agency. The generally accepted understanding is that an “agency” is a branch of the government, not the government itself. Black’s Law Dictionary defines “agency” as “a governmental body with the authority to implement and administer particular legislation.” BLACK’S LAW DICTIONARY 67 (8th ed. 2004). It defines “federal agency” as “[a] department or other instrument of the executive branch of the federal government, including a government corporation and the Government Printing Office.” *Id.* at 68. The Federal [**6**] Administrative Procedure Act defines agency as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency,” but not including the Congress, the courts of the United States, or the governments of the territories or possessions of the United States. 5 U.S.C.S. § 551 (2015). It is clear then under American jurisprudence, “agency” typically does not refer to the government as a whole, but rather to departments of the government, usually under the executive branch, that implement legislation.

[4-6] ASG is also not an “individual, partnership, corporation, association, [or] governmental sub-division.” It does, however, fit the definition of public “organization of any character, other than an agency.” The ordinary meaning of the words in the phrase “public . . . organization of any character” plainly encompasses the government, which is the epitome of a public organization. Furthermore, holding that ASG is a public organization and thus entitled to judicial review is in line with the presumption that parties, including the government, are entitled to judicial review of administrative action. *See, e.g., Pinnacle Armor, Inc. v. United States*, 684 F.3d 708, 718 (9th Cir. 2011) (citing *Traynor v. Turnage*, 485 U.S. 535, 542 (1988)).

[7] Consequently, we hold that ASG is a “person” for purposes [**7**] of A.S.C.A. § 4.1040(a) and entitled to judicial review of final agency decisions.²

² It appears from the record that the original respondent was sometimes styled as “American Samoan Government/Criminal Justice Planning Agency” and sometimes styled as “American Samoa Government, American Samoa Department of Human Resources and the American Samoa Criminal Justice Planning Agency.” During the pendency of the case before the ALJ, Appellant came to be styled as “American Samoan Government” without any sort of formal order to support this change.

An “agency” is defined as a “board, commission, department or officer . . . authorized by law to make rules or to determine contested cases.” A.S.C.A. § 4.1001(a) (emphasis added). However, although the Criminal Justice Planning Agency is styled as an “agency,” the statutes

2. A.S.A.C. § 4.0902(j) is inconsistent with A.S.C.A. § 4.1040(a) and not applicable.

Although A.S.C.A. § 4.1040(a) states that any person who has exhausted administrative remedies is entitled to judicial review, A.S.A.C. § 4.0902(j) provides that an order of the PAB “shall be final, subject only to further action if the *employee* appeals the decision in court.” (Emphasis added). This administrative rule suggests that Petitioner ASG cannot appeal a decision of the PAB to the High Court since ASG is an employer and not an employee.

[8] A.S.A.C. § 4.0902(j) is an administrative rule promulgated by an executive branch agency pursuant to the APA, A.S.C.A. §§ 4.1001-.1026. A legislature may delegate some of its legislative power, including rulemaking authority, to executive **[**8**]** branch agencies. See *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (“Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”). However, this grant of legislative power is limited because “[a]dministrative rules must not only be consistent with the statute under which they are promulgated, but also within the scope of the legislative delegation.” *Lauvao v. Am. Samoa Gov’t*, 1 A.S.R.3d 224, 226 (Land & Titles Div. 1997); see also *Nat’l Pac. Ins. Co., Ltd., v. Comm’r*, 5 A.S.R.3d 183, 188 (Trial Div. 2001).

[9-10] A.S.C.A. § 4.1002(1) mandates and empowers government agencies to: “adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available” Thus, all an agency is empowered to do under § 4.1002(1) is to promulgate rules dealing with matters of agency “practice” and “procedure.” The American Samoa Legislature did not intend to sanction agency rulemaking on matters of substantive import, such as a party’s right to judicial review. Indeed, allowing agencies to make such regulations would curtail the judiciary’s exercise of its “judicial power” under REV. CONST. AM. SAMOA art. III, § 1, possibly in an

that established it do not, in fact, give it the power to make rules or determine contested cases. A.S.C.A. § 46.0104. Thus, the Criminal Justice Planning Agency would fall within the definition of a governmental sub-division, not an agency. A “governmental sub-division” is included in the definition of a “person” under A.S.C.A. § 4.1001(f) who is entitled to judicial review. Thus, even if the respondent had proceeded as the Criminal Justice Planning Agency, or some form thereof, it would have been entitled to judicial review under A.S.C.A. § 4.1001(f).

unconstitutional manner.³

[11-12] When administrative code provisions are inconsistent with statutory provisions, the statute prevails. See *Fa'avae v. Am. Samoa Power Auth.*, 5 A.S.R.2d 53, 54-55 (Trial Div. 1987). “[R]egulations . . . do not and cannot supersede . . . mandatory statutory requirement[s].” *Leiato v. Pers. Advisory Bd.*, 21 A.S.R.2d 25, 31 (App. Div. 1992). The APA clearly provides for judicial review of final decisions by an agency in American Samoa. A.S.C.A. § 4.1040(a). Yet, A.S.A.C. § 4.0902(j) attempts to curtail this right by limiting who may obtain judicial review from an order of the PAB to employees. Thus, A.S.A.C. § 4.0902(j) is inconsistent with A.S.C.A. § 4.1040(a).

Public policy also favors allowing ASG the right to judicial review, even in employment cases. Proceedings before the ALJ pursuant to A.S.A.C. § 4.0902 concern the suspension, involuntary demotion, or removal of a career service employee. A.S.A.C. § 4.0901. If the ALJ finds in favor of the employee, the employee may be fully reinstated and receive the attendant benefits—including back pay and other forms of compensation. A.S.A.C. § 4.0902(k). This puts public revenue and government resources directly at stake in these proceedings. Nevertheless, A.S.A.C. § 4.0902(j) purports to foreclose judicial review of an award of public, government funds when the government employer believes there has been an appealable error in that award.

Finally, although the ALJ sits in place of the PAB in certain cases under the APA, the PAB and ALJ are still separately established statutory entities. See A.S.C.A. §§ **[**10**]** 4.0602, 7.0101. The PAB is a seven-member body that is purely advisory in nature and is without independent “power to hire and fire” government employees. See A.S.C.A. § 7.0102(a); *Banks v. Am. Samoa Gov’t*, 4 A.S.R.2d 113, 118 (Trial Div. 1987). Conversely, the ALJ has jurisdiction over many different kinds of matters.⁴ See A.S.C.A. § 4.0604. With respect to personnel matters, the

³ We make no ruling on the constitutionality of the statutes and regulations at issue in this case at this time. We merely note our concern that when agencies make rules regarding substantive matters, it could lead to a violation of the separation of powers doctrine.

⁴ Agencies are often created to help effectively administer laws enacted by the legislation. See, e.g., *Nat’l Pac. Ins. Co. Ltd.*, 5 A.S.R.3d at 188. The theory is that an agency or the ALJ is better able to create rules and make decisions within the subject matter they specifically handle because they have developed expertise in that subject matter. However, the ALJ Act may have removed the expertise element out of the agency review process here. Perhaps also gone is the appropriateness of the deferential

Legislature directly vested the ALJ with jurisdiction to conduct hearings and issue decisions with respect to “[c]ontroversies, grievances and administrative appeals by government employees on matters pertaining to employment, including matters pertaining to hiring, termination, suspension and discipline.” A.S.C.A. § 4.0604(b). The ALJ also holds “[t]he responsibilities formerly held by the Personnel Advisory Board pursuant to section 7.0102.” *Id.*

A.S.A.C. § 4.0902(j) was adopted before the Administrative Law Judge Act of 1998, which transferred the final administrative agency hearing authority of the PAB to the ALJ. *See Nat’l Pac. Ins. Co., Ltd.*, 5 A.S.R.3d at 190. As discussed above, the PAB’s responsibilities pursuant to A.S.C.A. § 7.0102 **[**11**]** were purely advisory, unlike the ALJ, who conducts hearings and issues final decisions. Therefore, it makes little sense to apply A.S.A.C. § 4.0902(j), which was written to apply to an advisory board, to prohibit ASG from obtaining judicial review from a final agency decision by the ALJ.

One final matter must be addressed. Seumanutafa argues that allowing ASG to appeal a decision from the ALJ would likely result in the Office of the Attorney General representing both Petitioner ASG and Respondent ALJ. This Court has previously held that “[t]he agency issuing the order [shall be] named as the respondent” in an appeal from a final agency order to the Appellate Division of the High Court. *See Viena v. Am. Samoa Gov’t*, AP No. 07-11, slip op. at *12 (App. Div. June 10, 2014) (op. & order); *Segi v. Am. Samoa Gov’t*, AP No. 07-12, slip op at *9 (App. Div. Aug. 22, 2013) (op. & order). The PAB and ALJ are distinct entities, and it was the ALJ who issued the final order in this case. Thus, the ALJ should have been the sole respondent.

While we are concerned about possible dual representation by the Office of the Attorney General and the conflict this presents, this issue is not before us in the present case since ASG incorrectly named Seumanutafa as a respondent, and the case has proceeded as such. Furthermore, it is not within the jurisdiction of the Court to rewrite statutes. As such, we **[**12**]** strongly urge the Legislature to review the pertinent statutes and make necessary changes to prevent the problem of future dual representation by the Office of the Attorney General in appeals from an ALJ’s decision by ASG.

standard of review accorded to the agencies themselves in light of their expertise, technical competence, and specialized knowledge, when the ALJ acts as an agency hearings officer. *See* A.S.C.A. § 4.1043(b).

Order

Seumanutafa's motion to dismiss ASG's petition for review is denied and ASG's Petition for Review of the ALJ's order is granted.

ASG is directed to serve and file its brief on the review of the ALJ's order within 40 days of the date this order was entered. Seumanutafa is directed to serve and file his brief within 30 days after service of the ASG's brief. ASG is also directed to move to set a trial date.

It is so ordered.

Cite As: *Longline Servs., Inc. v. Workmen’s Comp. Comm’r*, AP No. 15-14, slip op. at [page number] (App. Div. Mar. 24, 2016) (order den. mot. to dismiss)

LOGLINE SERVICES, INC., Appellant,

v.

WORKMEN’S COMPENSATION COMMISSIONER, Appellee.

AMOSASUUAO, Real Party in Interest

High Court of American Samoa
Appellate Division

AP No. 15-14

March 24, 2016

[1] Judicial review of an order of workmen’s compensation by the administrative law judge is available under A.S.C.A. § 32.0652.

[2] The Court finds that A.S.C.A. § 32.0652 did not vest final appellate judicial review of workmen’s compensation orders with the Trial Division.

[3] The Court finds that the plain language of A.S.C.A. § 32.0652 does not bar any further review of the Trial Division’s workmen’s compensation-related decisions.

[4] The Court will not read limitations into an unambiguous statute.

[5] Under A.S.C.A. § 3.0208(c), the Appellate Division has previously heard cases on appeal from the trial court regarding workmen’s compensation orders and has never seen fit to discuss whether it might or might not have jurisdiction in such a case due to A.S.C.A. § 32.0652(a).

[6] Although A.S.C.A. § 32.0652(a) limits the scope of judicial review of workmen’s compensation orders to whether the order is “in accordance with law,” the Court has never held that this limitation on the scope of review limits the Appellate Division’s ability to hear an appeal from a trial court’s order.

[7] This Court has previously held that errors of law under A.S.C.A. § 32.0652(a) can be reviewed and remedied by each level of the reviewing courts.

[8] The Appellate Division has jurisdiction to review a trial court's order in workmen's compensation cases under A.S.C.A. § 3.0208(c).

[9] The statutorily imposed scope of judicial relief available under the Workmen's Compensation Act is far narrower than afforded by the Administrative Procedures Act to the Appellate Division.

[10] The standard of judicial review available varies under the Administrative Procedures Act as compared to other statutes that provide for alternative means of judicial review.

[11] The standard of judicial review in workmen's compensation cases is not the "substantial rights of the petitioner have been prejudiced" standard established by the Administrative Procedures Act, but the "not in accordance with law" standard established by A.S.C.A. § 32.0652(a).

[12] The Court has jurisdiction under A.S.C.A. § 3.0208 (c) to hear the appeal from the Trial Division's final decision on the workmen's compensation case.

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

Counsel: For Appellant, Roy J.D. Hall Jr.
For Real Party in Interest, Charles V. Ala'ilima

ORDER DENYING MOTION TO DISMISS

Background

On March 16, 2005, Amosa Asuao ("Asuao") was injured when the truck he was riding in, after work, was involved in an accident. The truck was driven by an employee of Longline Services, Inc., ("Longline Services"). Asuao performed welding at Longline Services. On May 28, 2013, the administrative law judge ("ALJ") awarded Asuao workmen's compensation benefits. **[**2**]**

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

On August 5, 2013, Longline Services petitioned the Trial Division for injunctive relief to review the award and to stay the award. On September 11, 2014, the trial court issued an opinion and order affirming the ALJ's decision. Longline Services timely filed a motion for reconsideration, which the trial court denied on November 7, 2014.

Longline Services then filed a notice of appeal on November 17, 2014. In response, Asuao filed a motion to dismiss the appeal on January 20, 2015. The sole issue raised by Asuao's motion to dismiss is whether the Appellate Division has jurisdiction to hear an appeal from the Trial Division in a case dealing with workmen's compensation award. *See* (Asuao's Mot. Dismiss Appeal at 3-4). Asuao propounds that the injunction proceedings in the Trial Division is the only "level of appellate judicial review of an [workmen's compensation] award" and there can be no further review by the Appellate Division. *Id.* at 4. Longline Services, on the other hand, argues that the Appellate Division has jurisdiction under A.S.C.A. § 3.0208(c) to hear appeals from final decisions of the Trial Division, such as the September 11, 2014 opinion and order, and, thus, can hear this appeal.

Oral arguments were heard on February 25, 2016. For the reasons below, we deny Asuao's motion to dismiss. **[**3**]**

Applicable Statutes

[1] Judicial review of an order of workmen's compensation by the ALJ is available under A.S.C.A. § 32.0652. Specifically, § 32.0652(a) states: "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the Commissioner, and instituted in the High Court of American Samoa."

A.S.C.A. § 3.0208(c), which delineates the Appellate Division's jurisdiction, states:

The Appellate Division of the High Court shall have jurisdiction to review, on appeal, final decisions of the trial and land and titles divisions of the High Court, matters on appeal from the District Court as provided in 3.0309, appeals of administrative decisions as provided in 4.1040 through 4.1044 and appeals of other matters specifically provided for by statute.

Discussion

The Workmen's Compensation Act, A.S.C.A. §§ 32.0501-.0674, provides for compensation of employees who are injured or killed in

certain work situations. Under the Act, a claim must be filed within 30 days of the date of the injury or death. A.S.C.A. § 32.0626. After a claim has been filed, the Commissioner (“Commissioner”) of the American Samoa Workmen’s Compensation Commission conducts investigation(s) and informal hearing(s) for 45 days in an effort to secure an agreeable settlement by the **[**4**]** parties. A.S.C.A. § 32.0629(b). If no settlement is reached within those 45 days, the matter is referred to the ALJ for formal adjudication. *Id.* Upon formal adjudication by the ALJ, the order is filed with the Commissioner, and judicial review in the Trial Division of the High Court is available to any party in interest. A.S.C.A. §§ 32.0650, 32.0652; *see also Westerlund v. Scalan*, 4 A.S.R. 998, 999 (App. Div. 1975).

First, Asuao argues that judicial review of a workmen’s compensation order is strictly limited by A.S.C.A. § 32.0652, and the Appellate Division lacks jurisdiction to hear an appeal from the trial court in such a case. Under the Appellate Division’s jurisdictional statute, the Appellate Division may hear (1) final decisions from the Trial, and Land and Titles Divisions, (2) appeals from certain District Court decisions, (3) appeals from certain administrative decisions, and (4) appeals of other matters specifically provided for by statute. A.S.C.A. § 3.0208(c). Asuao maintains that the Appellate Division’s ability to review workmen’s compensation orders must fall under the fourth prong of § 3.0208(c) – “appeals of other matters specifically provided for by statute.” He goes on to claim that since § 32.0652 specifically provides for judicial review of these cases, and since § 32.0652 does not specifically vest such review with the Appellate Division, then the Appellate Division lacks jurisdiction for further review under the fourth prong of § **[**5**]** 3.0208(c). Asuao supports his claim by boldly asserting that § 32.0652 is the “[only] one level of appellate judicial review of an [workmen’s compensation] award and that [is] done in the trial division by way of injunctive action.” *See* (Asuao’s Mot. Dismiss Appeal at 4).

[2-4] Asuao’s logic is flawed. His argument attempts to transform the Appellate Division’s jurisdiction under the fourth prong of A.S.C.A. § 3.0208 (c) into an extraordinary appellate power for the Trial Division under A.S.C.A. § 32.0652. He offers no other statutory or case law to support his interpretation. We are not convinced that § 32.0652 vested final appellate judicial review of workmen’s compensation orders with the Trial Division. Nor are we convinced that the plain language of § 32.0652 (a) bars any further review of the Trial Division’s workmen’s compensation-related decisions. If the *Fono* intended such a limitation, it would have stated that the injunction proceedings in § 32.0652(a) is the only judicial review available in workmen’s compensation cases and that no further appeals to the Appellate Division may be taken. The *Fono* did not, and we will not read such a limitation into an unambiguous statute.

[5] Additionally, Asuao would have us disregard the first category in A.S.C.A. § 3.0208(c), which gives the Appellate Division jurisdiction to hear appeals from final decisions of the Trial Division. Yet under this category, the Appellate Division has *****6**** previously heard cases on appeal from the trial court regarding workmen's compensation orders and has never seen fit to discuss whether it might or might not have jurisdiction in such a case due to A.S.C.A. § 32.0652(a). *See, e.g., Nat'l Pac. Ins., Ltd. v. Comm'r*, 8 A.S.R.3d 21, 24-27 (App. Div. 2004) (affirming the trial court's order with no discussion about lack of jurisdiction in workmen's compensation order case from the Trial Division).

[6-8] Moreover, although § 32.0652(a) limits the scope of judicial review of workmen's compensation orders to whether the order is "in accordance with law," see *Nat'l Pac. Ins., Ltd.*, 8 A. S. R. 3d at 24; *Cont'l Ins. Co. v. Workmen's Comp. Comm'n*, 8 A.S.R.2d 152, 154 (App. Div. 1988), the Court has never held that this limitation on the scope of review limits the Appellate Division's ability to hear an appeal from a trial court's order. *See, e.g., Nat'l Pac. Ins., Ltd.* at 24-27. Indeed, this Court has previously held that "errors of law [under A.S.C.A. § 32.0652(a)] can be reviewed and remedied by *each level of the reviewing courts*," which affirms that the Appellate Division has jurisdiction to review a trial court's order in this type of case under A.S.C.A. § 3.0208(c). *See id.* at 24 (emphasis added).

Second, Asuao reasons that *Longline Servs., Inc. v. Workmen's Comp. Comm'n*, AP No. 11-06, slip op. (App. Div. Feb. 26, 2008), supports his assertion that the Appellate Division does not have *****7**** jurisdiction. Specifically, he points to footnote 2, in which he claims the Court "admonished counsel for parties to be very mindful that the Appellate Division does not have the jurisdiction to either over-rule the administrative decisions of the Administrative Law judge [sic] on the merits of the case nor on the merits of the trial division's judgment that it was not shown the award was 'not in accordance with law.'" (Asuao's Mot. Dismiss Appeal at 4.)

[9-11] Asuao misconstrues the Court's point in footnote 2 in *Longline Services, Inc.* In footnote 2, the Court notes that "the statutorily imposed scope of judicial relief available [under the Workmen's Compensation Act] is far narrower than afforded by the [Administrative Procedures Act] to the Appellate Division." *Longline Servs., Inc.*, AP No. 11-06 at 4 n.2. To be clear, the Court was merely cautioning both parties' counsel to be aware that the standard of judicial review available varies under the Administrative Procedures Act ("A.P.A."), A.S.C.A. § 4.1044, as

compared to other statutes that provide for alternative means of judicial review. Under the alternative (i.e., non-A.P.A.) judicial review provided by the Workmen's Compensation Act, the standard of judicial review is limited to whether the order was "in accordance with law." Footnote 2 is not a commentary on the Appellate Division's inability to hear appeals from the trial court on workmen's compensation orders, as Asuao claims. **[**8**]** Footnote 2 is a reminder to the Bar that the standard of judicial review in workmen's compensation cases is not the "substantial rights of the petitioner have been prejudiced" standard established by the A.P.A., but the "not in accordance with law" standard established by § 32.06S2(a).

[12] Accordingly, we hold that this Court has jurisdiction under § 3.0208 (c) to hear the appeal from the Trial Division's final decision.

Order

Asuao's motion to dismiss appeal is denied.

It is so ordered.

Cite As: *Am. Samoa Gov't v. Fanene*, AP No. 03-15, slip op. at [page number] (App. Div. June 10, 2016) (order den. mot. to dismiss)

AMERICAN SAMOA GOVERNMENT, Appellant,

v.

**IN THE MATTER OF BEN FA'ASAMOA FANENE, A MINOR
CHILD, FA'ASAMOA FANENE, and MATAVIA FANENE,
Appellees.**

High Court of American Samoa
Appellate Division

AP No. 03-15

June 10, 2016

[1] The Appellate Division may dismiss an appeal for a party's failure to comply with any of the requirements of A.C.R. 10.

[2] In deciding whether to dismiss the appeal for failure to comply with A.C.R. 10, the Court considers a number of factors, including the length of delay caused by the appellant's failure to comply with appellate procedures, the consequent prejudice to the appellees, and the possibility of the appeal's success on the merits.

Before KRUSE, Chief Justice; PATEA,* Acting Associate Justice;
SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Appellant, Assistant Attorney General Aitofele B. Sunia
For Appellee, Mark F. Ude

ORDER DENYING MOTION TO DISMISS

Background

The Notice of Appeal in the above-referenced matter was filed on September 11, 2015. The Notice included the request for an estimate of transcripts of all proceedings in the case. In response, on September 29, 2015, two court reporters filed their estimates of transcripts for the bench

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

trial that was conducted on July 10 and 11, 2014. The estimated cost of transcripts was \$200 for trial proceedings on July 10, 2014, and \$220 for trial proceedings on July 11, 2014. Appellant American Samoa Government (“ASG”) *****2**** did not file anything in writing indicating its intention either to order transcripts from the court reporters or to forego ordering any transcript. On January 4, 2016, a court reporter served ASG with the transcript for trial proceedings on July 10, 2014. Appellees’ copy of the transcript was transmitted the next day by ASG to Appellees’ counsel. On January 15, 2016, the transcript for trial proceedings on July 11, 2014 was served by the other court reporter on ASG and Appellees through their respective counsel.

In between receiving the two separate transcripts, Appellees filed (on January 12, 2016), a motion to dismiss the appeal on the ground that ASG did not properly comply with Appellate Court Rules 10(b), 11(a), and 11(b). On January 20, 2016, ASG filed a receipt, which showed that ASG paid \$220 to one of the court reporters.

Oral arguments were heard on March 31, 2016. For the reasons below, we deny Appellees’ motion to dismiss.

Applicable Rules and Case Law

A.C.R. Rule 10(b) states, in pertinent part:

(b) The Transcript of Proceedings; Duty of Appellant to Order; Notice to Appellee if Partial Transcript is Ordered. *****3****

(1) Within 10 days after receiving the reporter’s or clerk’s estimate the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary. The order shall be in writing and within the same period a copy shall be filed with the clerk of courts and served on the appellee. If no such parts of the proceedings are to be ordered, within the same period the appellant shall file a certificate to that effect.

(2) If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) Unless the entire transcript is to be included, the appellant shall, within the 10 days time provided in (b) (1) of this rule, file a statement of the issues he intends to present on the appeal and shall file on the appellee a copy of the order or certificate and of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, he shall, within 10 days after the service of the order or certificate and the statement of the

appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has ordered such parts, and has so notified the appellee, the appellee may within the following 10 days either order the parts or move in the trial division, land and titles division or district court for an order requiring the appellant to do so.

(4) At the time of ordering, a party must deposit an amount of cash equal to the estimated cost with the reporter. The deposit is subject to revision by the reporter when the transcript is completed. Counsel must file a copy of the reporter's receipt with the clerk of court. .. If an appellant is represented by the Public Defender's Office or the Office of the Attorney General, then the estimated cost of the transcript need not be deposited at the time of ordering the transcript; rather, upon completion of the transcript, the court reporter is to transmit written notice of the cost of the transcript to the **[**4**]** appellant's counsel, and payment of the cost is to be made as timely as practicable.

(5) The appellate division may on its own motion or motion by either party dismiss the appeal for failure of a party to comply with any of the above provisions.

A.C.R. Rule 11, titled "Transmission of the Record," states the following:

(a) Duty of Appellant. After filing the notice of appeal the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of 10(b) ACR and shall take any other action necessary to enable the clerk to assemble the record.

(b) Duty of Reporter to Prepare and File Transcript; Notice to Appellate Division. Upon receipt of an order for a transcript, the reporter shall acknowledge at the foot of the order the fact that he has received it and the date on which he expects to have the transcript completed and shall transmit the order, so endorsed, to the clerk of court. If the transcript cannot be completed within 30 days of receipt of the order the reporter shall request an extension of time from the clerk of court and the action of the clerk of court shall be entered on the docket and the parties notified. In the event of the failure of the reporter to file the transcript within the time allowed, the clerk of court shall notify the court below and take such steps as may be directed by the court below. Upon completion of the transcript the reporter shall file it with the clerk of court.

[1-2] The Appellate Division may dismiss an appeal for a party's failure to comply with any of the requirements of A.C.R. 10. In deciding whether to dismiss the appeal, the Court considers a number of factors, including the length of delay caused by the appellant's failure to comply with appellate **[**5**]** procedures, the consequent prejudice to the appellees, and the possibility of the appeal's success on the merits. *Alaimalo v. Sivia*, 17 A.S.R.2d 25 (App. Div. 1990).

Discussion

Appellees claim that ASG failed to comply with the requirements of A.C.R. 10(b). Clearly, the record is void that ASG filed a written request for transcripts after receiving the reporters' estimate - a violation of A.C.R. 10(b) (1).

Appellees next cite a violation of A.C.R. 10(b) (2) and (3), claiming that the record on appeal is defective because only the transcripts of trial proceedings were completed, and ASG failed to file a statement of the issues in order for Appellees to determine if other proceedings below should also be transcribed. The Notice of Filing of Record on Appeal, filed January 21, 2016, itemizes the contents of the Record. While ASG argues that the record is complete with the inclusion of the transcripts of the trial proceedings, Appellees, on the other hand, fail to identify any other proceedings below for which transcripts are necessary and currently lacking. Thus, we are not convinced that a violation of A.C.R. 10(b) (2) and (3) exist. **[**6**]**

Appellees also claim a violation of A.C.R. 10(b) (4), arguing that ASG failed to file receipts of payment for the transcripts. Appellees do not argue non-payment for the transcripts, but simply the failure to file proof of such payment. The record contains a copy of a receipt for \$220 for only one of the transcripts. Thus, there is a partial violation of A.C.R. 10(b) (4).

Appellees further point to a violation of A.C.R. 11(a), claiming that ASG failed to comply with their duty to adhere to the requirements of A.C.R. 10(b), and to a violation of A.C.R. 11(b), claiming that the court reporters failed to prepare and file the transcripts in a timely manner.

ASG's violation, or lack thereof, of A.C.R. 10(b) is addressed in the previous paragraphs and will not be repeated here. Regarding the lack of timeliness of the transcripts, the record shows that the transcripts were filed a little over 3 months from the date that estimates were provided. Further, the record lacks any filing by the reporters to extend time to complete the transcripts beyond the initial 30 days.

To summarize, ASG failed to file a written request for transcripts, and failed to file the other receipt for payment of transcripts. In addition, the court reporters failed to request [***7**] an extension beyond the initial 30 days required by rule to complete and file the transcripts. However, Appellees have failed to establish that ASG's violations resulted in unfair prejudice to them. *See Alaimalo*, 17 A.S.R.2d. Furthermore, Appellees simply argue that the reporters did not file for an extension beyond 30 days and took over 3 months to file the transcripts without any effort to show how such a length of time unfairly prejudiced them. *Id.* Appellees are content to expose A.C.R. violations and then do nothing more. The Court will not adopt such a simplistic approach advocated by Appellees in this case.

Based on our review of the record as assembled by the clerk of courts, we decline to exercise our discretion under A.C.R. 10(b)(5) to dismiss this appeal. For the reasons set forth above, we deny Appellees' motion to dismiss.

It is so ordered.

Cite As: *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14, slip op. at [page number] (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief)

LOGLINE SERVICES, INC., Appellant,

v.

WORKMEN'S COMPENSATION COMMISSIONER, Appellee.

AMOSASUAO, Real Party in Interest

High Court of American Samoa
Appellate Division

AP No. 15-14

August 2, 2016

[1] Motions to strike are generally disfavored by courts. Nevertheless, strict compliance with the Appellate Court Rules is also required.

[2] The Appellate Court Rules do not contemplate the tolling of filing deadlines in appellate cases when a motion to dismiss is filed.

[3] A.C.R. 26(b) clearly allows a party to request more time to file a responding brief, or to request permission to file a responding brief after a deadline.

[4] The Court found that the readily available relief provided by A.C.R. 26(b) does not support any argument that the filing deadline in was tolled because the appellee filed a motion to dismiss. Similarly, nothing in the deadline-specific language of A.C.R. 31 supports any contention that the filing deadline for a responding brief is tolled when a motion to dismiss is filed.

[5] A.C.R. 31(c) allows the Court discretion to hear a party at oral arguments even after that party's brief is stricken.

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

Counsel: For Appellant, Roy J.D. Hall, Jr.
For Real Party in Interest, Charles V. Ala'ilima

ORDER GRANTING MOTION TO STRIKE REAL PARTY IN INTEREST'S BRIEF

The complete facts of this case have been set out in previous orders regarding this case. In short, Appellant Longline Services, Inc., (“Longline Services”) is appealing from the trial court’s September 11, 2014 opinion and order, which affirms the administrative law judge’s decision that Real Party in Interest Amosa Asuao (“Asuao”) was an employee of Longline Services and not an independent contractor. **[**2**]**

Longline Services filed a notice of appeal on November 17, 2014, and then filed its brief on December 31, 2014. In response, Asuao filed, on January 20, 2015, a motion to dismiss the appeal for lack of jurisdiction. The appellate panel heard oral arguments on the motion to dismiss on February 25, 2016, and issued an order denying the motion on March 24, 2016. Asuao subsequently filed his responding brief on April 12, 2016.

Currently at issue is Longline Services’ motion to strike Asuao’s brief for failure to timely file under A.C.R. 31 (a). Asuao argues that his brief should not be stricken because he filed a motion to dismiss the appeal within 30 days of service of Longline Services’ brief and then filed his responding brief within 30 days of the denial of the motion to dismiss.

We heard this issue on June 30, 2016. For the reasons below, we grant Longline Services’ motion to strike; however, we exercise our discretion under A.C.R. 31(c) and will allow Asuao to be heard at oral arguments.

Standard of Review

A.C.R. 31(a) states that the “appellant shall serve and file his brief within 40 days after the date on which the record is filed.” In turn, “[t]he appellee shall serve and file his brief within 30 days after service of the brief of the appellant.” A.C.R. 31(a). **[**3**]**

A.C.R. 31(c) provides that if the “appellant fails to file his brief within

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

the time provided by” A.C.R. 31, or within any extended time the Court may provide, the “appellee may move for dismissal of the appeal or [the] appellate division or a judge thereof may on its or his own motion dismiss the appeal.” Furthermore, “[i]f an appellee fails to file his brief, he will not be heard at oral argument *except by permission of the appellate division.*” A.C.R. 31(c) (emphasis added).

A.C.R. 26(b) states that “[t]he appellate division or a judge thereof for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time.”

Discussion

[1] Motions to strike are generally disfavored by courts. *See McConnell Dowell (Am. Samoa) Ltd. v. Am. Samoa Power Auth.*, 4 A.S.R.3d 73, 75 (Trial Div. 2000). Nevertheless, strict compliance with the Appellate Court Rules is also required. *Alaimalo v. Sivia*, 16 A.S.R.2d 117, 119 (App. Div. 1990).

Longline Services’ brief was filed on December 31, 2014. Asuao filed his responding brief more than a year later on April 12, 2016, after his motion to dismiss was denied. Asuao argues that his responding brief should not be stricken because he had timely filed a motion to dismiss and it would have been a “waste [**4**] of [the] court [’s] and both counsels’ time and resources” to file a responding brief if the motion to dismiss had been granted. *See* (Opp’n’s to Mot. to Strike at 2, Apr. 29, 2016).

[2-4] The Appellate Court Rules do not contemplate the tolling of filing deadlines in appellate cases when a motion to dismiss is filed. A.C.R. 26(b) clearly allows a party to request more time to file a responding brief, or to request permission to file a responding brief after a deadline. The readily available relief provided by A.C.R. 26(b) does not support any argument that the filing deadline in this situation was tolled. Similarly, nothing in the deadline-specific language of A.C.R. 31 supports any contention that the filing deadline for a responding brief is tolled when a motion to dismiss is filed.

Asuao also argues that his responding brief should not be stricken because “there is no harm alleged to appellant.” *See* (Opp’n’s to Mot. to Strike at 2, Apr. 29, 2016). Asuao cites no statutes, court rules, or case law to support this “harm” standard, nor could we find any authority for such a proposition. This Court simply will not create any exceptions to the clear requirements of A.C.R. 26 and A.C.R. 31.

Asuao could have easily filed a motion to enlarge time to file his responding brief, or sought permission to file the **[**5**]** brief after the deadline. He failed to do so. Consequently, the motion to strike is granted.

[5] Although Asuao's brief is stricken because of his failure to timely file his responding brief, A.C.R. 31(c) allows the Court discretion to hear Asuao at oral arguments. We exercise our discretion in favor of Asuao.

Order

Real Party in Interest's (Asuao's) Brief is hereby stricken. However, Asuao is granted permission to be heard at oral arguments. Furthermore, the clerk of courts is directed to calendar oral arguments for this appeal during the next session of the Appellate Division.

It is so ordered.

Cite As: *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14, slip op. at [page number] (App. Div. Aug. 4, 2016) (op. & order)

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 4, 2016

[1] The Appellate Division has jurisdiction over appeals of administrative decisions under A.S.C.A. § 4.1041.

[2] Under the Administrative Procedures Act, the High Court must confine its review of administrative decisions to the record and decision as developed and issued by the agency.

[3] The 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.

[4] When reviewing an administrative law judge's decision, the Court must first determine if substantial rights of an aggrieved party have been prejudiced by the decision.

[5] Even if an aggrieved party's substantial rights have been prejudiced, the Court may still only reverse, remand, or modify the administrative law judge's decision if it 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.

[6] When a party fails to follow the Appellate Court Rules and fails to perfect its appeal, it is subject to dismissal at the Appellate Division's discretion.

[7] To dismiss an appeal on the basis of the sheerest hypertechnicalities would frequently defeat the ends of justice.

[8] While strict compliance with Appellate Court Rules is generally required, exceptions and liberality should be applied in deserving cases where the party has not been derelict in its responsibilities to pursue its remedies with dispatch and due diligence.

[9] The Appellate Division has the power to review and reverse agency decisions that are made upon unlawful procedure or in excess of the statutory authority of the agency, including accusations that the administrative law judge lacked subject matter jurisdiction.

[10] The Appellate Division lacks subject matter jurisdiction to consider issues that were not presented to the administrative agency.

[11] Lack of subject matter jurisdiction cannot be waived at any level.

[12] Regulations A.S.A.C. §§ 4.0901-.0903 provide procedures a career service employee must follow to have his or her appeal from an employment matter controversy or grievance heard by the administrative law judge.

[13] If the career service employee has not been suspended, involuntary demoted, or removed, he may bring a grievance appeal before the administrative law judge after following the three-part grievance procedure described in A.S.A.C. § 4.0903.

[14] Under the three-part grievance procedure for career service employees, the grievance should first be placed in writing and a resolution attempted by the appropriate supervisor at the lowest level.

[15] Under the three-part grievance procedure for career service employees, the decision of the director of the Department of Human Resources may be appealed from within ten days.

[16] For a career service employee that was not officially suspended, demoted, or terminated, his appeal to the administrative law judge had to proceed under A.S.A.C. § 4.0903.

[17] If the Department of Human Resources director fails to act on a recommendation to terminate an employee, leaving the three-step grievance process incomplete, the employee cannot proceed under A.S.A.C. § 4.0903 since there was no “final decision” by the Department of Human Resources director.

[18] The statutory and regulatory scheme that protects government career service employees contemplates that an employee grievance or controversy be heard in a timely manner.

[19] The administrative law judge may have jurisdiction under § 4.0604(g) without a final decision because it specifically grants the administrative law judge jurisdiction over “any other contested case, grievance or controversy” from an agency, office or department of the government as long as the administrative law judge has jurisdiction over such matter.

[20] Outside extenuating circumstances, such as American Samoa Government’s actions preventing an employee from proceeding as customarily required under § 4.0604(b) for over 15 months, a controversy, grievance, or administrative appeal pertaining to government employment must proceed under A.S.C.A. § 4.0604(b) and not § 4.0604(g).

[21] Requiring dismissal and refiling by a plaintiff after the court’s jurisdiction has been perfected would be a needless and wasteful exercise.

[22] One of the most common tenets of statutory interpretation is that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.

[23] A plain-language reading of § 4.0902(k) shows that it is not a limitation on the administrative law judge’s ability to assess money damages, but instead is a rule that applies when a certain condition—an employee being fully reinstated after appeal—occurs. The subsection does not incorporate any limiting language, such as “unless” or “except,” to indicate the listed benefits are only available upon full reinstatement after appeal. Accordingly, subsection (k) is not a limitation on the administrative law judge’s power to award back pay or other benefits to employees after a hearing, but rather a mandate that the administrative law judge *must* provide the remedies listed in subsection (k) when an employee is fully reinstated after an appeal.

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

Counsel: For Petitioner, Assistant Attorney General Lornalei C.
Meredith
For Respondent Richard Seumanutafa, Mark F. Ude

OPINION AND ORDER

Before the Court is Respondent Richard Seumanutafa's ("Seumanutafa") motion to dismiss Petitioner American Samoa Government's ("ASG") petition. We heard oral arguments on the motion to dismiss and the merits of ASG's petition for review of the Administrative Law Judge's ("ALJ") decision on June 30, 2016. For the reasons below, the Court denies Seumanutafa's motion to dismiss and affirms the ALJ's order and decision.

Jurisdiction

[1] The Appellate Division has jurisdiction over appeals of administrative decisions under A.S.C.A. § 4.1041.¹ *Island's [**2**] Choice, Inc. v. Am. Samoa Gov't*, 5 A.S.R.3d 3, 5 (App. Div. 2001).

Standard of Review

[2-3] Administrative hearings for career service employee grievances and controversies are conducted by an ALJ. A.S.C.A §§ 4.0602, 4.0604. Under the Administrative Procedures Act, the High Court must confine its review of administrative decisions to the record and decision as developed and issued by the agency. A.S.C.A. § 4.1043(a); *Nat'l Pac. Ins. Co. v. Comm'r*, 5 A.S.R.3d 183, 189 (Trial Div. 2001). "The 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.*, 5 A.S.R.3d at 189; A.S.C.A. § 4.1043(b); *Nat'l Pac. Ins. Co. v. Comm'r*, 22 A.S.R.2d 15, 16-17 (Trial Div. 1992) ("[C]ourts have given considerable deference to administrative decisions involving an agency's construction of its governing statutes and regulations.").

[4-5] When reviewing an ALJ's decision, the Court must first determine if substantial rights of an aggrieved party have been prejudiced by the decision. *Nat'l Pac. Ins. Co.*, 5 A.S.R.3d at 189. Even if an aggrieved party's substantial rights have been [**3**] prejudiced, the Court may still only reverse, remand, or modify the ALJ's decision if it was:

¹ "Proceedings for review may be instituted by filing a petition in the appellate division of the High Court of American Samoa within 30 days after the issuance of the decision to be reviewed, or if rehearing or reconsideration is requested, within 30 days after the decision thereon." A.S.C.A. § 4.1041(a).

(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

Segi v. Am. Samoa Gov't, AP No. 07-12, slip op. at 3 (App. Div. Aug. 22, 2013) (op. & order); A.S.C.A. § 4.1044.

Background

On July 28, 2011, the Criminal Justice Planning Agency (“CJPA”) began the process of removing Seumanutafa, a career service employee working for CJPA. CJPA placed Seumanutafa on annual leave pending further notice on the same date. In April 2012, Seumanutafa completely stopped receiving payments and benefits. In November 2012, after writing several letters to the heads of CJPA and Department of Human Resources (“DHR”) about his situation, Seumanutafa wrote a letter to the ALJ, which was taken as an official complaint concerning his placement on annual leave and stopped payments and benefits. In August 2013, Seumanutafa was reinstated to his position by the DHR director, but his complaint with the ALJ remained pending.

On April 21, 2014, the ALJ heard Seumanutafa’s dispute with ASG regarding back pay. The ALJ decided that Seumanutafa was entitled to back pay and benefits for 36 pay periods and adopted **[**4**]** Seumanutafa’s proposed findings of fact and conclusions of law on April 30, 2014. ASG’s motion for reconsideration was denied on June 23, 2014.

On July 21, 2014, ASG filed a petition with the High Court for review of the ALJ’s order and decision. Seumanutafa filed a motion to dismiss on several grounds. The Court originally granted the motion to dismiss in a majority opinion on March 10, 2015, holding that ASG could not appeal a decision from the ALJ because it was not a “person” under A.S.A.C. § 4.0902(j). ASG then filed a motion for rehearing, which the Court granted. In its February 19, 2016 opinion and order on rehearing (“Order on Rehearing”), the Court reversed its position and held that ASG was a “person” under § 4.0902(j) and could seek judicial review of ALJ orders. The parties were ordered to move for trial and file briefs.

On April 22, 2016, Seumanutafa filed a new motion to dismiss—this time for ASG’s failure to effect service of its initial brief on the ALJ. Oral arguments on ASG’s original petition to the High Court for review of the ALJ’s order and decision was set for June 30, 2016. We heard

oral arguments on the new motion to dismiss the same day.

Discussion

1. Motion to Dismiss [5**]**

Appellee Seumanutafa argues that the case should be dismissed for ASG's failure to serve its initial brief on the ALJ after the High Court held in its Order on Rehearing that the ALJ should have been the sole respondent. ASG argues that it followed what it believed to be the correct procedure under the Order on Rehearing and is prepared to serve the ALJ if so directed by the Court.

[6-8] A.C.R. Rule 31(b) requires a party to serve a copy of its appellate brief "on counsel for each party separately represented." When a party fails to follow the Appellate Court Rules and fails to perfect its appeal, it is subject to dismissal at the Appellate Division's discretion. A.C.R. 10(b)(5); *Alaimalo v. Sivia*, 16 A.S.R.2d 117, 119 (App. Div. 1990). Even so, "[t]o dismiss an appeal on the basis of the sheerest hypertechnicalities would frequently defeat the ends of justice." *In re Matai Title Alalamua*, 4 A.S.R. 974, 978-79 (App. Div. 1974). Thus, while strict compliance is generally required, "exceptions and liberality" should be applied in deserving cases where the party has "not been derelict in [its] responsibilities to pursue [its] remedies with dispatch and due diligence." *Id.*

The ALJ has never responded in this case nor has he been an active party represented by counsel. In the Order on Rehearing, the Court specifically stated that it would not disturb the case [**6**] name or parties even though ASG had incorrectly named Seumanutafa as a respondent in its original petition and the sole respondent should have been the ALJ. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14, slip op. at 11 (App. Div. Feb. 19, 2016). In light of the Order on Rehearing, it is reasonable ASG believed it was under no obligation to serve its initial brief on the ALJ. Other than ASG's failure to serve its initial brief on the ALJ, it has not otherwise "been derelict in [its] responsibilities to pursue [its] remedies with dispatch and due diligence." *In re Matai Title Alalamua*, 4 A.S.R. at 978-79. Consequently, we deny the motion to dismiss and find that ASG adequately followed A.C.R. Rule 31(b) in this case.

2. Judicial Review of the ALJ's Order and Decision

A. Waiver of Lack of Jurisdiction Argument

In reviewing the ALJ order and decision, we must first deal with Seumanutafa's claim that ASG's argument that the ALJ lacked jurisdiction has been waived because ASG did not raise this argument before its motion for reconsideration to the ALJ.

[9-11] The Appellate Division has the power to review and reverse agency decisions that are made upon unlawful procedure or in excess of the statutory authority of the agency. A.S.C.A. § 4.1044; *Nat'l Pac. Ins. [**7**]* Co., 5 A.S.R.3d at 189. This would include the accusation that the ALJ lacked subject matter jurisdiction to hear the case before it. See *Nat'l Pac. Ins. Co.*, 5 A.S.R.3d at 188-89. The Appellate Division lacks subject matter jurisdiction to consider issues that were not presented to the administrative agency. *Pen v. Lavata'i*, 30 A.S.R.2d 10, 15 (App. Div. 1996). However, the lack of subject matter jurisdiction cannot be waived at any level. *Toomata v. Railey*, 1 A.S.R. 623, 627 (App. Div. 1907); *Purcell v. Seugogo*, 6 A.S.R.3d 276, 289 (Trial Div. 2002).

ASG raised the argument that the ALJ lacked subject matter jurisdiction because Seumanutafa failed to follow the proper procedure to trigger jurisdiction in its motion for reconsideration to the ALJ. The Court then is not barred from hearing this issue on the ground it was not presented to the ALJ. Additionally, subject matter jurisdiction cannot be waived, and the lack of subject matter jurisdiction is an issue the Appellate Division has the power to review. Therefore, ASG has not waived its jurisdictional argument.

B. Jurisdiction of the ALJ

ASG argues that the ALJ lacked jurisdiction to hear Seumanutafa's case because Seumanutafa did not follow the procedures set out in A.S.A.C. § 4.0903, which is required for the ALJ to have jurisdiction under A.S.C.A. § 4.0604(b). Seumanutafa argues that he followed the requirements of A.S.A.C. § 4.0903 and that even if he did not, the ALJ had jurisdiction to hear his case under A.S.C.A. § 4.0604(d), (g), and (h). [**8**]

A.S.C.A. § 4.0604 establishes the extent of the ALJ's jurisdiction. Section 4.0604(b) gives the ALJ jurisdiction over "[c]ontroversies, grievances and administrative appeals by government employees on matters pertaining to employment, including matters pertaining to hiring, termination, suspension and discipline." Subsection (d) gives the ALJ jurisdiction over "[a]ll disputes and controversies pertaining to claims for unpaid or improperly paid wages and hours pursuant to Chapter 03 of

Title 32 A.S.C.A.” Subsection (g) states that “[a]ny other contested case, grievance or controversy that agencies, offices and departments of the government may be referred [sic] to the [ALJ] for disposition providing that the [ALJ] has jurisdiction over such matter.” Lastly, subsection (h) states that “[a]ll appeals from administrative rulings or decisions of any administrative agency, except those matters specifically exempted herein or by statute, of a department, office, agency, commission, board or committee of the Executive branch or of the American Samoa Government, shall first be made to the” ALJ.

[12-13] Regulations A.S.A.C. §§ 4.0901-.0903 provide procedures a career service employee must follow to have his or her appeal from an employment matter controversy or grievance heard by the ALJ. Section 4.0901 states that “[c]areer employees may file appeals on matters concerning their suspension, involuntary demotion, or removal.” If the career service employee has not **[**9**]** been suspended, involuntary demoted, or removed, he may bring a grievance appeal before the ALJ after following the three-part grievance procedure described in A.S.A.C. § 4.0903.

[14-15] Under the three-part grievance procedure, the grievance should first be placed in writing and a resolution attempted by the appropriate supervisor at the lowest level. § 4.0903(b)(1). If that fails to resolve the issue, “the grievance shall then be elevated to an uninvolved higher level in the department, and the grievant allowed to present testimony in his behalf in an informal hearing.” § 4.0903(b)(2). Finally, “[i]f the recommendation of the hearing officer [fails] to satisfy the grievant, the case will be forwarded to the director for final decision.” That decision may be appealed from within ten days. In A.S.A.C. Title 4, “Director” refers to the director of the Department of Human Resources.² See A.S.A.C. § 4.0237.

On July 28, 2011, CJPAs recommended Seumanutafa for termination to the DHR director. On the same day, Seumanutafa was placed on annual leave until further notice. The DHR director delayed making a final decision on CJPAs recommendation until August 2013, approximately two years later, when he decided not to follow it and returned Seumanutafa to **[**10**]** work. Both parties agree that Seumanutafa is a

² A.S.A.C. § 4.0237 specifically states: “‘Director’ means the director of the office of manpower resources.” However, the Office of Human Resources has replaced the Office of Manpower Resources. See *Segi v. Am. Samoa Gov’t*, AP No. 07-12, slip op. at 6 (App. Div. Aug. 22, 2013) (op. & order) (referring to “director” in A.S.A.C. §§ 4.0801-.0802 as the director of the Department of Human Resources).

career service employee and that he was never suspended, demoted, or terminated.

[16-17] Since Seumanutafa was not officially suspended, demoted, or terminated, his appeal to the ALJ had to proceed under A.S.A.C. § 4.0903. After Seumanutafa was first recommended for termination, the DHR director failed to act on this recommendation. *Seumanutafa*, ALJ No. 07-12 at 1 (Apr. 30, 2014) (order adopting findings of fact & conclusions of law & decision); Proposed Findings of Facts & Conclusions of Law & Order at 2, *Seumanutafa*, ALJ No. 07-12 (Apr. 30, 2014). Seumanutafa then attempted to resolve his grievances—being recommended for termination and placed on annual leave without pay—by writing a letter to the DHR director on December 6, 2011. *Id.* After Seumanutafa’s December 6, 2011 letter, the CJP executive director again recommended to DHR that Seumanutafa’s employment be terminated on January 20, 2012. *Id.* The DHR director failed to act on this recommendation as well, leaving the three-step grievance process incomplete. *Id.* This meant Seumanutafa could not proceed under A.S.A.C. § 4.0903 since there was no “final decision” by the DHR director. *See* § 4.0903(b)(3).

On February 10, 2012, Seumanutafa wrote again to the CJP executive director about the withholding of his paychecks. *Seumanutafa*, ALJ No. 07-12 at 1 (Apr. 30, 2014) (order adopting findings of fact & conclusions of law & decision); Proposed Findings of Facts & **[**11**]** Conclusions of Law & Order at 2-3, *Seumanutafa*, ALJ No. 07-12 (Apr. 30, 2014). Nothing occurred after this letter until April 2012. *Id.* On April 12, 2012, a formal meeting was held between Seumanutafa, the CJP executive director, and the CJP deputy director to resolve Seumanutafa’s grievances. *Id.* Shortly after this meeting, CJP relieved Seumanutafa of his paid status though Seumanutafa officially remained on annual leave pending further notice. *Id.* This resolution failed to satisfy Seumanutafa; however, there was still no final decision from which Seumanutafa could appeal from under A.S.A.C. § 4.0903 even though the case had already been forwarded to the DHR director for a final decision. At this point, it had been approximately eight months since CJP had first recommended Seumanutafa’s employment be terminated and Seumanutafa had been placed on annual leave.

On November 8, 2012, over 15 months since CJP’s first recommendation of termination, Seumanutafa wrote a letter to the ALJ addressing his discriminatory treatment and grievances. Therefore, when the DHR director made a final decision in August 2013, Seumanutafa’s case was already pending before the ALJ. The DHR director’s final decision made Seumanutafa’s complaint about his employment status moot, but not his complaint about back pay.

The ALJ's order and decision establishes that Seumanutafa attempted to follow the procedure laid out in A.S.A.C. § 4.0903; **[**12**]** however, ASG failed to render a final decision from which Seumanutafa could appeal until August 2013, approximately two years later. The primary issue then is whether the ALJ has jurisdiction over a career service employee's employment grievance when a final, appealable decision on a recommendation to terminate employment is not made in a timely manner.

[18] The statutory and regulatory scheme that protects government career service employees contemplates that an employee grievance or controversy be heard in a timely manner. See A.S.C.A. § 7.0802-.0803; A.S.A.C. §§ 4.0802, .0902 (setting forth 10-day and 30-day deadlines in connection with removals, suspensions, and demotions); see *generally Segi v. Am. Samoa Gov't*, AP No. 07-12, slip op. at 6-7 (App. Div. Aug. 22, 2013) (op. & order) (describing the procedure for terminating a career service employee). Despite that, by the time Seumanutafa initiated a case before the ALJ, he had been on annual leave pending further notice for over fifteen months.

[19-20] The ALJ clearly has jurisdiction over career service employment matters under A.S.C.A. § 4.0604(b). Nonetheless, because the DHR director did not make a final decision until August 2013, Seumanutafa could not proceed to the ALJ under § 4.0604(b). The ALJ may, however, have jurisdiction under § 4.0604(g) without a final decision. Section 4.0604(g) specifically grants the ALJ jurisdiction over “any other **[**13**]** contested case, grievance or controversy” from an agency, office or department of the government as long as the ALJ has jurisdiction over such matter. Thus, because § 4.0604(g) allows an appeal to the ALJ from a contested grievance when there has not been a final decision, the ALJ generally has jurisdiction over career service employment grievances, and ASG's actions prevented Seumanutafa from proceeding as customarily required under § 4.0604(b) for over 15 months, the Court finds the ALJ had jurisdiction under A.S.C.A. § 4.0604(g). Nevertheless, outside extenuating circumstances, such as were present in this case, a controversy, grievance, or administrative appeal pertaining to government employment must proceed under A.S.C.A. § 4.0604(b) and not § 4.0604(g).

Seumanutafa also argued the ALJ had jurisdiction under A.S.C.A. § 4.0604(d) and (h). However, there is no need to analyze whether either subsection (d) or (h) would apply since we hold the ALJ had jurisdiction under A.S.C.A. § 4.0604(g).

C. Timeliness of Filing with the ALJ

ASG also argues that even if the ALJ had jurisdiction, Seumanutafa did not timely file his case. Specifically, ASG asserts that Seumanutafa should have filed a case with the ALJ within ten days from the date his paychecks stopped in April 2012 or ten days from when he was placed back on duty in August **[**14**]** 2013. He also claims that his case before the ALJ was timely filed.

A.S.A.C. § 4.0903 states an employee must file a grievance case with the ALJ within ten days of a final decision by the DHR director. However, as discussed above, the Court finds the ALJ had jurisdiction under A.S.C.A. § 4.0604(g) not § 4.0604(b) in this case. Consequently, Seumanutafa did not have to comply with the ten-day filing deadline in A.S.A.C. § 4.0903. Furthermore, despite ASG's jejune claims that Seumanutafa could have filed a case with the ALJ within ten days of when his paychecks were stopped in April 2012, the decision to stop Seumanutafa's paychecks was not a final decision by the DHR director. Consequently, Seumanutafa still would have had to complete the three-step grievance process in A.S.A.C. § 4.0903 before filing a case with the ALJ, which Seumanutafa could not do because there was not a final decision until August 2013.

[21] Once Seumanutafa was finally returned to his position in August 2013, he already had a pending case before the ALJ, one which the ALJ had jurisdiction to hear under A.S.C.A. § 4.0604(g). If the original ALJ complaint had been dismissed in August 2013, Seumanutafa would have been free to re-file his back pay grievance with the ALJ at that time. Even so, the court has previously held that requiring dismissal and refiling by a plaintiff after the court's jurisdiction has been perfected **[**15**]** would be a needless and wasteful exercise. See *Mataipule v. Tifaimoana P'ship, Ltd.*, 14 A.S.R.2d 100, 107 (Trial Div. 1990). The ALJ already had jurisdiction under A.S.C.A. § 4.0604(g) to require Seumanutafa's case to be dismissed and him to refile under A.S.C.A. § 4.0604(b) after ASG finally made a final decision would have been a "needless and wasteful exercise." Accordingly, the Court finds that Seumanutafa's case before the ALJ was timely filed.

3. ALJ's Award of Back Pay

ASG asserts that even if the ALJ had jurisdiction to hear Seumanutafa's case, it did not have the power to grant him back pay under A.S.A.C. § 4.0902(k). ASG also argues that under A.S.C.A. § 43.1209 "monetary damages as a remedy against ASG for alleged civil wrongs is a function reserved exclusively to the Judicial Branch." (Appellant ASG's Initial Br. at 11.)

A.S.C.A. § 43.1209 is located in the Government Tort Liability Act. See A.S.C.A. § 43.1201, .1209. Section 43.1209 states that the Trial Division has “exclusive jurisdiction of civil actions on claims against the government . . . for money damages.”

A.S.A.C. § 4.0902(k) is located in the regulations dealing with appeal procedures for suspensions, demotions, removals, or grievances of career service employees. A.S.A.C. § 4.0902(k) is entitled “Restoration of Rights” and provides that “[a]ny ****16**** employee, when fully reinstated after appeal, shall be guaranteed all employee rights and benefits, including back pay, sick leave, annual leave accrual, and retirement.”

First, this case comes under the Appellate Division’s jurisdiction over appeals from administrative decisions and is not connected to the Government Tort Liability Act. See A.S.C.A. 43.1201-.1235 (Government Tort Liability Act); A.S.C.A. § 4.1041-.1043 (judicial review of administrative decisions). Therefore, § 43.1209 is inapplicable here.

[22-23] One of the most common tenants of statutory interpretation is that “the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.” *Caminetti v. United States*, 242 U.S. 470, 485 (1917). A plain-language reading of § 4.0902(k) shows that it is not a limitation on the ALJ’s ability to assess money damages, but instead is a rule that applies when a certain condition—an employee being fully reinstated after appeal—occurs. The subsection does not incorporate any limiting language, such as “unless” or “except,” to indicate the listed benefits are only available upon full reinstatement after appeal. Accordingly, subsection (k) is not a limitation on the ALJ’s power to award back pay or other benefits to employees after a hearing, but rather a mandate that the ALJ *must* provide ****17**** the remedies listed in subsection (k) when an employee is fully reinstated after an appeal.

Both parties agree that Seumanutafa was not reinstated to his position after appeal. Because § 4.0902(k) does not limit the ALJ’s ability to give back pay, the ALJ had the power to award Seumanutafa back pay. In the ALJ’s order Adopting Findings of Fact and Conclusions of Law and Decision, the ALJ states that Seumanutafa “is entitled to restoration of all back pay and benefits” for 36 pay periods. The award of compensation for 36 pay periods plus the attendant career service employee pay benefits is squarely within the ALJ’s power. Thus, the ALJ’s order and decision stands.

Order

The ALJ's April 30, 2014 order and decision is affirmed.

It is so ordered.

SLIP OPINIONS
OF THE
TRIAL DIVISION
OF THE
HIGH COURT OF AMERICAN SAMOA
(2016)

Cite As: *Leuluai v. Am. Samoa Gov't*, CA No. 55-15, slip op. at [page number] (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees)

SA LEULUAI JR., Petitioner,

v.

AMERICAN SAMOA GOVERNMENT, Respondent.

High Court of American Samoa
Trial Division

CA No. 55-15

February 18, 2016

[1] The *Fono* has provided for a carefully delimited waiver of sovereign immunity, specifically reserving the government's immunity from suit for *any claim* arising out of false imprisonment, false arrest, malicious prosecution, abuse of process.

[2] The court cannot summarily award the government's money to a party without any sort of hearing or any sort of showing.

[3] The well-established principle of the "American Rule" does not allow the prevailing litigant to claim attorney's fees from the loser.

[4] The Territory has embraced and followed the American Rule with only narrowly circumscribed exceptions.

[5] In rare exceptional cases, the court may assess attorney's fees under its inherent power.

[6] The rationale behind fee-shifting is punitive.

[7] The judicial branch does not have some sort of supervisory role over the operations of the other branches of government and cannot punish other branches simply because a party believes the government to be in the wrong.

[8] An executive action is subject to judicial review only if the executive officer acted either unconstitutionally or beyond his statutory powers.

[9] Not every executive action in excess of a statutory power violates the

U.S. Constitution.

[10] A claim based on an executive action not in compliance with statutory procedures is a statutory one, and judicial review of such action is not available when the statute in question commits the decision to the discretion of the executive official.

[11] A mere excess of abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power because the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

[12] The judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

Before KRUSE, Chief Justice; and MUASAU, Associate Judge.

Counsel: For Petitioner, Mark F. Ude
For Defendant, Assistant Attorney General Douglas Juergens

ORDER DENYING PETITIONER'S MOTION FOR ATTORNEY'S FEES

On October 19, 2015, Petitioner Sa Leulua Jr. ("Petitioner") filed his application for extraordinary relief, alleging that he was arrested at his home without a valid arrest warrant. In his application, Petitioner claimed that the local police had on October 16, 2015, arrested and incarcerated him on the basis of an arrest warrant from the Honolulu Police Department, without affording him an opportunity to be heard in court. On October 20, 2015, the court issued an alternative writ to the government to explain why they arrested and detained Petitioner.

When the matter came for a hearing on October 22, 2015, the court learned that Petitioner, who did not show, had been released from the Territorial Correctional Facility. Accordingly, the writ application became moot. However, Petitioner's counsel, Mark F. Ude, requested the court to award **[**2**]** attorney's fees against the government. The court directed briefing.

Petitioner's counsel subsequently submitted a written brief on November 23, 2015, and secured a hearing date from the clerk's office on Petitioner's motion for the attorney's fees for December 22, 2015. Petitioner argued that because the government has repeatedly violated the constitutional rights of residents in the Territory by illegally detaining

them without proper grounds, his claim is not moot, and the government should “learn[] from the Court’s order reprimanding the [government] employees.” (Pet’r’s Br. at 7.) In response, the government submitted a copy of an arrest warrant and the extradition request issued by the State of Hawaii. The warrant showed that Petitioner was charged with Assault in the Second Degree, a felony crime carrying a maximum prison term of five years according to the government.

For the reasons set forth below, we hereby deny the motion.

Discussion

[1] First, the asserted claim ignores the substantive elephant in the (court)room, namely, “sovereign immunity.” In its enactment of the Government Tort Liability Act, A.S.C.A. §§ 43.1201-.1235, the *Fono* provided for a carefully delimited waiver of sovereign immunity, specifically reserving the government’s immunity from suit “for *any claim* arising out of . . . false imprisonment, false arrest, malicious prosecution, abuse of process.” A.S.C.A. § 43.1203(b)(5) (emphasis added). **[**3**]**

[2] Second, the asserted claim seeks a unilateral award of government money to Petitioner without any sort of hearing or any sort of showing. In other words, Petitioner would have the court summarily deprive the government of its property on the basis of Petitioner’s counsel’s self-serving assertion that the government routinely arrests and detains citizens unlawfully. The suggestion is ludicrous.

[3-6] Thirdly, the well-established principle of the “American Rule” does not allow the prevailing litigant to claim attorney’s fees from the loser. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975). The Territory has embraced and followed this principle with only narrowly circumscribed exceptions. *Samoa Dev., Inc. v. Am. Samoa Power Auth.*, 5 A.S.R.3d 172, 182 (Trial Div. 2001). In rare exceptional cases, the court may assess attorney’s fees under its inherent power. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). The rationale behind fee-shifting is punitive. *Id.* at 53. Here, the matter is a far cry from any of those “rare exceptional cases.” *Id.*

[7] Fourthly, there is a common misperception, evident by some recurring claims pursued in court, that the judicial branch has some sort of supervisory role over the operations of the other branches of government. This particular filing, seeking punitive attorney’s fees, is a typical example of this sort of misperception. Here the court is essentially being asked to punish the executive branch, by way of paying

lawyer Ude's fees, **[**4**]** simply because the executive branch allegedly¹ got it wrong, when it arrested and detained Petitioner. Cf. A.S.C.A. § 43.1203(b)(2), which specifically maintains government immunity against "any claim based upon the exercise or performance of, or the failure to exercise or perform, a discretionary function or duty on the part of an officer or employee, whether or not the discretion is abused."

[8-9] An executive action is subject to judicial review only if the executive officer "acted either unconstitutionally or beyond his statutory powers." *Dalton v. Specter*, 511 U.S. 462, 472 (1994). Not every executive action in excess of a statutory power violates the U.S. Constitution. *Id.* The U.S. Supreme Court has distinguished "actions contrary to a constitutional prohibition" and "those merely said to be in excess of the authority delegated by the Congress." *Id.*

[10-11] A claim based on an executive action not in compliance with statutory procedures is "a statutory one," and judicial review of such action "is not available when the statute in question commits the decision to the discretion" of the executive official. *Id.* at 474. The U.S. Supreme Court stated that "a mere excess of abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power" because "the judicial may not invade the legislative or executive departments so as to correct alleged **[**5**]** mistakes or wrongs arising from asserted abuse of discretion." *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919). According to this longstanding principle, the Supreme Court held that the president's action in *Dalton v. Specter* was not subject to judicial review. 511 U.S. In *Dalton*, the president made a decision to close the Philadelphia Naval Shipyard pursuant to the Defense Base Closure and Realignment Act of 1990 ("1990 Act"). *Id.* at 464. The petitioner challenged the president's decision on the ground that the decision-making process did not comply with the statutory procedures prescribed by the 1990 Act. *Id.* at 466. The Court denied the petitioner's claim because "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for [judicial] review." *Id.* at 476.

Here, Petitioner's argument is a statutory one, not a constitutional one. Petitioner's argument has no constitutional foundation as Petitioner's brief fails to point at any specific provision of the Constitution the government has allegedly violated. Rather, Petitioner's argument is

¹ There is no factual basis on the record to sustain Petitioner's claim of wrongful arrest.

statutory based: the government is said to have violated the procedures of A.S.C.A. §§ 46.0901 *et seq.* In particular, A.S.C.A. § 46.0915 says a police officer may arrest a person without a warrant. A person arrested without a warrant must appear before the High Court “with all practicable speed” and be heard “as if he had been arrested on a warrant.” *Id.*

[12] However, as stated in *Dalton*, the government’s action in [**6**] this case is not subject to judicial review. The statute in question, A.S.C.A. § 46.0915, grants the discretion to arrest a person without a warrant to the government. Here, the government exercised its discretion under A.S.C.A. § 46.0915 since the arrest warrant from Hawaii provided the government with the requisite reasonable information. A.S.C.A. § 46.0915 (“upon reasonable information that the accused stands charged in the courts of another state with a crime punishable by death or imprisonment for a term exceeding 1 year”). Therefore, like in *Dalton*, Petitioner is asking the court to review the government’s exercise of its discretion under A.S.C.A. § 46.0915. By denying Petitioner’s claim, the court reinforces the longstanding judicial principle that “the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.” *Dakota Cent. Tel.*, 250 U.S. at 184.

The motion for attorney’s fees is denied.

It is so ordered.

Cite As: *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15, slip op. at [page number] (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

**ONOSAI FESULUAI FAALELE, MAREN MILLER, AS
ADMINISTRATOR, OF THE ESTATE OF PAPU ULISESE,
FAALELE, MEMA TALI FAALELE, MATHEW PAPU
FAALELE, MARTHA, EMMA FAALELE, NUUMAU MONETTE,
FAALELE, MCCUTHEON IOSUA, FAALELE ET AL., Plaintiffs,**

v.

**PACIFIC STEVEDORING SERVICES, AN UNKNOWN
BUSINESS ENTITY, ROY AUSAGE, AND DOES 1 THROUGH 20,
inclusive Defendants.**

High Court of American Samoa
Trial Division

CA No. 30-15

February 25, 2016

[1] Assuming for argument's sake that the Longshore and Harbor Worker's Compensation Act does apply to American Samoa, the proper forum for Plaintiffs' Longshore and Harbor Worker's Compensation Act claims is not the High Court of American Samoa. Rather, the place to file such claims is the United States Department of Labor's Office of Worker's Compensation Programs.

[2] The High Court is not an authorized hearing agency for Longshore and Harbor Worker's Compensation Act claims.

[3] The Longshore and Harbor Worker's Compensation Act provides for judicial review of a final agency order at the United States court of appeals for the circuit in which the injury occurred. Likewise, the Longshore and Harbor Worker's Compensation Act provides for judicial enforcement of a final agency order at the federal district court for the judicial district in which the injury occurred. Since American Samoa is not, at this point in time, incorporated into any federal judicial district, this wanting necessarily begs the injured American Samoan longshoremen's question of where one goes to pursue (applicable) federal remedies.

[4] The American Samoa Workmen's Compensation Act is largely drawn from the 1927 version of the Longshore and Harbor Worker's Compensation Act.

[5] In construing and applying the American Samoa Workmen's Compensation Act, this court has consistently referred to the federal regulations and judicial holdings related to the Longshore and Harbor Worker's Compensation Act.

[6] The American Samoa Workmen's Compensation Act provides that every employer who has in the Territory one or more employees is subject to the American Samoa Workmen's Compensation Act and liable for compensation for injury to or death of his employees arising out of and in the course of employment.

[7] The remedy under the American Samoa Workmen's Compensation Act is exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife unless an employer fails to secure payment of compensation as required by the American Samoa Workmen's Compensation Act.

[8] Assuming for the sake of argument that Congress has not preempted the field with its enactment of the Longshore and Harbor Worker's Compensation Act, then quite clearly, A.S.C.A. § 32.0522 deprives this court of jurisdiction to entertain any causes for wrongful death and survivor actions under A.S.C.A. § 43.5001 and § 43.5002.

[9] Assuming for the sake of argument that federal law governs, then the Longshore and Harbor Worker's Compensation Act's A.S.C.A. § 32.0522 counterpart, viz; 33 U.S.C. § 905(a), is applicable. This enactment would equally deprive this court of jurisdiction over any other non Longshore and Harbor Worker's Compensation Act causes for which the employer may otherwise be liable.

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

Counsel: For Plaintiffs, Matailupevao Leupolu, Jr.
For Defendant, Gwen Tauiiili-Langkilde

ORDER OF DISMISSAL FOR WANT OF SUBJECT MATTER JURISDICTION

From what is to be gleaned from the pleadings and other matters on file, Papu Ulisese Faalele ("Decedent") died on August 9, 2011, following an accident on board a tuna seiner discharging its catch in the port of Pago

Pago, American Samoa. At the time of the accident, Decedent was employed by Defendant Pacific Stevedoring Services (“PSS”), an entity that is in business of unloading tuna seiners docked at the Star-Kist wharf in Satala. Defendant Roy Ausage (“Ausage”) is the alleged owner, officer, or director of PSS. Plaintiffs are the widow, children, and the estate of Decedent. The widow and children are currently **[**2**]** residing in San Diego, California.

On June 25, 2015, Plaintiffs filed wrongful death and survival actions against the defendants, cognizable in American Samoa only by virtue of A.S.C.A. § 43.5001 and § 43.5002 respectively. Plaintiffs’ complaint also asserts, in the alternative, claims for worker’s compensation benefits under the Federal Longshore and Harbor Worker’s Compensation Act (“LHWCA”). See U.S.C. § 901 *et seq.* The complaint unabashedly explains Plaintiffs’ alternative LHWCA cause as a hedging measure in the event that a benefits award under the LHWCA proves to be more substantial than a damages award in the civil action before the High Court. (Pls.’ Compl. 14, June 26, 2015.) The complaint alludes to Plaintiffs’ parallel action filed against the defendants in the California Superior Court for the County of San Diego, based on the same industrial incident in Satala. *Id.* at 4. And to add to the complexity of forum entanglements, the complaint alerts to yet another related [removal] action pending before a federal district court. *Id.* at 5.¹

On November 24, 2015, this matter had come on for hearing, upon motion for enlargement of time filed by one of the parties. At this hearing, we raised *sua sponte* this court’s subject matter jurisdiction, and directed briefing from counsel. In due course, **[**3**]** the parties filed briefs on the issue of jurisdiction.

For the reasons set below, we hold that this court lacks subject matter jurisdiction to entertain Plaintiffs’ actions and therefore dismiss the same without prejudice.

Discussion

1. The LHWCA

Plaintiffs argue that the LHWCA extends to American Samoa based on the Act’s plain language. The LHWCA defines its jurisdictional reach to

¹ *Cf. Meaamaile v. American Samoa*, 550 F.Supp 1227 (D. Haw. 1982)(dismissing a Western Samoan citizen’s action brought in Honolulu, for injuries suffered in American Samoa arising from an industrial accident).

include “the several States and Territories and the District of Columbia, including the territorial waters thereof.” 33 U.S.C. § 902(9). Plaintiffs argue that American Samoa is part of the LHWCA’s “territories” because the plain statutory language does not exclude American Samoa from the word “territories.” (Pls.’ Brief. 10, Dec. 8, 2015.)

Plaintiffs feel such interpretation matches Congress’s clear intent to “exercise to the fullest extent all the power and jurisdiction it had over the subject matter.” *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 130 (1962). Plaintiffs point at the phrase “[t]he sovereignty of the United States over American Samoa” in 48 U.S.C. § 1662 as evidence that Congress was aware of its sovereignty over the Territory before passing the LHWCA. Yet, Plaintiffs argue Congress did not vary the word “territories” to exclude American Samoa despite its awareness. Therefore, Plaintiffs believe the LHWCA extends to American Samoa **[**4**]** as the Sherman Act does under its term “any territory of the United States.” See *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937).

[1-2] Be that as it may, and while this discussion on the LHWCA’s territorial reach is interesting, and even assuming for argument’s sake that the LHWCA does apply to American Samoa, the proper forum for Plaintiffs’ LHWCA claims is not the High Court of American Samoa. Rather, the place to file such claims is the United States Department of Labor’s Office of Worker’s Compensation Programs (“OWCP”), the administrative agency that oversees the administration of the LHWCA. 20 C.F.R. § 701.201 (2015). Clearly, this court is not an authorized hearing agency for LHWCA claims.

[3] The curious aside with the LHWCA’s application to the Territory, is the logistics confronting the American Samoan Longshoreman pursuing an LHWCA claim. Firstly, our cursory research reveals that the OWCP has not established a District Office for American Samoa. Indeed, the nearest District Office to American Samoa is at Honolulu, Hawaii. Division of Longshore and Harbor Workers’ Compensation, District Office Location; <http://www.dol.gov/owcp/dlhwc/lsccontactmap.htm>. The Hawaii District covers “Hawaii” as well as Defense Base Act, 42 U.S.C. § 1651, claims of injured employees working overseas for United States government contractors. *Id.* Secondly, we note that the LHWCA provides for judicial review of a final agency order “at **[**5**]** the United States court of appeals for the circuit in which the injury occurred.” See 33 U.S.C. § 921(c). Likewise, the LHWCA provides for judicial enforcement of a final agency order at “the Federal district court for the judicial district in which the injury occurred.” 33 U.S.C. § 921(d). Since American Samoa is not, at this point in time, incorporated into any federal judicial district, this wanting necessarily begs the injured

American Samoan longshoremen's question of where one goes to pursue (applicable) federal remedies.

2. American Samoa Workmen's Compensation Act

[4-7] In 1967, the *Fono* enacted the Workmen's Compensation Act, ("ASWCA"), A.S.C.A. §§ 32.0501-0560. The ASWCA is largely drawn from the 1927 version of the LHWCA. *Etimani v. Samoa Packing Co.*, 19 A.S.R.2d 1, 5 (Trial Div. 1991). Therefore, in construing and applying the ASWCA, this court has consistently referred to the federal regulations and judicial holdings related to the LHWCA. *Id.*; *Patau v. Rosendahl Corp.*, 19 A.S.R.2d 80 (Trial Div. 1991). The ASWCA provides that "every [employer] who has in the territory one or more employees" is subject to the ASWCA and "liable for compensation for injury to or death of his employees arising out of and in the course of employment." A.S.C.A. § 32.0524(1); § 32.0520. The remedy under the ASWCA is "exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife" unless "an employer fails to secure payment of compensation as *****6**** required by" the ASWCA. A.S.C.A. § 32.0522.

[8] Assuming for the sake of argument that Congress has not preempted the field with its enactment of LHWCA, then quite clearly, A.S.C.A. § 32.0522 deprives this court of jurisdiction to entertain any causes for wrongful death and survivor actions under A.S.C.A. § 43.5001 and § 43.5002.

Plaintiffs argue that they are exempt from the ASWCA because of A.S.C.A. § 32.0521(b), which states that the ASWCA does not apply to "any person employing individuals for whom a rule of liability for injuries or death arising out of and in the course of employment is provided by the laws of the United States." Plaintiffs insist that since federal law such as the LHWCA or federal maritime law applies to this case, A.S.C.A. § 32.0521(b) exempts them from the ASWCA's coverage. (Pls.' Compl. 17.)

[9] Plaintiffs' reliance on A.S.C.A. § 32.0521(b) is not helpful. Again, assuming for the sake of argument that federal law governs, then the LHWCA's A.S.C.A. § 32.0522 counterpart, viz; 33 U.S.C. § 905(a), is applicable. This enactment would equally deprive this court of jurisdiction over any other non LHWCA causes for which the employer may otherwise be liable. See A.S.C.A. § 1.0201(2) (incorporating by reference "the laws of the United States of America as, by their own force, are in effect in American Samoa").

For reasons given, Plaintiffs' complaint is dismissed for want of subject matter jurisdiction. **[**7**]**

It is so ordered.

Cite As: *Am. Samoa Gov't v. Togitogi*, CR No. 27-15, slip op. at [page number] (Trial Div. Feb. 29, 2016) (dec. & order)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

JOE TOGITOGI, Defendant.

High Court of American Samoa
Trial Division

CR No. 27-15

February 29, 2016

[1] The court found that the government failed to prove that the defendant “knowingly” caused serious injury when he broke the complainant’s jaw with a single punch because a broken jaw is not a “practically certain” result of a single punch.

[2] The crime of Assault in the First Degree, as charged, includes the lesser crime of Assault in the Second Degree; the difference between the two offenses is the difference between the scienter elements of “knowingly” in Assault in the First Degree, and “recklessly” in Assault in the Second Degree.

[3] The court found that the government had proven that the defendant “recklessly” caused serious physical injury when he broke complainant’s jaw with a single punch.

[4] While the burden is on the defendant to “inject the issue” of self-defense, the government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense.

[5] The court found a witness’s testimony unreliable and not believable where she admitted that she was relying on defense counsel’s word as to the identity of the person she saw throw a punch and where defense counsel extracted her testimony through leading questions.

Before Kruse, Chief Justice; MUASAU, Associate Judge; and
TUNUPOPO, Associate Judge.

Counsel: For Plaintiff, Assistant Attorney General Robert Pickett

For Defendant, Assistant Public Defender Michael White

DECISION AND ORDER

This is a criminal matter where Plaintiff American Samoa Government (“the government”) has accused the defendant, Joe Togitogi (“Defendant”) with the crime of Assault in the First Degree, a Class B Felony, in violation of A.S.C.A. § 46.3520(a)(1). The Information charges Defendant with knowingly causing serious physical injury to Andy Fruean (“Complainant”), on or about May 27, 2015. The matter came on for bench trial on February 22, 2016, following Defendant’s written and in-court waiver of his right to jury trial.

We heard from two eyewitnesses, one called by each party. The first eyewitness was Complainant. He testified that on the date and time of the incident, May 27, 2015, around 9 o’clock in the evening, he was heading toward his ex-girlfriend’s home in Nu’uuli, having walked from his home in Kokoland. At the vicinity of the Hong Kong restaurant in Nu’uuli, he met up with **[**2**]** Defendant and another young man. Complainant, who knew of Defendant only from his ex-girlfriend as someone who was often seen sneaking around outside his ex-girlfriend’s home, asked Defendant about a missing TV set that had been stolen from his ex-girlfriend’s home. Complainant further testified that while Defendant’s companion had distracted him, Defendant punched him on the right side of his jaw.

Outmaneuvered and outnumbered, coupled with the sudden sensation that he could not move his jaw, Complainant tried to beat a hasty getaway. His efforts, however, were ineffectual as a number of other Nu’uuli youths quickly jumped into the fray and began pummeling him incessantly while he vainly tried to run away from his assailants. The beating only ceased when Defendant was finally able to escape after someone intervened at the Ocean Mart store vicinity, some distance up the road from where Defendant punched Complainant. Complainant eventually reached his ex-girlfriend’s residence where he received assistance from her father who took Complainant to the hospital.

At the hospital, Complainant was admitted for surgery with confirmed right mandibular (jaw bone) fractures in two sites. Dr. Nikasio Koroi of the Tropical Medical Center’s Dental Service treated Complainant’s jaw with open reduction and direct fixation, utilizing wires and the placement of arch bars on the **[**3**]** upper and lower arch. Complainant’s jaw was then essentially wired shut for six weeks; however, the procedure did not entirely resolve Complainant’s issues with his injury. Upon removal of the wires, there was small “stepping” found on the interior of Complainant’s jaw, which according to Dr. Koroi, will affect his eating.

This prognosis is borne out by Complainant's own description of his ongoing symptoms with his restricted jaw movements as affecting his speaking and his chewing. In his own words, "I have a crooked jaw and I can still feel it's a little bit weak." Finally, in terms of causation, Dr. Koro'i opined that the force of a single punch can cause the sort of injury suffered by Complainant.

The second eyewitness we heard, Ms. Natsha Wilson, was called by the defense. Ms. Wilson testified that she and her husband's family had been dining at the Hong Kong restaurant on the evening in question; that after stepping outside in front of the restaurant, she saw Complainant throw a punch at Defendant. Ms. Wilson concluded her testimony by saying that she saw nothing else as her husband then quickly ushered her back into the restaurant and away from the fracas.

Discussion

The court having heard and considered the evidence presented by both parties, finds beyond a reasonable doubt that on or about May 27, 2015, Complainant suffered a broken jaw (fractured mandible) caused by a punch he received to the right side of his face from Defendant. The incident occurred around 9:00 p.m. in **[**4**]** the evening, in the village of Nu'uuli, in front of the Hong Kong Restaurant.

Having said as much, there are two remaining questions presented on the evidence: 1) whether the injury suffered by Defendant constituted "serious physical injury"; and, 2) whether the scienter element of "knowingly," was shown. We answer the first question in the affirmative, but find insufficient evidence to establish the second, the requisite scienter element, beyond all reasonable doubt.

1. Serious Physical Injury--A.S.C.A. § 46.3111(24)

Statute defines serious physical injury as "physical injury that creates a substantial risk of death or that causes serious permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ." A.S.C.A. § 46.3111(24). We harbor no doubts, that evidence as to the outcome of the medical procedure coupled with the claimant's symptoms as presented today—diminished speaking and mastication—clearly speak to both "permanent disfigurement" and "protracted loss or impairment of" the complainant's previous normal jaw function.

2. Knowingly--A.S.C.A. § 46.3202(c)(2)

[1] Title 46, section 46.3202(c) of American Samoa Annotated Code reads:

(c) A person “acts knowingly” or with knowledge:

- (1) with respect to his conduct or to attendant circumstances when he is aware of the nature of his conduct or that those circumstances exist; or
- (2) with respect to a result of his conduct when he is aware that his conduct is practically certain to cause that result. **[**5**]**

(emphasis added). A.S.C.A. § 46.3202(c). While expert opinion suggested that a fractured jaw bone may be consistent with the force of a single punch, it is also quite clear that expert opinion did not say that a single punch is practically certain to result in a fractured jaw bone. Common sense and every day experience tells us that not every punch to another’s chin is practically certain to produce the outcome of a broken jaw bone. (The sport of boxing would not have otherwise endured over the ages). Accordingly, we find the element of “knowingly” to be insufficiently proven and the government falling short of discharging its burden of proof.

3. Lesser Included Offense--A.S.C.A. § 46.3108

[2] Under A.S.C.A. § 46.3108, “a defendant may be convicted of an offense included in the offense charged in the . . . information.” The crime of Assault in the First Degree as charged in Count 1 of the Information includes the lesser crime of Assault in the Second Degree. A person commits the crime of assault in the second degree if “he recklessly causes serious physical injury to another person.” A.S.C.A. § 46.3521(a)(2) (emphasis added). Thus, the difference between the two offenses is the difference between the scienter elements of “knowingly” in Assault in the First Degree, and “recklessly” in Assault in the Second Degree. Under A.S.C.A. § 46.3202(d), “A person ‘acts recklessly’ or is reckless when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and that failure constitutes a gross **[**6**]** deviation from the standard of which a reasonable person would exercise in the situation.”

[3] On the evidence before us, we are satisfied that Defendant forcefully punched the right side of Complainant’s jaw while he was distracted by Defendant’s companion. We are also satisfied on the evidence that a broken jaw is the reasonably foreseeable outcome of Defendant’s act—a lateral punch to an incautious Complainant’s jaw, delivered with enough brute force to cause fracture in two places. Notwithstanding, Defendant heedlessly took an unjustifiable risk without any regard to the likely consequences of his attack upon Complainant. Accordingly, we find

Defendant guilty of Assault in the Second Degree, in that he recklessly caused serious physical injury to Complainant.

4. Self Defense--A.S.C.A. § 46.3305(a)

[4] Defendant's tender of Ms. Wilson's testimony was his claim of justification or self-defense. Pursuant to A.S.C.A. § 46.3305(a),

A person may . . . use physical force upon another person when and to the extent he reasonably believes it to be necessary to defend himself. . .from what he reasonably believes to be the use or imminent use of unlawful force by the other person.

Self-defense, however, is not available where the actor is the initial aggressor, A.S.C.A. § 46.3305(a)(1), and while the burden is on Defendant to "inject the issue" of self-defense, A.S.C.A. § 46.3305(d), the government must prove beyond a reasonable doubt that Defendant did not act in reasonable self-defense.

On the evidence before us, we find that the government has *****7**** here met its burden. Of the two eye-witnesses, we find Complainant's memory of things to be the more reliable. The only believable aspect to Ms. Wilson's testimony was that she saw two men approaching each other and that one threw a punch at the other. Otherwise, the accuracy of Ms. Wilson's recollection of events was, in our view, tainted by her own admission that she was separately prompted by counsel before trial, and previously by the Public Defender's investigators, that the identity of one of the men she saw on the night of May 27, 2015, was Joe Togitogi. On direct examination, Ms. Wilson was asked by defense counsel in poignantly leading fashion:

Q. While you were at the Hong Kong Restaurant, do you recall seeing Mr. Togitogi outside the restaurant, Hong Kong Restaurant?

She answered:

A. Okay, that night I wasn't sure. I didn't even know it was him, not until I came here and then you told me he was Joe Togitogi. But I called him not until you told me he was Joe Togitogi.

Notwithstanding Ms. Wilson's hesitancy, counsel persisted in his suggestive fashion to have Ms. Wilson undertake an in-court identification of Defendant with the following:

Q. On the date and time we talked about a Hong Kong Restaurant--

A. Okay.

Q. --did you see this gentleman at that location?

A. Yes.

THE COURT:

And the record will reflect counsel was touching the shoulder of the defendant when he asked his question. **[**8**]**

Subsequently, defense counsel asked:

Q. From where you were standing and the gentlemen (Defendant and Complainant) were standing, could you get a clear look at their faces?

A. No.

Later in her testimony, Ms. Wilson tried to differentiate between the two gentlemen as “lighter skin” and “darker skin,” and “taller” and “short.” She testified that she saw the “darker brown skin guy punched the taller guy.” To which narrative, counsel retorted:

Q. You saw the darker skin man punched Mr. Togitogi?

THE COURT: No, she said “punched the taller guy.”
Counsel, stop leading.

Finally, upon cross examination, Ms. Wilson admitted that “it was dark outside,” corroborating Complainant’s testimony that incident occurred around 9:00 pm.

[5] On the record, we find that Ms. Wilson has no clear independent memory of the combatant’s identifying features. She only briefly witnessed the young men outside the Hong Kong restaurant, in the heat of the moment, before her husband quickly whisked her away from the fight scene. Under the circumstances, we believe that Ms. Wilson’s memory of the events, including salient identification detail, was implanted or supplemented by suggestion. To this end, we agree with counsel for the government, that if it had been the government who had employed the Public Defender’s tactics at pre-trial identification, Ms. **[**9**]** Wilson would not have been allowed to testify. The

identification process undertaken with Ms. Wilson by the Public Defender's Office, both pre-trial and in-court, was so overly suggestive that Ms. Wilson's in-court identification of Complainant, as the one who threw the first punch, is not only unreliable but not believable. Counsel's in-court attempts to steer Ms. Wilson to identify Complainant as the initial aggressor at the time, was nothing less than desperate measures, warranting caution from the bench.

On the other hand, Complainant's version of events is not only convincing but circumstantially reinforced. Complainant being the outsider, being alone and on foot within the confines of Defendant's village, during the hours of darkness, and being outnumbered at the initial encounter, all adds up to the highly unlikely scenario of Complainant initiating a fight by throwing the first punch. To the contrary, the evidence overwhelmingly showed that Complainant was in defensive mode right from the very beginning, being immediately punched and stomped upon by the gathering village rabble, who kept up their battery all the way from the Hong Kong Restaurant until their victim was able to escape his ordeal at the vicinity of the Ocean Star store, some hundreds of yards up the road.

The importance of pinning the first punch on Complainant, from the defense's point of view, is, as noted above, to avail **[**10**]** the defense of justification or self-defense which is not available to the "initial aggressor." A.S.C.A. § 46.3305(a)(1).

Finally, in that Complainant was distracted when Defendant took the presented opportunity to place and connect a well delivered blow to his unwary victim, we see nothing defensive about Defendant's punch, which from all accounts was consistent with the fa'apo (ambush) variety, favored by the coward and the unmanly.

On the foregoing, we find that self-defense is neither indicated on the facts nor available to Defendant as the initial aggressor. Accordingly, we find Defendant guilty of Assault in the Second Degree, Class D Felony, in violation of A.S.C.A. § 46.3521(a)(2).

Pursuant to A.S.C.A. § 46.1908 the Probation Office shall prepare herewith a presentence report to be made available on or before March 29, 2016, with sentencing herein to be held on April 1, 2016.

It is so ordered.

Cite as: *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15, slip op. at [page number] (Trial Div. April 1, 2016) (order den. real party in interest's mot. for sanctions)

AMERICAN SAMOA GOVERNMENT, Petitioner,

v.

WORKMEN'S COMPENSATION COMMISSION, Respondent.

KILISIMASI FAALEMIGA, Real Party in Interest

High Court of American Samoa
Trial Division

CA No. 27-15

April 1, 2016

[1] Simply regurgitating the language of Rule 11 and making broad accusations does not, by and large, provide sufficient proof for the court to impose sanctions.

[2] Sanctions should be imposed with caution—thus, specific evidence of how a party has violated Rule 11 is needed before the court will impose Rule 11 sanctions.

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

Counsel: For Petitioner, Assistant Attorney General Asaua Fuimoano
For Respondent, *Pro Se*
For Real Party in Interest, Mark F. Ude

**ORDER DENYING REAL PARTY IN INTEREST'S MOTION FOR
RULE 11 SANCTIONS**

On April 26, 2015, Petitioner American Samoa Government ("ASG") filed a Verified Complaint for Permanent Injunction and for Stay of Payment from the administrative law judge's order awarding Real Party in Interest Kilisimasi Faalemiga's ("Faalemiga") worker's compensation benefits. On August 3, 2015, after Faalemiga failed to file an answer within the prescribed period, ASG filed for default judgment. On August

24, 2015, Faalemiga moved Rule 11 sanctions against ASG. ASG opposes this motion.

[2**]** We heard this matter on December 22, 2015. For the reasons below, we deny Faalemiga's motion.

Discussion

T.C.R.C.P. Rule 11 provides, in relevant part, that an attorney presenting a pleading or motion to the court is certifying to the best of his knowledge, formed after reasonable inquiry, that:

- (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law,
- (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

T.C.R.C.P. 11. Rule 11 further provides that a motion for sanctions should describe the specific conduct alleged to violate the Rule. T.C.R.C.P. 11(c).

Faalemiga argues that ASG's complaint violated Rule 11 because: (a) the allegations were not formed after an inquiry that was not reasonable under the circumstances; (b) the allegations are presented for an improper purpose to harass and intimidate; (c) the claims and legal contentions are not **[**3**]** warranted by existing law or the establishment of new law; and (d) the allegations and other factual contentions fail to have evidentiary support and are unlikely to have evidentiary support. (Real Party in Interest's Mot. for Rule 11 Sanctions.)

[1-2] In his motion, Faalemiga merely follows the general language of Rule 11 and makes broad accusations that ASG failed to research the law, investigate the facts, or base their complaint on existing law or the establishment of a new law. However, simply regurgitating the language

of Rule 11 and making broad accusations does not, by and large, provide sufficient proof for the court to impose sanctions. Sanctions should be imposed with caution—thus, specific evidence of how a party has violated Rule 11 is needed before the court will impose Rule 11 sanctions. *See, e.g., Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994); *Moore v. Keegan Mgmt. Co.*, 78 F.3d 431, 437 (9th Cir. 1996) (stating courts should use caution when exercising the sanctioning power and only use it when the court is legally authorized to do so).

Faalemiga fails to provide specific evidence of any of the above enumerated allegations. He states ASG fails to support its complaint with proof that the workmen’s compensation award by the administrative law judge is not “in accordance with the law,” which is the standard of review for such awards. He also **[**4**]** claims ASG’s allegations are intended to harass him and are frivolous.

Faalemiga cites *Rakhshan v. Fuimaono*, 18 A.S.R.2d 77 (Trial Div. 1991) in support of his argument. However in *Rakhshan*, the attorney admitted that he had filed a lawsuit with dubious merits. *Rakhshan*, 18 A.S.R.2d at 79. That is not the case here. Faalemiga also cites to several other cases, spending the most time on *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156 (9th Cir. 1987).

In *Hudson*, the Ninth Circuit held that the counterclaim was not wholly frivolous but that the request for approximately \$4 million in damages against the employee did not have a factual or legal basis and was simply motivated by retaliation. *Id.* at 1163-64. First, outside of asking for attorney’s fees, ASG is not seeking damages, let alone retaliatory damages, against Faalemiga—it also does not appear to be making any other retaliatory claims. Second, ASG’s complaint is based on the Workmen’s Compensation Act, A.S.C.A. §§ 32.0501-.0674, which allows a party to appeal a workmen’s compensation award that it believes is not in accordance with law, as ASG does here.

Under the Workmen’s Compensation Act, a party may seek judicial review of an order by the administrative law judge that it believes is not “in accordance with law.” A.S.C.A. § 32.0652 (1967). Here, ASG argues that Faalemiga had medical issues with his heart that **[**5**]** could have caused a stroke before ASG employed him and that such issues support ASG’s belief that the workmen’s compensation award was not in accordance with law.

Faalemiga also appears to urge the court to impose sanctions against ASG because ASG’s verified complaint was not properly verified. While this could affect some procedural issues in the case, it does not subject ASG’s complaint to sanctions.

Accordingly, the motion for Rule 11 sanctions is denied.

Order

Faalemiga's motion for Rule 11 sanctions is denied. It is so ordered.

Cite As: *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14, slip op. at [page number] (Trial Div. April 6, 2016) (order den. mot. to compel)

AUGUST CURRY and SESILIA CURRY, Plaintiffs,

v.

**FLORENCE SAULO & ASSOCIATES INSURANCE & FINANCE,
INC., GABRIEL MANCINI, TUSIPA ANOA'I, PROGRESSIVE
INSURANCE COMPANY (PAGO PAGO) LIMITED, ANZ GUAM,
INC., Jointly and Severally, Defendants.**

High Court of American Samoa
Trial Division

CA No. 77-14

April 6, 2016

[1] Our rules of discovery rely in large part on the good faith and diligence of counsel and the parties in abiding by these rules and conducting themselves and their judicial business honestly.

[2] Effective discovery requires a party serving an interrogatory to avoid an argumentative question which serves no purpose in providing additional discovery information.

[3] A requesting party should not engage in abusive discovery tactics which are designed for the purpose of annoying, embarrassing or burdening their opponent.

[4] When the court sees abusive discovery tactics in play, it may make orders circumscribing discovery which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

[5] A responding party should not evade its duty to faithfully answer interrogatories by providing responses in stock phrases or making meritless objections to the requests.

[6] A defendant's basis for its denials of Plaintiffs' legal assertions, probe into the defendant's legal opinions, which are covered by the attorney work-product privilege doctrine and, therefore, are beyond the

permissible scope of discovery, which covers only non-privileged materials.

[7] Stock phrases are conclusory statements that are destined to come back to court by inviting debates.

[8] Objections wrapped in stock phrases are meaningless as they do not sufficiently explain grounds for objections.

[9] Abuse of discovery by providing meaningless questions and answers by the parties will warrant severe sanctions for wasting judicial resources.

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

Counsel: For Plaintiffs, Mark F. Ude
For Defendants, Florence Saulo & Associates Insurance &
Finance, Inc., and Gabriel Mancini, Toetasi Fue Tuiteleleapaga
For Defendants Tusipa Anoa'i and Progressive Insurance
Company (Pago Pago) Limited, Roy J.D. Hall, Jr.
For Defendant ANZ Bank Guam Inc., Marian T. McGuire
substituted by David P. Vargas

ORDER DENYING PLAINTIFFS' MOTION TO COMPEL DISCOVERY

On April 16, 2013, Defendant Gabriel Mancini allegedly backed his vehicle into Plaintiff August Curry's vehicle, which was being driven by Plaintiff Sesilia Curry in the parking lot of Defendant ANZ Guam, Inc. d/b/a ANZ Amerika Samoa Bank ("ANZ"). On October 16, 2014, Plaintiffs filed a complaint against the defendants, asserting a claim for negligence against ANZ.

On August 26, 2015, Plaintiffs submitted a set of twenty-one (21) Interrogatories to ANZ. Information the Interrogatories [**2**] sought included "what kind of leasehold interest you had with the actual owner of the land stated in Interrogatory No. 2," "you or your agent's involvement of the accident on 16 April 2013," and "the number of customers that have joined ANZ Guam, Inc." from an unspecified date to 16 April 2013. (Pls.' First Set of Interrogs. upon Def. ANZ Guam, Inc., 6-7, Aug. 26, 2015.)

ANZ answered Plaintiffs' Interrogatories on November 19, 2015, well past the 30 days after service of the Interrogatories in violation of Rule 30(a) of the Trial Court Rules of Civil Procedure. ANZ's answers contained objections to Interrogatories Numbers 3, 7, 10, 11, 12, 13, 19,

20, and 21, all or partly on the ground that an interrogatory is “vague, ambiguous, and unintelligible.” (Def. ANZ’s Response to Pls.’ First Set of Interrogs., Nov. 19, 2015.)

Meanwhile, Plaintiffs made a motion to compel ANZ to answer Plaintiffs’ Interrogatories on October 26, 2015, and the court heard the motion on November 23, 2015. The court awarded ANZ attorney’s fees for preparing the motion to compel. However, still dissatisfied with certain of ANZ’s answers, Plaintiffs filed another motion on December 11, 2015, seeking to compel ANZ to answer nine Interrogatories that ANZ refused to answer with various objections.

For the reasons set forth below, we deny the motion.

Standard of Review

T.C.R.C.P. Rule 26 allows “discovery regarding any matter, not privileged, which is relevant to the subject matter involved [***3**] in the pending action.” Discovery questions must be “reasonably calculated to lead to the discovery of admissible evidence.” T.C.R.C.P. 26(a).

[1-4] Our rules of discovery rely “in large part on the good faith and diligence of counsel and the parties in abiding by these rules and conducting themselves and their judicial business honestly.” *Metro. Opera Ass’n v. Local 100*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003). This requires a party serving an interrogatory to avoid “an argumentative question which serves no purpose in providing additional discovery information.” *Berleme v. Matagiese*, 3 A.S.R.3d 118, 121 (Trial Div. 1991). Furthermore, a requesting party should not engage in abusive discovery tactics which are designed “for the [] purpose of annoying, embarrassing or burdening their opponent.” *Progressive Ins., v. S. Star Int’l, Inc.*, 5 A.S.R.2d 20, 22 (Trial Div. 2001). When the court sees such tactics in play, it may make orders “circumscribing discovery which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Id.*

[5] A responding party should not evade its duty to faithfully answer interrogatories by providing responses in stock phrases or making meritless objections to the requests. *Collisson v. Hartunian*, 21 Cal. App. 4th 1611 (Cal. Ct. App. 1994). T.C.R.C.P. Rule 37(a)(3) treats an evasive or incomplete answer “as a failure to answer,” allowing the court to sanction the responding party for its failure. [***4**]

Discussion

Here, Plaintiffs engage in abuse of the discovery process. Plaintiffs' interrogatories are wrapped in vague phrases, seeking information that neither addresses nor develops the core issues of this case. For instance, Plaintiffs, in interrogatory No. 7, ask, "Please describe in full, listing each and every fact, you or your agent's involvement of the accident on 16 April 2013." (Pls.' First Set of Interrogs. 7.) The question confuses its purpose through its unclear wording as well as serving "no purpose in providing additional discovery information." See *Berleme*, 3 A.S.R.3d at 121. So is Plaintiffs' interrogatory No. 10, asking for "the number of customers that have joined ANZ Guam, Inc. from after receiving notice . . . to the date of the accident, 16 April 2013." *Id.*

[6] In addition, Plaintiffs' Interrogatories No. 11, 12 and 13, seeks ANZ's legal opinion protected by the attorney work-product privilege. Interrogatories No. 11, 12, and 13 stem from ANZ's denial of Plaintiffs' legal assertions in Complaint's Paragraphs 52, 53 and 54.¹ See *id.* at 7. ANZ's denials are legal conclusions as they counter Plaintiffs' legal arguments. Thus, Plaintiffs' interrogatories, which seek ANZ's basis for their denials of Plaintiffs' legal assertions, probe into ANZ's legal [**5**] opinions covered by the attorney work-product privilege doctrine. The information sought is beyond the permissible scope of discovery, which covers only non-privileged materials. T.C.R.C.P. Rule 26.

We find Interrogatories No. 19, 20, and 21, as being unduly burdensome, serving little, if any, relevant discovery purpose but to harass ANZ.² See *Progressive Ins. Co.*, 5 A.S.R.2d at 20. These questions would not have featured in Plaintiffs' current motion to compel had ANZ answered these interrogatories with reasonable explanations such as "ANZ is not in possession of relevant records or data."

¹ In Paragraphs 52, 53, and 54, Plaintiffs claim that ANZ breached its duty by "failing to exercise a sufficient degree of care to insure the safety of their persons and property" and "to use the reasonable care," and therefore, was "the proximate cause of the collision." (Compl. ¶¶ 52-54.)

² Interrogatory No. 19: "Please state the amount of time it took a customer from when he or she first entered ANZ Guam's Inc.'s building on the Fagatogo property before they departed"; No. 20: "Please state approximately how many customers were at the ANZ Guam's Inc.'s [sic] property in Fagatogo on 16 April 2013"; No. 21: "Please state approximately how many of your customers at the ANZ Guam, Inc.'s[,] property in Fagatogo on 16 April 2013 drove vehicles to their destination." *Id.* at 9.

However, rather than providing simple, clear answers, ANZ convolutes the process by countering with objections wrapped in stock phrases. ANZ continues to use the stock phrase that an interrogatory is “vague, ambiguous, and unintelligible” as their objection to six Interrogatories No. 3, 7, 10, 19, 20, and 21. *See* (Def. ANZ’s Response). ANZ’s objections reiterate other phrases as well, such as “overly broad,” “burdensome,” and “information not reasonably calculated to lead to the discovery of admissible evidence” to Interrogatories No. 10, 19, 20, and 21. *See Id.* **[**6**]**

ANZ’s use of repetitive, vague phrases does not accurately explain and reflect the grounds of the objections. For example, ANZ makes the same stock-phrase objection to both Interrogatories No. 3 and 7 on two vastly different grounds. ANZ explains their objection to Interrogatory No. 3³ that “the accident complained of did not occur on the land occupied, controlled, and/or used by ANZ Bank on the date of the accident,” and that Plaintiffs’ question “assumed facts not in evidence.” (Def. ANZ’s Opp’n to Mot. to Compel Further Answers to Pls.’ First Set of Interrogs., 2, Jan. 15, 2016.) To Interrogatory No. 7, ANZ tackles not relevancy of the information sought but wording of the question which calls for speculation on ANZ’s part. *Id.* at 3. Yet, ANZ uses the same objection to both questions in that an interrogatory is “vague, ambiguous, and unintelligible,” without explaining the differing grounds. *See* (Def. ANZ’s Response).

[7-8] Stock phrases are conclusory statements that are destined to come back to court by inviting debates. Objections wrapped in stock phrases are meaningless as they do not sufficiently explain grounds for objections. As a result, the objections raise questions in the mind of the other side and prompt them to engage in an attempt to clarify answers by ways of making motions like one before us. The lengthening discussions and debates on questions and answers inherently involve the use of the court’s **[**7**]** limited resources, wasting our time and effort.

[9] The court duly warns that future abuse of discovery by providing meaningless questions and answers by the parties will warrant severe sanctions for wasting judicial resources.

³ Interrogatory No.3: “If ANZ Guam, Inc.[,] did not own the land on 16 April 2013, please state what kind of leasehold interest you had with the actual owner of the land stated in Interrogatory No.2.”

For the reasons set above, we deny Plaintiffs' motion to compel discovery.

It is so ordered.

Cite As: *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10, slip op. at [page number] (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions)

NATIVE RESOURCES DEVELOPER, INC., and GREEN GOLD ENTERPRISES, INC., Plaintiffs/Counter-Defendants,

v.

AMERICAN SAMOA GOVERNMENT, and JOHN DOES I THROUGH X, jointly and severally Defendants/Counterclaimants.

High Court of American Samoa
Trial Division

CA No. 86-10

April 11, 2016

[1] Trial rules governing discovery are to be liberally construed in favor of discovery.

[2] Due to the broad scope of allowable discovery, the court may issue a protective order where “good cause” is shown to prevent abusive discovery requests.

[3] Good cause for a protective order requires a showing that the order is required to prevent clearly defined and serious injury, harassment, or the abuse of court processes; mere inconvenience and expense are not enough.

[4] Given that the liberal construction favors discovery, parties opposing discovery must shoulder a heavy burden when arguing why discovery should be denied.

[5] The court has authority to compel answers to interrogatories.

[6] The trial court enjoys broad discretion in managing discovery, including whether to compel discovery.

[7] In ruling on a motion to compel, the court should independently determine the proper course of discovery based on arguments by the parties.

[8] The scope of discovery is vastly broad permitting the discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence.

[9] Sanctions for a successfully raised motion to compel are also within the court's discretion to impose and usually take the form of attorney's fees it cost to raise the motion.

[10] The court may impose more severe sanctions than attorney's fees when necessary.

[11] Motions to strike are disfavored and infrequently granted.

[12] A motion to strike should "be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.

[13] While a motion to strike can be used to attack an entire pleading, it is more often used to attack portions of a pleading—even just single words or phrases.

[14] A motion to strike can also provide an early challenge to the legal sufficiency of a defense.

[15] 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.

[16] Under the *Twombly-Iqbal* heightened pleading standard, the court applies a two-prong analysis.

[17] Part of the *Twombly-Iqbal* standard 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.

[18] While the pleading does not need to include detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.

[19] Prong two of the *Twombly-Iqbal* standard instructs the court to analyze whether the well-pleaded allegations "plausibly give rise to an entitlement to relief.

[20] The *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal.

[21] In considering a motion to dismiss, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true.

[22] A complaint should not be dismissed because a court does not believe that a plaintiff will prevail on [his or her] claim.

[23] The court's practice to liberally construe pleadings to avoid injustice does not extend to refashioning [a plaintiff's] theory of relief.

[24] T.C.R.C.P. 37 allows the court discretion to impose a wide range of sanctions for willful failure to comply with discovery rules, including default judgment.

[25] A party is not required to turn over privileged information, such as attorney work product which would include an attorney's thoughts on how a case does or does not apply to the litigation.

[26] A motion for an order of protection against inappropriate discovery is timely if it was served before the date set for the production of the discovery.

[27] Striking affirmative defenses and counterclaims, and granting default judgment are extreme sanctions.

[28] The court should tailor sanctions to match the severity of the misconduct.

[29] Exceptionally severe sanctions, such as dismissal or default judgment, are generally only ordered in response to T.C.R.C.P. 37 violations as a last resort.

[30] Where an order instructs a plaintiff to amend interrogatories in a certain manner and instructs the defendant to answer the amended interrogatories, the defendant's failure to answer the interrogatories is not a violation of a court order if the plaintiff did not properly amend the interrogatories.

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

Counsel: For Plaintiffs/Counter-Defendants, Mark F. Ude
For Defendants/Counterclaimants, Assistant Attorney General
Elana Rivkin-Haas

ORDER GRANTING ASG’S MOTION FOR PROTECTIVE ORDER,
AND DENYING PLAINTIFFS’ MOTIONS FOR CONTEMPT WITH
SANCTIONS BY STRIKING AFFIRMATIVE DEFENSES,
DISMISSING COUNTERCLAIM, AND GRANTING DEFAULT
JUDGMENT

Pending are the motion of Defendant American Samoa Government (“ASG”) for a discovery protective order, and the motions of Plaintiffs Native Resources, Inc. and Green Gold Enterprises, Inc. (“Plaintiffs”) to hold ASG in contempt with sanctions by striking affirmative defenses, dismissing the counterclaim by ASG, and for a default judgment. For the below reasons, we grant ASG’s motion and deny Plaintiffs’ motions.

Background

This case began in 2010 shortly after the tsunami of 2009. A vessel owned by Plaintiffs was impacted by the tsunami and **[**2**]** allegedly destroyed by ASG during the aftermath recovery program. The propriety of ASG’s action is the core issue.

To date, the case has gone through a variety of pretrial proceedings. Relevant to the present order, the court issued an order granting motion to compel in part and denying motions to strike affirmative defenses and dismiss counterclaim on October 19, 2015. In this order, the court directed Plaintiffs to resubmit several interrogatories and ASG to answer said interrogatories as thoroughly as possible. The order also denied Plaintiffs’ motions to strike ASG’s affirmative defenses, to dismiss ASG’s counterclaim, and for a default judgment against ASG.

Plaintiffs filed amended interrogatories on October 26, 2015. On November 20, 2015, ASG filed a motion for a protective order pursuant to T.C.R.C.P. 26(c), arguing that Plaintiffs had failed to make their interrogatories more specific, and ASG should not have to go through the burden and expense of answering interrogatories that remain the same.

On November 30, 2015, Plaintiffs filed a renewed motion to hold ASG in contempt for failure to comply with the October 19, 2015 order. They also filed motions to strike ASG’s affirmative **[**3**]** defenses, to dismiss ASG’s counterclaim, and for default judgment as sanctions for ASG’s failure to comply.

We heard all of these matters on December 30, 2015.

Standard of review

1. Motion for Protective Order

[1-4] 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, the court may issue a protective order where “good cause” is shown to prevent abusive discovery requests. *Progressive Ins. Co. v. S. Star Int’l, Inc.*, 5 A.S.R.3d 20, 22 (Trial Div. 2001); 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 that the liberal construction favors discovery, “parties opposing discovery must shoulder a heavy burden when arguing why discovery should be denied.” *Id.*

2. Motion for a Finding of Contempt for Failure to Comply with Motion to Compel

[5-6] The court has authority to compel answers to interrogatories under T.C.R.C.P. 37. The trial court enjoys broad discretion in managing discovery. *Lefiti v. Ford Motor [**4**] Co.*, CA No. 90-04, slip op. at 3 (Trial Div. May 31, 2006) (order directing disc.); *see also Suntrust Bank v. Blue Water Fiber, L.P.*, 210 F.R.D. 196, 199 (E.D. Mich. 2002). Our 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).

[7-8] In ruling on a motion to compel, we should independently determine the proper course of discovery based on arguments by the 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.*, 5 A.S.R.3d at 22 (citing T.C.R.C.P. 26(b)(1)).

[9-10] Sanctions for a successfully raised motion to compel are also within our discretion to impose and usually take the form of attorney’s fees it cost to raise the motion. *See Pago Petroleum Prods., Inc. v. Ye Ahn Moolsoan, Ltd.*, 27 A.S.R.2d 94, 95-96 (Trial Div. 1995); *Johnson v. Coulter*, 25 A.S.R.2d 84, 88-89 (Trial Div. 1993); T.C.R.C.P. 37(a). We may impose more **[**5**]** severe sanctions if appropriate. *See Pago Petroleum Prods., Inc.*, 27 A.S.R.2d at 96; T.C.R.C.P. 37(a).

3. Motion to Strike Affirmative Defenses

[11-12] Motions to strike are governed by T.C.R.C.P. 12(f). Rule 12(f) provides in relevant part: “upon motion made by a party before responding to a pleading or . . . upon the court’s own initiative . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Motions to strike are disfavored and infrequently granted. *Lunsford v. United States*, 570 F.2d 221, 229 (8th Cir. 1977). A motion to strike should “be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of the parties.” *Pashoian v. GTE Directories*, 208 F. Supp. 2d 1293, 1297 (M.D. Fla. 2002).

[13-14] While a motion to strike can be used to attack an entire pleading, it is more often used to attack portions of a pleading—even just single words or phrases. See *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994) (holding that striking only a few lines from pleading was proper); *Day v. Moscow*, 955 F.2d 807, 811 (2d Cir. 1992) (stating “[r]ule 12(f) [was] designed for **[**6**]** excision of material from a pleading, not for dismissal of claims in their entirety”). A motion to strike can also provide an early challenge to the legal sufficiency of a defense. *California v. United States*, 512 F.Supp. 36, 38 (N.D. Cal. 1981).

4. Motion to Dismiss Counterclaim

[15-19] 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, Ltd. v. Am. Samoa Power Auth.*, 4 A.S.R.3d 73, 76-77 (Trial Div. 2000); *Afele-Fa’amuli v. Am. Samoa Cmty. Coll.*, 4 A.S.R.3d 219, 221-22 (Trial Div. 2000). Under the *Twombly-Iqbal* heightened pleading standard, the court applies a two-prong analysis. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see also *Vergara v. Am. Samoa Gov’t*, CA No. 86-11, slip op. at 4-5 (Trial Div. Feb. 9, 2012) (order on def.’s mot. to dismiss). Part one directs the court to accept a complaint’s “well-pleaded” factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. *Iqbal*, 129 S.Ct. at 678-79. While the pleading does not need to include detailed factual allegations, “it demands more than an unadorned, the-defendant-unlawfully- **[**7**]** 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.

[20-23] 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*, 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 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). **[**8**]**

5. Motion for Default Judgment

[24] Under Rule 37(b)(2) if a party “fails to obey an order to provide or permit discovery . . . [or] fails to obey an order entered in regard to the failure,” the court may render “a judgment by default against the disobedient party.” Thus, Rule 37 allows sanctions against parties for willful failure to comply with discovery rules. *Pago Petroleum Prods., Inc.*, 27 A.S.R.2d at 96. It is within the court’s discretion to impose a wide range of sanctions if appropriate, even default judgment. *See id.*

Discussion

1. ASG Is Entitled to a Protective Order

ASG is asking the court for a protection order to spare it the annoyance, undue burden, and expense of answering Plaintiffs’ amended interrogatories. It argues that “instead of reworking the [i]nterrogatories to be more specific and targeted to elicit relevant information, Plaintiffs’ Amended Interrogatories, for the most part, remain unchanged. . . . [T]herefore, [the interrogatories] further no legitimate discovery interests and serve no purpose but to annoy and harass.” (Def. Am. Samoa Gov’t’s Mot. for Protective Order 9.) **[**9**]**

After reviewing Plaintiff’s amended interrogatories, we find that interrogatories 11, 18, and 25-40 are still overbroad, seemingly unnecessary, and/or attempt to require ASG to provide publically available information readily available to Plaintiffs. Most of these interrogatories have been amended only slightly by either deleting a phrase, sentence, or part; adding a phrase, sentence, or part that is mostly

factual in nature; or rearranging the order of the words.

In the October 19, 2015 order, we specifically noted that the availability of cranes capable of lifting the boat was not relevant to this litigation and that asking for “each and every fact” makes an interrogatory overbroad. We also stated that ASG is not required to do Plaintiffs’ research, and thus, Plaintiffs should refrain from asking about statutes and regulations that are accessible to Plaintiffs.

[25] Furthermore, ASG is not required to turn over privileged information, such as attorney work product which would include an attorney’s thoughts on how a case does or does not apply to the litigation. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947) (stating the work product doctrine protects an attorney’s thought process); *Holmgren v. St. Farm Mut. Auto Ins. Co.*, 976 F.2d 573, 577 (9th Cir. 1992) (holding opinion work product, **[**10**]** such as an attorney’s conclusions, opinions, or legal theories, is protected under work product doctrine).

In *Progressive Ins. Co.*, the court granted Progressive’s motion for a protection order when the other party could not explain how the information they sought was reasonably calculated to lead to the discovery of admissible evidence, the information sought included sensitive financial information, and the request placed an undue burden on Progressive. *Progressive Ins. Co.*, 5 A.S.R.3d at 22-23.

We gave Plaintiffs a second chance to formulate appropriate interrogatories, and they failed to do so. Although they are not requesting financial information, some of the interrogatories do request privileged information. Like in *Progressive Ins. Co.*, Plaintiffs have also failed to explain how the information they seek is needed. Because some of the interrogatories seek privileged information, others seek publically available information, and others are unduly burdensome to ASG, we are inclined to grant ASG’s motion for a protective order.

Plaintiffs argue that ASG’s motion for a protection order should be denied because it was untimely. To this end, Plaintiffs point to a case out of the Southern District of New **[**11**]** York. *See United States v. Int’l Bus. Machs. Corp.*, 79 F.R.D. 412 (S.D.N.Y. 1978). T.C.R.C.P. 26(c), however, does not mandate a motion for a protective order be filed by any specific date:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense If the motion for a

protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

Our case law is also silent on the matter.

Furthermore, *International Business Machines Corp.* does not state what Plaintiffs' counsel, Mark Ude ("Ude"), claims it does.¹ The court in *International Business Machines Corp.* holds that motions for protective orders are generally accepted as timely if they are served before the date set for production, as in this case. However, in *International Business Machines Corp.*, the motion was filed for the first time in a motion for **[**12**]** reargument, after the date for production had long passed. Ude is warned that the court does not look kindly on being mislead, and he should take care to carefully review his research in the future.

[26] In this case, the motion was timely filed as it was served before the date set for the production of ASG's answers to the amended interrogatories. We did not issue our order allowing Plaintiffs to amend certain interrogatories and ordering ASG to answer said interrogatories until October 19, 2015. Thus, it would have been impossible for ASG to file a motion for a protection order against the amended interrogatories by March 17, 2015, the date by which Plaintiffs claim such a motion must have been filed.

As the motion was timely filed and ASG answered the only amended interrogatories that were not overbroad, unnecessary, requesting publically available information, or requesting privileged information, we grant their motion for a protective order as to the remaining interrogatories.

¹ It should also be noted that attorney Ude provided a quote allegedly from *International Business Machines Corp.*: "Motion for protective order must be deemed as untimely when it was first made in motion for reargument of document production order and party had ample opportunity to seek protective order earlier." (Opp'n to Def. the Am. Samoa Gov't's Mot. for Protective Order Pursuant to T.C.R.C.P. 26(c) 2.) However, upon searching for this quote in the case, we could not find it anywhere. Neither did we find it in any of the prior or later orders or opinions for this case that we could locate. See *United States v. Int'l Bus. Machs. Corp.*, 70 F.R.D. 700 (S.D.N.Y. 1976); *United States v. Int'l Bus. Machs. Corp.*, 461 F. Supp. 732 (S.D.N.Y. 1978); *United States v. Int'l Bus. Machs. Corp.*, 81 F.R.D. 625 (S.D.N.Y. 1979).

2. Holding ASG in Contempt and Imposing Sanctions Is Not Warranted

Plaintiffs' request that ASG be held in contempt for failing to comply with the October 19, 2015 order and fully answer the amended interrogatories. For ASG to have failed to **[**13**]** follow the October 19, 2015 order, Plaintiffs first had to amend certain interrogatories to be "more specific and poignant." (Order Granting in Part Mot. to Compel & Den. Mots. to Strike Affirmative Defenses & Dismiss CounterCl. 8.) As discussed above, Plaintiffs failed to do so. Since ASG has not failed to comply with the October 19, 2015 order, it is not subject to contempt and the suggested sanctions.

Plaintiffs also ask the court to strike ASG's affirmative defenses, dismiss its counterclaim, and grant Plaintiffs default judgment against ASG. The primary reason provided for all of Plaintiffs' motions is the same as for the motions we addressed in the October 19, 2015 order: this should be the sanctionable punishment for ASG's continued refusal to answer all the interrogatories. Plaintiffs further argue that some of ASG's affirmative defenses should be struck because they have no merit and ASG cannot justify them. We disagree with all of these contentions.

[27-29] Striking ASG's affirmative defenses and dismissing their counterclaim are extreme responses; granting Plaintiffs a default judgment is an even more extreme response. The court should tailor sanctions to match the severity of the misconduct. *See Pago Petroleum Prods., Inc.*, 27 A.S.R.2d at 96. And **[**14**]** exceptionally severe sanctions, such as dismissal or default judgment, are generally only ordered in response to Rule 37 violations as a last resort. *See TCW Spec. Credits, Inc. v. F/V Cassandra Z*, 3 A.S.R.3d 149, 153 (Trial Div. 1999).

[30] As we stated in the October 19, 2015 order, the first set of interrogatories "genuinely confused" ASG. (Order Granting in Part Mot. to Compel & Den. Mots. to Strike Affirmative Defenses & Dismiss CounterCl. 8.) Plaintiffs have failed to adequately amend the interrogatories to be more specific—they are still overbroad, unnecessary, asking for privileged information, and/or asking for publically available information. In order for ASG to have disobeyed the October 19, 2015 order, Plaintiffs first had to amend the interrogatories per the instructions in the order. Accordingly, ASG is not in contempt and subject to sanctions. We deny Plaintiffs' motions to strike ASG's affirmative defenses, dismiss its counterclaim, and grant Plaintiffs default judgment.

Order

ASG's motion for a protective order with respect to Plaintiffs' interrogatories 11, 18, and 25-40 is granted.

Plaintiffs' motions to hold ASG in contempt for ASG's failure to comply with the court's October 19, 2015 order with ****15**** sanctions by striking ASG's affirmative defenses, dismissing ASG's counterclaim, and granting Plaintiffs' a default judgment against ASG are denied.

It is so ordered.

Cite As: *Am. Samoa Gov't v. Lefatia*, CR Nos. 13-15, 18-15 & 19-15, slip op. at [page number] (Trial Div. April 11, 2016) (order granting mot. to cont., join, & consol. trial)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

**MANU LEFATIA, SINAPATI TU'UFA'ANATU, TULIESE
TALIU, Defendants.**

High Court of American Samoa
Trial Division

CR Nos. 13-15, 18-15, & 19-15

April 11, 2016

[1] The court found that consolidation of criminal cases served the interests of judicial economy, justice, and fairness because all criminal charges of the four defendants are in connection with the same shooting incident and present similar evidentiary, factual, and legal issues.

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

Counsel: For Plaintiff, Assistant Attorney General Russell D. Smith,
substituted by Assistant Attorney General Tyler Ganzel
For Defendants Sinapati Tu'ufa'anatu and Tuliese Taliu,
Public Defender Douglas Fiaui
For Defendant Manu Lefatia, Sharron I. Rancourt

**ORDER GRANTING MOTION TO CONTINUE, JOIN AND
CONSOLIDATE TRIAL**

The government filed criminal complaints against Defendant Manu Leafatia on March 16, 2015, and Defendants Sinapati Tu'ufa'anatu, Tuliese Taliu, and Mosegi Solia, Jr., on April 7, 2015. Each defendant was respectively charged with two counts of Assault in the Second Degree and one count of Property Damage in the First Degree. All of the charges stem from a shooting incident that occurred at the Leone Police Substation on November 1, 2014. Despite the fact that the underlying conduct giving rise to the common charges, spring from the same

transaction, a drive-by shooting, the government initiated separate prosecutions, resulting in four separate criminal cases—**[**2**]** Defendant Leafatia in CR No. 13-15, Defendant Tu’ufa’anatu in CR 18-15, Defendant Taliu in CR No. 19-15, and Defendant Solia in CR No. 20-15—for which joinder had not been sought until now. Initially, all four cases were randomly assigned to Chief Justice. However, Defendant Leafatia was arraigned before Justice Richmond (in the absence of the Chief Justice) on March 17, 2015, while the remaining three defendants were subsequently before the Chief Justice on April 7, 2015. Noticing at arraignment that Defendant Solia as a close relative of his, within the ambit of A.S.C.A. § 3.1007(a), the Chief Justice was disqualified to sit on his relative’s matter. Defendant Solia’s matter was accordingly reassigned to Associate Justice Richmond. In CR No. 13-15, 18-15, and 19-15, jury trials were scheduled on June 27, 2016, April 4, 2016, and April 25, 2016 in a corresponding order.

On April 1, 2016, the government moved to join all four criminal cases and to continue the jury trial in CR No. 18-15, which was scheduled on April 4, 2016. The government argued that because the cases present “similar charges and transactions that will require examination of the same witnesses, documents, and other evidence,” they “can be disposed of efficiently at a single trial.” (Gov’t’s Mot. for Joinder and Mot. for New Trial Date, March 16, 2016.) The motion came on for hearing on April 1, 2016.

Rule 8(b) of Trial Court Rules of Criminal Procedure (“T.C.R.Cr.P.”) allows joining two or more defendants in the same **[**3**]** information “if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions.” T.C.R.Cr.P. Rule 13 further provides that “two or more complaints or information” can be “tried together if the offenses, and the defendants . . . could have been joined in a single complaint or information.”

The court finds the government’s motion to join the four cases in alliance within T.C.R.Cr.P. Rule 13, as well as consistent with the interests of judicial economy and justice. All criminal charges of the four defendants are in connection with the same shooting incident on November 1, 2014 and present similar evidentiary, factual, and legal issues. Hence, the interests of judicial economy, justice, and fairness warrant all four cases, CR No. 13-15, 18-15, 19-15, and 20-15, to be consolidated into a single criminal matter and disposed together. Given the fact that CR No. 20-15 involves a relative of Justice Kruse and has a scheduled jury trial before Justice Richmond, the three cases CR No. 13-15, 18-15, and 19-15 should all be joined with CR No. 20-15 into a single criminal matter and consolidated for trial before Justice Richmond.

In the interest of judicial economy, the three cases, CR No. 13-15, 18-15, 19-15, and 20-15 shall be consolidated with CR No. 20-15 and be assigned to Justice Richmond.

It is so ordered.

Cite As: *Nomura v. Jones*, CA No. 50-06, slip op. at [page number]
(Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel)

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

v.

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

High Court of American Samoa
Trial Division

CA No. 50-06

June 2, 2016

[1] The High Court follows the ABA Model Rules of Professional Conduct.

[2] In considering whether to disqualify counsel under Rule of Professional Conduct 3.7(a), the court must first determine if the lawyer is likely to be a necessary witness.

[3] A lawyer is considered a “necessary witness” if he or she has crucial information that is not cumulative and cannot be obtained elsewhere.

[4] If a lawyer is not a necessary witness, then the inquiry ends; however, if a lawyer is a necessary witness, they may still be able to act as an advocate at trial if they fall into one of the three listed exceptions.

[5] The court should grant a motion for disqualification only under the most compelling of circumstances because of the potential for abuse.

[6] To prove a breach of contract claim, a party must show there was a valid contract, a breach by the other party occurred, and damages.

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

Counsel: For Plaintiff, Richard deSaulles
For Defendant, Mark F. Ude

ORDER DENYING MOTION TO DISQUALIFY DEFENDANT'S COUNSEL

Pending is Plaintiff Ricky Nomura's ("Nomura") motion to disqualify Defendant Timothy Jones's ("Jones") counsel, Mark Ude ("Ude"). For the reasons below, we deny the motion.

Background

On June 5, 2006, 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.

After several years passed with no progress, Jones filed a motion to dismiss under T.C.R.C.P. Rule 41(b) for failure to prosecute on January 21, 2014. We denied the motion to dismiss on September 15, 2015. However, we sua sponte awarded **[**2**]** reasonable attorney's fees and costs incurred in connection with the dismissal motion to Jones.

On September 25, 2015, Nomura moved for reconsideration of the court's imposition of lesser sanctions sua sponte. Around the same time, Jones filed a motion to compel Nomura to respond to the first set of interrogatories. We denied the motion for reconsideration and the motion to compel on January 15, 2016.

Nomura then filed a motion to disqualify Jones's counsel, Ude, on March 10, 2016, arguing that Ude is a necessary witness. Jones opposes this motion.

We heard this matter on May 13, 2016.

Discussion

[1] High Court Rule 104 states that the High Court of American Samoa shall follow the ABA Model Rules of Professional Conduct. The Model Rules of Professional Conduct Rule 3.7(a) states:

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
 - (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

[2-4] Under Rule 3.7(a), the court must first determine if the lawyer is “likely to be a necessary witness.” *Id.*; see, e.g., *Kelly v. CSE Safeguard Ins. Co.*, No. 2:08-cv-00088-KJD-RJJ, 2010 U.S. Dist. LEXIS 101118, at *5-6 (D. Nev. Sept. 8, 2010). A lawyer is considered a “necessary witness” if he or she has [**3**] crucial information that is not cumulative and cannot be obtained elsewhere. See, e.g., *Velger v. Carr*, No. 2010-42, 2012 U.S. Dist. LEXIS 26277, at *6 (D.V.I. Feb. 29, 2012). If a lawyer is not a necessary witness, then the inquiry ends; however, if a lawyer is a necessary witness, they may still be able to act as an advocate at trial if they fall into one of the three listed exceptions. See Model Rules of Prof’l Conduct R. 3.7(a); see, e.g., *Kelly*, 2010 U.S. Dist. LEXIS 101118, at *6.

[5] The court should grant a motion for disqualification only under the most compelling of circumstances because of the potential for abuse. See *Manning v. Warning, Cox, James, Sklar & Allen*, 849 F.2d 222, 224 (6th Cir. 1988) (stating the ability to disqualify opposing attorney is a “potent weapon”); *Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir. 1993) (stating courts “should hesitate” to disqualify an attorney); *Optyl Eyewear Fashion Int’l Corp. v. Style Cos.*, 760 F.2d 1045, 1050 (9th Cir. 1985) (stating disqualification of counsel should be subject to “strict scrutiny”).

Nomura argues that Ude is a necessary witness because of a conversation between the two in October 2012. (Mot. to Disqualify Counsel at 3.) Nomura claims that during that conversation Ude told him that Jones is a good person and would pay if given more time. (Aff. of Ricky Nomura in Opp’n to Defs.’s Mot. to Dismiss at 2.) Nomura states that Ude’s [**4**] testimony is “necessary to support Plaintiff’s claims that Plaintiff made demand upon Defendant for the outstanding debt, [sic] and that Defendant and Defendant’s current counsel, Mark Ude, promised that Defendant would pay the debt but asked for more time to do so.” (Mot. to Disqualify Counsel at 3.)

[6] Nomura’s complaint asserted a breach of contract claim. To prove a breach of contract claim, a party must show there was a valid contract, a breach by the other party occurred, and damages. See, e.g., *First Com. Mortgage Co. v. Reece*, 89 Cal. App. 4th (2001). In addition, Jones asserted the affirmative defenses of estoppel, waiver, accord and satisfaction, and failure to state a claim upon which relief can be granted. Because the testimony potentially relates to the alleged breach of contract and affirmative defenses, it cannot be said at this time that the testimony is irrelevant or only relates to uncontested issues.

However, it is likely that Nomura could obtain this evidence from elsewhere. Specifically, Nomura states that Jones had said similar

things—that he, Jones, would pay if given more time—several times over the years. (Aff. of Ricky Nomura in Opp’n to Defs.’s Mot. to Dismiss at 2.) Furthermore, if Ude talked to Nomura on Jones’s behalf, Jones ostensibly directed Ude to do so, and thus, this exact information could be obtained by calling Jones as a witness instead of Ude. Because Ude’s **[**5**]** testimony would be cumulative or could be obtained elsewhere, we hold Ude is not a “necessary witness.”

Since Ude is not a “necessary witness,” it is unnecessary to address whether any of the three exceptions in Rule 3.7(a) apply. Nomura has failed to meet his burden in proving Ude should be disqualified as Jones’s counsel in this case.

Order

Plaintiff’s motion to disqualify counsel is denied.

It is so ordered.

Cite As: *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16, slip op. at [page number] (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike)

**ANZ GUAM, INC. D/B/A ANZ AMERIKA SAMOA BANK,
Plaintiff,**

v.

**ESTATE OF IUPATI C. TERVOLA, BY AND THROUGH ITS
ADMINISTRATOR, TAPAI P. TERVOLA, Defendant.**

High Court of American Samoa
Trial Division

CA No. 18-16

June 27, 2016

[1] Motions to strike are generally disfavored.

[2] When ruling on a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader.

[3] The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.

[4] A motion to strike can be used to attack parts of a pleading or an entire pleading.

[5] Rule 12(f) also gives the court the power to strike a pleading if it fails to meet the requirements of T.C.R.C.P. 8(a) or 8(e)(1).

[6] If the pleading violates Rule 8(a)(2) and 8(e)(1) such that a great deal of judicial energy would have to be devoted to eliminating the unnecessary matter and restructuring the pleading, the court may strike the entire pleading while granting leave to replead.

[7] Rule 12(f) provides three ways a motion to strike may be made: (1) before a party responds to a pleading, if a responsive pleading is permitted, (2) within 10 days after the service of a pleading, if no responsive pleading is permitted, or (3) sua sponte by the court.

[8] A responsive pleading is allowed when a defendant makes a counterclaim.

[9] The court interprets A.S.C.A. § 43.0201 as prohibiting objections to technical deficiencies in pleadings.

[10] A.S.C.A. § 43.0201 does not work to prohibit the court from granting a motion to strike if it is appropriate under Rule 12(f).

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

Counsel: For Plaintiff, Craig Miller
For Defendant, Mark F. Ude

ORDER GRANTING PLAINTIFF’S MOTION TO STRIKE

Pending is the motion to strike Defendant’s answer and counterclaims under T.C.R.C.P. 12(f) filed by Plaintiff ANZ Guam, Inc. (“ANZ”). For the below reasons, we grant ANZ’s motion.

Background

ANZ brought this collection and foreclosure action on April 5, 2016. In short, ANZ is suing Defendant Estate of Iupati C. Tervola, which is represented by its administrator, Tapai P. Tervola (“Tervola”), for a money judgment on two defaulted promissory notes and for foreclosure of a mortgage that secures both promissory notes.

On May 5, 2016, Tervola, while pro se, filed Defendant’s answer, affirmative defense and counterclaim (“Answer and *****2**** Counterclaim”) to ANZ’s Complaint. The Answer and Counterclaim is 35-pages long, contains numerous grammatical errors, including sentences that continue for the length of a page, and is generally difficult to understand.

On May 25, 2016, ANZ moved to strike the Answer and Counterclaim in its entirety, arguing that it is “prolix, opaque and unintelligible.” See (ANZ Bank’s Mot. to Strike at 2). On June 13, 2016, Tervola, having retained her present counsel after filing the Answer and Counterclaim, filed her opposition to the motion to strike. We heard this matter on June 14, 2016.

Standard of Review

T.C.R.C.P. 12(f) states that

[u]pon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon him or upon court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.¹

[1-2] Motions to strike are generally disfavored. *McConnell Dowell Ltd. v. Am. Samoa Power Auth.*, 4 A.S.R.3d 73, 75 (Trial Div. 2000). When ruling on a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader. *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669 (C.D. Cal. 2000). **[**3**]**

[3-4] “(T)he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983). A motion to strike can be used to attack parts of a pleading or an entire pleading. See *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993), *rev'd on other grounds*, 510 U.S. 517 (1994) (holding that striking of a few lines from the pleading was proper); *Carone v. Whalen*, 121 F.R.D. 231, 233 (M.D. Penn. 1988) (striking plaintiff's complaint in its entirety).

[5-6] Rule 12(f) also gives the court the power to strike a pleading if it fails to meet the requirements of T.C.R.C.P. 8(a) or 8(e)(1). See *Hardin v. Am. Elec. Power*, 188 F.R.D. 509, 511 (S.D. Ind. 1999) (stating if “complaint fails to meet the requirements of Rule 8,” court may dismiss for failure to state a claim upon which relief may be granted or strike parts under Rule 12(f)); *Fisher v. Am. Samoa Gov't*, CA No. 14-11, slip op. at 4-5 (Trial Div. Oct. 7, 2015) (order dismissing action) (stating the court has the power to dismiss a complaint under Rule 8 when it is murky and confusing). “[I]f the [pleading] violates Rule 8(a)(2) and 8(e)(1) such that a great deal of judicial energy would have to be devoted to eliminating the unnecessary matter and restructuring the pleading, [the court] **[**4**]** may strike the entire pleading while granting leave to replead.” *Id.* (citing *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 706 (3d

¹ T.C.R.C.P. 12(f) is substantially similar to Federal Rule of Civil Procedure 12(f), and cases interpreting Federal Rule 12(f) may be used to understand our own Rule 12(f).

Cir. 1996) and *Kuehl v. FDIC*, 8 F.3d 905, 908 (1st Cir. 1993)) (internal citations omitted).

[7-8] First, we address Tervola’s argument that ANZ’s motion to strike is untimely because ANZ filed the motion more than 10 days after the Answer and Counterclaim was served. Rule 12(f) provides three ways a motion to strike may be made: (1) before a party responds to a pleading, if a responsive pleading is permitted, (2) within 10 days after the service of a pleading, if no responsive pleading is permitted, or (3) sua sponte by the court. A responsive pleading is allowed when a defendant makes a counterclaim. T.C.R.C.P. 12(a) (“The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer . . .”).

Tervola asserted multiple counterclaims in the Answer and Counterclaim, and thus, ANZ had 20 days to respond to the Answer and Counterclaim. ANZ filed its motion to strike on the twentieth day. *See* T.C.R.C.P. 6 (computation of time). Because a responsive pleading was allowed, ANZ need only to have filed a motion to strike before it responded to the Answer and Counterclaim. Accordingly, the motion to strike was timely filed. Even if the motion was untimely filed, Rule 12(f) grants **[**5**]** the court the power to strike a pleading, or part of a pleading, on its own initiative as well. T.C.R.C.P. 12(f).

Tervola’s 35-page Answer and Counterclaim is exceedingly difficult to understand, in part because it is apparent Tervola is not comfortable with the written English language. The Answer and Counterclaim lays out 20 affirmative defenses and 27 counterclaims, most of which are only supported by bare facts that are not enough to substantiate the allegations. Like ANZ, we had difficulty understanding Tervola’s legal argument in large parts of the Answer and Counterclaim. Under Rule 12(f), we have the power to strike a pleading that violates Rule 8(a) and 8(e)(1), as the Answer and Counterclaim plainly does. We also find it would be in parties’ best interest to grant ANZ’s motion to strike since it will ultimately save both parties time and money by clarifying Tervola’s allegations and litigating only the non-spurious claims. Consequently, the motion to strike is granted.

Finally, we wish to address Tervola’s claim that A.S.C.A. § 43.0201 prohibits the court from ever striking deficient pleadings. Section 43.0201 states that “no objection may be made to *formal* deficiencies in pleading.” If § 43.0201 was interpreted as Tervola argues, the court could never grant a Rule 12(f) motion and Rule 12(f) would be completely extraneous; however, that is clearly not the case. *See, e.g., McConnell [**6**] Dowell*, 4 A.S.R.3d at 75-76 (discussing court’s power to strike under Rule 12(f) with no mention of § 43.0201);

Lacambra v. Lacambra, 28 A.S.R.2d 114, 115-16 (Trial Div. 1995) (same); *Rakshan v. Am. Samoa Gov't*, 28 A.S.R.2d 151, 157 (Trial Div. 1995) (same); *Am. Samoa Power Auth. v. Deutz MWM Far East Ltd.*, 7 A.S.R.3d 178, 181-182 (Trial Div. 2003) (same). Furthermore, following Tervola's logic, if § 43.0201 barred all objections to deficiencies in a pleading, the court would also be unable to reject pleadings that violated Rule 8(a) and 8(e).

[9-10] Instead, we read § 43.0201 as prohibiting objections to technical deficiencies in pleadings. This reading of § 43.0201 is supported by *Farapo v. Am. Samoa Gov't*, 23 A.S.R.2d 51 (App. Div. 1992). In *Farapo*, the Appellate Division cited § 43.0201(b) in support of its denial of a motion to dismiss for technical deficiencies, such as incorrectly styling the matter as an “appeal” even though it was a “petition for review” and naming the American Samoa Government, the Attorney General, and the Chief Immigration Officer instead of only the Immigration Board. For that reason, § 43.0201 does not work to prohibit the court from granting a motion to strike if it is appropriate under Rule 12(f), as it is here.

Order

The court grants ANZ's motion to strike. The Answer and Counterclaim is stricken in its entirety. However, Tervola has **[**7**]** leave to replead and refile her answer and any counterclaims within 20 days from the date of entry of this order.

It is so ordered.

Cite As: *Am. Samoa Gov't v. Loma*, CR No. 52-15, slip op. at [page number] (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

BRIAN BENJAMIN LOMA,

High Court of American Samoa
Trial Division

CR No. 52-15

July 29, 2016

[1] Article I, § 5 of the Revised Constitution of American Samoa guarantees individuals the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

[2] Evidence obtained in violation of Article I, § 5 cannot be admitted in any court against the individual whose right was violated.

[3] Article I, § 5 mirrors the Fourth Amendment of the United States Constitution; thus cases interpreting the Fourth Amendment provide appropriate guidance in applying Article I, Section 5 of our Constitution.

[4] Both this court and the United States Supreme Court have stated that a border search is subject to a significantly less demanding standard than that required for other searches and seizures.

[5] The Fourth Amendment is not typically violated by routine border searches.

[6] Routine questioning by customs officials does not trigger the *Miranda* warnings of rights requirements.

[7] Even a referral to a secondary inspection at the border does not necessarily create a custodial interrogation requiring *Miranda* warnings because it can be part of a routine border inspection.

[8] *Miranda* warnings during a border search are only required if the process transforms from a routine border search and inquiry to a

custodial interrogation.

[9] The questioning or circumstances during a border search must rise to a distinctly accusatory level before a reasonable person would feel restrained to the degree associated with formal arrest.

[10] A border search or detention may become more than routine when an individual is discovered to be concealing suspicious materials or taken to a private room and strip searched.

[11] Customs officers may search all persons entering or leaving American Samoa.

[12] All merchandise and baggage imported or brought into American Samoa shall be unloaded in the presence of, and inspected by, a customs officer, and that officer may require the owner to open any container for inspection.

[13] Field drug tests are not searches within the meaning of Fourth Amendment.

[14] Field drug testing may be performed in connection with a border search without violating a defendant's constitutional rights.

[15] A customs officer may inspect any person arriving in the Territory to determine whether such person is violating the laws and regulations pertaining to entry into American Samoa without a warrant.

[16] A strip search may be performed if there is real or reasonable suspicion supported by the objective and articulable facts that the passenger is concealing evidence of a crime or contraband upon his or her person.

[17] A pat down at the border must meet a very low standard and only requires the articulation of some facts which would lead a reasonable and objective customs officer to believe the search necessary.

[18] The requirements for a border strip search requires a heightened level of suspicion, due the increased intrusiveness.

[19] Merely taking the defendant to the customs office for a secondary search did not make this a custodial interrogation.

[20] The alert by a drug dog, the private room with a closed door, officers escorting the defendant to the restroom and to get his luggage, the discovery of drugs, the positive drug testing and accusation of

cocaine possession led the court to hold that the defendant was in custody and evidence obtained at that point would be suppressed.

[21] When a law enforcement officer interrogates a suspect but does not give a *Miranda* warning until after obtaining an incriminating statement, the court must determine whether the warning was deliberately withheld when deciding whether to suppress a subsequent, post-warning confession.

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

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

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT’S MOTION TO SUPPRESS

On September 14, 2015, Defendant Brian Benjamin Loma (“Defendant”) was charged by information with one count of unlawful possession of the controlled substance marijuana. Defendant moves to suppress any physical evidence found and seized by Plaintiff American Samoa Government (“ASG”) in connection with this matter and any testimonial evidence attributed to Defendant in violation of Defendant’s constitutional rights. For the reasons stated below, we grant in part and deny in part Defendant’s motion.

Background

On September 11, 2015, Defendant was a passenger on a Hawaiian Airlines flight from Hawaii to American Samoa and [***2***] sought to enter the Territory. On this particular night, customs officer David McMoore (“Officer McMoore”) from the K-9 Unit was performing a routine inspection with Benny, a trained drug detection dog.

Officer McMoore testified that when Benny smells the odor of certain drugs, Benny begins to pant and wag his tail at an increased rate while trying to pinpoint the location of the odor. Once the odor is located, Benny will sit next to or on the source of the odor. When Officer McMoore and Benny approached Defendant while walking down the line of passengers waiting in the immigration line, Benny began to cast about for the odor of drugs. Officer McMoore testified that when the Defendant noticed Benny, Defendant started to walk away, at which point Officer McMoore asked Defendant to stand still. The Defendant, however, testified that at no point did he attempt to walk away from Officer McMoore and Benny. Either way, after Benny approached and

sniffed the Defendant, Benny sat down next to Defendant. Officer McMoore then pulled Defendant out of line and asked Defendant for his entry declaration form.

Around this time, customs officer Samuel Savali (“Officer Savali”), who had noticed Benny’s behavior, approached Officer McMoore and Defendant. The officers then proceeded to ask Defendant routine questions about his identity and his purpose **[**3**]** for entering the Territory. The officers informed Defendant that Benny was a drug-sniffing dog and that Benny had alerted them to the odor of drugs on Defendant. During this conversation, Officer Savali took Defendant’s passport from him and gave it to an immigration officer to stamp. Defendant was then escorted into the customs office supervisor’s office for a secondary search.

Once in the customs office, the officers told Defendant that they would be performing a pat down and asked Defendant if he had any drugs or anything else on him. They also asked if Defendant had smoked any marijuana before coming to the Territory. Defendant told the officers that he had smoked some marijuana before entering the Territory and that he had some chocolate candy bars that contained marijuana in his backpack, which he had carried into the room. Officer Savali asked Defendant to show them the products in his backpack, which Defendant did. Upon inspection, the officers discovered “THC”, which is a key element in marijuana, in the ingredient list for the candy bars. When asked if he had any more drugs, Defendant indicated that there were additional marijuana products in his luggage.

After Defendant showed the officers the candy bars containing THC from his backpack, one of the officers proceeded **[**4**]** to pat down Defendant. During the pat down, the officer felt a suspicious bulk in Defendant’s crotch area. Because of this, a strip search was performed. However, the suspicious bulk was not contraband material, and nothing else suspicious was found during the strip search.

After the strip search, Defendant was escorted back out to the general waiting area to retrieve his remaining luggage. During a search of Defendant’s luggage, a small wax ball smelling of marijuana and a lollipop, tea bags, and some pills containing THC were discovered. The officers performed field drug testing on some of these items and verified that the products contained THC. At one point, customs officer Suafo’a, who was assisting, told the other officers and Defendant that the drug test he had performed had tested positive for cocaine.¹ After the officers had

¹ Defendant has not been charged with possession of cocaine and no other evidence has been presented to suggest Defendant was in

performed the field drug testing, they informed Defendant that they would be calling the Department of Public Safety (“DPS”) and turning Defendant and all evidence over to DPS.

After the THC products were discovered, Defendant behaved in a nervous and depressed manner—holding his hand to his forehead at times and saying things like “I can’t believe I left [**5**] that in there” and “I’m going to go to jail.” Officer McMoore testified that when Defendant said “I’m going to go to jail,” he told Defendant that they had not said that and that it was up to DPS to determine if Defendant would be arrested.

At no point was Defendant handcuffed during the secondary search. Defendant did not ask to leave nor did the officers tell him that he was free to leave. However, when Defendant left the room to collect his luggage and to visit the restroom he was escorted by an officer. Throughout the secondary search, anywhere from three to six customs officers were in the room with the Defendant. In addition, the door to the customs office was closed while Defendant was inside.²

Sometime after Defendant’s luggage had been searched, the officers asked Defendant if they could use the products they found to train Benny further. Defendant consented, and Officer McMoore placed some of the found products on Defendant for this training purpose.

Approximately two and half hours after Defendant was pulled out of line for a secondary search, DPS Detective John Seumanutafa (“Detective Seumanutafa”) arrived at the airport with his partner. Detective Seumanutafa verbally informed Defendant [**6**] of his constitutional rights. Defendant was then transferred to the police substation in Tafuna in handcuffs. At the Tafuna substation, Detective Seumanutafa informed Defendant of his rights again and Defendant sign a warning of rights form. Defendant then made a verbal statement. When Detective Seumanutafa asked Defendant to put the verbal statement on paper, however, Defendant asked to speak to a lawyer. At this point, Detective Seumanutafa ceased all questioning.

On September 14, 2015, ASG charged Defendant with one count of unlawful possession of a controlled substance (marijuana). Defendant

possession of cocaine. There was some testimony by Officer Savali that the positive drug test could have been an error by Officer Suafo’a.

² Officer McMoore testified that the door to the customs office was locked from the inside, but Officer Savali testified that the door was only closed. For purposes of this opinion, it does not matter whether the door was merely closed or whether it was locked from the inside.

now moves to suppress any physical evidence collected by the customs officers, the field drug tests, any statements made by him during the secondary search at the airport, and the subsequent arrest. We heard this matter on July 12, 2016.

Standard of Review

[1-3] Article I, § 5 of the Revised Constitution of American Samoa guarantees individuals the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” Evidence obtained in violation of Article I, § 5 cannot be admitted in any court against the individual whose right was violated. *Am. Samoa Gov’t v. Kava*, 4 A.S.R.3d 240, 243 (Trial Div. 2000) (citing *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)). Article I, § 5 mirrors the Fourth **[**7**]** Amendment of the United States Constitution; thus cases interpreting the Fourth Amendment provide appropriate guidance in applying Article I, Section 5 of our Constitution.

[4-5] Both this court and the United States Supreme Court have stated that a border search is subject to a significantly less demanding standard than that required for other searches and seizures. *See Am. Samoa Gov’t v. Vagavao*, 3 A.S.R.3d 72, 75 (Trial Div. 1999). As a result, the Fourth Amendment is not typically violated by routine border searches. *United States v. Moody*, 649 F.2d 124, 126-27 (2d Cir. 1981).

[6-10] Routine questioning by customs officials also does not trigger the *Miranda* warnings of rights requirements. *See, e.g., United States v. Manasen*, 909 F.2d 1357, 1358 (9th Cir. 1990). Even a referral to a secondary inspection at the border does not necessarily create a custodial interrogation requiring *Miranda* warnings because it can be part of a routine border inspection. *See, e.g., United States v. Hernandez*, 229 Fed. App’x 331, 332 (5th Cir. 2007). *Miranda* warnings during a border search are only required if the process transforms from a routine border search and inquiry to a custodial interrogation. *Id.* This means that the questioning or circumstances must rise to a “distinctly accusatory level” before a reasonable person would feel restrained to the degree associated with formal arrest. **[**8**]** *See, e.g., United States v. Moya*, 74 F.3d 1117, 1120 (11th Cir. 1996). A border search or detention may become more than routine when an individual is discovered to be concealing suspicious materials or taken to a private room and strip searched. *See, e.g., United States v. Hartwell*, 296 F. Supp. 596, 606 (E.D. Pa. 2003) (citing *United States v. Salinas*, 439 F.2d 376, 380 (5th Cir. 1971)).

Discussion

Defendant moves to suppress all physical evidence found by the customs officers, the field drug tests, any statements made by Defendant, and the subsequent arrest on the grounds that ASG had no authority to detain and search him. Defendant also argues that any statements Defendant made should be suppressed because he was not given a *Miranda* warning.

ASG argues that under A.S.C.A. § 27.1003 it is entitled to perform the exact type of search and seizure that occurred in this case. It further argues that Defendant gave consent to the search of his luggage.

I. Border Search

[11-12] A.S.C.A. § 27.1003 states that customs officers may search “[a]ll persons entering or leaving American Samoa.” In addition, “[a]ll merchandise and baggage imported or brought into American Samoa . . . shall be unladed in the presence of, [**9**] and inspected by, a customs officer, and that officer may require the owner . . . to open” any container for inspection. § 27.1003(a).

In *American Samoa Government v. Fonoti*, the defendant entered the Territory by boat. 5 A.S.R.3d 81, 82 (Trial Div. 2001). Customs officials then questioned the defendant and searched his belongings, including a waist pouch that contained a locked section, in the customs inspection area. *Id.* at 83. The court held that § 27.1003 was constitutional and that the search of the pouch, including the locked section, fell within the actions allowed by § 27.1003. *Id.* at 87. Consequently, the defendant’s constitutional rights were not violated. *Id.* at 87.

The search of Defendant’s luggage is similar to the search of the waist pouch in *Fonoti*. Defendant was stopped in the customs area at the Pago Pago International Airport. Thus, customs officers would have been entitled to search the Defendant’s luggage even if he was not pulled aside for a secondary search. In this case, the customs officers also had probable cause to search Defendant’s luggage because of the alert by Benny, the drug detection dog. However, we need not further discuss whether probable cause existed or whether Defendant gave consent for his luggage to be searched since we hold that the search of Defendant’s luggage was [**10**] constitutional under § 27.1003.

II. Field Drug Testing

[13-14] Field drug tests are not searches within the meaning of Fourth Amendment. *United States v. Jacobsen*, 466 U.S. 109, 122-26 (1984). Thus, field drug testing may be performed in connection with a border search without violating a defendant's constitutional rights. See *United States v. Smythe*, 84 F.3d 1240, 1242 (10th Cir. 1996). Based on the testimony, the field drug tests were performed according to procedure during the secondary search. Furthermore, the officers legally stopped Defendant under A.S.C.A. § 27.1003 for a border search. The field drug testing did not violate Defendant's constitutional rights and will not be suppressed.

III. Pat Down and Strip Search

[15-16] A customs officer may inspect "any person arriving in the Territory to determine whether such person is violating the laws and regulations pertaining to entry into American Samoa" without a warrant. § 27.1003(b). "A strip search may be performed if there is real or reasonable suspicion supported by the objective and articulable facts that the passenger is concealing evidence of a crime or contraband upon his or her person." *Id.*

[17-18] In *Vagavao*, a customs officer became suspicious of the defendant's behavior because it varied significantly from [**11**] behavior the defendant had exhibited on previous trips to the Territory. 3 A.S.R.2d at 74. The officer then directed the defendant to a private room and patted him down. *Id.* During the pat down, the officer felt unusual bulges in the crotch area at which point the defendant whispered "please" in Samoan. *Id.* The officer then performed a strip search, which revealed packets of marijuana concealed on the defendant's person. *Id.* In its analysis, the court stated that a pat down at the border must meet a "very low standard" and only requires the "articulation of some facts which would lead a reasonable and objective customs officer to believe the search necessary." 3 A.S.R.3d 76, 75 (Trial Div. 1999). The court also stated that "the requirements for a border strip search . . . requires a heightened level of suspicion," due the increased intrusiveness. *Id.* at 76. Under these standards, the court held that neither the pat down nor the strip search violated the defendant's constitutional rights. *Id.* at 75-76.

Officer McMoore was alerted to the odor of drugs on Defendant by Benny, the drug detection dog. We find that this gave Officer McMoore ample reason to believe a pat down was necessary, given the low standard. During the pat down, the officer felt a suspicious bulge in the crotch area. This, along with the alert by Benny and the discovery of THC products in [**12**] Defendant's backpack, gave the officer a reasonable suspicion that was supported by "objective and articulable

facts” that Defendant might be concealing contraband upon his person. Consequently, the pat down and strip search did not violate Defendant’s constitutional rights.

I. Miranda Warnings

While the High Court has not previously addressed when a *Miranda* warning must be issued during a border search, several federal circuit courts have addressed this exact issue.

In a case from the Second Circuit, customs officers became suspicious of the defendant after observing her bulky clothing and nervous behavior in the immigration line. *Moody*, 649 F.2d at 128. The officers approached her, identified themselves, and escorted her into a private room for a secondary inspection. *Id.* at 126. While in the private room, the customs officers questioned the defendant, patted her down, and performed a strip search upon feeling unnatural bulges. *Id.* During the strip search, the officers discovered a bag hidden on the defendant’s body and asked what it was. *Id.* The court held that because the defendant was in a private room and the questioning was for the purpose of incriminating her, she had been subject to a custodial interrogation and not a routine border inquiry. *Id.* at 128. As a result, the officers should have given the **[**13**]** defendant a *Miranda* warning. *Id.*

The Fifth Circuit has also held that a routine border inquiry turns into a custodial interrogation, requiring a *Miranda* warning, when the defendant is questioned in a private room and subjected to a strip search. *United States v. Salinas*, 439 F.2d 376, 380 (5th Cir. 1971) (remanding case to determine if incriminating statement was made while defendant was in strip search room and if so, holding defendant was “in custody”).

In a different Second Circuit case, the defendant sought entry to the United States and lied about her citizenship status to an immigration inspector. *United States v. Silva*, 715 F.2d 43, 45 (2d Cir. 1983). The defendant was then taken to a private room and asked further questions about her identity. *Id.* While she was in the private room, the officer went through her purse and found \$20,000 of undeclared currency. *Id.* at 45-46. At no point was the defendant subject to a strip search. *Id.* At the end of the interview, the officer gave the defendant a routine declaration form, on which she gave false information about the amount of currency she was carrying. *Id.* at 46. She was later charged and convicted of making a false statement on a customs declaration. *Id.* The court held that under these facts the defendant was only exposed to routine border detention and questioning, and thus, the officers were not required to give **[**14**]** her a *Miranda* warning. *Id.* at 47.

The Eleventh Circuit has held that a defendant is not in custody when questioned at the border when: (1) the defendant is not physically moved or restrained by officers, (2) no handcuffs or guns are used, (3) the defendant is not booked or told of formal accusations or told he is under arrest, (4) the defendant does not ask to leave and is not told he is not free to do so, and (5) the defendant makes no admissions during the interview that would lead a reasonable person to conclude he would be arrested immediately. See *United States v. McDowell*, 250 F.3d 1354 (11th Cir. 2001); *United States v. Moya*, 74 F.3d 1117 (11th Cir. 1996).

The facts of this case more closely resemble those of *Moody* and *Salinas*, where a *Miranda* warning was required, than *Silva* or *Moya*. See *Moody*, 649 F.2d at 126; *Moya*, 74 F.3d at 1119; *Salinas*, 439 F.2d at 379-80; *Silva*, 715 F.2d at 47. Defendant was moved to a private room where the door was closed, and possibly locked, for a secondary search. During the secondary search, there were three to six officers in the room at any given point. While Defendant did not ask to leave and was not told he was not free to do so, he was escorted by an officer the two times he did leave the room. Furthermore, shortly after Defendant entered the private room, he admitted to smoking **[**15**]** marijuana in Hawaii and having products that contained marijuana. These statements reasonably led him to believe he would be arrested. Officer McMoore admittedly told Defendant that he was not presently under arrest and that whether Defendant would be arrested would be up to DPS when the Defendant said “I’m going to go to jail.” Nevertheless, in light of the other circumstances—the alert by a drug dog, the private room with a closed door, officers escorting Defendant to the restroom and to get his luggage, the discovery of drugs, the positive drug testing and accusation of cocaine possession, and the drug training with Defendant and Benny—a reasonable person still would have felt restrained to the degree associated with formal arrest.

[19-20] Merely taking Defendant to the customs office for a secondary search did not make this a custodial interrogation. However, under these facts, we hold that Defendant was subject to more than a routine border search once incriminating evidence was discovered. At that point, Defendant was entitled to be given a *Miranda* warning. Consequently, any statements Defendant made before the officers discovered THC products in his backpack are admissible, but any statements made after that during the secondary search are suppressed.

[21] In addition to any statements Defendant made during the **[**16**]** secondary search, there is the question of the validity of his statements to Detective Seumanutafa after he was given a *Miranda* warning. When a law enforcement officer interrogates a suspect but does not give a *Miranda* warning until after obtaining an incriminating statement, the

court must determine whether the warning was deliberately withheld when deciding whether to suppress a subsequent, post-warning confession. See, e.g., *United States v. Williams*, 435 F.3d 1148 (9th Cir. 2006). We hold that the *Miranda* warning was not deliberately withheld by the customs officers or Detective Seumanutafa. As soon as Detective Seumanutafa arrived at the airport, he informed Defendant of his constitutional rights. Detective Seumanutafa then also gave Defendant a *Miranda* warning at the Tafuna substation and had the Defendant sign a warning of rights form. At this point, Defendant had been well apprised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Therefore, any statements Defendant made to Detective Seumanutafa at the Tafuna substation that would traditionally be admissible are not suppressed.

Order

The search and seizure of marijuana products from Defendant's backpack and luggage during the border search and the field drug testing of such products were constitutionally **[**17**]** valid and will not be suppressed. Defendant's statements to Detective Seumanutafa after Defendant was given a *Miranda* warning are also constitutionally valid and will not be suppressed.

However, we find that Defendant was subject to a custodial interrogation in the customs' airport office during the secondary search. Thus, any statements Defendant made during the secondary search after incriminating evidence was discovered are suppressed.

It is so ordered.

Cite As: *Foketi v. Am. Samoa Gov't*, CA No. 30-16, slip op. at [page number] (Trial Div. July 29, 2016) (order granting extraordinary relief)

UILITONI FOKETI, Petitioner,

v.

AMERICAN SAMOA GOVERNMENT, Respondent.

High Court of American Samoa
Trial Division

CA No. 30-16

July 29, 2016

[1] Extraordinary writs provide a uniform method of review of judicial, executive or administrative acts or failures to act only when there is no appeal allowed or the remedy by appeal is inadequate.

[2] In order for the court to issue an alternative writ of mandamus, the petitioner must make out a prima facie case for granting the peremptory writ.

[3] The extraordinary writ of mandamus will not be issued unless: (1) the plaintiff has a plain right to have the act performed; (2) the defendant has a plain duty to perform it; and (3) there is no other adequate remedy available to the plaintiff.

[4] The Immigration Act provides that no alien may be employed in the Territory without Immigration Board approval.

[5] A defendant has a plain right to appear before the court and to not be held in Territorial Correctional Facility for an unspecified amount of time.

[6] The Probation Office has a plain duty to bring criminal defendants before the court when probationers violate the court's order.

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

Counsel: For Petitioner, Mark F. Ude
For Respondent, Assistant Attorney General Vincent Kruse

ORDER GRANTING EXTRAORDINARY RELIEF

Pending is the Verified Petition for Extraordinary Relief filed by Petitioner Uilitoni Foketi's ("Foketi"). For the reasons below, the court grants Foketi's petition on the terms set forth in the order below.

Background

Foketi is a Tongan citizen who was allowed to enter and reside in the Territory in or about 1997. On September 1, 2011, Foketi was sentenced to 15 years imprisonment for unlawful possession of a controlled substance (methamphetamine), though the sentence was suspended and Foketi was placed on probation. *See Am. Samoa Gov't v. Foketi*, CR No. 69-10 (Trial Div. Sept. 1, 2011) (j. & sentence). This is a felony conviction. *Id.* At the time of Foketi's conviction, his **[**2**]** immigration sponsor was Fa'ailiga Tumama ("Mrs. Foketi"), who is Foketi's wife and an American Samoa citizen. On May 22, 2013, the High Court released Foketi from prison early on the condition that he shall be "gainfully employed" within 60 days ("Early Release Order"). *See Am. Samoa Gov't v. Foketi*, CR No. 69-10 (Trial Div. May 22, 2013) (order). Foketi secured employment at a bakery on July 4, 2013.

During the 20 months Foketi had been in prison, his immigration ID had expired. Thus, his authorization to reside and be employed in the Territory was no longer valid. Once released from prison, Foketi submitted a renewal application to the Immigration Board, listing Mrs. Foketi as his intended sponsor. On May 8, 2014, the Immigration Board held a hearing to review Foketi's application. The Immigration Board denied the application and ordered Foketi to voluntarily depart the Territory. It also barred him from returning to American Samoa for five years. Foketi signed the bottom of the order acknowledging receipt of the order. *See* (Opp'n to Pet'r's Verified Pet. for Extraordinary Relief at App. A).

Foketi asked for a rehearing before the Immigration Board. At the rehearing on June 4, 2014, the Immigration Board again denied Foketi's application because he had been convicted of a drug-related felony and because Mrs. Foketi no longer resided in the Territory. The Immigration Board informed Foketi that he **[**3**]** had 10 days to voluntarily depart. At no point was Foketi given permission by the Immigration Board to work in the Territory after his early release.

Foketi failed to voluntarily depart the Territory within 10 days of his rehearing and continued to live and be employed here. On October 8, 2014, the Attorney General issued a warrant to arrest Foketi for his

violation of the Immigration Board's order to depart. He was arrested at his workplace on October 9, 2014.

Since his arrest in October 2014, Foketi has been held in the Territorial Correctional Facility ("TCF"). Respondent American Samoa Government ("ASG") claims that it is holding him until Mrs. Foketi can provide a confirmed ticket for Foketi's return to his home country. ASG also claims that it cannot release him back into the Territory since he has no legal right under American Samoa immigration laws to remain and be employed in American Samoa. Since the arrest, no immigration proceedings have been held, and Foketi has not been brought before the High Court for any other proceedings in CR No. 69-10.

On June 27, 2106, Foketi filed a verified petition for extraordinary relief, asking the court to compel ASG to explain why he was still being held in TCF and why he has not been provided a hearing before the Immigration Board. ASG opposes the petition. We heard this matter on July 19, 2016. **[**4**]**

Discussion

[1-3] T.C.R.C.P. 87 through 102 provide for extraordinary writs. Extraordinary writs "provide a uniform method of review of judicial, executive or administrative acts or failures to act only when there is no appeal allowed or the remedy by appeal is inadequate." T.C.R.C.P. 87. In order for the court to issue an alternative writ of mandamus, the petitioner must make out a prima facie case for granting the peremptory writ. *Porter v. Registrar of Vital Stats.*, 28 A.S.R.2d 175, 176 (Trial Div. 1995). The standard for granting an alternative writ of mandamus, as set forth in T.C.R.C.P. 90, has been interpreted by the High Court as follows:

The extraordinary writ of mandamus will not be issued unless (1) the plaintiff has a plain right to have the act performed; (2) the defendant has a plain duty to perform it; and (3) there is no other adequate remedy available to the plaintiff.

Id. (quoting *Mulitauaopele v. Maiava*, 24 A.S.R.2d 97, 98 (Trial Div. 1993)) (internal quotations omitted).

Although not directly discussed by the parties, there are both criminal and immigration matters at play in this case: Foketi's violation of the Early Release Order and Foketi's failure to voluntarily depart the Territory within 10 days from the June 4, 2014 immigration order. Criminal cases, however, take precedence over civil cases, which includes immigration **[**5**]** matters. See Fed. R. Crim. Proc. 50;

Zukowski v. Howard, Needles, Tammen & Bergendoff, Inc., 115 F.R.D. 53, 55 (D. Colo. 1987); *United States v. Bridges*, 86 F. Supp. 931, 932 (N.D. Cal. 1949).

[4] Foketi was granted early release to secure gainful employment on May 22, 2013. We interpret this condition to also mean the employment is lawful. Additionally, the Judgment and Sentence stated that one of the conditions of Foketi's probation was that he "conduct himself as a law-abiding citizen while on probation." *Foketi*, CR No. 69-10, slip op. at 2 (j. & sentence). This condition remained in place after he obtained early release. *Foketi*, CR No. 69-10, slip op. at 1 (order). The Immigration Act provides that no alien may be employed in the Territory without Immigration Board approval. A.S.C.A. § 41.0409(a); *Tuilefano v. Att'y Gen.*, 4 A.S.R.3d 67, 70-71 (Trial Div. 2000). Consequently, because the Immigration Board did not give Foketi approval for employment in the Territory after he was released, his unlawful employment was in violation of the Early Release Order even though he secured employment within 60 days.

Once Foketi violated the Early Release Order, the Probation Office should have initiated proceedings for revocation of Foketi's probation by seeking a show cause order and an arrest warrant. Foketi's arrest on immigration matters disrupted [**6**] this process, and it appears that neither ASG nor the Probation Office has taken steps within the last two years to bring Foketi before the court in CR No. 69-10.

[5-6] Foketi has a plain right to appear before the court and to not be held in TCF for an unspecified amount of time. The Probation Office also has a plain duty to bring criminal defendants before the court when probationers violate the court's order. There is no other adequate remedy available for Foketi in this instance, as demonstrated by the fact he has been left languishing in TCF for the past two years. For this reason, we will order the Chief Probation Officer to seek issuance of a show cause order so that Foketi may be brought before the court for violation of the Early Release Order in criminal case CR No. 69-10.

Order

The Verified Petition for Extraordinary Relief is granted as follows:

The Chief Probation Officer is directed to request the presiding justice to order Foketi to show cause why his probation should not be revoked in CR No. 69-10 on the basis of Foketi's failure to obtain lawful gainful employment in violation of the May 22, 2013 Early Release Order in the criminal case. For this purpose, a copy of this order shall be given to the

Chief Probation Officer. **[**7**]**

It is so ordered.

Cite As: *Am. Samoa Gov't v. Wright*, CR No. 67-14, slip op. at [page number] (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

SAMELU WRIGHT, Defendant.

High Court of American Samoa
Trial Division

CR No. 67-14

August 4, 2016

[1] The right to counsel goes beyond the perfunctory appointment of counsel and means the right to effective assistance of counsel.

[2] Effective assistance of counsel should put the prosecution's case to survive the crucible of meaningful adversary testing.

[3] The right to counsel only guarantees the defendant adequate and fair representation, not perfect representation.

[4] The right to effective assistance of counsel carries some limitations as it guarantees a defendant the right to be represented by an otherwise qualified attorney whom the defendant can afford to hire, or is willing to represent him even though he is without funds.

[5] The aim the constitutional right to counsel is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.

[6] An indigent defendant who lacks means to hire his own lawyer cannot insist on representation by an attorney he cannot afford, and does not have a cognizable constitutional complaint so long as he is adequately represented by attorney appointed by the courts.

[7] The Territory's indigent defendant can receive legal representation of the Public Defender, not an attorney of his choice, if he requests it, or the court so orders and he does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding.

[8] If the indigent defendant does not wish to be represented by the Public Defender, he can choose to waive his constitutional right to counsel and represent himself.

[9] Because the indigent defendant's right to have counsel of his choice is limited, the court has no obligation to appoint new counsel at the defendant's request.

[10] The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing.

[11] Unless the indigent defendant can show a constitutional violation of his right to counsel, whether to appoint a different lawyer for him who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the trial court.

[12] Even if the defendant intends to raise an ineffective assistance of counsel claim against his own counsel as part of his motion for new trial, the court may refuse appointing new counsel to assist the defendant in moving for a new trial.

[13] The defendant must meet a heavy burden to show his need for new counsel because a series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one.

[14] To succeed on the motion to appoint new counsel based on incompetence, the defendant must show that the conflict between the defendant and his counsel had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment.

[15] The defendant's "general loss of confidence or trust in his counsel" is not enough to warrant substitution of counsel.

[16] The defendant must present enough evidence of the counsel's incompetent representation to the court because we have an affirmative duty to inquire into the disagreement with existing counsel to determine if there is, in fact, good cause to appoint new counsel.

[17] If the defendant's showing of incompetence offers little merit, the court is under no obligation to appoint new counsel to argue the motion for new trial.

Before KRUSE, Chief Justice; and MUASAU, Associate Judge.

Counsel: For Plaintiff, Assistant Attorney General Tyler Ganzel
For Defendant, Assistant Public Defender Michael White

ORDER DENYING MOTION TO APPOINT NEW COUNSEL

Plaintiff American Samoa Government (“ASG”) filed a four-count information against Defendant Samuelu Wright (“Wright”) in connection with an armed robbery at the Gold Conda Store in Faga’alu village. Two co-defendants, Falefatu Asi and Alatuna Simi, were also separately charged by information for their alleged involvement in the same incident.¹ At the outset of the criminal proceedings against each, the three defendants were assigned counsel with the Public Defender’s Office. Wright was represented by Assistant Public Defender Joel Shiver, who was later substituted by another assistant public defender, Michael White.

Wright was initially bound over to the High Court to answer the charges against him on August 18, 2014, when he first *****2**** appeared with his counsel for arraignment. On December 5, 2014, Wright, through Counsel White, informed the court of his interest in retaining private counsel. Whereupon, the court continued the hearing to allow Wright to obtain private counsel. When the parties re-convened in court on December 19, 2014, Wright again appeared with Counsel White and personally addressed the court that he was comfortable with and wanted to be represented by Counsel White.

Wright’s jury trial began February 29, 2016, during which Wright appeared with Counsel White. ASG and Wright introduced various witnesses and exhibits and presented their arguments to the court and the jury. Among ASG’s witnesses who testified on the stand against Wright was Alatuna Simi, Wright’s co-defendant. During trial, Wright again wavered on whether to continue with Counsel White’s representation. On March 1, 2016, Wright stated to the court that he desired to represent himself. When the court cautioned him about the prudence of his move, Wright asked for a few minutes to consult with his counsel and then once more reaffirmed, through Counsel White, that he wanted to continue with Counsel White.

¹ Asi was charged in CR 69-14, and Simi in CR 68-14. Both pled guilty to one count of Conspiracy to Commit Robbery in the First Degree, a class B felony.

On March 2, 2016, the jury returned at the conclusion of the trial a verdict of guilty against Wright on all counts: Robbery in the First Degree, Stealing, and Unlawful Use of Weapon. Wright, however, was ultimately convicted of two counts, Robbery in the First Degree and Unlawful Use of Weapon with the court ruling that the Stealing charge was merged with the Robbery **[**3**]** count, as more particularly stated in our judgment and order issued on March 4, 2016. Wright was subsequently sentenced on May 6, 2016 to a term of imprisonment of 30 years on the count of Robbery in the First Degree, and 5 years imprisonment on the count of Unlawful Use of a Weapon.

After sentencing, Wright, through Counsel White, filed on May 17, 2016 his motion to appoint counsel for motion for new trial. Wright argued that he needs new counsel to handle his motion for new trial because he and Counsel White “have had a complete breakdown in attorney-client relationship,” and that he has a plan to “raise ineffective assistant of counsel” in his intended motion for a new trial. (Def.’s Mot. to Appoint Counsel for Mot. for New Trial, May 17, 2016.) The motion came on for hearing on July 1, 2016 with Wright again appearing with Counsel White who represented to the court that no other attorney from the Public Defender’s Office was available to represent Wright due to various conflicts. For the reasons stated below, we hereby deny Wright’s motion to appoint new counsel.

[1-3] Under the Revised Constitution of American Samoa, Wright has the right “to have the assistance of counsel for his defense.” REV. CONST. AM. SAMOA art. I, § 6. This right to counsel “goes beyond the perfunctory appointment of counsel” and means “the right to effective assistance of counsel.” *Suisala v. Moaali’itele*, 6 A.S.R.2d 15, 19 (Trial Div. 1987). Effective assistance of counsel should put “the prosecution’s case to **[**4**]** survive the crucible of meaningful adversary testing.” *Id.*, at 19. Yet, the right to counsel only guarantees the defendant “adequate and fair representation, not perfect representation.” *Am. Samoa Gov’t v. Majhor*, 8 A.S.R.3d 176, 182 (Trial Div. 2004).

[4-6] The right to effective assistance of counsel carries some limitations as it “guarantees a defendant the right to be represented by an otherwise qualified attorney *whom the defendant can afford to hire*, or is willing to represent [him] even though he is without funds.” *Caplin & Drysdale v. United States*, 491 U.S. 617, 624-25 (1989) (emphasis added). The aim of this constitutional right is “to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.” *Id.* As a result, an indigent defendant who lacks means to hire his own lawyer “cannot insist on representation by an attorney he cannot afford,” and does not have a

cognizable constitutional complaint “so long as [he is] adequately represented by attorney appointed by the courts.” *Caplin & Drysdale*, 491 U.S. at 624.

[7-8] Subject to this limitation, the Territory’s indigent defendant can receive legal representation from the Public Defender, not an attorney of his choice, if he requests it, or the court so orders and he “does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding.” A.S.C.A. § 46.1001. If the indigent defendant does not wish to be represented by the Public Defender, he can choose to waive his constitutional right to counsel and represent **[**5**]** himself.²

[9-11] Because the indigent defendant’s right to have counsel of his choice is limited, the court has no obligation to appoint new counsel at the defendant’s request. *Jackson v. Ylst*, 921 F.2d 882, 888 (9th Cir. 1990) (“[T]here is no automatic right to a substitution of counsel simply because the defendant informs the trial court that he is dissatisfied with appointed counsel’s performance.”) In fact, the court “should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing.” *People v. Smith*, 6 Cal. 4th 684, 696 (Cal. 1993); *United States v. Durham*, 172 Fed. Appx. 261, 266 (11th Cir. 2006) (“[The indigent defendant] does not have a right to demand a different lawyer be appointed, except upon a showing of good cause.”). Unless the indigent defendant can show a constitutional violation of his right to counsel, “whether to appoint a different lawyer for [him] who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the [trial] court.” *Durham*, 172 Fed. Appx. at 266.

[12-13] Even if the defendant intends to raise an ineffective assistance of counsel claim against his own counsel as part of his motion for new trial, the court may refuse appointing new counsel to assist the defendant in moving for a new trial. **[**6**]** *Jackson*, 921 F.2d at 888 (“[A] defendant who makes a motion during trial for substitution of counsel based on incompetence of counsel or conflict of interest is *not* entitled to an *automatic* appointment of a new attorney.”); *id.* at 692-93. Present counsel, by arguing an ineffective assistance of counsel claim against himself, may “be placed in a conflict position when a defendant requests substitute counsel,” and “it is difficult for counsel to argue his or her own incompetence.” *Smith*, 6 Cal. 4th at 694. Yet, the defendant must meet a

² The right to effective assistance of counsel carries “a correlative right to dispense with a lawyer’s help.” *Faretta v. Cal.*, 422 U.S. 806, 814 (1975).

heavy burden to show his need for new counsel because “[a] series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one.” *Id.* at 695.

[14-17] To succeed on the motion to appoint new counsel based on incompetence, the defendant must show that the conflict between the defendant and his counsel “had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment.” *Schell v. Witek*, 218 F.3d 1017, 1025-26 (9th Cir. 2000). The defendant’s “general loss of confidence or trust in his counsel” is not enough to warrant substitution of counsel. *Id.* The defendant must present enough evidence of the counsel’s incompetent representation to the court because we have “an affirmative duty to inquire into the disagreement with existing counsel to determine if there is, in fact, good cause” to appoint [**7**] new counsel. *U.S. v. Melillo*, 631 Fed. Appx. 761, 771 (11th Cir. 2015). If the defendant’s showing of incompetence offers little merit, the court is under no obligation to appoint new counsel to argue the motion for new trial. *Roberts v. Felker*, No. 1:07-1197 JLS (POR), 2009 U.S. Dist. Lexis 58319, at 19* (E.D. Cal. June 18, 2009).

Here, Wright fails to meet his burden for appointment of new counsel. First, Wright presents no substantial evidence that Counsel White’s representation was inadequate. The only evidence he showed is a singular conclusionary assertion that he and Counsel White had a complete breakdown in the attorney-client relationship without any evidence to support the claim. This assertion alone without any proof is blatantly insufficient for us to conduct our mandated inquiry into his motion for new counsel. *See Melillo*, 631 Fed. Appx. at 771.

Second, Wright’s claim of incompetence has little hope of success on the merits because on record, Counsel White’s incompetent performance is nowhere indicated. Counsel White argued on behalf of Wright against various odds such as having no witness to support Wright’s innocence during the jury trial. The court has observed Counsel White’s performance throughout the jury trial and the sentencing, and noticed that any subpar performance on the part of Counsel White was simply not indicated during these proceedings. In fact, our record shows that on several occasions, even Wright chose to proceed with Counsel White’s representation when Wright was presented with [**8**] alternatives to Counsel White’s representation. Accordingly, the court is under no duty to accept Wright’s claim of incompetence and appoint new counsel. *See Roberts*, 2009 U.S. Dist. Lexis 58319, at 19*.

For the reasons stated above, we deny Wright's motion for appointment of new counsel.

It is so ordered.

Cite As: *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15, slip op. at [page number] (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action)

AMERICAN SAMOA GOVERNMENT, Petitioner,

v.

WORKMEN'S COMPENSATION COMMISSION, Respondent,

KILISIMASI FAALEMIGA, Real Party in Interest.

High Court of American Samoa
Trial Division

CA No. 27-15

August 16, 2016

[1] A court cannot render a decision or judgment in an action for which the court knows it lacks subject matter jurisdiction; such judgment or decision is a nullity.

[2] A court must dismiss any case when it knows or discovers it lacks jurisdiction over it.

[3] A compensation order becomes effective when filed in the Office of the Workmen's Compensation Commissioner and, unless proceedings for the suspension or setting aside of such order are instituted, becomes final at the expiration of the thirtieth day thereafter.

[4] Once the workmen's compensation order is filed with the Workmen's Compensation Commission, a party has 30 days to initiate injunction proceedings in the Trial Division of the High Court to suspend or set aside the compensation order.

[5] Judicial review of a workmen's compensation order is limited to whether the order was "in accordance with law."

[6] The initiation of injunction proceedings in the Trial Division does not automatically stay payments awarded by the workmen's compensation order.

[7] Workmen's compensation payments may only be stayed pending a final decision upon an application for an interlocutory injunction and where the court finds that irreparable damage would otherwise ensue to the employer.

[8] If an employer fails to comply with a workmen's compensation order making an award that has become final, any beneficiary of such award may apply to the High Court of American Samoa for the enforcement of the order.

[9] If the workmen's compensation order was made, and served in accordance, with law and the employer has failed to comply, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise.

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

Counsel: For Petitioner, Assistant Attorney General Asaua Fuimaono
For Respondent, Mark F. Ude

ORDER ENFORCING ADMINISTRATIVE LAW JUDGE'S APRIL
27, 2015 AWARD OF WORKMEN'S COMPENSATION BENEFITS
TO REAL PARTY IN INTEREST AND DISMISSING AMERICAN
SAMOA GOVERNMENT'S ACTION

Pending is the petition filed by the Real Party in Interest Kilisimasi Faalemiga (Faalemiga) to enforce the order issued on April 27, 2015, by the administrative law judge ("ALJ") awarding Faalemiga workmen's compensation benefits. For the below reasons, we grant the petition to enforce the ALJ's order and dismiss this action filed by Petitioner American Samoa Government ("ASG"). **[**2**]**

Background

On April 27, 2015, the ALJ issued an order adopting findings of fact and conclusions of law and decision ("ALJ's Order"), holding that Faalemiga is entitled to workmen's compensation benefits as a result of a work-related and stress-related stroke. The ALJ denied ASG's motion for reconsideration on May 27, 2015. A copy of the ALJ's Order was first filed with the Office of the Workmen's Compensation Commissioner ("WCC") on August 14, 2015, by Faalemiga. ASG meanwhile filed a verified complaint for permanent injunction and for stay of payment from the ALJ's Order on May 26, 2015.

On April 14, 2016, Faalemiga filed a motion to dismiss, arguing that the Trial Division lacked jurisdiction to review workmen's compensation orders under A.S.C.A. § 32.0652 and that ASG made several errors in the complaint that warranted a dismissal. ASG opposed the motion to dismiss and shortly thereafter filed a motion to stay enforcement of the ALJ's Order. In an order dated May 24, 2016, we denied the motion to dismiss and granted the motion to stay enforcement.

A second copy of the ALJ's Order was filed with the WCC on May 26, 2016, by the ALJ. Faalemiga then filed the present petition for enforcement of the ALJ's Order on June 27, 2016, **[**3**]** which we treat as a counterclaim. See T.C.R.C.P. 13. ASG opposes the petition for enforcement. We heard this matter on August 2, 2016.

Discussion

[1-2] “A court cannot render a decision or judgment in an action for which the court knows it lacks subject matter jurisdiction . . . such judgment or decision is a nullity.” *Am. Samoa Gov't v. Tinitali*, AP No. 02-12, slip op. at 2 (App. Div. Aug. 3, 2012) (order dismissing appeal for lack of subject matter jurisdiction) (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 11-12 (1982)). Consequently, a court must dismiss any case when it knows or discovers it lacks jurisdiction over it. See *id.* (citing T.C.R.C.P. 12(h)(3)).

[3] A.S.C.A. §§ 32.0601-.0674 set out the procedure by which workmen's compensation claims are filed and compensation orders are issued and reviewed. Once the ALJ issues an order pursuant to A.S.C.A. §§ 32.0635-.0646, the order shall be filed with the WCC. A.S.C.A. § 32.0650. “A compensation order becomes effective when filed in the Office of the Commissioner and, unless proceedings for the suspension or setting aside of such order are instituted, becomes final at the expiration of the thirtieth day thereafter.” A.S.C.A. § 32.0651. **[**4**]**

[4-5] Once the workmen's compensation order is filed with the WCC, a party has 30 days to initiate injunction proceedings in the Trial Division of the High Court to suspend or set aside the compensation order. A.S.C.A. § 32.0652(a); *Tinitali*, AP No. 02-12, slip op. at 4, 5 (order dismissing appeal for lack of subject matter jurisdiction). Judicial review of a compensation order is limited to whether the order was “in accordance with law.” A.S.C.A. § 32.0652(a).

[6-9] The initiation of injunction proceedings in the Trial Division does not automatically stay payments awarded by the compensation order. A.S.C.A. § 32.0652(c). Payments may only be stayed pending a final

decision “upon [an] application for an interlocutory injunction” and where the court finds that “irreparable damage would otherwise ensue to the employer.” *Id.*

If an employer fails to comply with a “compensation order making an award that has become final, any beneficiary of such award . . . may apply to the High Court of American Samoa for the enforcement of the order.” A.S.C.A. § 32.0653(a). If the order “was made, and served in accordance, with law” and the employer has failed to comply, “the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise.” A.S.C.A. § 32.0653(b).
[**5**]

The ALJ’s Order of April 27, 2015, found Faalemiga was entitled to workmen’s compensation benefits and ordered ASG to pay said benefits. The ALJ’s Order was first filed with the WCC on August 14, 2015, by Faalemiga; the ALJ subsequently filed a copy of the order with the WCC on May 26, 2016. ASG, however, filed its Complaint on May 26, 2015, well before the ALJ’s Order was filed with the WCC by either Faalemiga or the ALJ.

Under A.S.C.A. §§ 32.0650-.0652, the Trial Division does not have jurisdiction to review a compensation order unless injunction proceedings are initiated within 30 days of the order being filed with the WCC. ASG did not re-file its Complaint, or file any other motion or notification, with the court within 30 days of either filing of the ALJ’s Order with the WCC. Thus, although ASG filed a complaint in the correct division of the High Court, the complaint was not timely filed in light of A.S.C.A. §§ 32.0650-.0652. As such, this court has never had jurisdiction over ASG’s Complaint, let alone ASG’s May 5, 2016 motion for a stay of enforcement. The May 24, 2016 order denying motion to dismiss for lack of subject matter jurisdiction and granting motion to stay enforcement is set aside.¹ [**6**]

¹ We note that the order denying the motion to dismiss for lack of subject matter jurisdiction on the basis that ASG improperly filed its Complaint in the Trial Division instead of the Appellate Division sets forth the correct legal standards and analysis: judicial review of workmen’s compensation orders issued by the ALJ requires appeal to the Trial Division first. *Tinitali*, AP No. 2-12, slip op. at 4 (order dismissing appeal for lack of subject matter jurisdiction); *Longline Servs, Inc. v. Workmen’s Comp. Comm’r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss). However, we now find we lack jurisdiction to hear this action on other grounds that were not raised before Faalemiga’s June 27, 2016 Petition for Enforcement.

This court does have jurisdiction, however, to enforce the ALJ's Order. See T.C.R.C.P. 41(a)(2) (allowing independent counterclaims to remain for adjudication when a plaintiff's claim is dismissed). Once a workmen's compensation order is final and has been properly served on the employer, the court must enforce obedience with the order if the employer has failed to comply with the order. A.S.C.A. § 32.0653. The ALJ's Order was final by June 27, 2016, at the latest. See T.C.R.C.P. 6 (setting forth rules on computation of time). There is also evidence that the order was "served in accordance with law" on ASG, the employer. A.S.C.A. § 32.0653; see *generally* (Opp'n to Real Party in Interest Pet. for Enforcement of the ALJ's 27 April 2015 Order (acknowledging the ALJ's Order and its finality)). Consequently, we order ASG to comply with the ALJ's Order.

Order

The May 24, 2016 order denying motion to dismiss for lack of subject matter jurisdiction and granting motion to stay enforcement is set aside. **[**7**]**

ASG shall comply with the ALJ's April 27, 2015 workmen's compensation award to Faalemiga, which is now a final order under A.S.C.A. § 32.0651.

The court has no jurisdiction to hear ASG's Complaint; therefore, ASG's action is otherwise dismissed.

It is so ordered.

Cite As: *Nomura v. Jones*, CA No. 50-06, slip op. at [page number]
(Trial Div. Aug. 24, 2016) (op. & order)

**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

August 24, 2016

[1] Differences between allegations in complaint and testimony at trial are not usually grounds for dismissal but go to the confidence the court can place in the testimony.

[2] The court found dismissal improper where the defendant had notice that trial testimony would not exactly mirror allegations in the complaint.

[3] To establish a breach of contract claim, a plaintiff must prove three essential elements: existence of the contract; breach; and damages as a result of breach.

[4] The essential elements of a contract include the subject matter, parties, terms and conditions, and price or other consideration.

[5] The court found a handwritten note containing the identity of the parties, subject matter of the agreement, the sale price, and terms and agreements to be a valid contract.

[6] The parol evidence rule does not allow for extrinsic or oral evidence to change the unambiguous terms of a written contract.

[7] The general rule for breach of contract suits is that each party to a case bears its own attorneys' fees.

[8] Awarding prejudgment interest is a well established remedy of breach of contract suits that lies soundly within the court's discretion.

[9] The court may exercise its discretion to deny the award of interest to a plaintiff in a breach of contract action who delays in prosecuting his case.

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

Counsel: For Plaintiff, Richard deSaulles
For Defendant, Mark F. Ude

OPINION AND ORDER

Plaintiff Ricky Nomura, dba Skyview Store and Tent Rental (“Nomura”) brought this action against Defendant Timothy Jones, dba Extreme Power Samoa (“Jones”) for money damages on a breach of contract claim. For the reasons that follow, the court awards Nomura judgment against Jones.

Background

In 2003, Nomura purchased a power generator from Jones for \$20,370. The purchase included a warranty for parts and labor. After Jones delivered and installed the generator, Nomura used the generator 12 hours per day for a couple of weeks. **[**2**]**

Less than a month after the generator was installed and after running the generator for approximately 100 hours, Nomura contacted Jones to complain that the generator was smoking heavily and had to be turned off. Pursuant to the warranty, Jones arranged to have the generator repaired. Although Jones claims the generator functioned properly after the repair, Nomura argues that Jones attempted to repair it several times but was unsuccessful. After several months of working to satisfy Nomura, Jones told Nomura that he would search for a third party to buy the generator, and that when he found one, he would remove the generator and refund the full \$20,370 cost to Nomura. Nomura agreed to allow Jones time to find a buyer.

After a lengthy search, Jones found a potential buyer for the generator and, on August 26, 2005, Jones arrived at Nomura’s place of business to remove it. Before Nomura would allow Jones to remove the generator, he required Jones to sign an agreement to pay \$20,370 in exchange for the right to remove and take possession of the generator that day. Nomura’s wife was present and drafted a brief agreement requiring Jones to make a \$5,000 deposit the day he collected the generator from Nomura’s business, then pay an additional \$5,000 within 30 days and then monthly payments of \$1,000 each until the balance was paid. Jones signed the agreement, gave Nomura a check for \$5,000, and **[**3**]** took away the generator.

Jones was unable to complete the sale of the generator to the prospective buyer, and Nomura alleges Jones only paid \$12,000 of the agreed \$20,370. After numerous demands over the course of many years that Jones pay the remaining balance, Nomura filed this action against Jones on June 5, 2006, alleging breach of contract. The complaint erroneously alleged that Jones purchased the generator from Nomura on August 8, 2004.

Trial was held on July 7, 2016. At the close of Nomura's case in chief, Jones moved for a "directed verdict" arguing that relief could not be granted under the complaint. The civil procedure rules do not provide for a directed verdict motion. However, based on the substance of Jones' motion, we treated it as a motion for dismissal under T.C.R.C.P. 41(b). We denied the motion and declined to render any judgment until we had heard all the evidence. At the close of trial, the matter was taken under advisement.

Discussion

1. Differences between Facts Alleged in the Complaint and Shown at Trial Do Not Warrant Dismissal.

Jones argues that the court should dismiss the case without considering the merits of Nomura's breach of contract claim because the complaint alleged that Nomura sold the generator to **[**4**]** Jones, whereas the evidence at trial showed Jones sold the generator to Nomura. Jones cites *Palelei v. Star-Kist Samoa, Inc.*, 15 A.S.R.2d 120 (Tr. Div. 1990), for the proposition that a defendant in a suit cannot be expected to defend against a new claim at trial. The portion Jones cites says the defendant "was entitled to come to trial prepared to defend only against the allegations in the verified complaint, not against a new and different set of allegations." *Palelei*, 15 A.S.R.2d at 123.

[1] Jones argues this language requires the court to disregard Nomura's allegations and dismiss the case. Not so. In *Palelei*, the plaintiff alleged in his complaint that he was wrongfully terminated from his job for making decisions that were within his discretion. *Id.* at 121. At trial, however, the plaintiff testified that he did not have discretion to make the decisions he did, among other testimony that contradicted his complaint. *Id.* at 123. Acknowledging the contradictions, the court did not dismiss the case, but instead proceeded to rule on its merits. *Id.* at 124-25. Nor did the court disregard the plaintiff's trial testimony or rule it inadmissible. *Id.* Instead, the court relied on the plaintiff's trial testimony in finding for Star-Kist, *Id.* at 124, and further noted that the contradictions only affected the confidence the court could place in

Palelei's version of events. *Id.* at 125. **[**5**]**

[2] Similar to *Palelei*, the contradictions between Nomura's complaint and testimony do not require this court to dismiss the claim or disregard the testimony. Despite Jones's argument, Nomura's testimony does not require Jones to defend against a new claim. Whether characterized as a sale or a refund, both the complaint and Nomura's testimony present breach of contract claims involving a sale of a generator. Further, at least several months before trial, discovery revealed that Nomura was claiming that Jones breached his promise to fully refund the cost of a defective generator he claimed Jones had sold him. Thus, Jones cannot argue there was an unfair surprise at trial. Accordingly, this court may consider the merits of Nomura's claim for breach of contract.

2. Jones Is Liable to Nomura for Breach of Contract.

[3] To establish a breach of contract claim, a plaintiff must prove three essential elements: existence of the contract; breach; and damages as a result of breach. *See, e.g., Mintz v. Mark Bartelstein & Assocs.*, 906 F. Supp. 2d 1017, 1035-36 (C.D. Cal. 2012) (citing *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011)).

A. Existence Of A Contract.

[4-5] The essential elements of a contract include the subject matter, parties, terms and conditions, and price or other **[**6**]** consideration. *Misipeka v. Leg. of Am. Samoa*, 7 A.S.R.3d 96 (Trial Div. 2003). Here, Nomura submitted to the court a document with "Skyview Store and Tent Rental" stamped at the top and Timothy Jones's name written below. This clearly identifies the parties. The document also says that the total price of the generator is \$20,370, that \$5,000 has been paid by check, and that Jones must pay the remaining balance and includes terms of payment.

In this manner, the document detailed the subject matter, price, and terms and conditions. Jones signed the bottom of the document. The court finds a valid contract existed whereby Jones would take ownership and possession of the generator and in exchange would pay \$23,370 to Nomura.

B. Breach.

Nomura presented evidence that Jones paid \$12,000 towards the amount specified, but stopped following the payment schedule documented in the contract and refuses to pay the remaining balance. Jones does not deny these facts but argues his agreement to pay was conditioned on his finding of a third party to buy the generator from him.

[6] Because Jones was unable to sell the generator, he argues his promise to pay is unenforceable. The court disagrees. The condition is not mentioned on the signed document. Although, [**7**] Nomura agrees that prior to the signing of the document, he had allowed Jones time to find a third party buyer, he contends that it was not contemplated as a condition of payment at the time Jones agreed to pay \$23,370 in exchange for taking ownership and possession of the generator. The condition was not included in the document and the parol evidence rule does not allow for extrinsic or oral evidence to change the unambiguous terms of a written contract. See *Tedreck v. Noga*, 6 A.S.R.3d 102 (Trial Div. 2002). The court finds that Jones breached the contract.

C. Damages.

Nomura claims that Jones paid \$12,000 of the agreed \$20,370, leaving a balance of \$8,370. Nomura submitted to the court three checks from Jones totaling \$7,000. Nomura also agreed that Jones had paid an additional \$5,000 for which he did not have evidence. Jones does not dispute that he has not paid the remaining \$8,370, but relies on his arguments that he has no contractual obligation discussed above. Because a valid contract existed between Nomura and Jones, the court finds that Nomura has suffered damages in the amount of \$8,370.

3. Prejudgment Interest And Attorneys' Fees.

[7] The general rule is that each party to a case bears its own attorneys' fees. *Samoa v. Gibbens*, 3 A.S.R.2d 121, 123 (Trial [**8**] Div. 1986). Nomura seeks to have Jones pay his attorneys' fees, arguing such action is appropriate where a party has acted wantonly, oppressively, or in bad faith. The court does not find that Jones acted in a way that warrants an award of attorneys' fees. Nomura's request for attorney's fees is denied.

[8-9] Nomura also asks the court to award pre-judgment interest. "[T]he general rule is to award prejudgment interest, although this award always lies soundly within the court's discretion." *Interocean Ships, Inc. v. Samoa Gases*, 26 A.S.R.2d 28, 43 (Trial Div. 1994). The court may exercise its discretion to deny the award of interest in peculiar circumstances, including delay by the plaintiff. *Id.* In this case, 10 years passed between the filing of the complaint and the trial. In fact, the court imposed sanctions on Nomura for his failure to prosecute his case. See *Nomura v. Jones*, CA No. 50-06 (Trial Div. Sep. 15, 2015)(order den. mot. to dismiss & imposing lesser sanctions). Due to Nomura's delay, the court denies his request for pre-judgment interest.

Order

Judgment shall be entered for Plaintiff Nomura against Jones. Jones is ordered to pay damages to Nomura in the principal amount of \$8,370, plus court costs and post-judgment interest at 6% per annum on the unpaid balance of the judgment. *****9****

It is so ordered.

Cite As: *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15, slip op. at [page number] (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

WH FISHERIES, INC., a Nevada Corporation, Plaintiff,

v.

CAROL LINDA, Official Number 624971, her boilers, engines, machinery, motors, masts. etc., IN REM; and VASCO ENTERPRISES, INCORPORATED. A California Corporation, IN PERSONAM, Defendants.

UNITED STATES OF AMERICA, Plaintiff in Intervention,

v.

CAROL LINDA, Official Number 624971, her boilers, engines, machinery, motors, masts. etc., IN REM; and VASCO ENTERPRISES, INCORPORATED. A California Corporation, IN PERSONAM, Defendants.

OLOIE, INC., Plaintiff in Intervention,

v.

F/V “CAROL LINDA,” Official Number 624971, her engines, Apparel, electronics, tackle, aircraft, books, and [2**] appurtenances, IN REM; and VASCO ENTERPRISES, INCORPORATED, A California Corporation, IN PERSONAM, Defendants.**

High Court of American Samoa
Trial Division

CA No. 40-15

August 29, 2016

[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.

[3] If the movant meets his burden in a summary judgment motions, the non-moving party must then affirmatively show there is a genuine issue for trial.

[4] For summary judgment, only disputes over facts that might affect the outcome of the suit under the governing law” are “material,” and an issue is “genuine” only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party.

[5] In considering a motion for summary judgment, a court must construe any factual issues in controversy in “a light most favorable to the non-moving party.

[6] Conclusory, non-specific allegations are not sufficient to survive a motion for summary judgment, and missing facts will not be presumed.

[7] Under maritime law, *custodia legis* expenses are recoverable from the proceeds of a judicial sale and have priority over all other claims.

[8] In order to qualify as *custodia legis* expenses, the services or goods for which payment or reimbursement is sought must have been necessary for the care and preservation of the vessel and for the common benefit of all parties who have a claim to the vessel.

[9] While attorneys’ fees in certain limited circumstances may be awarded as an item of damages in an *in rem* action, attorneys’ fees are generally not properly included as *custodia legis* expenses.

[10] The court held that attorneys’ fees should not be awarded in this case because they were not proved to be necessary for the care and preservation of the vessel and for the common benefit of all the parties who have a claim to the vessel.

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

Counsel: For Plaintiff, Keith R. Solar, admitted *Pro Hac Vice*, Craig Miller, and Nicholas Smith
For Defendants, Roy J.D. Hall, Jr.
For Plaintiff in Intervention United States, Benjamin C. Mizer, *Pro Hac Vice*, and Richard DeSaulles

For Plaintiff in Intervention Oloie, Mark F. Ude
For Wage Claimant Christopher Freitas, Sharron I. Rancourt
For Purse Seine Samoa, Inc., Toetasi Fue Tuiteleapaga

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF
WH FISHERIES' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pending is Plaintiff WH Fisheries, Inc.'s ("WHF") motion for partial summary judgment and immediate disbursement of *custodia legis* expenses from the sale proceeds of the F/V Carol Linda filed by Plaintiff WH Fisheries. For the reasons below, we grant the motion in part and deny it in part. **[**3**]**

Background

On August 17, 2015, WHF filed a complaint against Vasco Enterprises, Inc. ("Vasco"), the owner of the F/V Carol Linda ("the Vessel"), requesting foreclosure of its mortgage on the Vessel. The High Court issued a warrant for the arrest of the Vessel on the same day. The court issued an order for the interlocutory sale of the Vessel on December 9, 2015. A public auction was held on February 16, 2016, and Plaintiff in Intervention United States purchased the Vessel for a credit bid of \$2.5 million. The sale was approved by the court on March 7, 2016.

On July 7, 2016, WHF filed a motion for partial summary judgment, asking the court to immediately disburse *custodia legis* expenses from the sale proceeds. WHF asks that a total of \$ 354,585.82 in *custodia legis* expenses be disbursed, including \$ 61,440.07 in attorneys' fees.

Plaintiffs in Intervention the United States and Oloie, Inc. filed briefs opposing WHF's motion for partial summary judgment on the basis that *custodia legis* expenses do not ordinarily include attorneys' fees. During the motion hearing, all other parties opposed WHF's motion for partial summary judgment on the same grounds.

We heard this matter on August 10, 2016. **[**4**]**

Standard of Review

[1-2] The court will grant a motion for summary judgment "when the pleadings and other supporting documents 'show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact." *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));

T.C.R.C.P. 56.

[3-4] If the movant meets this burden, “the non-moving party must then affirmatively show there is a genuine issue for trial.” *Constr. Servs. of Sam., Inc.*, 8 A.S.R.3d at 115; *see also RDL, Inc./CIDA, 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 an issue is “genuine” only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[5-6] Lastly, a court must construe any factual issues in controversy 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). However, conclusory, non-specific **[**5**]** 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).

Discussion

[7-8] Under maritime law, *custodia legis* expenses are recoverable from the proceeds of a judicial sale and have priority over all other claims. 46 U.S.C. § 31326; *Sembawang Mar. Ltd. v. F/V Don Juan*, 31 A.S.R.2d 193, 194 (Trial Div. 1997). In order to qualify as *custodia legis* expenses, the services or goods for which payment or reimbursement is sought must have been necessary for the care and preservation of the vessel and for the common benefit of all parties who have a claim to the vessel. *F/V Don Juan*, 31 A.S.R.2d at 195 (citing *Oil Shipping v. Royal Bank of Scotland*, 817 F. Supp. 1254, 1259-60 (E.D. Pa. 1993)).

In *United Air Lines Employees’ Credit Union v. M/V Sans End*, 15 A.S.R.2d 95 (Trial Div. 1990), the court released *custodia legis* expenses to the plaintiff, which included “attorney fees related to securing and selling the vessel.” *Id.* at 109. Although the court stated that the *custodia legis* expenses included certain attorneys’ fees, it did not discuss the appropriateness of generally allowing attorneys’ fees as *custodia legis* expenses. **[**6**]**

[9] In a later maritime case, however, the court specifically discussed the issue of whether attorneys’ fees may be properly included in *custodia legis* expenses. *F/V Don Juan*, 31 A.S.R.2d at 194-95. In answering this question, the *F/V Don Juan* court noted that in arresting a vessel and prosecuting the claim, an attorney “may spend time performing tasks which contribute to the preservation of the vessel.” *Id.* However, it went on to state that there is a notable “lack of precedent for the inclusion of

attorney's fees as *custodia legis* expenses." *Id.* at 195. This led the court to hold that while attorneys' fees "in certain limited circumstances, may be awarded as an item of damages in an *in rem* action," attorneys' fees are generally not "properly included as *custodia legis* expenses." *Id.*

WHF argues that *F/V Don Juan* allows for the possibility of *custodia legis* expenses including attorneys' fees, despite its holding, because the court stated in a footnote that "even if attorney's fees were included as *custodia legis* expenses, the fee statement provided by counsel fails to adequately disclose how many of the activities benefitted the vessel or the other creditors." *Id.* We do not, however, read this footnote as allowing attorneys' fees to be routinely included in *custodia legis* expenses. Rather we read it merely as an observation by the court that even if attorney's fees were included in *custodia legis* expenses, the plaintiff there still would have had failed [**7**] to meet all of the qualifications necessary in order for the fees to be *custodia legis* expenses.

[10] The holding in *F/V Don Juan* and the still existing lack of precedence for the inclusion of attorneys' fees in *custodia legis* expenses convinces this court that the \$61,440.07 listed as attorneys' fees have not been established as properly included as *custodia legis* expenses in this action. This amount is therefore excluded.

There are no objections to the remaining expenses, and they appear proper in that they were necessary for the care and preservation of the Vessel and for the common benefit of all the parties who have a claim to the Vessel. Thus, the \$156,246.95 in substitute custodian payments and the \$136,898.80 in payments for fuel, insurance premiums, vessel movement fees, oil filters, crew wages, and surety fees are approved for payment or reimbursement.

Order

WHF's motion for partial summary judgment is granted for approved *custodia legis* expenses in the amount of \$293,145.75, to be immediately paid from the proceeds of the sale of the Vessel. To the extent WHF's motion included attorneys' fees in its calculation of *custodia legis* expenses, however, it is denied. [**8**]

It is so ordered.

Cite As: *Am. Samoa Gov't*, CR No. 07-12, slip op. at [page number]
(Trial Div. Nov. 10, 2016) (order den. mot. for emergency release)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

FALANIKO MAFUTO'A, Defendant.

High Court of American Samoa
Trial Division

CR No. 07-12

November 10, 2016

[1] Once a sentence of imprisonment is imposed, the defendant is committed to the custody of the corrections division until he is released under procedures established elsewhere by law.

[2] One statutory procedure for release of prisoners is available through the parole board.

[3] T.C.R.Cr.P. 35 allows the court to reduce a sentence within 120 days after a final action in the case.

[4] Other than T.C.R.Cr.P. 35 no other statute or rule provides the Trial Division with jurisdiction over prisoners or authority to modify final sentences of such prisoners who have been sentenced to terms of imprisonment.

[5] This court has explicitly found that the Trial Division of this court lacks any authority to overturn final judgments and sentences in criminal matters.

[6] Any relief from the judgment and sentence after more than 120 days have passed since the sentencing is exclusively within the executive's authority through commutation, reprieve or pardon.

[7] The doctrine of habeas corpus does not provide the court any jurisdiction to release a prisoner or modify a sentence.

[8] Habeas corpus proceedings serve to question the lawfulness of confinement.

[9] Courts have held that the Eighth Amendment of the U.S. Constitution requires providing prisoners with adequate medical care, and allegations of inadequate medical care may be brought through a petition for a writ of habeas corpus.

[10] Although the judiciary cannot ordinarily employ a writ of habeas corpus to review prison management or the conditions of a prisoner's otherwise lawful confinement, exceptional prison circumstances rising to the level of constitutional deprivations are within the court's jurisdiction.

[11] The typical relief under a writ of habeas corpus for unconstitutional prison conditions is an order to correct the offending conditions, not a release from prison.

[12] The court may not, pursuant to a writ of habeas corpus or otherwise, commute a prisoner's sentence.

[13] Release on parole is the exclusive authority of the Parole Board, and commutations and pardons are reserved solely for the Governor.

Before PATEA, Acting Associate Justice; MAMEA, Chief Associate Judge; and MUASAU, Associate Judge.

Counsel: For Plaintiff, Gerard Murphy, Assistant Attorney General

ORDER DENYING MOTION FOR EMERGENCY RELEASE

Plaintiff American Samoa Government ("ASG"), through counsel, submitted a motion for emergency release, seeking Defendant Falaniko Mafuto'a's ("Mafuto'a") release from prison. For the following reasons, the motion is denied.

Background

On September 4, 2012, Mafuto'a pled guilty to charges of sodomy and deviate sexual assault. On October 5, 2012, the court sentenced Mafuto'a to concurrent terms of imprisonment of fifteen (15) years for sodomy, and seven (7) years for deviate sexual assault. Mafuto'a is incarcerated at the Territorial [**2**] Correctional Facility ("TCF").

On August 23, 2016, Mafuto'a suffered a stroke and has been hospitalized at LBJ Tropical Medical Center since that day. ASG submitted a "motion for emergency release" of Mafuto'a from TCF. ASG claims that Mafuto'a has lost the use of half of his body and requires 24-hour care to administer medications, provide tube feedings,

perform personal hygiene, and turn Mafuto'a over every two hours to prevent skin ulcers. ASG contends that TCF cannot adequately provide for Mafuto'a's medical care, and that to continue to confine him without adequate medical care violates his constitutional rights. Thus, ASG moves the court to immediately release Mafuto'a, or, in the alternative, to amend his sentence to home detention. As a second alternative, ASG asks the court to "provide Habeas Corpus relief" and release Mafuto'a "based on the inability of the government to meet the medical needs" of Mafuto'a.

Discussion

I. Release and Modification of Sentence

[1-2] ASG's motion seeks the release of Mafuto'a, or, alternatively, the modification of his sentence to "home detention." ASG cites no authority that grants the court jurisdiction over prisoners, or that allows the court to amend final sentences. Once a sentence of imprisonment is imposed, the defendant is committed to the custody of the corrections [**3**] division "until (he is) released under procedures established elsewhere by law." A.S.C.A. § 46.2303. One such statutory procedure for release is available through the parole board. A.S.C.A. § 46.2304.

[3-4] Trial Court Rule of Criminal Procedure ("T.C.R.Cr.P.") 35 allows the court to reduce a sentence within 120 days after a final action in the case. Mafuto'a was sentenced four years ago to terms of imprisonment, and there is no record that an appeal was taken. Thus, his sentence was final, and the time for action under Rule 35 has long since passed. No other statute or rule provides the Trial Division with jurisdiction over prisoners or authority to modify final sentences of such prisoners who have been sentenced to terms of imprisonment.

[5-6] Moreover, this court has explicitly found that "the Trial Division of this court lacks any authority to overturn final judgments and sentences in criminal matters. Any relief from the judgment and sentence at this time is exclusively within the executive's authority through commutation, reprieve or pardon." *Am. Samoa Gov't v. McKenzie*, 31 A.S.R.2d 151, 151 (Trial Div. 1997) (citing REV. CONST. AM. SAMOA art. IV, § 9).

Accordingly, this court lacks jurisdiction to grant ASG's motion to release Mafuto'a or modify his sentence to home detention. [**4**]

II. Release as a form of Habeas Corpus relief

[7] Alternatively, ASG “asks the court to provide Habeas Corpus relief based on the inability of the government to meet the medical needs of [Mafuto’a].” The doctrine of habeas corpus, however, does not provide the court any jurisdiction to release a prisoner or modify a sentence.

[8-12] Article I, Section 7 of the Revised Constitution of American Samoa provides for granting of writs of habeas corpus. Habeas corpus proceedings serve to question the lawfulness of confinement. *Suisala v. Moaali’itele*, 6 A.S.R.2d 15, 18 (Trial Div. 1987). Courts have held that the Eighth Amendment of the U.S. Constitution requires providing prisoners with adequate medical care, and allegations of inadequate medical care may be brought through a petition for a writ of habeas corpus. *In re Estevez*, 165 Cal. App. 4th 1445, 1460-61 (2008). Although the judiciary cannot ordinarily employ a writ of habeas corpus to review prison management or the conditions of a prisoner’s otherwise lawful confinement, exceptional prison circumstances rising to the level of constitutional deprivations are within the court’s jurisdiction. *Am. Samoa Gov’t v. Agasiva*, 6 A.S.R.2d 32, 38 (Trial Div. 1987). However, the typical relief under a writ of habeas corpus for unconstitutional prison conditions is an order to correct the offending conditions, not a release from prison. *See, e.g., Agasiva*, 6 A.S.R.2d at 41; [**5**] *Rakhshan v. Tuilefano*, 18 A.S.R.2d 18, 22 (Trial Div. 1991); *In re Estevez*, 165 Cal. App. 4th at 1463-64. The court may not, pursuant to a writ of habeas corpus or otherwise, commute a prisoner’s sentence. *Siaumau v. Am. Samoa Gov’t*, 7 A.S.R.3d 130, 131 (Trial Div. 2003).

Conclusion

[13] The court does not have jurisdiction to grant the relief sought. The motion seeks the outright release of Mafuto’a from prison, or, alternatively, modification of his sentence to home detention. The substance of either action is a release without parole or commutation of his sentence. The court has no authority to do so. Release on parole is the exclusive authority of the Parole Board, and commutations and pardons are reserved solely for the Governor. *Siaumau*, 7 A.S.R.3d at 131; *McKenzie*, 31 A.S.R.2d at 151.

Order

ASG's motion for emergency release of Mafuto'a is denied.

It is so ordered.

SLIP OPINIONS
OF THE
LAND AND TITLES DIVISION
OF THE
HIGH COURT OF AMERICAN SAMOA
(2016)

Cite As: *Williams v. Chand*, LT No. 15-14, slip op. at [page number]
(Land & Titles Div. Feb. 19, 2016) (op. & order)

DRACO WILLIAMS, Plaintiff,

v.

MUKESH “BOB” CHAND and DOES I-X, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 15-14

February 19, 2016

[1] A lessor is entitled to evict a tenant at the expiration of the lease or when the lessee has breached the lease.

[2] Failure to pay rent is a breach of the lease.

[3] A party who has properly terminated a lease is entitled to immediate possession of the premises.

[4] Substantial improvements made to the property by the tenant do not change the lessor’s right to request the tenant to vacate the premises after the lease is legally terminated.

[5] A tenant who makes repairs and improvements to the property in good faith, however, is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less.

[6] A tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time set by the court.

[7] When a tenant continues to occupy the property after elapse of a reasonable time from notice to quit, that tenant is liable for rent for such period as he continues to occupy the property.

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

Counsel: For Plaintiff, Toetasi Tuiteleleapaga
For Defendant, Mark F. Ude

OPINION AND ORDER

Plaintiff Draco Williams (“Williams”) has registered ownership as his individually owned land of a parcel of land known as “Niua-Tonganiumuli” situated in the village of Iliili (“the land”). Defendant Mukesh “Bob” Chand (“Chand”) occupies the land as a tenant. On June 23, 2014, Williams filed this action to repossess the land and recover damages from Chand for nonpayment of rent. Chand’s answer and counterclaim refutes the eviction claim and seeks damages from Williams. Trial was held on September 8, 2015. For the reasons below, we award Williams repossession of the land from and unpaid rent as damages by Chand, and deny the payment of the damages counterclaimed by Chand. **[**2**]**

Background

On June 16, 2010, Williams leased the land and house on it to Epifania Chand, Chand’s former wife, for a five-year term ending on June 15, 2015, at a rental of \$800.00 per month. When she entered the lease with Williams, Epifania was acting for the benefit of both herself and Chand. At some point during the five-year term, Chand and Williams agreed to extend the lease term another five years, or until June 15, 2020.

Throughout the lease term up to and including the trial date, Chand and the five children of his marriage with Epifania occupied the house on the land as their personal residence. In addition, Chand ran an auto repair business on the land. He also made improvements to the house at his cost, which he estimates at approximately \$50,000.

During this period, on December 17, 2013, the Chands were divorced. *See Chand v. Chand*, FDR No. 2-12 (Fam. Drug & Alcohol Div. Dec. 16, 2013). The leasehold was awarded to Chand pursuant to their settlement agreement approved by the court.

As for rental payment, the Lease agreement provided that in lieu of the total anticipated rental amount of \$48,000 for the original 5-year term, the Chands would transfer title to a 1999 Ford F-350 bus and a 2003 Nissan Frontier to Williams, along **[**3**]** with \$1,200 in cash. During 2010, after the lease was entered, Williams received two different vehicles, a Dodge Ram truck and a 2002 Nissan Frontier, and approximately \$3,900 in cash it appears, as rental payments. No rent in cash or kind was paid to Williams after November 2010. Beginning in December 2010, Williams was incarcerated for a substantial period at the

Territorial Correctional Facility for a controlled substance offense.

On April 29, 2014, Williams served Chand with notice to vacate the premises due to nonpayment of rent since November 2010. When Chand failed to vacate the premises within the allotted time, Williams filed this eviction and damage action. Williams specifically asked for an order evicting Chand from the land and requiring him to pay him the fair rental value of the land for 41 months. At \$800 per month, that total amount is \$32,800.

Discussion

[1-3] A lessor is entitled to evict a tenant at the expiration of the lease or when the lessee has breached the lease. *Tiumalu v. Levi*, 4 A.S.R.3d 291, 297 (Land & Titles Div. 2000). Failure to pay rent is a breach of the lease. *See id.*; *Fealofa'i v. Reid*, 14 A.S.R.2d 57, 64 (Trial Div. 1990). A party who has properly terminated a lease is entitled to immediate possession of the [**4**] premises. *Am. Samoa Gov't v. Anoa'i*, 30 A.S.R.2d 180, 182 (Trial Div. 1996).

[4-6] Substantial improvements made to the property by the tenant do not change the lessor's right to request the tenant to vacate the premises after the lease is legally terminated. *See Tiumalu*, 4 A.S.R.3d at 298; *J.M. Gebauer Inc. v. Am. Samoa Power Auth.*, 5 A.S.R.3d 204, 209 (Trial Div. 2001). A tenant who makes repairs and improvements to the property in good faith, however, is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less. *Tiumalu*, 4 A.S.R.3d at 298. On the other hand, a tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time set by the court. *See Leomiti v. Pu'efa*, 27 A.S.R.2d 150, 154 (Land & Titles Div. 1995).

The original lease term ended on June 15, 2015, at which point Williams was entitled to possession of the premises if the lease had not been renewed. If Chand failed to pay rent during this lease term, however, that is considered a breach of the lease, which entitled Williams to reenter the premises before June 15, 2020. [**5**]

The evidence clearly established that Chand has not paid any of the rent due to Williams under the lease after November 2010 up to and continuing during the trial. Therefore, Chand breached the lease, and Williams is entitled to immediate possession of the premises.

[7] Since Chand breached the lease and still retained possession of the property, Williams is also entitled to payment of the rent Chand failed to submit to him. Furthermore, when a tenant continues to occupy the property after elapse of a reasonable time from notice to quit, that tenant is liable for rent for such period as he continues to occupy the property. *See Wightman v. Vala*, 2 A.S.R. 136, 137 (Trial Div. 1941). Thus, Chand is liable not only for rent for the 21 months prayed for by Williams in his petition but for rent for the entire period from December 2010 to the date he quits the property, 60 days from the date this order is entered, April 19, 2016. In total, then, Chand owes rent to Williams at \$800 per month for 64 months and 19 days, a total of \$51,706.67.

Chand argues that if Williams is entitled to possession of the premises, Chand is at least entitled to reimbursement for improvements he made to the property. Case law states that a tenant who makes repairs or improvements in good faith is entitled to reimbursement for the lesser of (1) the amount of [**6**] the actual expenses in improving the property or (2) the amount by which the improvements enhanced the value of the property. *See Tiimalu*, 4 A.S.R.3d at 298. Here, testimony showed that the property has declined in value. Therefore, even if Chand made improvements in good faith, he is not entitled to reimbursement for improvements and repairs he made to the property. He is, however, allowed to remove any fixtures or possessions he brought to the property within the time set by the court below.

Williams also asked the court for attorney's fees and costs. The general rule is that attorney's fees are not recoverable except when statute dictates or the opposing party acted in bad faith, wantonly, or oppressively. *Fiaui v. Faumuina*, 27 A.S.R.2d 36, 42 (Trial Div. 1994). There is no statute dictating the award of attorney's fees in these circumstances. In addition, neither party acted in bad faith, wantonly, or oppressively. Neither party is awarded attorney's fees.

Order

Chand is evicted from the land at issue. Taking into account the family home and business uses of the land, Chand is afforded a reasonable time period to find a suitable location or locations to relocate the family residence and his business operations: Chand and his children must vacate the land within 60 days of entry of this order. [**7**]

During this 60 days period, Chand may remove at his option any improvements, possessions and fixtures belonging to him and not permanently attached to the land. If such items are not removed within that time, they shall become Williams's property.

Chand, his agents, servants, employees, and attorneys, and those persons in active concert or participation with them are permanently enjoined from entering the land after the 60-day period, and from undertaking thereafter any business or other activity on the land at any time without Williams' prior permission.

Chand shall also pay to Williams damages in the amount of \$51,706.67.

The parties shall bear their respective costs of suit and attorney's fees, under the circumstances of this case.

It is so ordered.

Cite As: *Mafi v. Paulo*, LT No. 04-15, slip op. at [page number] (Land & Titles Div. March 4, 2016) (order den. mot. for default j.)

ALEKI F. MAFI, Plaintiff,

v.

SAANE PAULO and PAULO MOSE, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 04-15

March 4, 2016

[1] In a hearing for default judgment, the court must scrutinize the evidence itself

[2] A party moving for summary judgment must present the court with enough evidence that a court can independently conclude for itself whether the amount has been correctly calculated.

[3] An attorney's affidavit alone is an inadequate evidential basis for entry of default judgment.

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

Counsel: For Plaintiff, Matailupevao Leupolu, Jr.
For Defendants, pro se

ORDER DENYING MOTION FOR DEFAULT JUDGMENT

On February 2, 2015, Plaintiff Aleki F. Mafi filed a complaint for eviction and injunctive relief, seeking to recover his rental property and overdue rents from Defendants Saane Paulo and Paulo Mose (collectively "Defendants").¹ The complaint alleges an oral lease between the parties and that Defendants have been in arrears with rent for nine months.

¹ Inexplicably, Plaintiff did not invoke the summary proceedings available for the recovery of premises, under A.S.C.A. §§ 43.1401 et seq.

The record reflects that Defendants have been served process but neither defendant has bothered to answer or otherwise defend. As a result, Plaintiff obtained a clerk's default entry against Defendants on August 18, 2015. On October 30, 2015, Plaintiff filed his motion for default judgment against Defendants, under **[**2**]** T.C.R.C.P. 55(b).²

Plaintiff's motion for default judgment finally came on for hearing on February 17, 2016, following a delay because of insufficient notice of motion to Defendants, as required by T.C.R.C.P. Rule 55(b).³ At the hearing, Plaintiff's testimony was the only evidence presented. The only evidence elicited from Plaintiff by counsel's questions was that Plaintiff has property in Nu'uuli, American Samoa known as "Vaitele next to Chief Tago Ativalu"; that Plaintiff has a house on Vaitele; and, that "he [Defendants] owe me about a thousand eight hundred"; and that Plaintiff desires "him [Defendants] to know I want him to get out of my house."

When the court inquired as to the basis of the claim, whether there was a written lease, Plaintiff responded to his counsel's question as to the whereabouts of the lease; "I don't have it with me." Whereupon counsel rested.

[1-3] Upon the foregoing, we must deny the motion for insufficient showing. In this jurisdiction, the court in a T.C.R.C.P. Rule 55(b) hearing has an evidentiary duty to "take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other **[**3**]** matter." T.C.R.C.P. 55(b). This means that the court "must scrutinize the evidence itself." *Scalise v. Gorniak*, 26 A.S.R.2d 85, 86 (Trial Div. 1994). Therefore, a moving party must present the court with enough evidence that "a court can [independently] conclude for itself whether the amount has been correctly calculated." *Id.* An attorney's affidavit alone is an inadequate evidential basis for entry of default judgment. *Id.*

Here, Plaintiff failed its burden under T.C.R.C.P. 55(b). Plaintiff offered his testimony alone without producing any other evidence for the court to independently assess his testimony that he indeed had a landlord-tenant relationship with Defendants, and that Defendants had an obligation to

² The previously available Clerk's entry of Judgment by Default for sum certain, was abolished in this jurisdiction by rule amendment on March 16, 1987.

³ Pursuant to the 1987 amendment, notice of motion for default judgment to the defaulting party "shall be in English and Samoan." T.C.R.C.P. Rule 55(b).

pay him. Hence, Plaintiff is asking the court to enter default judgment against Defendants solely on the basis of his allegations in his complaint and his conclusionary testimony as to a leasehold, in lieu of our independent and informed assessment of the legal relationship claimed.

For the reasons set above, we hereby deny the motion for default judgment.

It is so ordered.

Cite As: *In re Matai Title Malaepule*, MT No. 04-15, slip op. at [page number] (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

IAKOPO TA'AMU, Claimant,

v.

FUEGA S. MOLIGA, Counterclaimant.

In re Matai Title "Malaepule" of the Village of Olosega, Manu'a

High Court of American Samoa
Land and Titles Division

MT No. 04-15

March 14, 2016

[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] 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 make a ruling if it lacks subject matter jurisdiction.

[3] Under A.S.C.A. § 1.0409, the Land and Titles Division of the High Court has jurisdiction to hear disputed claims for a *matai* title, as long as the parties have followed the procedural requirements set out in § 43.0302.

[4] Section 43.0302 states that before an action over communal land or *matai* titles may be commenced in the Land and Titles Division, the parties must file a certificate of irreconcilable dispute to prove the parties have appeared before the Office of Samoan Affairs and attempted to resolve the matter.

[5] A family meeting is a procedural requirement for this court to have jurisdiction over a *matai* title dispute.

[6] Claimant's failure to submit a questionnaire and his current off-island status have no effect on the court's jurisdiction where the claimant is off island for medical treatment and plans to return in the near future.

[7] 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.

[8] 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. Prong one directs the court to accept a complaint's "well-pleaded" factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. The pleading does not need to include detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Prong two instructs the court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief.

[9] *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. Second, a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on his or her claim.

[10] A complaint drafted by a *pro se* litigant is generally afforded more liberal construction than pleadings drafted by an attorney.

[11] Nevertheless, while the court must liberally construe pleadings to avoid injustice, this does not extend to refashioning a plaintiff's theory of relief.

[12] 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.

[13] Claims that Claimant has failed to submit a questionnaire and that Claimant now resides off-island do not affect whether Claimant has failed to state a claim on which relief may be granted for a *matai* title case.

[14] The court will grant a motion for summary judgment if the pleadings and other documents show "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

[15] 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.

[16] An issue is considered “material” if it will affect the outcome of the suit under the governing law; and a dispute over a “material fact” is “genuine” only when the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party.

[17] 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.

[18] In a summary judgment motion, the court will construe all inferences in a light most favorable to the non-moving party.

[19] Summary judgment effectively nullifies 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.

Before RICHMOND, Associate Justice; SU’APAIA, Associate Judge; SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Claimant, Pro se
For Counterclaimant, Matailupevao Leupolu Jr.

ORDER DENYING COUNTERCLAIMANT’S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

Pending is Counterclaimant Fuega S. Moliga’s (“Moliga”) motion to dismiss or for summary judgment. For the reasons below, we deny Moliga’s motion.

Discussion

Moliga claims that the court should dismiss this case under T.C.R.C.P. 12(b)(1), 12(b)(6), or 56 for several reasons. First, he argues that the Malaepule family unanimously selected him as successor. Next he claims that Claimant Iakopo Ta’amu (Ta’amu) filed his registration for the *matai* title before the family meeting was held. Third, he essentially argues that by hearing this case the court will encourage other individuals to *****2**** “disregard the wish and consensus of the family,” as well as discouraging “family members from participating in meaningful family meetings because the family consensus means nothing.” (Mot. to Dismiss or for Summ. J. & Mem. of P. & A. in Support of Mot. 5.) Fourth, he states that Ta’amu has failed to file his questionnaire, as required by statute, and the time for filing it has passed. Fifth, and finally, he claims that Ta’amu is now residing in the United States for medical reasons.

1. T.C.R.C.P. 12(b)(1)

[1-2] 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 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) (order of dismissal without prejudice).

[3-4] Under A.S.C.A. § 1.0409, the Land and Titles Division of the High Court has jurisdiction to hear disputed claims for a *matai* title, as long as the parties have followed the procedural requirements set out in § 43.0302. Section 43.0302 states that before an action over communal land or *matai* titles may be commenced in the Land and Titles Division, the parties must file a certificate of irreconcilable dispute (“CID”). The CID proves ******* the parties have appeared before the Office of Samoan Affairs pursuant to the statutes and attempted to resolve the matter. See *Heirs of Hunkin v. Faiivae*, 8 A.S.R.2d 260, 262 (Land & Titles Div. 2004).

[5-6] A CID was properly submitted with the case. In addition, the other documents in the file suggest that all procedural requirements, such as family meeting, have been met. Ta’amu’s failure to submit a questionnaire and his current off-island status¹ have no effect on the court’s jurisdiction. Therefore, we decline to dismiss the case for lack of jurisdiction. Should it be discovered later that Moliga’s claims that the procedural requirements were not followed are true, the court will readdress the jurisdictional issue.

2. T.C.R.C.P. 12(b)(6)

[7-8] 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

¹ On July 14, 2015, the court received a fax from Ta’amu, stating that he was currently receiving medical treatment in Las Vegas. The court received a second fax from Ta’amu on November 12, 2015, stating he was still receiving medical treatment in Las Vegas but that he intended to return to the island in the near future.

(Trial Div. Feb. 9, 2012) (order on def.'s mot. to dismiss). Prong one directs the court to **[**4**]** 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.

[9] 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*, 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).

[10-12] 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). **[**5**]** 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).

[13] Since Ta'amu is a *pro se* litigant, he should be afforded more liberal construction of the rules. When construing the current facts of the case in a light most favorable to Ta'amu, the non-moving party, it is clear that the allegations state a claim on which relief may be granted in American Samoa. *See Iqbal*, 556 U.S. at 678-79. The CID and other documents, such as the notices of registration, show that a reasonable fact finder could find Ta'amu has followed the regulations so as to entitle him to a finding in his favor by the High Court in this matter. It should be noted again that Moliga's claims that Ta'amu has failed to submit a questionnaire and that Ta'amu now resides off-island do not affect whether Ta'amu has failed to state a claim on which relief may be granted or not. Consequently, we decline to dismiss the case under T.C.R.C.P.

12(b)(6) for failure to state a claim. **[**6**]**

3. T.C.R.C.P. 56

[14-15] The court will grant a motion for summary judgment if the pleadings and other documents show “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *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)). “The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact.” *Id.* If the movant meets this burden, “the non-moving party must then affirmatively show there is a genuine issue for trial.” *Constr. Servs. of Sam., Inc.*, 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).

[16] An issue is considered “material” if it will “affect the outcome of the suit under the governing law”; and a dispute over a “material fact” is “genuine” only when 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).

[17-18] 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 [**7**] 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).

[19-20] This court has previously held that summary judgment effectively nullifies 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. *See In re Matai Title Le’i*, MT No. 06-14, at *6 (Land & Titles Div. Dec. 22, 2015) (op. & order). Thus, even if Moliga has provided a basis for summary judgment in his favor, we would 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)).

Nevertheless, we believe that there are disputes as to genuine issues of material fact in the present case. In fact, many, if not all, of Moliga's arguments for why the case should be dismissed actually reveal disputes over genuine issues of material fact, such as who the family originally selected as the successor or whether Ta'amu may still register the *matai* title **[**8**]** when he has been living in Las Vegas for several months in order to receive medical treatment. For these reasons, we decline to dismiss this case on a summary judgment motion.

Order

Moliga's motion to dismiss or for summary judgment is denied.

It is so ordered.

Cite As: *In re Matai Title Le'i*, MT No. 06-14, slip op. at [page number]
(Land & Titles Div. April 13, 2016) (order den. mot. for recons./new
trial)

NU'UTAI SONNY THOMPSON, Claimant,

v.

LEATU SEGILA VAEAO, Counterclaimant.

In re *Matai* Title “Le'i” of the village of Ofu

High Court of American Samoa
Land and Titles Division

MT No. 06-14

April 13, 2016

[1] It is unimportant whether a motion under T.C.R.C.P. 59 is styled as a motion for a new trial, a motion for reconsideration, or both, so long as it is made in a timely fashion and clearly informs the court of the claimed errors.

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

[3] 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.

[4] The decision whether to grant a motion for reconsideration is within the broad discretion of the trial court.

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

[6] The standard for granting a motion for reconsideration is strict and the burden is on the moving party to show substantial reasons that such relief should be granted.

[7] In a motion for reconsideration, 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.

[8] In computing time in an order or statute, time begins to run the day *after* the day of the order, act or event.

[9] Finding the first titleholder that could be identified and counting the generations from said titleholder to each claimant is a proper application of the Sotoa Rule.

[10] In *matai* title disputes, it is within the court's discretion to weigh the evidence and make a fact determination.

[11] The doctrine of stare decisis does not apply to a determination of the facts of a case, and a trial court does not err when it chooses not to follow the specific findings of fact from prior cases.

[12] Customs and tradition for selecting the next holder of a *matai* title are fluid and subject to modification by the family.

[13] A claimant who is more familiar with the family associated with the *matai* title the claimant seeks is better qualified to assume leadership of that family.

[14] Although the fact that a claimant prevails on the third statutory requirement does not mean they will automatically prevail on the fourth statutory requirement, the value of a *matai* to his or her family, village, and government depends, to some degree, on his or her forcefulness, character, personality, and knowledge of Samoan customs.

[15] A claimant who has worked for the American Samoa Government is, generally, more valuable to the village and country.

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

Counsel: For Claimant, Afoa L. Su'esu'e Lutu and Matailupevao Leupolu, Jr.
For Counterclaimant, Sharron I. Rancourt

ORDER DENYING MOTION FOR RECONSIDERATION/NEW TRIAL

Pending is Counterclaimant Leatu Segila Vaeao's (Vaeao) motion for

reconsideration/new trial. For the below reasons, we deny the motion.

Background

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. This matter was first referred to the Land and Titles Division of the High Court of American Samoa on September 16, 2014. **[**2**]**

On December 22, 2015, having considered the evidence and counsel's oral and written arguments, the court awarded the *matai* title Le`i to Thompson. Vaeao filed a motion for reconsideration/new trial on January 4, 2016. Thompson filed his opposition to the motion on February 2, 2016.

We heard this matter on February 4, 2016.

Standard of Review

[1] A motion for reconsideration/new trial may be made under T.C.R.C.P. 59. It is unimportant whether the motion is styled as a motion for a new trial, a motion for reconsideration, or both, so long as it is made in a timely fashion and clearly informs the court of the claimed errors. *Soli Corp. v. Amerika Samoa Bank*, 25 A.S.R.2d 40, 41 (App. Div. 1993). Under T.C.R.C.P. 59, a motion for reconsideration or new trial must be filed within ten days of the date the judgment was entered. See *Development Bank of Am. Samoa v. Tuika*, 7 A.S.R.3d 86, 89 (Trial Div. 2003). In computing a prescribed period of time allowed by the statute or by order of the court, T.C.R.C.P. 6 states that:

the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday.

[2-5] Reconsideration is appropriate if (1) the court is presented with newly discovered evidence, (2) the court **[**3**]** committed clear error or the initial decision was manifestly unjust, or (3) there is an intervening change in controlling law. See, e.g., *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). However, 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).

[6-7] The standard for granting a motion for reconsideration is strict and the burden is on the moving party to show substantial reasons that such relief should be granted. See *S. Pac. Island Airsystems*, 28 A.S.R.2d at 171; *Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). 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. *S. Pac. Island Airsystems*, 28 A.S.R.2d at 171-72; see also T.C.R.C.P. 7(b)(1). **[**4**]**

Discussion

1. The motion was filed timely.

The matter of whether Vaeao’s motion was timely filed must be addressed first. In his opposition to the motion, Thompson argues that Vaeao should have filed the motion by December 30, 2014, and thus, the motion “must be dismissed because [it] was filed more than ten (10) days after the court [sic] rendered its Opinion and Decision.” In so claiming, Thompson clearly has not correctly applied T.C.R.C.P. 6.

[8] In computing time in an order or statute, time begins to run the day *after* the day of the order, act or event. In this case, the court released its opinion and order on December 22, 2015. Thus, the time began to run on December 23, 2015. Ten days from December 23, 2015, was Friday, January 1, 2016. Under T.C.R.C.P. 6, New Year’s Day is a “legal holiday.” The next day that is not a Saturday, Sunday, or a legal holiday was Monday, January 4, 2016—Vaeao filed his motion on January 4, 2016. Consequently, the motion was timely filed.

2. Vaeao fails to show substantial reasons for reconsideration or a new trial.

Vaeao claims that the court made six manifest errors of fact and law. Each is addressed below.

[9] Vaeao first claims that the court erred in its factual and legal analysis and application of the Sotoa Rule. In support of [**5**] this contention, he quoted *In re Matai Title Mauga*, 5 A.S.R.3d 270 (Land & Titles Div. 2001), and *In re Matai Title Misaalefua*, 1 A.S.R.3d 23 (App. Div. 1997), at length. While both opinions are informative on the application of the Sotoa Rule, neither support the contention that this court committed clear error in its application of the rule. The court did not, as Vaeao claims, “mysteriously link[] the candidates to Le’i E’e.” Mot. for Recons./New Trial; & Mem. of P. & A. in Support of Mot.; & Notice of Hearing at 4, *In re Matai Title Le’i*, MT No. 6-14 (Jan. 4, 2016). Instead, it took the first titleholder that could be identified and counted the generations from said titleholder to each claimant. This is a proper application of the Sotoa Rule.

[10-11] Next, Vaeao argues that the court committed a manifest error of fact when it defined the family clans as To’afala, Pule, and Isumama. Both parties presented evidence on the clans, and, based on this evidence, the court held that To’afala, Pule, and Isumama comprised the clans. It is within the court’s discretion to weigh the evidence and make a fact determination. Vaeao points to other cases supposedly involving the same or similar parties to support his contention that the court erred. However, the doctrine of stare decisis does not apply to a determination of the facts of a case, such as here, and a trial court does not err when it chooses not to follow the specific findings of fact from prior cases. See *Kelemete v. Atualevao*, 8 [**6**] A.S.R.3d 50, 53 (App. Div. 2004). Thus, Vaeao is not entitled to reconsideration or a new trial on these grounds.

Third, Vaeao argues that the court committed a manifest error of fact and law when it denied Vaeao’s motion to dismiss because the court did not have jurisdiction to decide the underlying merits of the case. Essentially, Vaeao claims that the statutory requirements for *matai* selection were not followed. For support, he points to the fact that even though the traditional meeting place is in Ofu, the meeting was held at Thompson’s private home, which is not a neutral meeting place. Mot. for Recons./New Trial; & Mem. of P. & A. in Support of Mot.; & Notice of Hearing at 9-10. He also claims that the individual family clans had not met yet and that the family did not consider his objections to the location of the family meetings. *Id.* at 10.

[12] The court took the change of location of the meeting place into consideration in its opinion. In fact, it specifically addressed the change of location, noting that “[o]nly a few members still reside on the island of Ofu,” and that customs and tradition are fluid and subject to modification by the family. See *In re Matai Title Le’i*, MT No. 6-14, at 4, 5 (Land &

Titles Div. Dec. 22, 2015) (op. & order). In addition, the statutory requirements that family meetings take place were met in this case, and the case was properly forwarded to the court for **[**7**]** adjudication. The court does not commit clear error simply because the party disagrees with the outcome. Consequently, Vaeao is not entitled to reconsideration or a new trial on these grounds

[13] Finally, Vaeao asserts that the court committed a manifest error of fact and law when it found Thompson prevailed on the third and fourth statutory criterion. The finding that Thompson prevailed on the third and fourth statutory criterion is supported by substantial evidence. Testimony at trial showed that Thompson has been actively engaged in the Le'i family and Ofu village affairs whereas Vaeao has primarily participated in the affairs of another family. A claimant who is more familiar with the family associated with the *matai* title the claimant seeks is better qualified to assume leadership of that family. *See Aano v. Sitau*, 2 A.S.R. 107, 110 (Trial div. 1940).

[14-15] In addition, Thompson's participation in the Le'i family, Ofu village, and American Samoa Government operations make him more valuable to the family, village, and country than Vaeao. Although the fact that a claimant prevails on the third statutory requirement does not mean they will automatically prevail on the fourth statutory requirement, the value of a *matai* to his or her family, village, and government depends, to some degree, on his or her forcefulness, character, personality, and knowledge of Samoan customs. *See In re Matai Title Maiava*, **[**8**]** 4 A.S.R. 116, 120 (Land & Titles Div. 1973); *In re Matai Title Tiimalu*, 4 A.S.R. 156, 172 (Land & Titles Div. 1975). Furthermore, a claimant who has worked for the American Samoa Government is, generally, more valuable to the village and country. *See In re Matai Title Leoso*, 3 A.S.R. 414, 421 (Trial Div. 1960). For these reasons, the court properly held that Thompson prevailed on the fourth statutory requirement. As the court's ruling that Thompson prevailed on the third and fourth statutory criterion was supported by substantial evidence, Vaeao is not entitled to reconsideration or a new trial on these grounds.

Order

Vaeao's motion for reconsideration or new trial is denied. It is so ordered.

Cite As: *Dionne v. Wai*, LT No. 07-11, slip op. at [page number] (Land & Titles Div. May 24, 2016) (op. & order)

FAYE PUNOUAI DIONNE, Plaintiff,

v.

EMORY WAI, LINDA WAI, and DOES I through X, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 07-11

May 24, 2016

[1] When a person occupies property with the owner's permission but without any provisions for rent, a tenancy at will is created.

[2] In a tenancy at will, the owner retains the right to require the tenant notice to quit, but the tenant is entitled to reasonable notice to quit.

[3] Substantial improvements made to the property by the tenant do not change the owner's right to require a tenant to vacate the premises; however, a tenant who makes repairs and improvements to the property in good faith is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less.

[4] A tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time set by the court.

[5] When the landlord allows the tenant to improve the property, the tenant is a good-faith improver.

[6] A tenant who makes improvements without the consent of the owner is not a good-faith improver.

[7] The general rule is that attorney's fees are not recoverable except when statute dictates or the opposing party acted in bad faith, wantonly, or oppressively.

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

Counsel: For Plaintiff, Fiti A. Sunia
For Defendants, M. Talaimalo Uiagalelei

OPINION AND ORDER

Plaintiff Faye Punouai Dionne (“Dionne”) owns approximately one acre of individually owned land known as “Leatuvai” in Tafuna. On March 28, 2011, Dionne filed this action to evict Defendants Emory Wai (“Emory”) and Linda Wai (“Linda”) (collectively “the Wais”), and any later joined Does I through X, from the property and order the Wais to pay her any and all unaccounted rental income from the property. For the reasons below, we award Dionne repossession of the land and unaccounted rental income from the property.

Background

Around 1995, the Wais moved onto approximately one acre of individually owned land known as “Leatuvai” in Tafuna. This **[**2**]** land was owned first by Dionne’s husband and then Dionne after her husband’s death. Linda is Dionne’s daughter.

Dionne authorized the Wais to occupy the single-story residential structure on the property and lease two other buildings on the property for commercial purposes. In exchange for living on the property, the Wais were to watch over the property. Dionne was to receive a portion of any rental income, and the rest was to be used to provide repairs and maintenance to the buildings as needed. The Wais were not required to pay rent under this agreement. This agreement worked for years until, at some point, the Wais allegedly stopped paying Dionne her share of the rental income.

In 2003, a fire destroyed one of the commercial buildings on the property known as the “Purple Onion.” Around the same time, Hurricane Heta severely damaged the other commercial building and residence. The Wais claim that when they informed Dionne of the damage, she gave them permission to fix all three structures but told them they would be responsible for paying for it. Dionne, on the other hand, claims that rental income from the buildings and her money paid for the repairs. While repairing the buildings, the Wais expanded the Purple Onion building and built the residence into a two-story house. Dionne **[**3**]** claims that she never gave the Wais permission to expand the house so extensively by adding a second story.

By February 2011, the relationship between mother, daughter, and son-in-law had soured to the point that Dionne requested the Wais vacate the property. The Wais refused to vacate the property and, according to Dionne, to pay Dionne any more of the rental income. As a result, Dionne brought this action on March 28, 2011. The Wais filed their Answer on April 18, 2011, arguing that they relied on Dionne's verbal and written permission to improve the land and are good-faith improvers of the property. They ask the court to deny Dionne's eviction claim or, alternatively, order her to pay for the good faith improvements they made to the commercial buildings and residence.

Early in the case, on May 27, 2011, the court ordered the Wais to deposit \$2,500 of the monthly rental income into the court registry. When this case first came to trial on February 12-13, 2015, \$35,000 from a settled insurance claim involving the property and \$21,297.50 in rental income had been paid into the court registry.

At the February 2015 trial, we strongly urged the parties to seek resolution of their disagreement. The parties reached a tentative agreement under which Dionne would begin collecting **[**4**]** the monthly rental income and pay \$1,000 of it to the Wais. However, the agreement was not consummated when the Wais refused to sign it, but Dionne still began collecting the monthly rental income of approximately \$3,200 in March 2015.

At a status hearing on May 20, 2015, the Wais complained that Dionne had failed to continue to pay the Wais \$1,000 per month after March even though Dionne was still collecting the rental income. Dionne asked the court to allow Dionne to continue to collect the income since very little had been deposited into the court registry while the Wais were collecting it and suggested that Dionne put the collected rental income into the court registry. Consequently, the court ordered the rental income to be placed into the court registry once again.

During this time, the trial was continued several times by both sides. It was finally heard in full on November 23-25, 2015.

On December 3, 2015, the Wais filed a motion for release of funds and order directing deposit of all rental proceeds into the court registry. In the motion, the Wais asked the court to release \$18,000 from the court registry to them to cover personal needs, to split the monthly rental proceeds eventually between the parties, and to order the commercial tenants to **[**5**]** directly deposit rental proceeds into the court registry. This motion was heard on December 7, 2015.

Discussion

[1-2] When a person occupies property with the owner's permission but without any provisions for rent, a tenancy at will is created. *Wightman v. Vala*, 2 A.S.R. 136, 137 (Trial Div. 1941). In a tenancy at will, the owner retains the right to require the tenant notice to quit, but the tenant is entitled to reasonable notice to quit. *Id.*

[3-6] Substantial improvements made to the property by the tenant do not change the owner's right to require a tenant to vacate the premises; however, a tenant who makes repairs and improvements to the property in good faith is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less. *See Tiimalu v. Levi*, 4 A.S.R.3d 291 at 298 (Land & Titles Div. 2000). On the other hand, a tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time set by the court. *See Leomiti v. Pu'efa*, 27 A.S.R.2d 150, 154 (Land & Titles Div. 1995). When the landlord allows the tenant to improve the property, the tenant is a good-faith improver. *See Tiimalu*, 4 A.S.R.3d at 298. However, **[**6**]** a tenant who makes improvements without the consent of the owner is not a good-faith improver. *See J.M Gebauer Inc. v. Am. Samoa Power Auth.*, 5 A.S.R.3d 204, 209 (Trial Div. 2001).

1. Eviction

The individually owned property in this case clearly belongs to Dionne. Since there was no lease or other oral or written agreement between the parties setting forth provisions for rent, a tenancy at will was created. Dionne requested the Wais vacate the property by March 1, 2011, on February 16, 2011; however, the Wais refused to do so.

The law is clear in this situation—under a tenancy at will, Dionne has the right to request the Wais vacate the property and, after a reasonable amount of time, they must do so. Consequently, we grant Dionne's claim for eviction and an accounting of the monthly rental income.

2. Accounting of Monthly Rental Income

Dionne appears to argue that she is not only entitled to the rental income the Wais received from leasing the commercial buildings but also to the revenue the Wais made from any businesses they ran on the property. (See Pl.'s Response to Defs.' Closing Argument 4-7.) It is clear from the evidence that Dionne knew the Wais ran various businesses on the property at different times. The long-standing arrangement between the

[**7**] parties only required the Wais to forward part of the income derived from renting out space in the Barber Shop or Purple Onion buildings. In addition, the letters Dionne gave the Wais granting them permission to lease space in the commercial buildings on the land was silent regarding their responsibility to pay rent for their use of the residence or commercial space. No evidence was presented showing that Dionne and the Wais agreed Dionne would be entitled to any part of the revenue the Wais made from businesses they ran on the property. Consequently, we hold that Dionne is only entitled to the rental income and not to the revenue the Wais made from businesses they ran on the property.

Dionne stated that in exchange for the Wais oversight of the property, the Wais were required to pay Dionne “only a portion of the rental income from leases of her buildings while keeping the other portion to pay for repairs and maintenance of the buildings.” (Compl. 2-3.) Her testimony also supported this: she testified during trial that she did, in fact, receive about half of the rental income for a time.¹ Since the parties agree that Dionne was to receive only a portion of the rental income, Dionne is only entitled to half of the rental payments [**8**] she did not receive until she terminated the agreement between the parties.

In 2011, Dionne requested the Wais quit the property by March 1, 2011. (Compl. 3.) This terminated the agreement between the parties, and thus, she is entitled to the full amount of rent from the date the Wais should have quit the property—March 1, 2011.

Based on the testimony and exhibits provided at trial, we have determined Dionne is entitled to the following rent collected by the Wais from the commercial building known as the Barber shop:

<u>Year</u>	<u>Tenant</u>	<u>Months</u>	<u>Monthly Rent</u>	<u>Percent</u>	<u>Tenant Total</u>
2000-12	Lucky Star ²	36	\$750	50%	\$13,500
		30	\$1,000	50%	\$15,000
		30	\$1,200	50%	\$18,000
		38	\$1,500	50%	\$28,500

¹ Testimony provided by Dionne and Linda reveal that Dionne often received around half of the rental income when the Wais sent her a portion of the rental income. For example, Dionne received \$400 when the rental income was \$800 and \$300 when the rental income was \$700.

² Linda testified that the rental income for Lucky Star, who rented the Barber Shop building, was \$750 from 2000-2002, \$1,000 from 2003 to 2005, \$1,200 from 2005 to 2007, and \$1,500 from 2008 to 2012.

	16	\$1,500	100%	\$24,000
TOTAL				\$99,000

Dionne is also entitled to the following rent collected by the Wais from the commercial building known as the Purple Onion: *****9*****

<u>Year</u>	<u>Tenant</u>	<u>Months</u>	<u>Monthly Rent</u>	<u>Percent</u>	<u>Tenant Total</u>
2008	Plaza Video	11	\$1,700	50%	\$9,350
2011-12	TMA ³	2	\$3,150	50%	\$3,150
		10	\$3,150	100%	\$31,500
2011	Falaniko ⁴	4	\$1,575	100%	\$6,300
2011-Present	PFST ⁵	47	\$1,575	100%	\$74,025
2012	Sweetie's	1	\$1,800	100%	\$1,800
2012-Present	Manaia	24	\$1,700	100%	\$40,800
		11	\$1,800	100%	\$19,800
TOTAL					\$186,725

In addition to the rent collected by the Wais, Dionne is also entitled to the \$1,000 she paid the Wais under the failed settlement agreement. This brings the amount to \$285,725.

However, the Wais are allowed an offset for the amounts they already paid to Dionne, the rent they deposited into the court registry, and the amount they paid to Charles Alailima for legal services in connection with an insurance claim on the property. We find these sums to include the following:

³ TMA's lease began on January 1, 2011. Therefore, Dionne is only entitled to half of the rental income from TMA in January and February 2011.

⁴ Falaniko's lease began after March 1, 2011, the date by which the Wais should have vacated the property; thus, Dionne is entitled to the full amount of those leases.

⁵ PFST's lease also began after March 1, 2011. Furthermore, since Dionne began directly collecting the rent in March 2015, we have only calculated the amounts she is owed up to that date for all leases.

<u>Category</u>	<u>Amount</u>
Paid to Dionne	\$13,275.00
Court Registry	\$21,297.50
Paid to Charles Alailima	\$8,000.00
TOTAL	\$42,572.50

In sum, the Wais owe Dionne \$243,152.50 in rental payments. **[**10**]**

At this point in our discussion, it is appropriate to take up and resolve the Wais' motion for release of funds and order directing deposit of all rental proceeds into the court registry. The Wais ask the court to release \$18,000 from the court registry to them so that they may cover personal needs, to split the monthly rental proceeds eventually between the parties, and to order the commercial tenants to deposit rental proceeds directly into the court registry. At the December 7, 2015 hearing on this motion, the Wais complained that even though Dionne has been collecting rental payments since March 2015, she has failed to pay them \$1,000 a month per the failed settlement agreement or to deposit the proceeds into the court registry.

As we find Dionne was legally entitled to the property, including the rental income, a reasonable amount of time after she requested the Wais quit, we decline to release \$18,000 from the court registry to the Wais, split the rental proceeds between the parties, or order the tenants to deposit the rental income into the court registry.

The Wais base most of their argument for the release of the \$18,000 on the failed February 2015 settlement agreement. Under this settlement agreement, Dionne would collect the rental payments but would pay \$1,000 of it to the Wais every month. When it came time to execute this settlement agreement, however, **[**11**]** the Wais refused to sign it, and the case proceeded to trial. (See Aff. in Support of Defs.' Mot. for Release of Funds & Order Directing Deposit of All Rental Proceeds into Court's Registry 2-3.) Even though Dionne began collecting the rental payments per the agreement in March 2015, the Wais still cannot claim benefits they would have received under a settlement agreement that was never finalized. Therefore, they are not entitled to the \$18,000.

We also decline to sanction Dionne for failing to follow our order from the May 20, 2015 hearing that she deposit the monthly rental income into the court registry. Although we admonish Dionne for failing to follow court orders, we note that the Wais similarly failed to follow a previous order on May 27, 2011, that they deposit \$2,500 of the monthly rental income into the court registry. In short, it appears that neither party

believed it necessary to follow the court's orders. Accordingly, we will not currently sanction either party. Nonetheless, we caution the parties and counsel for both parties that failure to follow court orders in the future will not be dealt with so lightly.

3. Reimbursement for Good-Faith Improvements [****12****]

The Wais argue that if they are evicted, they are at least entitled to reimbursement for improvements they made to the property since they made the improvements in good faith. Evidence submitted shows that the Wais were good-faith improvers. Not only do we believe that Dionne orally gave them permission to make the improvements and saw the improvements on her trips to the Territory, but in a notarized letter dated August 20, 2010, Dionne stated that the Wais had "permission to build anything on my land in 'Leatuvai' where they live." (See Answer to Compl. ex. 4.) This could easily be misunderstood to have given the Wais permission to rebuild the residential structure as a two-story building. Consequently, we hold the Wais were good-faith improvers when they expanded the Purple Onion building and residence.

Despite the fact that the Wais were good-faith improvers, they failed to present any evidence or specific testimony showing the actual expenses they spent in improving the property or the amount by which the improvements enhanced the value of the property. As such, we will grant them a period of 60 days in which to submit documented evidence showing this expense. If they should fail to submit such evidence, they will not be entitled to the value of the improvements.

4. Attorney's Fees [****13****]

[7] Both parties asked the court for attorney's fees and costs. The general rule is that attorney's fees are not recoverable except when statute dictates or the opposing party acted in bad faith, wantonly, or oppressively. *Fiaui v. Faumuina*, 27 A.S.R.2d 36, 42 (Trial Div. 1994). There is no statute dictating the award of attorney's fees in these circumstances. In addition, neither party acted in bad faith, wantonly, or oppressively. Thus, neither party is awarded attorney's fees.

Order

The Wais are evicted from the property at issue. Taking into account the family home and business uses of the land, the Wais are afforded a reasonable period to find suitable relocations for their residence and business operations: the Wais and their children must vacate the land within 60 days of entry of this order.

During this 60 days period, the Wais may remove at their option any improvements, possessions, and fixtures belonging to them and not permanently attached to the land. If such items are not removed within that time, they shall become Dionne's property.

The Wais, their agents, servants, employees, and attorneys, and those persons in active concert or participation with them are permanently enjoined from entering the land after the 60-day ****14**** period, and from undertaking after that any business or other activity on the land at any time without Dionne's prior permission.

The Wais shall also pay to Dionne rent collected until March 2015, minus any amounts already paid or deposited into the court registry, in the amount of \$243,152.50. The \$35,000 deposited into the court registry from the settled insurance claim involving the property is granted to Dionne.

As good-faith improvers of the land, the Wais have 60 days of entry of this order to document their actual expenses in improving the property or the enhanced value of the property by their improvements to enable the court to determine any monetary compensation for the improvements. If they fail to provide such documentation within 60 days, their claims for improvements to the property shall be waived.

The parties shall bear their respective costs of suit and attorney's fees, under the circumstances of this case.

It is so ordered.

Cite As: *In re Matai Title Sagapolutele*, MT No. 09-15, slip op. at [page number] (Land & Titles Div. June 9, 2016) (order invalidating successor *matai* claim, referring selection process to family & dismissing action)

AIGAFEALOFANI TUPUTALA F. SAGAPOLUTELE, Claimant,

v.

**TU'UTAU A. ATUALEVAO, TELESIA FIAME, AND JUNIOR
FILEMU SAGAPOLUTELE, Objectors/Counterclaimants.**

In re Matai Title “Sagapolutele” of the Village of Ili’ili

High Court of American Samoa
Land and Titles Division

MT No. 09-15

June 9, 2016

[1] A.S.C.A. §§ 1.0401-.0414 are designed and were enacted to preserve the *matai* system as a fundamental feature of Samoan culture and customs.

[2] The culture and customs require the family to meet in accordance with the family’s traditions to select the successor to fill a family’s vacant *sa’o* title.

[3] The meeting must provide a meaningful opportunity to the family members to thoroughly deal with the title vacancy and determine if a successor titleholder can be selected.

Before RICHMOND, Associate Justice; MAMEA, Chief Associate Judge; SU’APAIA, Associate Judge; SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Claimant, M. Talaimalo Uiagalelei
For Counterclaimant Tu’utau A. Atualevao, Pro Se
For Counterclaimant Telesia Fiame, Sharron I. Rancourt
For Counterclaimant Junior Filemu Sagapolutele, Pro Se

ORDER INVALIDATING SUCCESSOR MATAI REGISTRATION
CLAIM, RETURNING SELECTION PROCESS TO FAMILY, AND
DISMISSING ACTION

On March 28, 2016, objector Telesia Fiamē (“Telesia”) moved to dismiss this action for judicial selection of the successor to the vacant *matai* title “Sagapolutele” to be the *sa’o* (head family chief) for lack of jurisdiction. Telesia alleged that there were no meaningful family meetings to select the successor titleholder and the meetings for that purpose before the Secretary of Samoan Affairs were defective. An evidentiary **[**2**]** hearing was conducted on April 19, 2016 to establish factual findings essential to ruling on the motion. The contestants and their respective counsel were present.

The court, having considered the testimony and other evidence, finds facts and makes conclusions of law as set forth below, and grants Telesia’s motion.

Discussion

The Sagapolutele family met twice at the Sagapolutele guesthouse for the purpose of selecting the successor Sagapolutele titleholder. The first meeting, held on January 25, 2014, was noticed and well attended by family members. Family Chief Namu (Namu) chaired the title selection process. However, Namu loudly directed offensive language towards some attending family members, especially Claimant Aigafealofani Tuputala F. Sagapolutele (Tuputala). When the developing confrontation between Namu and Tuputala disrupted continuation of the successor selection process, the family members present opted to postpone and carry on the process at a later time.

While still at the January 25 meeting, the family members present agreed to meet again, ultimately on March 1, 2014, to select the successor titleholder. The family met again on March 1. This second meeting for the title selection was also well **[**3**]** attended by family members. Unfortunately the conflict between Namu and Tuputala flared up again, and this meeting also ended without selection of the successor Sagapolutele titleholder.

Tuputala then resolved to file with the Territorial Registrar his claim of succession to the Sagapolutele title, which he did on July 17, 2014. His action prompted the remaining parties to this action to timely file with the Registrar their counterclaims to the title in opposition to Tuputala’s title claim, and ultimately led to referral to this court for judicial selection of the successor titleholder.

[1-3] A.S.C.A. §§ 1.0401-.0414 are designed and were enacted to preserve the *matai* system as a fundamental feature of Samoan culture and customs, as required by the Am. Samoa Rev. Const. art. I, § 3. *In re Matai Title Taliaaueafe*, 3 A.S.R.3d 225, 227 (Land & Titles Div. 1999). The culture and customs require the family to meet in accordance with the family's traditions to select the successor to fill a family's vacant *sa'o* title. *Id.* at 227-28. The meeting must provide a meaningful opportunity to the family members to thoroughly deal with the title vacancy and determine if a successor titleholder can be selected. *Id.* **[**4**]**

Clearly under the evidence presented in this case, neither the January 25 nor the March 1 meetings in 2014 provided Sagapolutele family members with a truly meaningful opportunity to select the next Sagapolutele titleholder.

Namu passed away not long after Tuputala filed his registration claim for the title. This turn of events may facilitate resumption of the family's successor selection process. However, even if Namu were still alive, we are persuaded under the evidence that the family could overcome the type of differences exhibited at the January 25 and March 1 meetings and productively select the Sagapolutele title successor.

Order

1. The successor claim to the vacant Sagapolutele *matai* title filed with the Territorial Registrar on July 14, 2014 is invalidated.
2. The process to select the successor to the vacant title is returned to the family.
3. This action is dismissed without prejudice.

It is so ordered.

Cite As: *In re Matai Title Aoelua*, MT No. 07-14, slip op. at [page number] (Land & Titles Div. June. 23, 2016) (op. & order)

SOLOMONA V. AOELUA, Claimant,

v.

TELA I. MALAGA, Objector/Counterclaimant.

In re Matai Title “Aoelua” from the Village of Afono

High Court of American Samoa
Land and Titles Division

MT No. 07-14

June 23, 2016

[1] In *matai* title disputes, the court is guided by the four criteria set out in A.S.C.A. § 1.0409(c): (1) best hereditary right; (2) clan support; (3) forcefulness, character and personality, and knowledge of Samoan customs; and (4) value to family, village, and country.

Before KRUSE, Chief Justice; SUAPAIA, Associate Judge;
FA’AMAUSILI, Associate Judge; MUASAU, Associate Judge; and
TUNUPOPO, Associate Judge.

Counsel: For Claimant, M. Talaimalo Uiagalelei
For Objector/Counterclaimant, Arthur Ripley, Jr.

OPINION AND ORDER

This dispute concerns the vacant *matai* title “Aoelua” attached to the village of Afono. The Clerk’s file reveals the following chronology of events: Pursuant to A.S.C.A. § 1.0405, Solomona Aoelua (“Solomona”) offered to register the *matai* title “Aoelua” with the Territorial Registrar (the “Registrar”) on August 28, 2012. Notice of Solomona’s succession claim was duly publicly noticed by the Registrar in accordance with A.S.C.A. § 1.0406, and on October 26, 2012, Tela I. Malaga (“Tela”) filed an objection and counterclaim to title under A.S.C.A. § 1.0407.

By letter dated November 14, 2012, the Registrar referred the matter and parties to the Secretary of Samoan Affairs (the “Secretary”) for the

settlement conferences required by A.S.C.A. § 43.0302. The parties attended three such sessions before the [***2***] Secretary; however, they could not resolve the controversy. Accordingly, the Secretary certified an irreconcilable dispute for judicial determination. Consequently, the Registrar transmitted his record to the clerk of courts on September 10, 2014, and the Clerk, upon filing and receiving the same, issued the prescribed Questionnaires to the parties for answer and filing, all in accordance with the requirements of Land and Titles Rules (“TCRLT”) Rule 3.

This matter came on for trial on May 19, 2016. However, a prior continuance motion filed by Tela came on for hearing on May 11, 2016, but neither the movant nor his counsel showed and the motion was denied. A hurried *ex parte* application to reconsider the court’s denial of Tela’s motion was considered and also denied on the day of trial. First, Solomona objected to any further continuance, secondly, the court was not impressed with counsel’s excuse of “no notice” of the hearing of his own motion, and finally, this matter has been continued thrice before because of party unavailability.

On the evidence presented at trial, we find that Solomona is eligible to *matai* succession, having satisfactorily proven his eligibility as set forth in A.S.C.A. § 1.0403(a),(b),(c) and (d); (1) that he is at least one-half Samoan blood, (2) that he was born on American soil and a resident of American Samoa, (3) that he has been chosen by his family for the title, and (4) that he has lived with Samoans as a Samoan. *Id.*

[1] In *matai* title disputes, the court is guided by the four [***3***] criteria set out in A.S.C.A. § 1.0409(c): (1) best hereditary right; (2) clan support; (3) forcefulness, character and personality, and knowledge of Samoan customs; and (4) value to family, village, and country.

Findings

1. Hereditary Right

Solomona’s father was a former titleholder and thus his degree of hereditary right is 50%. No evidence was presented on Tela’s behalf; his counsel excused himself from any participation in the trial following the court’s denial of his client’s motion to reconsider not granting a continuance.¹

¹ We note, however, from Tela’s verified response to questionnaire No. 25, that his heredity claim is essentially based on the same genealogy claim advanced in *In re Matai Title Aoelua*, 27 A.S.R.2d 17 (Land & Titles Div.

2. Wish of the Clans

On this issue, we find for Solomona. Several family meetings were convened to select a titleholder and notice of these meetings was widely disseminated both personally and by public media. We are satisfied on the evidence that Tela had actual notice but, nonetheless, opted not to attend any of these meetings. We additionally find that the Aoelua family is a single-clan entity and that the family consensus reached at these meetings was in favor of Solomona as the next titleholder.

We conclude, therefore, that Solomona was duly chosen by the Aoelua family to hold the *matai* title “Aoelua” and that he prevails **[**4**]** under A.S.C.A. § 1.0409(c)(2).

3. Forcefulness, Character and Personalty, Knowledge of Samoan Customs

Having considered the evidence given on Solomona’s developmental, educational, and vocational history, we are satisfied that he has the personal attributes to acquit himself well as the next family leader.

4. Value to Family, Village, and Country

We find that Solomona’s service to family, village, and country has been sufficiently shown to demonstrate not only his eligibility but also his qualification to serve and fulfill the Aoelua family’s expectations in his role as the next titleholder.

Conclusion and Order

Accordingly, Solomona V. Aoelua shall be registered as the successor to the *matai* title “Aoelua” attached to the Village of Afono. The Territorial Registrar shall, therefore, in accordance with the requirements of A.S.C.A. § 1.0409(b), register the Aoelua title from the village of Afono to Claimant Solomona V. Aoelua.

It is so ordered.

1994), against claimant Valovalo Aoelua, Solomona’s brother. The court there found that Valovalo’s heredity prevailed.

Cite As: *In re Matai Title Tago*, MT No. 05-15, slip op. at [page number] (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction)

LAITITI LAITITI, JR., Claimant,

v.

ATIVALU A. TAGO, JR., Objector/Counterclaimant.

In re *Matai* Title “Tago” of the Village of Nu’uuli

High Court of American Samoa
Land and Titles Division

MT No. 05-15

July 1, 2016

[1] In the selection of a *matai*, the registration statute quite clearly calls for a “family” mandate, as opposed to the desires of a mere faction of the family.

[2] A family meeting cannot simply be a “perfunctory” exercise but must present a “meaningful” opportunity to discuss selecting a titleholder in accordance with family tradition.

[3] A meaningful family meeting cannot be based on the practice of private meetings by individual candidates and their immediate supporters.

[4] The meeting must provide “a meaningful opportunity” to the family to decide for itself whether or not it can select a new titleholder.

[5] Without 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 Land and Titles Division really has no business entertaining *matai* title cases.

[6] The court has no jurisdiction to entertain a *matai* disputes in the absence of meaningful family attempts to select a *matai*.

[7] In selecting the successor to a *matai* title, the family should not be held hostage to the impetuous agenda of a single family member, who

happens to know where the Office of the Territorial Registrar is located as well as the well-beaten path to the courthouse.

Before KRUSE, Chief Justice; SUAPAIA, Associate Judge; SATELE, Associate Judge; MUASAU, ASSOCIATE JUDGE; and TUNUPOPO, Associate Judge.

Counsel: For Claimant, Sharron I. Rancourt
For Counterclaimant, Matailupevao Leupolu, Jr.

ORDER OF DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION

This controversy concerns the vacant *matai* title *Tago* attached to the village of Nu'uuli. Claimant Laititi Laititi, Jr. ("Laititi") offered the title for registration with the Territorial Registrar's Office on July 11, 2014. His offer attracted the timely objection of Ativalu A. Tago, Jr., ("Ativalu") who interjected his own succession claim to the Tago title. The Territorial Registrar duly referred the dispute to the Office of Samoan Affairs ("OSA") for conciliatory proceedings before the Secretary of Samoan Affairs (the "Secretary") pursuant to A.S.C.A. § 43.0302. The parties were not able to resolve their dispute at OSA and on May 11, 2015, the Secretary, in **[**2**]** accordance with A.S.C.A. § 1.0409, issued his Certificate of Irreconcilable Dispute ("CID") thereby certifying the matter as a dispute for judicial determination. The matter accordingly came on for trial before us on May 26, 2016, and for reasons given, we hold that this court lacks subject matter jurisdiction.

The evidence shows that Laititi's registration effort precipitated a meeting held by Laititi and his supporters. Laititi convened this meeting knowing full well that Ativalu had a scheduling conflict with the meeting date. Following the meeting, the attendees filed their collective Petition with the Territorial Registrar declaring, *inter alia*, "[t]hat at a family meeting called and held for the purpose of selecting a successor to the *matai* title 'Tago' . . . [the undersigned] therefore petition the Territorial Registrar that the *matai* title 'Tago' be registered in the name of Laititi Laititi Jr." See Petition of Laititi Laititi, Jr. to Register *Matai* Title "Tago" with the Office of the Territorial Registrar (July 11, 2014). This meeting in actuality followed two preceding, and inconclusive, meetings of the entire Tago family which had been called and convened after Laititi and Ativalu had consulted with one another on dates. However, when it came to the third meeting, the parties did not agree to the date; Laititi wanted to quickly meet on a certain day while Ativalu required a later date because of his scheduling conflict. As it happened, Laititi took it upon himself to hastily convene the third meeting regardless of whether or not Ativalu (and his supporters) would attend. Under the

circumstances, we hold that the so called third *****3**** “family meeting” was not in fact a “family” meeting for purposes of A.S.C.A. § 1.0403(c); rather, the meeting amounted to nothing more than a select gathering of only some members of the Tago family, namely, Laititi and his supporters.

[1-6] The *Fono* has made clear that a claimant to a *matai* title is “ineligible to succeed to a *matai* title”, unless he can satisfy, among other enumerated criteria, “his be[ing] chosen by his *family* for the title.” A.S.C.A. § 1.0403. (emphasis added). Thus, a claimant must state in his succession claim to be filed with the Registrar “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). In the selection of a *matai*, the registration statute quite clearly calls for a “family” mandate, as opposed to the desires of a mere faction of the family. The court has thus explained time and time again, most recently in *In re Matai Title Le’i*, that a family meeting cannot simply be a “perfunctory” exercise but must present a “meaningful” opportunity to discuss selecting a titleholder in accordance with family tradition. AP No. 11-11, slip op. at 9 (App. Div. Aug. 7, 2013) (op. & order); *In Re Matai Title Laolagi*, AP No. 07-04, slip op. at 6 (App. Div. Oct. 16, 2006) (op. & order). A meaningful family meeting cannot be “based on the practice of private meetings . . . by individual candidates and their immediate supporters.” *In re Matai Title Le’i*, AP No. 11-11, slip op. at 3 n.2. By this process, the meeting must *****4**** provide “a meaningful opportunity” to the family “to decide for itself whether or not it can select a new titleholder.” *In Re Matai Title Letuli*, 4 A.S.R.3d 273, 275 (Land & Titles Div. 2000). Without 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 Land and Titles Division really has no business entertaining *matai* title cases.” *In re Matai Title Le’i*, AP No. 11-11, slip op. at 4-5. In other words, the court has no jurisdiction to entertain a *matai* disputes in the absence of meaningful family attempts to select a *matai*. See *In re Matai Title Taliaaauafe*, 3 A.S.R.3d 225 (Trial Div. 1999).

[7] Here, a meaningful family meeting did not take place. If anything, the family was still in the process of *matai* selection following two previous meetings that failed to reach a consensus. This process, however, was short-circuited by Laititi and his supporters when they organized their own meeting and Petition filed with the Registrar’s Office to trigger the registration process. Accordingly, the outcome of their gathering cannot be considered as family based as Ativalu, who objected to this meeting due to conflicts, was not heard in this process, and as we recently noted in *In re Matai Title Levu*, MT No. 06-04, slip op. 4-5 (Land & Tiles Div.

Jan. 30, 2006) (order of dismissal), “[t]he family should not be held hostage to the impetuous agenda of a single family member, who happens to know where the Office [***5**] of the Territorial Registrar is located as well as the well-beaten path to the courthouse.” Deficient of the prerequisite of meaningful family action, we hold that this matter is not ripe for judicial determination. We lack subject matter jurisdiction.

The matter is remanded back to the Tago family (not simply a faction thereof) for further deliberation in accordance with family traditions. The succession claims made before the court are premature and shall be dismissed without prejudice. The Territorial Registrar is directed to cancel all pending registration offers on the *matai* title Tago.

It is so ordered.

Cite As: *Aumoeualogo v. Pulu*, LT No. 09-15, slip op. at [page number]
(Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

**AUMOEUALOGO T.J. FUAVAI, and the AUMOEUALOGO
FAMILY, Plaintiffs,**

v.

**UGAITAFA SIMEI PULU, PAOPAO J. FIAUI, ET AL.,
Defendants.**

High Court of American Samoa
Land and Titles Division

LT No. 09-15

August 16, 2016

[1] A case concerning a dispute between two Samoan families asserting adverse claims to land is squarely within the bailiwick of this court.

[2] The alienation enactments are merely concerned with instruments affecting title to native land.

[3] Instruments affecting title to native land under the alienation enactments are void and quite meaningless without gubernatorial assent.

[4] The Governor's role in matters related to instruments affecting title to native lands pertains to the implementation of legislative policy against the monopolistic ownership of land and improvident alienation of communal lands by those charged with the management and control thereof.

[5] This familiar executive role--implementing legislative policy--should not, however, be conflated with the equally familiar role of the judiciary to determine land disputes.

[6] Compliance with A.S.C.A. § 37.0101 et. seq., is not a bar to relief.

[7] Where the subject matter of a land dispute is a tract of land delimited in metes and bounds and can be indentified and determined, meaningful judgment can be rendered without a survey.

Before KRUSE, Chief Justice; and MUASAU, Associate Judge.

Counsel: For Plaintiffs, Matailupevao Leupolu Jr.
For Defendants, Ugaitafa Simeu Pulu and Tagiilima Iatala,
Sharron I. Rancourt

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Defendants Ugaitafa Simeu Pulu and Tagiilima Iatala move for summary judgment seeking a dismissal of Plaintiffs' complaint asserting, among other things, this court's lack of subject matter jurisdiction. The subject matter here is a small tract of land, 0.0006 acres (the "disputed tract"), located on the mountainous hinterlands separating the village of "Aoa" on the Island of Tutuila's north shore, and the village of "Amouli" located on its south coast. The disputed tract is claimed by both the Aumoeualogo communal family of Aoa and the Fuata communal family of Amouli. The harmony between these coastal settlements, *vis a vis* their common hinterland, has recently become disturbed because of the local community's growing dependency on mobile telephones and the affected utility provider's corresponding need to strategically locate cell-phone [**2**] towers along Tutuila's mountain ridges.¹

[1-7] Defendants' motion for summary judgment is denied for the following reasons: First, this is clearly a controversy "relating to land," over which "[t]he land and titles division of the High Court shall have *exclusive jurisdiction*." A.S.C.A. § 3.0208(b)(2) (emphasis added). Since this case concerns a dispute between two Samoan families asserting adverse claims to land, the matter is squarely within the bailiwick of this court. *Id.* Second, Defendants' reliance on *Moetoto v. Savusa*, 28 A.S.R.2d 144 (Land & Titles Div. 1995), to frame the matter as an administrative proceeding before the Governor and Land Commission under the Alienation of Native Land enactments, A.S.C.A. §§ 37.0201-.0230, is entirely misplaced. The *Moetoto* case was not concerned with an inter-family land dispute, as is the case here. Rather *Moetoto*, was an intra-family dispute within the Savusa family of Nu'uuli concerning alienation efforts by different Savusa family members to lease out family land to third-parties. The alienation enactments are merely concerned with "instruments affecting title to [native] land." A.S.C.A. § 37.0203. Such instruments are void and quite meaningless without gubernatorial assent. See A.S.C.A. § 37.0204 and § 37.0230. The Governor's role in

¹ See also *Mamea v. Utu, et al.*, LT No. 29-15, involving members of the same opposing coastal settlements and the same mountain ridge vicinity because of the water utility corporation's desire to locate a water tank in the area.

these matters pertains to the implementation of legislative policy against “the monopolistic ownership of land [**3**] and improvident alienation of communal lands by those charged with the management and control thereof.” A.S.C.A. § 37.0203. This familiar executive role--implementing legislative policy--should not, however, be conflated with the equally familiar role of the judiciary to determine land disputes. Finally, Defendants’ claim summary judgment “as a matter of law,” T.C.R.C.P. Rule 54, because Plaintiff’s “quiet title” claim is “meaningless without a survey and without first complying with those statutory requirements relating to the registration of title.” *Vaivao v. Craddick*, 14 A.S.R.2d 108, 114 (Land & Titles Div. 1990) (citing A.S.C.A. § 37.0101 et. seq.). We agree with Plaintiffs’ submission that compliance with A.S.C.A. § 37.0101 et. seq., is not a bar to relief. The court’s statement in *Vaivao*, which Defendants cite as a basis for summary judgment, is not without context. In *Vaivao*, the court found in favor of a number of Pago Pago families’ adverse claims to land which was located inland of the main highway at the vicinity of the Pago Pago stream which the defendant had included in his survey. While none of these families had provided surveys of their respective land claims, judgment was nonetheless rendered collectively in their favor. The court’s reference to “meaningless” had nothing to do with the merits of the plaintiffs’ respective causes against the defendant, but the court’s inability to enter a meaningful judgment in metes and bounds on an individual basis. Thus in *Liufau v. Tufaga*, 7 A.S.R.3d 294, 295 (Land & Titles Div. 2003), this court lamented having to revisit the “location” of certain [**4**] lands which were awarded 100 years earlier to the plaintiff’s predecessor, because “[u]nfortunately for posterity `no plans were filed [in *Tufaga v. Liufau*, 1 A.S.R. 84, 85 (Trial Div, 1909)] but the names of different pieces of land.”” Here, the facts are distinguishable. The subject matter of the dispute before us is a tract of land, 0.0006 acre, delimited in metes and bounds, as depicted in DRG 1265-8-13 and reproduced in Plaintiffs’ proposed lease to AST Telecom LLC, as incorporated in its Complaint. While the court’s determination herein will only be binding on the parties before it, judgment can nonetheless be meaningfully rendered.

The motion for summary judgment is denied.

It is so ordered.

Cite As: *Posala v. Alaipalelei*, LT No. 10-03, slip op. at [page number]
(Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss)

**ROSALIA TALIA POSALA, TAULAPAPA S. SAVEA, and
FAITOTO'ATASIOAINIUTEA PULEISILI TUIOLOSEGA,
Plaintiffs,**

v.

**TOILOLO ETUENI ALAIPALELEI, PAULO TALAMOA, AND
SAIFAGA P. TALAMOA, Defendants.**

High Court of American Samoa
Land & Titles Division

LT No. 10-03

September 7, 2016

[1] A defendant may move for dismissal of an action or of any claim against him for a plaintiff's failure to prosecute.

[2] In determining whether to dismiss for lack of prosecution, the facts of each individual case are important.

[3] When considering dismissing a case for lack of prosecution, 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.

[4] The pertinent question when considering dismissal for lack of prosecution is whether there has been delay and prejudice to the defendant sufficient to justify a dismissal with prejudice.

[5] The High Court of American Samoa 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] When the High Court dismisses cases for want of diligent prosecution, Land and Titles Division cases should be dismissed without prejudice.

[7] Public interest and the court's interest in effectively managing its docket favor expeditious resolution of litigation.

[8] Abandonment does not equal willful delay or bad faith conduct.

[9] A court is not required to expressly warn the plaintiff of the possibility of dismissal before dismissing the case pursuant to a noticed motion.

[10] Dismissals are rarely granted without adequate notice and an opportunity to be heard.

[11] Unreasonable delay creates a presumption of prejudice to defendant's case.

[12] 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.

[13] Only when a plaintiff provides a non-frivolous excuse for the delay must a defendant produce evidence that the delay has prejudiced his case.

[14] Land cases are often dismissed for lack of prosecution, without prejudice to lessen the severity of a dismissal and permit re-filing later.

[15] Dismissal with prejudice is a drastic measure and public policy favors resolving issues on the merits.

[16] The court granted dismissal with prejudice because it found dismissal without prejudice would be inefficient where plaintiff took no action after three motions to dismiss for lack of prosecution.

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

Counsel: For Plaintiffs, Fiti A. Sunia
For Defendant Toilolo Etueni Alaipalelei, Matailupevao Leupolu, Jr.
For Defendants Paulo and Saifaga Talamoa, Sharron I. Rancourt

ORDER GRANTING MOTION TO DISMISS

Pending is the motion to dismiss for lack of prosecution filed by Defendants Paulo and Saifaga Talamoa (collectively “the Talamoas”). For the reasons stated below, we grant the motion.

Background

This case has a long and complicated history. On April 24, 2003, Plaintiffs Rosalia Talia Posala, Taulapapa Savea and Faitoto’atasioainiutea Puleisili Tuiolosega, acting on behalf of the Talia family (collectively “Plaintiffs”) filed this action seeking to enjoin Defendants from removing cinders from and conducting other activities on their family Talia’s communal [**2**] land in Malaeloa. Defendants answered and counterclaimed, alleging the land to be the Toilolo family’s communal land. On July 17, 2003, this action was consolidated with two pending actions, LT Nos. 9-85 and 6-86, with related land ownership disputes. However, those cases have since been dismissed. *See Tatasi v. Toilolo*, LT Nos. 9-85, 6-86, & 10-03 (Land & Titles Div. Feb. 14, 2007) (orders granting def’s mot. to dismiss LT No. 9-85 and pls.’ mot. to dismiss LT No. 6-86, denying mot. to dismiss LT No. 10-03, and granting Setaliaaueafe Talalima’s mot. to intervene in LT No. 10 03).

On June 30, 2003, Chief Justice Kruse preliminarily enjoined Defendants from removing cinders from the land-and ordered them to deposit any profits made from the land into the court registry. Chief Justice Kruse then recused himself due to his representation of Defendants as a private attorney in prior cases.

After numerous delays, this matter came on for trial on August 10, 2006. Plaintiffs and their counsel failed to appear for trial.¹ Consequently, Defendant Toilolo Etueni Alaipalelei (“Toilolo”) orally moved to dismiss the case for lack of prosecution and requested the release of the funds still being [**3**] deposited into the court registry. The court took the matter under advisement and scheduled a status hearing for August 17, 2006.

On August 17, 2006, Counsel Fiti A. Sunia appeared and informed the court that he had been retained by Plaintiffs’ counsel. At the same hearing, Toilolo filed a written motion to dismiss. The court denied the motion in a lengthy order issued on February 14, 2007 (“February 2007 Order”).

¹ Plaintiffs and their counsel also failed to appear at a status hearing on July 7, 2006, regarding the status of Plaintiffs’ search for new counsel since they had discharged their previous counsel in April 2006.

After the February 2007 Order, no action was taken in the case until July 14, 2011, when Defendants moved to dismiss for lack of prosecution again. Plaintiffs appeared and opposed the motion. Ultimately, the court denied Defendants' motion on August 26, 2011 ("August 2011 Order").

Defendants filed a pretrial motion on December 19, 2011, in accordance with the August 2011 Order; Plaintiffs did not and still have not filed a pretrial motion. On January 28, 2012, the court issued an order remanding the matter back to the Secretary of Samoan Affairs for further mediation of the dispute.

On July 14, 2015, Toilolo submitted a certificate of irreconcilable dispute ("CID") along with a motion for a hearing to set the matter for trial. At the hearing to set the matter for trial on October 21, 2015, Plaintiffs did not appear. However, Counsel Sunia appeared and indicated that he intended to **[**4**]** withdraw as Plaintiffs' counsel; as a result, the matter was rescheduled.²

On November 18, 2015, Toilolo moved to dismiss the Talamoas from the case. The Talamoas opposed the motion based on still pending differences with Toilolo. We denied this dismissal motion.

On April 29, 2016, the Talamoas moved to dismiss the case for lack of prosecution on April 29, 2016, which we heard on May 16, 2016. Counsel for both the Talamoas and Toilolo were present, but Plaintiffs and their counsel were not present. During the hearing, the Talamoas and Toilolo informed the court that they had resolved their differences, and Toilolo supported the Talamoas' dismissal motion.

Standard of Review

[1-4] A defendant may move for dismissal of an action or of any claim against him for a plaintiff's failure to prosecute. T.C.R.C.P. 41(b). 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 the defendants from any delay versus the law's strong **[**5**]** bias in favor of disposition of claims on their merits. *Nat'l Credit Union Admin. Bd. v. Gurr*, AP 08-05, slip op. at 6 (App. Div. Aug. 30, 2006). The pertinent question is whether there has been delay

² Despite Counsel Sunia's stated intent to withdraw as Plaintiffs' counsel, he officially remains their counsel of record.

and prejudice to the defendant sufficient to justify a dismissal with prejudice. *Mir v. Fosburg*, 706 F.2d 916, 918 (9th Cir. 1983).

[5-6] The High Court of American Samoa 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.

Nat'l Credit Union Admin. Bd., AP 08-05, slip op. at 6. When the High Court dismisses cases for want of diligent prosecution, Land and Titles Division cases should be dismissed without prejudice. *See Jennings v. Jennings*, 19 A.S.R.2d 34, 38-39 (Trial Div. 1991).

Discussion

1. Duration of Dilatoriness

[7] Public interest and the court's interest in effectively managing its docket favor expeditious resolution of litigation, but this case has now been pending for more than 13 years. *See [**6**] Nat'l Credit Union Admin. Bd.*, AP 08-05, slip op. at 6. Since 2006, Plaintiffs have taken very little action to pursue the matter other than opposing Defendants' motion to dismiss in 2011. While a CID was filed with the court on July 14, 2015, it only underlines Plaintiffs' lack of action because only Toilolo attended the three hearings. Additionally, the much older cases originally combined with this case have been dismissed. *See Tatasi*, LT Nos. 9-85, 6-86, & 10-03.

Defendants have now moved to dismiss this case for lack of prosecution three times. They filed a pre-trial brief, showing they were prepared to move forward, and participated in the hearings at the Samoan Affairs Office. It is evident then that Plaintiffs have been the cause of delay in this matter for the last nine years.

2. Willful or Bad Faith Conduct to Delay by Plaintiffs

[8] There is no evidence that Plaintiffs delayed this matter out of a bad faith effort to confound Defendants' case. There is also no evidence that Plaintiffs merely willfully delayed the prosecution. Instead, Plaintiffs

seem to have simply abandoned the matter; however, abandonment does not equal willful delay or bad faith conduct.

3. Notice that Further Delays Would Result in Dismissal

[9-10] A court is not required to expressly warn the plaintiff of the possibility of dismissal before dismissing the case pursuant **[**7**]** 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. Wabash R.R. Co.*, 370 U.S. 626, 632 (1962).

In the August 2011 Order, this court noted that “the extended inactivity in this action raises legitimate concern over its continued viability.” Plaintiffs opposed the two previous motions to dismiss for lack of prosecution; however, they have failed to respond to this motion at all. The previous motions, the court’s noted concern in the August 2011 Order, and the opportunity to respond to this noticed motion show that Plaintiffs have had more than adequate notice that further delays might result in dismissal.

4. Prejudice to Defendant by Further Delay

[11-13] “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 Virgin Islands*, 132 F.R.D. 405, 412 (D.V.I. 1990). Only when a plaintiff provides an unfrivolous excuse for the delay must a defendant produce evidence that the delay has prejudiced his **[**8**]** case. *Nealy v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1281 (9th Cir. 1980).

Plaintiffs have not provided any explanation for why they have failed to prosecute their case; therefore, it is presumed that the delay has prejudiced Defendants’ case.

5. Efficacy of Lesser Sanctions

[14-16] Land cases are often dismissed for lack of prosecution, without prejudice to lessen the severity of a dismissal and permit re-filing later. See *Jennings*, 19 A.S.R.2d at 38–39. The prior dismissal motions in this case were denied because dismissal with prejudice is a drastic measure and public policy favors resolving issues on the merits. Nevertheless, this

is the third motion to dismiss for lack of prosecution by Defendants, and past denials have not galvanized Plaintiffs into action. Dismissal without prejudice would no longer be efficient in this case.

Order

The Talamoas' motion to dismiss is granted, and this action is dismissed with prejudice. All interim injunctions and other orders having ongoing effect are vacated. So ordered.

Cite As: *Fa'amausili v. Lefiti*, LT No. 05-16, slip op. at [page number]
(Land & Titles Div. Sept. 7, 2016) (order den. mot. for recon.)

FA'AMAUSILI POMELE, Plaintiff,

v.

LEFITI AITUILAGI PESE and DOES 1 through 10, Defendants.

High Court of American Samoa
Land and Titles Division

LT No. 05-16

September 7, 2016

[1] Parties involved in controversies concerning communal land must comply with the prerequisite administrative proceedings before the Secretary of Samoan Affairs before the court can assert subject matter jurisdiction.

[2] A.S.C.A. §§ 43.0302(b) and 43.0303 afford the court limited jurisdiction to make certain interlocutory orders, including preliminary injunctions, before the parties have complied with the administrative proceedings.

[3] It is well established that statutes take precedence over case law.

[4] Limited jurisdiction is granted the court to make certain interlocutory orders before the parties have completed the Office of Samoan Affairs' administrative proceedings, and such limited jurisdiction does not include the authority to grant a party leave to amend the complaint for permanent injunction.

Before PATEA,* Acting Associate Justice; SU'APAIA, Associate Judge;
and SATELE, Associate Judge.

Counsel: For Plaintiff, Gwen F. Tauiliili-Langkilde
For Defendant, M. Talaimalo Uiagalelei

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

ORDER DENYING MOTION FOR RECONSIDERATION

Background

On March 4, 2016, Plaintiff Fa'amausili Pomele ("Fa'amausili") submitted a complaint for permanent injunction. The complaint alleged that in November 2015, Defendant Lefiti Aituilagi Pese ("Lefiti") cleared and built upon communal land belonging to the Pomele family. An application for ex-parte temporary restraining order and preliminary injunction was filed also on March 4, 2016. A show cause hearing was scheduled for the request for preliminary injunction, and the matter was finally heard on June 27 and 28, 2016. At the end of the hearing, Lefiti moved to dismiss the matter on the grounds that **[**2**]** Fa'amausili failed to comply with the requirements of A.S.C.A. § 43.1309(b).

On July 6, 2016, we denied Lefiti's motion to dismiss and granted the preliminary injunction. *Fa'amausili v. Lefiti*, LT No. 05-16 (Land & Titles Div. July 6, 2016) (order den. mot. to dismiss & granting prelim. inj.). The July 6, 2016 order also granted Fa'amausili leave to amend his complaint to conform to the requirements of § 43.1309(b).

On July 18, 2016, Lefiti filed a motion for reconsideration of motion to dismiss. Lefiti asserts that this court has not yet acquired jurisdiction over Fa'amausili's complaint, and therefore could not grant leave to amend the complaint. Lefiti also argues that amending the complaint does not cure the defect that exists in the application for preliminary injunction – i.e. that it failed to comply with A.S.C.A. § 43.1309(b). We heard Lefiti's motion on August 10, 2016, and for the reasons below, we deny the motion.

Discussion

[1-2] Parties involved in controversies concerning communal land must comply with the prerequisite administrative proceedings before the Secretary of Samoan Affairs before the court can assert subject matter jurisdiction. A.S.C.A. § 43.0302. However, A.S.C.A. §§ 43.0302(b) and 43.0303 afford the court limited jurisdiction to make certain interlocutory orders, **[**3**]** including preliminary injunctions, before the parties have complied with the administrative proceedings.

Section 43.0302(b) states that a certificate of irreconcilable dispute is not "required prior to the issuance of a temporary restraining order issued by the Chief Justice or an Associate Justice to prevent the occurring of irreparable damage." Section 43.0303(a) states that the court "may, at any time before the commencement of proceedings" make such orders that it deems necessary to restrain any individuals from: "(1) remaining in

possession of or entering upon any Samoan land; (2) holding or using any Samoan name or title; (3) exercising any right or doing any act, matter or thing concerning or affecting any Samoan land or any Samoan name or title.” Any interim orders made under § 43.0303(a) “shall remain in full force and effect until the final judgment of the Land and Titles Division.” However, “[t]he presiding judge may, at any time after the commencement of proceedings and upon the application of any party affected by such order, modify, vary or rescind” the order.

Pursuant to § 43.1309(b), if the *sa’o* title is vacant, two blood male *matai* members over the age of 18 are allowed to bring an application for injunction in controversies involving communal land. If the family does not have blood *matai* male *****4**** members, § 43.1309(b) then allows at least two blood members over the age of 18 to bring an application for injunction.

Lefiti’s motion for reconsideration argues that the court exercised only the limited jurisdiction available under §§ 43.0302(b) and 43.0303, and therefore lacked jurisdiction to grant Fa’amausili leave to amend his complaint for permanent injunction in order to conform to the requirements of § 43.1309(b). Lefiti further argues that amending the complaint for permanent injunction does not cure the defect in the application for preliminary injunction because Fa’amausili alone filed the action without blood male *matai* members, or without at least another blood member of the Pomele family - as required by § 43.1309(b) - and, thus, the case must still be dismissed.

In the July 6, 2016 order, we cited three cases in support of our decision to allow Fa’amausili leave to amend his complaint so that it would be compliant with § 43.1309(b). In those three cases, we were persuaded, and still remain so, that the court was more concerned with substance rather than form. The *Fanene* court, rather than dismissing the matter outright, ruled that it was “in the interest of judicial economy” to defer a ruling on whether the plaintiffs’ proposed amended complaint met the requirements of § 43.1309(b). *Fanene v. Scanlan*, 8 A.S.R.3d 272, 274 (Land & Titles Div. 2004). The *Sasa* court held that even though the *sa’o* was available but failed to bring the *****5**** pending action, “the early posture of (the) case (did) not warrant dismissal of (the) case.” *Sasa v. Levu*, 2 A.S.R.3d 225, 226 (Land & Titles Div. 1998). The *Fiams* court allowed the plaintiffs as qualified blood members of the family for purposes of petitioning for a preliminary injunction, even though it was not clear that the family lacked at least two blood male *matai* members as required by § 43.1309(b). *Fiams v. Tuiolemotu Family*, 6 A.S.R.3d 310 (Land and Titles Div. 2002). None of the three cited cases, however, went so far as to grant leave to amend a complaint.

[3-4] It is well established that statutes take precedence over case law. See *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14, slip op. at 8-9 (App. Div. Feb. 19, 2016) (op. & order); *United States v. Kolter*, 849 F.2d 541, 543 (11th Cir. 1988). A careful review of the relevant statutes discussed above show that limited jurisdiction is granted the court to make certain interlocutory orders before the parties have completed the Office of Samoan Affairs' administrative proceedings, and such limited jurisdiction does not include the authority to grant a party leave to amend the complaint for permanent injunction. Thus, we did not have the authority to grant Fa'amasili leave to amend **[**6**]** his complaint for permanent injunction. Consequently, that part of our July 6, 2016 order is hereby set aside.¹

Nevertheless, our July 6, 2016 order remains in full force and effect in so far as it grants a preliminary injunction. Section § 43.1309 states that if the *sa'o* title is vacant, then "at least two blood male *matai* members of said family over the age of 18 may bring such an application If the family does not have blood *matai* male members, then . . . at least two blood members of the family over the age of 18 may bring such application . . ." (emphasis added.) We heard evidence over a 2-day period and we viewed the various Pomele family members in court during the hearing on the application for preliminary injunction. Based upon the evidence adduced and our observations in court, we are satisfied that while the application was filed in Fa'amasili's name only, Fa'amasili is indeed joined by other blood members of the Pomele family over the age of 18 in bringing this application for preliminary injunction.

During the hearing on the application, in response to questions by Lefiti's counsel, Fa'amasili testified that if the Pomele title is vacant, then the Fa'amasili title-holder acts as the senior *matai* for the Pomele family. When asked if there **[**7**]** were other *matai* members of the Pomele family, Fa'amasili responded that they were in San Francisco and Hawaii, and Fa'asua (who was present at the hearing) is in American Samoa. And when asked about the people who accompanied him to court for the hearing on the application, Fa'amasili confirmed that they were blood members of the Pomele family.² During redirect examination, Fa'amasili reaffirmed that Fa'asua and all the blood members of the Pomele family present in court had agreed that Fa'amasili would take

¹ At some point, in order to avoid any further § 43.1309(b) challenges, Fa'amasili should consider addressing this aspect of his complaint for permanent injunction.

² These are the same individuals named Fa'asua and other blood members of the Pomele family that we had referenced in footnote 1 of our July 06, 2016 order.

the lead on behalf of the Pomele family in the matter before the court. Lefiti did not call any of the blood members of the Pomele family present in court to refute any of Fa'amausili's assertions. Thus, we are convinced that more than two blood members of the Pomele family over the age of 18 did indeed bring the application for preliminary injunction that was filed by Fa'amausili.

Order

That portion of our July 06, 2016 order denying motion to dismiss and granting preliminary injunction which granted leave to amend Fa'amausili's complaint (for permanent injunction) to conform to the requirements of A.S.C.A. § 43.1309(b) is vacated.

The preliminary injunction granted in our July 16 order remains in full force and effect. **[**8**]**

Lefiti's motion for reconsideration of motion to dismiss is denied.

It is so ordered.

Cite As: *In re Matai Title Pagofie*, MT No. 07-15, slip op. at [page number] (Land & Titles Div. Dec. 16, 2016) (op. & order)

AVA LUFILUFI L. PENEUETA, et al., Petitioners,

v.

PAGOFIE FIAIGOA, Respondent.

In re Matai Title “Pagofie” of the Village of Pava’ia’i

High Court of American Samoa
Land and Titles Division

MT No. 07-15

December 16, 2016

[1] Just because certain individuals can then lay claim to mutual family ties, this fact does not give rise to any culturally cognizant merger of two separate and distinct *matai* and family institutions.

[2] In a case or controversy relating to *matai* titles, the trier of fact are the Associate Judges.

Before KRUSE, Chief Justice; SUAPAIA, Associate Judge; SATELE, Associate Judge; and TUNUPOPO, Associate Judge.

Counsel: For Petitioner, Charles V. Alailima
For Respondent, Togiola T.A. Tulafono

OPINION AND ORDER

The controversy here concerns the *matai* title *Pagofie*, attached to the village of Pava’ia’i, Tualauta County. Petitioner Ava Lufilufi Peneueta (“Ava”) along with others who have collectively joined this cause as the “AVA/PAGOFIE communal family” (“Petitioners”), seek the removal of Respondent Pagofie Fiaigoa (“Respondent”) from continuing to hold the registered *matai* title “Pagofie.” Petitioners’ grounds for removal are allegedly Respondent’s:

1. Disrespecting the traditional authority of the Ava title’s *ali’i* status over the Pagofie *tulafale* within the communal

family.

2. Obstructing the Ava titleholder's *saofa'i* and the current Ava's authority in the village of Pavaiai and thereby making it very difficult for issues in the relationship between the village and the communal family to be addressed.
3. Falsely asserting the *pule* of the Pagofie title over the family communal lands in opposition to the Ava *pule*. **[**2**]**
4. Obstructing court and other proceedings instituted by the Ava titleholder to recover (sic) of communal lands.
5. Continuing to assert that the current Ava has no blood connection to the Ava *ali'i* title and the Pagofie *tulafale* title despite court decisions.
6. Supporting the alienation of the communal lands by supporting registration of family communal land as the individual land of members of his immediate family.
7. Blocking the cemetery that belongs to the Ava family by building his houses and guest house on the grave yard on land called "PAEPAEALA."

Appendix "A" to Pet'rs' Complaint and Petition to Remove Titleholder.

The matter was initially brought before the Office of Samoan Affairs for the prerequisite conciliatory meetings mandated by A.S.C.A. § 43.0302. After it was apparent that settlement attempts were proving futile and of no avail, with the parties unable to bridge their differences, the Secretary of Samoa Affairs issued his Certificate of Irreconcilable Dispute ("CID") on April 13, 2015, thereby facilitating access to judicial recourse. *Id.* The CID was filed with the Clerk's Office on December 18, 2015, and subsequently on July 2, 2015, Petitioners filed their "Complaint and Petition to Remove Titleholder" (the "Petition") under A.S.C.A. § 1.0411,¹ providing for removal of *matai* titles **[**3**]** "for cause."

¹ A.S.C.A. ' 1.0411 provides in pertinent part:

- (a) A *matai* title may be removed by the High Court upon a petition for removal filed in the High Court by 25 blood members of the *matai*'s family, over 18 years of age, who at the time of the petition are all serving the *matai* and family according to Samoan custom.
- (b) Service of the petition for removal of the title shall be made in the manner provided in 43.0502 except that the posting of the required notice shall be for 30 days on the bulletin board of the administration building in Utulei and in 2 public places in the village to which the title is attached such notice to be in both the English and Samoan languages.
- (c) Proof of service shall be made in accordance with 43.0503

Aoelua v. Aoelua, 21 A.S.R.2d 1, 2 (App. Div. 1992). The matter eventually came on for trial on October 3, 2016 and at the conclusion of the evidence, we directed the parties to file and submit their final arguments in writing. Upon the filing and receiving of the parties' final arguments, the court then took the matter under advisement.

Discussion

Ava claims, and she so testified, that her *matai* title Ava is the superior *ali'i* or high chief title, while the Pagofie title is her subordinate *tulafale* (orator). Elaborating on her claim, Ava further testified that she is the *sa'o* (senior *matai*) of the "Ava/Pagofie" communal family, and that Pagofie speaks for Ava at gatherings of the Ava/Pagofie family. Pagofie, according to Ava, has neither appurtenant lands² or rank within the village of Pavaiai. As such, she further contends that Pagofie is not a ranking *matai* in Pavaiai, that Pagofie has no salutation, and that Pagofie participates in the village council only upon Ava's permission. Consequently, Ava claims *pule* to all lands pertaining to the "Ava/Pagofie" family, which claim encompasses a tract of land that Respondent's mother Rasela had acquired title to in the 1990s, either through the statutory registration [**4**] process or by court decision,³ as her own individually-owned property. Rasela's registered land is located outside of Pavaiai, within the village of Tafuna. In that Respondent continues to "support" the individualized treatment of the Tafuna lands, to exclusion of the Ava/Pagofie communal family and, hence, Ava's *pule*, Ava contends that her Petition for *matai* removal is, therefore, merited.

Respondent emphatically rejects Ava's claim that the Pagofie is a subordinate *matai* of the Ava title. He equally dismisses the notion of a culturally recognized entity in Pavaiai known as the "Ava/Pagofie" communal family. Rather, Respondent asserts that "Ava" and "Pagofie" are separate and distinct *matai*, with separate and distinct extended families, with separate landholding pertaining to each *matai* title.

We hold that the Petition fails for several reasons. First, the Associate Judges, who are ranking *matai* and traditional heads of Samoan family units in their own right, do not find that the Ava and Pagofie *matai* titles

² So as to emphasize her claim, Ava even averred upon cross examination that the Ava owns the title Pagofie.

³ The evidence here was only clear on Rasela acquiring individualized title to a tract of land in Tafuna, but rather murky as to how Rasela procured such title.

give rise to one and the same family. Cultural realities and village *fa'alupega* (honorifics) simply do not bear out Petitioners' claim of a singular entity known as the "Ava\Pagofie" family, headed by the *matai* "Ava"; nor Ava's claim that Pagofie is a subordinate *matai* without standing or salutation. Indeed, even at the county level, Respondent was at one time selected by the county council to take one of the two **[**5**]** senate seats of the American Samoa Legislature, that have been constitutionally allotted to the Tualauta County. This county recognition hardly bespeaks the lesser, and culturally unfounded, *matai* status claims of Petitioners.

[1] Rather, the Associate Judges agree with, and therefore accept, Pagofie's position that the Ava and Pagofie titles are and have been independently distinct and separate *matai* titles, appurtenant to independently distinct and separate extended family entity, with corresponding separate and distinct communal landholdings. Village *fa'alupega* (honorifics) so shows quite definitively. While the evidence reveals that the Ava family and Pagofie family have a number of common family members, the evidence is also clear that each family has members who do not share common family roots. Just because certain individuals can then lay claim to mutual family ties, this fact does not give rise to any culturally cognizant merger of two separate and distinct *matai* and family institutions.

[2] The charges brought against Pagofie are, therefore, baseless. We do not accept the allegations that Ava gets to say she is superior to Pagofie in the Pagofie family and that Respondent must lose his title and family respect because he will not do as she says or take her before the Pavaiai village council.⁴ This is especially true because Ava and Pagofie are **[**6**]** two separate entities. Moreover, Petitioners' allegations touching on landholding disputes are not properly before us for determination. In the matter at bar, "[a] case[] or controvers[y] relating to *matai* titles," A.S.C.A. § 3.0241(b), the trier of fact are the Associate Judges. *Id.* The presiding Justice does not participate in the factfinding unless there is a tie vote among the Associate Judges. *Id.* However, Ava's claim to Rasela's registered interest in the Tafuna land, is a case or controversy "relating to land," A.S.C.A. § 3.0241(a), and as such the issue must go before a fact finding panel comprising of a justice and two associate judges. *Id.* Although the land and titles division of the High

⁴ We also accept Respondent's testimony that existing village *tapu* against women being seated in the Pavaiai village council, has more to do with Ava's inability to garner village recognition rather than any failure on the part of Respondent to present Ava before the council.

Court has jurisdiction in all matters relating to *matai* titles, A.S.C.A. § 3.0208(b)(1), and all controversies relating to the land, A.S.C.A. § 3.0280(b)(2), this is not a “land dispute” case, and the Associate Judges who are here empanelled as the finders of fact in this *matai* title dispute, are not empowered to determine and underlying land issues. In other words, the validity of Ava’s underlying claim against Rasela’s Tafuna land interest, is an issue beyond the jurisdiction of the current panel of judges. Likewise, Ava’s claim to *pule* over Pagofie family land interests, in derogation of Respondent’s *pule*, is also an issue outside the competence of the presently constituted fact finders.

For the reasons set forth above, the Petition is denied and Judgment shall accordingly enter for Respondent.

It is so ordered.

SLIP OPINIONS
OF THE
FAMILY DRUG AND ALCOHOL DIVISION
OF THE
HIGH COURT OF AMERICAN SAMOA
(2015)

Cite As: *Am. Samoa Gov't v. Kuka*, FDACR No. 07-15, slip op. at [page number] (Fam. Drug & Alcohol Div. Jan. 27, 2016) (judgment & sentence)

AMERICAN SAMOA GOVERNMENT, Plaintiff,

v.

NICHOLAS KUKA, Defendant.

High Court of American Samoa
Family Drug and Alcohol Division

FDACR No. 07-15

January 27, 2016

[1] Entry of plea agreement is proper where the defendant is fully competent and capable of entering an informed plea, and that his plea has been knowingly, voluntarily, and intelligently made with the advice of counsel.

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

Counsel: For Plaintiff, Assistant Attorney General Russell Smith
For Defendant, Assistant Public Defender Michael White

JUDGMENT AND SENTENCE

Introduction

On August 12, 2015, Defendant Nicholas Kuka, a Western Samoan national, pled guilty to Sexual Assault on a child 16 years of age or less, a Class C Felony. A.S.C.A. § 46.3610(a). Defendant's sentencing hearing was initially scheduled for October 9, 2015. The matter was, however, continued because the file before the court revealed a glaring disconnect between the information furnished by the Immigration Office ("IO") as to the immigration status of Defendant, a Western Samoan national, and that to be gleaned from the District Court's sentencing record on Defendant's prior conviction in *Am. Samoa Gov't. v. Kuka*, DCCR No. 607-12 (Dist. Ct. Sept. 9, 2012). Whereas the IO informed this court's Probation Office ("PO") that the IO had no immigration file for Defendant, the District Court's record shows that on September 9, 2012,

Defendant, who had apparently been residing illegally in American Samoa since 2005, was ordered to depart the Territory and not re-enter for a period of one year. In light of these circumstances, Defendant's on-island presence, culminating in the criminal activity now before us, beckoned an explanation and further inquiry. The matter was then continued to further hear from the IO, under oath, as to Defendant's immigration status.¹

On October 16, 2015, chief immigration officer, Dennis Fuimaono, ("CIO") appeared and testified about Defendant's immigration status. In the course of testifying, the CIO produced an "immigration file" on Defendant and then gratuitously offered that no one from the PO had contacted him about Defendant.

The CIO's testimony proved deceptive. First, our record reveals that the PO had in fact contacted the IO for information on Defendant's immigration status. Our record further reveals that the IO duly answered the PO's inquiry advising the PO of the absence of any immigration file for Defendant. This exchange between the PO and the CIO was in writing, utilizing standard forms developed by each for pre-sentence report purposes. ******* Secondly, we noted that the documents produced by the CIO, were only concerned with Defendant's March 14, 2014 application with the Governor's Amnesty Program. This furnished file provided nothing to explain Defendant's on-island presence, nor how or when he managed to enter or re-enter the Territory. Additionally, we saw nothing to illuminate how Defendant remained on-island undetected until he opted to come forward under the amnesty program's promise of immunity.

Confronted with the court's further inquiry, the CIO then ventured to say that Defendant's records were at the government archivist's office in Tafuna. The hearing was again continued to October 23, 2015, and further subpoena was issued to obtain Defendant's reportedly archived records.

At the October 23, 2015 hearing, the CIO's evolving story about Defendant's immigration history tracked an entirely different course from that of his previous testimony. The CIO's new direction on the stand was

¹ This court's past encounters with IO officials on the not infrequent matter of missing immigration files for alien defendants have been troubling. Whether a file is missing because it is in fact missing, or whether it is reported to be missing because there never was a file on the offending defendant in the first place, is a question which often remains unfathomable.

prompted by the archivist's response, in a written "Certified Statement," which clearly contradicted the CIO's earlier testimony regarding archived records on Defendant. Unable to reconcile the contradiction, the CIO steered his narrative toward the misdeeds of the previous administration [in the apparent attempt to deflect attention from any misdeed on his part—such as false or misleading testimony about an archived record for Defendant]. The CIO gave the anecdotal explanation that former Attorney General Fepulea'i had **4** directed the removal and transfer of all pre-2010 immigration files for storage in certain shipping containers located in Tafuna; that these containers later deteriorated and exposed the stored files to weather damage. Be that as it may, the fact remains that the IO has no idea of Defendant's border movement history, while the court's pursuit of Defendant's nonexistent immigration records, based upon the CIO's mutating story from hearing to hearing resulted in a lot of wasted effort and time for all concerned.

Quite clearly, the IO's records management system is not conducive to the Territory's public safety. Not unlike the IO's fictional "lookout list," which woefully failed as a policing measure to prevent the multiple reentry of another foreign child sex offender, whom the court had previously barred from the Territory, *see Am. Samoa Gov't. v. Maiava*, CR No. 66-10 (Trial Div. Nov. 10, 2015) (order revoking probation), the facts here further highlight the IO's significantly compromised capacity to screen out "excludable" foreigners, A.S.C.A. § 41.0615, from entering or re-entering the Territory.² The disturbing percentage of alien offenders appearing for sentencing before the **5** High Court alone,³ suggest that the implementation of the Citizenship, Alienation and Immigration Act, A.S.C.A. §§ 41.0201 et seq., by the executive branch has not been in sync with the Act's legislative purposes enunciated in A.S.C.A. § 41.0201.⁴

² Moreover, the facts before us bear sad commentary on the Governor's amnesty program as implemented. Defendant's amnesty application file gives no indication of any apparent concern for background check. Indeed, when pressed, government's counsel had to concede that rapists and other criminals without pre-2007 immigration history may well have been approved by the amnesty process.

³ The Clerk's docket for 2015 shows that 65% of foreign convicts were illegal aliens, and 39% of them were sexual offenders.

⁴ 41.0201. Purpose-Interpretation.

(a) . . . in recognition of the present policy of the United States Government to develop American Samoa for American Samoans, and in furtherance of the provisions of the Constitution of American Samoa, Article I, Section 3, authorizing enactment of such legislation as may be necessary to protect the lands, customs,

Judgment and Sentence

On August 12, 2015, Defendant Nicholas Kuka (“Defendant”), entered his plea of guilty in open court to the crime of Sexual Assault on a minor who is 16 years of age or less, as charged in Count 3 of the Information, in violation of A.S.C.A. § 46.3610(a), a Class C Felony. The court accepted his plea **[**6**]** agreement with the government for reasons below:

[1] The court finds that Defendant is fully competent and capable of entering an informed plea, and that his plea has been knowingly, voluntarily, and intelligently made with the advice of counsel. The court is further satisfied that Defendant is aware of the nature of the charge and consequences of his plea, and that a factual basis sufficient to sustain the plea has been established. Accordingly, Defendant is adjudged guilty of that offense. Counts 1, 2, 4 and 5 of the Information in accordance with the terms of the Plea Agreement are dismissed.

The court having considered Defendant’s plea in mitigation, the submissions of counsel, the testimony received, the Probation Office’s Presentence Report filed herein, and other pertinent matters on file, sentences Defendant as follows:

Defendant Nicholas Kuka is sentenced to seven (7) years imprisonment. However, execution of sentence is suspended and Defendant is placed on probation for a period of seven (7) years upon the following conditions of probation:

culture, and traditional American Samoan family organizations of persons of American Samoa ancestry, and to encourage business enterprises by American Samoans, the Legislature finds there are limited land resources, water, sewage facilities, and educational and economic opportunities in American Samoa. Therefore, with the increasing mobility of today’s population, the only way to preserve the American Samoan 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. With this in mind, *the Legislature has enacted this title and it must be so construed for the protection of the people of American Samoa, their lands, and their economic and political future.*

(b) *This title is to be interpreted and construed so as to effect its general purpose to limit entry into American Samoa to persons of American Samoa ancestry, their spouses and their children.*

(emphasis added.)

1. Defendant shall undertake a term of detention of twenty-eight (28) months without any release whatsoever except for genuine medical emergency or other order of court.
2. Probation review hearing shall be scheduled upon Defendant's motion, after he serves twelve (12) months of detention.
3. Upon release from detention, Defendant shall depart the **7** Territory of American Samoa and remain outside its borders for the remaining period of probation. This condition, however, is stayed until further order of court.
4. Upon release from detention, Defendant shall visit the Probation Officer at least once a month or more frequent as the Probation Office may require.
5. Within 90 days of release from detention, Defendant shall be gainfully employed and so remain during the period of probation. If he fails to meet this condition, the condition to depart and remain outside the Territory shall no longer be stayed and shall become effective immediately thereafter.
6. Defendant shall have no contact, directly or indirectly, with the Complainant in this matter.
7. Defendant shall abstain from consuming or possessing alcoholic beverages, controlled substances, and so called designer drugs (synthetic cannabinoids, and synthetic cathinones) unless prescribed by a physician duly licensed in the Territory. In addition, Defendant shall not congregate with people who are in possession of or consuming any of the aforesaid prohibited substances, nor may he visit any bars, taverns, or any establishment whose primary business activity is the dispensing of alcohol to the public.
8. Upon demand of the Probation Officer or police officer, Defendant shall submit himself to random search or testing of his person to ensure compliance with non-possession and use of **8** alcohol, controlled substances, or designer drugs.
9. Defendant shall remain law-abiding.
10. Defendant shall register as a sex-offender pursuant to A.S.C.A. § 46.2912(a)(1).

11. Defendant shall subject himself to an HIV testing pursuant to A.S.C.A. § 46.3619(a)(1).

It is so ordered.

DIGEST OF CASES REPORTED

ADMINISTRATIVE LAW

General Provisions

When administrative code provisions are inconsistent with statutory provisions, the statute prevails. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

Administrative Agencies, Officers, and Agents¹

American Samoa Government is not a “board, commission, department or officer of the government” and thus, it is not an agency. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

The generally accepted understanding is that an “agency” is a branch of the government, not the government itself. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

It is clear then under American jurisprudence, “agency” typically does not refer to the government as a whole, but rather to departments of the government, usually under the executive branch, that implement legislation. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

American Samoa Government is also not an “individual, partnership, corporation, association, [or] governmental sub-division.” It does, however, fit the definition of public “organization of any character, other than an agency.” *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

The ordinary meaning of the words in the phrase “public . . . organization of any character” plainly encompasses the government, which is the epitome of a public organization. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

Separation of Administrative and Other Powers²

¹ See ADMINISTRATIVE LAW—Powers and Proceedings of Administrative Agencies, Officers, and Agents

² See AMERICAN SAMOA GOVERNMENT—The Legislature

The legislature did not intend to sanction agency rulemaking on matters of substantive import, such as a party's right to judicial review. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

Powers and Proceedings of Administrative Agencies, Officers, and Agents³

There is a presumption that parties, including the government, are entitled to judicial review of administrative action. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

American Samoa Government is a "person" for purposes of A.S.C.A. § 4.1040(a) and entitled to judicial review of final agency decisions. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

All an agency is empowered to do under A.S.C.A. § 4.1002(1) is to promulgate rules dealing with matters of agency "practice" and "procedure." *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

Judicial Review of Administrative Decisions^{4, 5, 6, 7, 8, 9}

The Administrative Procedures Act clearly provides for judicial review of final decisions by an agency in American Samoa. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

The standard of judicial review available varies under the Administrative Procedures Act as compared to other statutes that provide for alternative means of judicial review. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

³ See EMPLOYMENT LAW—Government Employees

⁴ See ADMINISTRATIVE LAW—Powers and Proceedings of Administrative Agencies, Officers, and Agents

⁵ See WORKMENS' COMPENSATION—Judicial Review

⁶ See CIVIL PROCEDURE—Post Judgment Motions and Appeals

⁷ See CIVIL PROCEDURE—Jurisdiction

⁸ See TORTS—Damages

⁹ See AMERICAN SAMOA GOVERNMENT—Separation of Powers

The Appellate Division has jurisdiction over appeals of administrative decisions under A.S.C.A. § 4.1041. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Under the Administrative Procedures Act, the High Court must confine its review of administrative decisions to the record and decision as developed and issued by the agency. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

The 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. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

When reviewing an administrative law judge's decision, the Court must first determine if substantial rights of an aggrieved party have been prejudiced by the decision. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Even if an aggrieved party's substantial rights have been prejudiced, the Court may still only reverse, remand, or modify the administrative law judge's decision if it 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. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

The Appellate Division has the power to review and reverse agency decisions that are made upon unlawful procedure or in excess of the statutory authority of the agency, including accusations that the administrative law judge lacked subject matter jurisdiction. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

The Appellate Division lacks subject matter jurisdiction to consider issues that were not presented to the administrative agency. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

An executive action is subject to judicial review only if the executive officer acted either unconstitutionally or beyond his statutory powers. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

Not every executive action in excess of a statutory power violates the U.S. Constitution. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

A claim based on an executive action not in compliance with statutory procedures is a statutory one, and judicial review of such action is not available when the statute in question commits the decision to the discretion of the executive official. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

ADMIRALTY

Preferred Ship Mortgages and Maritime Liens

Under maritime law, *custodia legis* expenses are recoverable from the proceeds of a judicial sale and have priority over all other claims. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

In order to qualify as *custodia legis* expenses, the services or goods for which payment or reimbursement is sought must have been necessary for the care and preservation of the vessel and for the common benefit of all parties who have a claim to the vessel. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

While attorneys' fees in certain limited circumstances may be awarded as an item of damages in an *in rem* action, attorneys' fees are generally not properly included as *custodia legis* expenses. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

The court held that attorneys' fees should not be awarded in this case because they were not proved to be necessary for the care and preservation of the vessel and for the common benefit of all the parties who have a claim to the vessel. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

AMERICAN SAMOA GOVERNMENT

The Federal Government, Constitution, and Laws of American Samoa¹⁰

Assuming for argument's sake that the Longshore and Harbor Worker's Compensation Act does apply to American Samoa, the proper forum for Plaintiffs' Longshore and Harbor Worker's Compensation Act claims is not the High Court of American Samoa. Rather, the place to file such claims is the United States Department of Labor's Office of Worker's Compensation Programs. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

The High Court is not an authorized hearing agency for Longshore and Harbor Worker's Compensation Act claims. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

The Longshore and Harbor Worker's Compensation Act provides for judicial review of a final agency order at the United States court of appeals for the circuit in which the injury occurred. Likewise, the Longshore and Harbor Worker's Compensation Act provides for judicial enforcement of a final agency order at the federal district court for the judicial district in which the injury occurred. Since American Samoa is not, at this point in time, incorporated into any federal judicial district, this wanting necessarily begs the injured American Samoan longshoremen's question of where one goes to pursue (applicable) federal remedies. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

It is well established that statutes take precedence over case law. *Fa'amausili v. Lefiti*, LT No. 05-16 (Land & Titles Div. Sept. 7, 2016) (order den. mot. for recon.)

Separation of Powers¹¹

A mere excess of abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power because the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

¹⁰ See TORTS—Government Tort Liability Act

¹¹ See AMERICAN SAMOA GOVERNMENT—The Judiciary

The judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

The Legislature^{12, 13}

A legislature may delegate some of its legislative power, including rulemaking authority, to executive branch agencies, but the rules must be consistent with the statutes under which the rules are promulgated and within the legislative delegation. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Feb. 19, 2016) (op. & order on reh'g).

The Executive^{14, 15, 16, 17, 18}

The Judiciary^{19, 20, 21, 22, 23, 24, 25, 26, 27}

The Court will not read limitations into an unambiguous statute. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-12 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

One of the most common tenets of statutory interpretation is that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

¹² See ADMINISTRATIVE LAW—Separation of Administrative and Other Powers

¹³ See WORKMEN'S COMPENSATION—Judicial Review

¹⁴ See ADMINISTRATIVE LAW—Administrative Agencies, Officers, and Agents

¹⁵ See CRIMINAL PROCEDURE—Post-Verdict Motions

¹⁶ See CRIMINAL PROCEDURE—Punishment and Sentencing

¹⁷ See REAL PROPERTY—Alienation of Land

¹⁸ See REAL PROPERTY—Communal Lands

¹⁹ See ADMINISTRATIVE LAW—General Provisions

²⁰ See ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

²¹ See WORKMEN'S COMPENSATION—Judicial Review

²² See TORTS—Damages

²³ See AMERICAN SAMOA GOVERNMENT—Separation of Powers

²⁴ See WORKMEN'S COMPENSATION—Purpose and Origin

²⁵ See MATAI TITLE DISPUTES—Procedural Rules

²⁶ See REAL PROPERTY—Alienation of Land

²⁷ See REAL PROPERTY—Communal Lands

The judicial branch does not have some sort of supervisory role over the operations of the other branches of government and cannot punish other branches simply because a party believes the government to be in the wrong. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

An executive action is subject to judicial review only if the executive officer acted either unconstitutionally or beyond his statutory powers. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

The doctrine of stare decisis does not apply to a determination of the facts of a case, and a trial court does not err when it chooses not to follow the specific findings of fact from prior cases. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

Sovereign Rights²⁸

CIVIL PROCEDURE

Initial Matters^{29, 30, 31, 32, 33}

Lack of subject matter jurisdiction cannot be waived at any level. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

A court cannot render a decision or judgment in an action for which the court knows it lacks subject matter jurisdiction; such judgment or decision is a nullity. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

A court must dismiss any case when it knows or discovers it lacks jurisdiction over it. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

²⁸ See TORTS—Government Tort Liability Act

²⁹ See AMERICAN SAMOA GOVERNMENT—The Federal Government, Constitution, and Laws of American Samoa

³⁰ See WORKMEN'S COMPENSATION—Judicial Review

³¹ See CIVIL PROCEDURE—Pretrial Motions

³² See MATAI TITLE DISPUTES—Procedural Rules

³³ See REAL PROPERTY—Communal Lands

Pleadings³⁴

Simply regurgitating the language of Rule 11 and making broad accusations does not, by and large, provide sufficient proof for the court to impose sanctions. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. April 1, 2016) (order den. real party in interest's mot. for sanctions).

Sanctions should be imposed with caution—thus, specific evidence of how a party has violated Rule 11 is needed before the court will impose Rule 11 sanctions. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. April 1, 2016) (order den. real party in interest's mot. for sanctions).

Under the *Twombly-Iqbal* heightened pleading standard, the court applies a two-prong analysis. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Part of the *Twombly-Iqbal* standard 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. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

While the pleading does not need to include detailed factual allegations, it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Prong two of the *Twombly-Iqbal* standard instructs the court to analyze whether the well-pleaded allegations "plausibly give rise to an entitlement to relief. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The *Twombly-Iqbal* standard does not alter the well-established fundamental guidelines for considering a complaint subject to dismissal. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

³⁴ See CIVIL PROCEDURE—Pretrial Motions

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. Prong one directs the court to accept a complaint’s “well-pleaded” factual allegations while disregarding bare legal conclusions not buttressed by facts in the complaint. The pleading does not need to include detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. Prong two instructs the court to analyze whether the well-pleaded allegations plausibly give rise to an entitlement to relief. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or for summ. j.)

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. Second, a complaint should not be dismissed because a court does not believe that a plaintiff will prevail on his or her claim. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or for summ. j.)

A complaint drafted by a *pro se* litigant is generally afforded more liberal construction than pleadings drafted by an attorney.

Nevertheless, while the court must liberally construe pleadings to avoid injustice, this does not extend to refashioning a plaintiff’s theory of relief.

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.

Pretrial Motions^{35, 36, 37, 38, 39}

Motions to strike are disfavored and infrequently granted. *Native Res. Developer, Inc. v. Am. Samoa Gov’t*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

A motion to strike should “be denied unless the allegations have no possible relation to the controversy and may cause prejudice to one of

³⁵ See CIVIL PROCEDURE—Pleadings

³⁶ See CIVIL PROCEDURE—Discovery

³⁷ See LEGAL PROFESSION—The Office of Attorney

³⁸ See EVIDENCE—Witnesses

³⁹ See REAL PROPERTY—Communal Lands

the parties. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

While a motion to strike can be used to attack an entire pleading, it is more often used to attack portions of a pleading—even just single words or phrases. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

A motion to strike can also provide an early challenge to the legal sufficiency of a defense. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with 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. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

In considering a motion to dismiss, the complaint should be construed in the light most favorable to the plaintiff by accepting the facts alleged as true. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

A complaint should not be dismissed because a court does not believe that a plaintiff will prevail on [his or her] claim. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The court's practice to liberally construe pleadings to avoid injustice does not extend to refashioning [a plaintiff's] theory of relief. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Striking affirmative defenses and counterclaims, and granting default judgment are extreme sanctions. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The court should tailor sanctions to match the severity of the misconduct. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No.

86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Exceptionally severe sanctions, such as dismissal or default judgment, are generally only ordered in response to T.C.R.C.P. 37 violations as a last resort. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Motions to strike are generally disfavored. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

When ruling on a motion to strike, the court must view the pleading under attack in the light most favorable to the pleader. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

A motion to strike can be used to attack parts of a pleading or an entire pleading. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

Rule 12(f) also gives the court the power to strike a pleading if it fails to meet the requirements of T.C.R.C.P. 8(a) or 8(e)(1). *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

If the pleading violates Rule 8(a)(2) and 8(e)(1) such that a great deal of judicial energy would have to be devoted to eliminating the unnecessary matter and restructuring the pleading, the court may strike the entire pleading while granting leave to replead. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

Rule 12(f) provides three ways a motion to strike may be made: (1) before a party responds to a pleading, if a responsive pleading is permitted, (2) within 10 days after the service of a pleading, if no responsive pleading is permitted, or (3) sua sponte by the court. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

A responsive pleading is allowed when a defendant makes a counterclaim. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

The court interprets A.S.C.A. § 43.0201 as prohibiting objections to technical deficiencies in pleadings. *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

A.S.C.A. § 43.0201 does not work to prohibit the court from granting a motion to strike if it is appropriate under Rule 12(f). *ANZ Guam, Inc. v. Tervola ex rel. Estate of Tervola*, CA No. 18-16 (Trial Div. June 27, 2016) (order granting pl.'s mot. to strike).

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. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.).

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 make a ruling if it lacks subject matter jurisdiction. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.).

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. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.).

A defendant may move for dismissal of an action or of any claim against him for a plaintiff's failure to prosecute. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

In determining whether to dismiss for lack of prosecution, the facts of each individual case are important. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

When considering dismissing a case for lack of prosecution, 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. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

The pertinent question when considering dismissal for lack of prosecution is whether there has been delay and prejudice to the defendant sufficient to justify a dismissal with prejudice. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

The High Court of American Samoa 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. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

When the High Court dismisses cases for want of diligent prosecution, Land and Titles Division cases should be dismissed without prejudice. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Public interest and the court's interest in effectively managing its docket favor expeditious resolution of litigation. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Abandonment does not equal willful delay or bad faith conduct. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

A court is not required to expressly warn the plaintiff of the possibility of dismissal before dismissing the case pursuant to a noticed motion. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Dismissals are rarely granted without adequate notice and an opportunity to be heard. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Unreasonable delay creates a presumption of prejudice to defendant's case. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

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. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Only when a plaintiff provides an non-frivolous excuse for the delay must a defendant produce evidence that the delay has prejudiced his case. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Land cases are often dismissed for lack of prosecution, without prejudice to lessen the severity of a dismissal and permit re-filing later. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Dismissal with prejudice is a drastic measure and public policy favors resolving issues on the merits. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

The court granted dismissal with prejudice because it found dismissal without prejudice would be inefficient where plaintiff took no action after three motions to dismiss for lack of prosecution. *Posala v. Alaipalelei*, LT No. 10-03 (Land & Titles Div. Sept. 7, 2016) (order grant. mot. to dismiss).

Discovery⁴⁰

Our rules of discovery rely in large part on the good faith and diligence of counsel and the parties in abiding by these rules and conducting themselves and their judicial business honestly. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

Effective discovery requires a party serving an interrogatory to avoid an argumentative question which serves no purpose in providing additional discovery information. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

A requesting party should not engage in abusive discovery tactics which are designed for the purpose of annoying, embarrassing or burdening their opponent. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

When the court sees abusive discovery tactics in play, it may make orders circumscribing discovery which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

⁴⁰ See CIVIL PROCEDURE—Pretrial Motions

A responding party should not evade its duty to faithfully answer interrogatories by providing responses in stock phrases or making meritless objections to the requests. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

A defendant's basis for its denials of Plaintiffs' legal assertions, probe into the defendant's legal opinions, which are covered by the attorney work-product privilege doctrine and, therefore, are beyond the permissible scope of discovery, which covers only non-privileged materials. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

Stock phrases are conclusory statements that are destined to come back to court by inviting debates. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

Objections wrapped in stock phrases are meaningless as they do not sufficiently explain grounds for objections. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

Abuse of discovery by providing meaningless questions and answers by the parties will warrant severe sanctions for wasting judicial resources. *Curry v. Florence Saulo & Assocs. Ins. & Fin., Inc.*, CA No. 77-14 (Trial Div. April 6, 2016) (order den. mot. to compel).

Trial rules governing discovery are to be liberally construed in favor of discovery. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Due to the broad scope of allowable discovery, the court may issue a protective order where "good cause" is shown to prevent abusive discovery requests. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Good cause for a protective order requires a showing that the order is required to prevent clearly defined and serious injury, harassment, or the abuse of court processes; mere inconvenience and expense are not enough. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Given that the liberal construction favors discovery, parties opposing discovery must shoulder a heavy burden when arguing why discovery should be denied. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The court has authority to compel answers to interrogatories. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The trial court enjoys broad discretion in managing discovery, including whether to compel discovery. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

In ruling on a motion to compel, the court should independently determine the proper course of discovery based on arguments by the parties. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with 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. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Sanctions for a successfully raised motion to compel are also within the court's discretion to impose and usually take the form of attorney's fees it cost to raise the motion. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

The court may impose more severe sanctions than attorney's fees when necessary. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

T.C.R.C.P. 37 allows the court discretion to impose a wide range of sanctions for willful failure to comply with discovery rules, including default judgment. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

A party is not required to turn over privileged information, such as attorney work product which would include an attorney's thoughts on

how a case does or does not apply to the litigation. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

A motion for an order of protection against inappropriate discovery is timely if it was served before the date set for the production of the discovery. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Where an order instructs a plaintiff to amend interrogatories in a certain manner and instructs the defendant to answer the amended interrogatories, the defendant's failure to answer the interrogatories is not a violation of a court order if the plaintiff did not properly amend the interrogatories. *Native Res. Developer, Inc. v. Am. Samoa Gov't*, CA No. 86-10 (Trial Div. April 11, 2016) (order granting mot. for prot. order & den. mot. for contempt with sanctions).

Summary Judgment⁴¹

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. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

The party seeking summary judgment bears the burden of showing there is no genuine issue of material fact. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

If the movant meets his burden in a summary judgment motions, the non-moving party must then affirmatively show there is a genuine issue for trial. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

For summary judgment, only disputes over facts that might affect the outcome of the suit under the governing law" are "material," and an issue is "genuine" only where the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

⁴¹ See MATAI TITLE DISPUTES—Procedural Rules

In considering a motion for summary judgment, a court must construe any factual issues in controversy in “a light most favorable to the non-moving party. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

Conclusory, non-specific allegations are not sufficient to survive a motion for summary judgment, and missing facts will not be presumed. *WH Fisheries Inc. v. Carol Linda*, CA No. 40-15 (Trial Div. Aug. 29, 2016) (order grant-den. in part mot. for sum. j.)

A party moving for summary judgment must present the court with enough evidence that a court can independently conclude for itself whether the amount has been correctly calculated. *Mafi v. Paulo*, LT No. 04-15 (Land & Titles Div. March 4, 2016) (order den. mot. for default j.)

The court will grant a motion for summary judgment if the pleadings and other documents show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or 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. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or for summ. j.)

An issue is considered “material” if it will affect the outcome of the suit under the governing law; and a dispute over a “material fact” is “genuine” only when the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or 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. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or for summ. j.)

In a summary judgment motion, the court will construe all inferences in a light most favorable to the non-moving party. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant’s mot. to dismiss or for summ. j.)

Injunctions⁴²

Judgments⁴³

In a hearing for default judgment, the court must scrutinize the evidence itself *Mafi v. Paulo*, LT No. 04-15 (Land & Titles Div. March 4, 2016) (order den. mot. for default j.)

An attorney's affidavit alone is an inadequate evidential basis for entry of default judgment. *Mafi v. Paulo*, LT No. 04-15 (Land & Titles Div. March 4, 2016) (order den. mot. for default j.)

Post Judgment Motions and Appeals^{44, 45, 46}

The Appellate Division may dismiss an appeal for a party's failure to comply with any of the requirements of A.C.R. 10. *Am. Samoa Gov't v. Fanene*, AP No. 03-15 (App. Div. June 10, 2016) (order den. mot. to dismiss).

In deciding whether to dismiss the appeal for failure to comply with A.C.R. 10, the Court considers a number of factors, including the length of delay caused by the appellant's failure to comply with appellate procedures, the consequent prejudice to the appellees, and the possibility of the appeal's success on the merits. *Am. Samoa Gov't v. Fanene*, AP No. 03-15 (App. Div. June 10, 2016) (order den. mot. to dismiss).

Motions to strike are generally disfavored by courts. Nevertheless, strict compliance with the Appellate Court Rules is also required. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief).

The Appellate Court Rules do not contemplate the tolling of filing deadlines in appellate cases when a motion to dismiss is filed. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief).

A.C.R. 26(b) clearly allows a party to request more time to file a responding brief, or to request permission to file a responding brief after a deadline. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No.

⁴² See WORKMEN'S COMPENSATION—Judicial Review

⁴³ See TORTS—Damages

⁴⁴ See ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

⁴⁵ See CIVIL PROCEDURE—Jurisdiction

⁴⁶ See WORKMEN'S COMPENSATION—Judicial Review

15-14 (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief).

The Court found that the readily available relief provided by A.C.R. 26(b) does not support any argument that the filing deadline in was tolled because the appellee filed a motion to dismiss. Similarly, nothing in the deadline-specific language of A.C.R. 31 supports any contention that the filing deadline for a responding brief is tolled when a motion to dismiss is filed. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief).

A.C.R. 31(c) allows the Court discretion to hear a party at oral arguments even after that party's brief is stricken. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Aug. 2, 2016) (order granting mot. to strike real party in interest's brief).

When a party fails to follow the Appellate Court Rules and fails to perfect its appeal, it is subject to dismissal at the Appellate Division's discretion. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

To dismiss an appeal on the basis of the sheerest hypertechnicalities would frequently defeat the ends of justice. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

While strict compliance with Appellate Court Rules is generally required, exceptions and liberality should be applied in deserving cases where the party has not been derelict in its responsibilities to pursue its remedies with dispatch and due diligence. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Requiring dismissal and refiling by a plaintiff after the court's jurisdiction has been perfected would be a needless and wasteful exercise. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

It is unimportant whether a motion under T.C.R.C.P. 59 is styled as a motion for a new trial, a motion for reconsideration, or both, so long as it is made in a timely fashion and clearly informs the court of the claimed errors. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

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

controlling law. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

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. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

The decision whether to grant a motion for reconsideration is within the broad discretion of the trial court. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

A judgment will not be set aside except for substantial reasons. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

The standard for granting a motion for reconsideration is strict and the burden is on the moving party to show substantial reasons that such relief should be granted. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

In a motion for reconsideration, 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 Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

In computing time in an order or statute, time begins to run the day *after* the day of the order, act or event. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

Conflict of Laws⁴⁷

Writs

Extraordinary writs provide a uniform method of review of judicial, executive or administrative acts or failures to act only when there is no appeal allowed or the remedy by appeal is inadequate. *Foketi v. Am. Samoa Gov't*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

⁴⁷ See WORKMEN'S COMPENSATION—Judicial Review

In order for the court to issue an alternative writ of mandamus, the petitioner must make out a prima facie case for granting the peremptory writ. *Foketi v. Am. Samoa Gov't*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

The extraordinary writ of mandamus will not be issued unless: (1) the plaintiff has a plain right to have the act performed; (2) the defendant has a plain duty to perform it; and (3) there is no other adequate remedy available to the plaintiff. *Foketi v. Am. Samoa Gov't*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

CONSTITUTIONAL LAW

Judicial Review^{48, 49, 50}

Constitutional and Statutory Interpretation^{51, 52, 53, 54, 55}

Separation of Powers^{56, 57, 58}

Individual Rights⁵⁹

Habeas Corpus⁶⁰

⁴⁸ See AMERICAN SAMOA GOVERNMENT—The Judiciary

⁴⁹ See ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

⁵⁰ See AMERICAN SAMOA GOVERNMENT—The Federal Government, Constitution, and Laws of American Samoa

⁵¹ See ADMINISTRATIVE LAW—General Provisions

⁵² See AMERICAN SAMOA GOVERNMENT—The Judiciary

⁵³ See WORKMEN'S COMPENSATION—Judicial Review

⁵⁴ See AMERICAN SAMOA GOVERNMENT—The Federal Government, Constitution, and Laws of American Samoa

⁵⁵ See WORKMEN'S COMPENSATION—Purpose and Origin

⁵⁶ See AMERICAN SAMOA GOVERNMENT—The Judiciary

⁵⁷ See AMERICAN SAMOA GOVERNMENT—Separation of Powers

⁵⁸ See CRIMINAL PROCEDURE—Post-Verdict Motions

⁵⁹ See CRIMINAL PROCEDURE—Post-Verdict Motions

⁶⁰ See CRIMINAL PROCEDURE—Post-Verdict Motions

CONTRACTS

Contract Formation

The essential elements of a contract include the subject matter, parties, terms and conditions, and price or other consideration. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

Contract Interpretation

The parol evidence rule does not allow for extrinsic or oral evidence to change the unambiguous terms of a written contract. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

Performance and Breach

To prove a breach of contract claim, a party must show there was a valid contract, a breach by the other party occurred, and damages. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

To establish a breach of contract claim, a plaintiff must prove three essential elements: existence of the contract; breach; and damages as a result of breach. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

Remedies

The general rule for breach of contract suits is that each party to a case bears its own attorneys' fees. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

Awarding prejudgment interest is a well established remedy of breach of contract suits that lies soundly within the court's discretion. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

The court may exercise its discretion to deny the award of interest to a plaintiff in a breach of contract action who delays in prosecuting his case. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

Types of Contracts

The court found a handwritten note containing the identity of the parties, subject matter of the agreement, the sale price, and terms and agreements to be a valid contract. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

CRIMINAL LAW

Liability^{61, 62}

The court found that the government failed to prove that the defendant “knowingly” caused serious injury when he broke the complainant’s jaw with a single punch because a broken jaw is not a “practically certain” result of a single punch. *Am. Samoa Gov’t v. Togitogi*, CR No. 27-15 (Trial Div. Feb. 29, 2016) (dec. & order).

Defenses⁶³

Specific Crimes^{64, 65}

The crime of Assault in the First Degree, as charged, includes the lesser crime of Assault in the Second Degree; the difference between the two offenses is the difference between the scienter elements of “knowingly” in Assault in the First Degree, and “recklessly” in Assault in the Second Degree. *Am. Samoa Gov’t v. Togitogi*, CR No. 27-15 (Trial Div. Feb. 29, 2016) (dec. & order).

CRIMINAL PROCEDURE

Pleas

Entry of plea agreement is proper where the defendant is fully competent and capable of entering an informed plea, and that his plea has been knowingly, voluntarily, and intelligently made with the advice of counsel. *Am. Samoa Gov’t v. Kuka*, FDACR No. 07-15 (Fam. Drug & Alcohol Div. Jan. 27, 2016) (judgment & sentence).

Parties and Procedure

The court found that consolidation of criminal cases served the interests of judicial economy, justice, and fairness because all criminal charges of the four defendants are in connection with the same shooting incident and present similar evidentiary, factual, and legal issues. *Am. Samoa*

⁶¹ See CRIMINAL LAW—Specific Crimes

⁶² See CRIMINAL PROCEDURE—Trial

⁶³ See CRIMINAL PROCEDURE—Trial

⁶⁴ See CRIMINAL LAW—Liability

⁶⁵ See CRIMINAL PROCEDURE—Trial

Gov't v. Lefatia, CR Nos. 13-15, 18-15 & 19-15 (Trial Div. April 11, 2016) (order granting mot. to cont., join, & consol. trial).

Trial⁶⁶

The court found that the government had proven that the defendant “recklessly” caused serious physical injury when he broke complainant’s jaw with a single punch. *Am. Samoa Gov’t v. Togitogi*, CR No. 27-15 (Trial Div. Feb. 29, 2016) (dec. & order).

While the burden is on the defendant to “inject the issue” of self-defense, the government must prove beyond a reasonable doubt that the defendant did not act in reasonable self-defense. *Am. Samoa Gov’t v. Togitogi*, CR No. 27-15 (Trial Div. Feb. 29, 2016) (dec. & order).

The court found a witness’s testimony unreliable and not believable where she admitted that she was relying on defense counsel’s word as to the identity of the person she saw throw a punch and where defense counsel extracted her testimony through leading questions. *Am. Samoa Gov’t v. Togitogi*, CR No. 27-15 (Trial Div. Feb. 29, 2016) (dec. & order).

A defendant has a plain right to appear before the court and to not be held in Territorial Correctional Facility for an unspecified amount of time. *Foketi v. Am. Samoa Gov’t*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

Punishment and Sentencing⁶⁷

The Probation Office has a plain duty to bring criminal defendants before the court when probationers violate the court’s order. *Foketi v. Am. Samoa Gov’t*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

Once a sentence of imprisonment is imposed, the defendant is committed to the custody of the corrections division until he is released under procedures established elsewhere by law.

One statutory procedure for release of prisoners is available through the parole board.

Release on parole is the exclusive authority of the Parole Board, and commutations and pardons are reserved solely for the Governor.

⁶⁶ See CRIMINAL LAW—Liability

⁶⁷ See CRIMINAL PROCEDURE—Post-Verdict Motions

Post-Verdict Motions

T.C.R.Cr.P. 35 allows the court to reduce a sentence within 120 days after a final action in the case.

Other than T.C.R.Cr.P. 35 no other statute or rule provides the Trial Division with jurisdiction over prisoners or authority to modify final sentences of such prisoners who have been sentenced to terms of imprisonment.

This court has explicitly found that the Trial Division of this court lacks any authority to overturn final judgments and sentences in criminal matters.

Any relief from the judgment and sentence after more than 120 days have passed since the sentencing is exclusively within the executive's authority through commutation, reprieve or pardon.

The doctrine of habeas corpus does not provide the court any jurisdiction to release a prisoner or modify a sentence.

Habeas corpus proceedings serve to question the lawfulness of confinement.

Courts have held that the Eighth Amendment of the U.S. Constitution requires providing prisoners with adequate medical care, and allegations of inadequate medical care may be brought through a petition for a writ of habeas corpus.

Although the judiciary cannot ordinarily employ a writ of habeas corpus to review prison management or the conditions of a prisoner's otherwise lawful confinement, exceptional prison circumstances rising to the level of constitutional deprivations are within the court's jurisdiction.

The typical relief under a writ of habeas corpus for unconstitutional prison conditions is an order to correct the offending conditions, not a release from prison.

The court may not, pursuant to a writ of habeas corpus or otherwise, commute a prisoner's sentence.

Appeals⁶⁸, ⁶⁹

Interrogation and Miranda⁷⁰

Even a referral to a secondary inspection at the border does not necessarily create a custodial interrogation requiring *Miranda* warnings because it can be part of a routine border inspection. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Miranda warnings during a border search are only required if the process transforms from a routine border search and inquiry to a custodial interrogation. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Merely taking the defendant to the customs office for a secondary search did not make this a custodial interrogation. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

When a law enforcement officer interrogates a suspect but does not give a *Miranda* warning until after obtaining an incriminating statement, the court must determine whether the warning was deliberately withheld when deciding whether to suppress a subsequent, post-warning confession. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Searches and Seizures⁷¹

Article I, § 5 of the Revised Constitution of American Samoa guarantees individuals the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Evidence obtained in violation of Article I, § 5 cannot be admitted in any court against the individual whose right was violated. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Article I, § 5 mirrors the Fourth Amendment of the United States Constitution; thus cases interpreting the Fourth Amendment provide

⁶⁸ See CIVIL PROCEDURE—Post Judgment Motions and Appeals

⁶⁹ See CIVIL PROCEDURE—Jurisdiction

⁷⁰ See CRIMINAL PROCEDURE—Searches and Seizures

⁷¹ See CRIMINAL PROCEDURE—Interrogation and Miranda

appropriate guidance in applying Article I, Section 5 of our Constitution. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Both this court and the United States Supreme Court have stated that a border search is subject to a significantly less demanding standard than that required for other searches and seizures. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

The Fourth Amendment is not typically violated by routine border searches. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Routine questioning by customs officials does not trigger the *Miranda* warnings of rights requirements. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

The questioning or circumstances during a border search must rise to a distinctly accusatory level before a reasonable person would feel restrained to the degree associated with formal arrest. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

A border search or detention may become more than routine when an individual is discovered to be concealing suspicious materials or taken to a private room and strip searched. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Customs officers may search all persons entering or leaving American Samoa. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

All merchandise and baggage imported or brought into American Samoa shall be unloaded in the presence of, and inspected by, a customs officer, and that officer may require the owner to open any container for inspection. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Field drug tests are not searches within the meaning of Fourth Amendment. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Field drug testing may be performed in connection with a border search without violating a defendant's constitutional rights. *Am. Samoa Gov't*

v. Loma, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

A customs officer may inspect any person arriving in the Territory to determine whether such person is violating the laws and regulations pertaining to entry into American Samoa without a warrant. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

A strip search may be performed if there is real or reasonable suspicion supported by the objective and articulable facts that the passenger is concealing evidence of a crime or contraband upon his or her person. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

A pat down at the border must meet a very low standard and only requires the articulation of some facts which would lead a reasonable and objective customs officer to believe the search necessary. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

The requirements for a border strip search requires a heightened level of suspicion, due the increased intrusiveness. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

The alert by a drug dog, the private room with a closed door, officers escorting the defendant to the restroom and to get his luggage, the discovery of drugs, the positive drug testing and accusation of cocaine possession led the court to hold that the defendant was in custody and evidence obtained at that point would be suppressed. *Am. Samoa Gov't v. Loma*, CR No. 52-15 (Trial Div. July 29, 2016) (order granting in part & den. in part def.'s mot. to suppress).

Counsel

The right to counsel goes beyond the perfunctory appointment of counsel and means the right to effective assistance of counsel. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

Effective assistance of counsel should put the prosecution's case to survive the crucible of meaningful adversary testing. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The right to counsel only guarantees the defendant adequate and fair representation, not perfect representation. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The right to effective assistance of counsel carries some limitations as it guarantees a defendant the right to be represented by an otherwise qualified attorney whom the defendant can afford to hire, or is willing to represent him even though he is without funds. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The aim the constitutional right to counsel is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

An indigent defendant who lacks means to hire his own lawyer cannot insist on representation by an attorney he cannot afford, and does not have a cognizable constitutional complaint so long as he is adequately represented by attorney appointed by the courts. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The Territory's indigent defendant can receive legal representation of the Public Defender, not an attorney of his choice, if he requests it, or the court so orders and he does not affirmatively reject, of record, the opportunity to be represented by legal counsel in the proceeding. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

If the indigent defendant does not wish to be represented by the Public Defender, he can choose to waive his constitutional right to counsel and represent himself. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

Because the indigent defendant's right to have counsel of his choice is limited, the court has no obligation to appoint new counsel at the defendant's request. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The court should deny a request for new counsel at any stage unless it is satisfied that the defendant has made the required showing. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

Unless the indigent defendant can show a constitutional violation of his right to counsel, whether to appoint a different lawyer for him who expresses dissatisfaction with his court-appointed counsel is a matter committed to the sound discretion of the trial court. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

Even if the defendant intends to raise an ineffective assistance of counsel claim against his own counsel as part of his motion for new trial, the court may refuse appointing new counsel to assist the defendant in moving for a new trial. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The defendant must meet a heavy burden to show his need for new counsel because a series of attorneys presenting groundless claims of incompetence at public expense, often causing delays to allow substitute counsel to become acquainted with the case, benefits no one. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

To succeed on the motion to appoint new counsel based on incompetence, the defendant must show that the conflict between the defendant and his counsel had become so great that it resulted in a total lack of communication or other significant impediment that resulted in turn in an attorney-client relationship that fell short of that required by the Sixth Amendment. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The defendant's "general loss of confidence or trust in his counsel" is not enough to warrant substitution of counsel. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

The defendant must present enough evidence of the counsel's incompetent representation to the court because we have an affirmative duty to inquire into the disagreement with existing counsel to determine if there is, in fact, good cause to appoint new counsel. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

If the defendant's showing of incompetence offers little merit, the court is under no obligation to appoint new counsel to argue the motion for new trial. *Am. Samoa Gov't v. Wright*, CR No. 67-14 (Trial Div. Aug. 4, 2016) (order den. mot. to appoint new counsel).

EMPLOYMENT LAW

Government Employees

Regulations A.S.A.C. §§ 4.0901-.0903 provide procedures a career service employee must follow to have his or her appeal from an employment matter controversy or grievance heard by the administrative law judge. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

If the career service employee has not been suspended, involuntary demoted, or removed, he may bring a grievance appeal before the administrative law judge after following the three-part grievance procedure described in A.S.A.C. § 4.0903. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Under the three-part grievance procedure for career service employees, the grievance should first be placed in writing and a resolution attempted by the appropriate supervisor at the lowest level. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Under the three-part grievance procedure for career service employees, the decision of the director of the Department of Human Resources may be appealed from within ten days. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

For a career service employee that was not officially suspended, demoted, or terminated, his appeal to the administrative law judge had to proceed under A.S.A.C. § 4.0903. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

If the Department of Human Resources director fails to act on a recommendation to terminate an employee, leaving the three-step grievance process incomplete, the employee cannot proceed under A.S.A.C. § 4.0903 since there was no “final decision” by the Department of Human Resources director. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

The statutory and regulatory scheme that protects government career service employees contemplates that an employee grievance or controversy be heard in a timely manner. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

The administrative law judge may have jurisdiction under § 4.0604(g) without a final decision because it specifically grants the administrative law judge jurisdiction over “any other contested case, grievance or controversy” from an agency, office or department of the government as

long as the administrative law judge has jurisdiction over such matter. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

Outside extenuating circumstances, such as American Samoa Government's actions preventing an employee from proceeding as customarily required under § 4.0604(b) for over 15 months, a controversy, grievance, or administrative appeal pertaining to government employment must proceed under A.S.C.A. § 4.0604(b) and not § 4.0604(g). *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

A plain-language reading of § 4.0902(k) shows that it is not a limitation on the administrative law judge's ability to assess money damages, but instead is a rule that applies when a certain condition—an employee being fully reinstated after appeal—occurs. The subsection does not incorporate any limiting language, such as “unless” or “except,” to indicate the listed benefits are only available upon full reinstatement after appeal. Accordingly, subsection (k) is not a limitation on the administrative law judge's power to award back pay or other benefits to employees after a hearing, but rather a mandate that the administrative law judge *must* provide the remedies listed in subsection (k) when an employee is fully reinstated after an appeal. *Am. Samoa Gov't v. Seumanutafa*, AP No. 10-14 (App. Div. Aug. 4, 2016) (op. & order).

EVIDENCE

Privileges⁷²

Witnesses

Differences between allegations in complaint and testimony at trial are not usually grounds for dismissal but go to the confidence the court can place in the testimony. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

The court found dismissal improper where the defendant had notice that trial testimony would not exactly mirror allegations in the complaint. *Nomura v. Jones*, CA No. 50-06 (Trial Div. Aug. 24, 2016) (op. & order).

⁷² See CIVIL PROCEDURE—Discovery

IMMIGRATION

Immigration Board

The Immigration Act provides that no alien may be employed in the Territory without Immigration Board approval. *Foketi v. Am. Samoa Gov't*, CA No. 30-16 (Trial Div. July 29, 2016) (order granting extraordinary relief).

INTERNATIONAL LAW

LEGAL PROFESSION

The Office of Attorney

The High Court follows the ABA Model Rules of Professional Conduct. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

In considering whether to disqualify counsel under Rule of Professional Conduct 3.7(a), the court must first determine if the lawyer is likely to be a necessary witness. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

A lawyer is considered a “necessary witness” if he or she has crucial information that is not cumulative and cannot be obtained elsewhere. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

If a lawyer is not a necessary witness, then the inquiry ends; however, if a lawyer is a necessary witness, they may still be able to act as an advocate at trial if they fall into one of the three listed exceptions. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

The court should grant a motion for disqualification only under the most compelling of circumstances because of the potential for abuse. *Nomura v. Jones*, CA No. 50-06 (Trial Div. June 2, 2016) (order den. mot. to disqualify def.'s counsel).

MATAI TITLE DISPUTES

Procedural Rules⁷³

Under A.S.C.A. § 1.0409, the Land and Titles Division of the High Court has jurisdiction to hear disputed claims for a *matai* title, as long as the parties have followed the procedural requirements set out in § 43.0302. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

Section 43.0302 states that before an action over communal land or *matai* titles may be commenced in the Land and Titles Division, the parties must file a certificate of irreconcilable dispute to prove the parties have appeared before the Office of Samoan Affairs and attempted to resolve the matter. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

A family meeting is a procedural requirement for this court to have jurisdiction over a *matai* title dispute. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

Claimant's failure to submit a questionnaire and his current off-island status have no effect on the court's jurisdiction where the claimant is off island for medical treatment and plans to return in the near future. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

Claims that Claimant has failed to submit a questionnaire and that Claimant now resides off-island do not affect whether Claimant has failed to state a claim on which relief may be granted for a *matai* title case. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

Summary judgment effectively nullifies 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. *In re Matai Title Malaepule*, MT No. 04-15 (Land & Titles Div. March 14, 2016) (order den. counterclaimant's mot. to dismiss or for summ. j.)

⁷³ See MATAI TITLE DISPUTES—Traditional Determination of Matai

In *matai* title disputes, it is within the court's discretion to weigh the evidence and make a fact determination. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

In the selection of a *matai*, the registration statute quite clearly calls for a "family" mandate, as opposed to the desires of a mere faction of the family. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

A family meeting cannot simply be a "perfunctory" exercise but must present a "meaningful" opportunity to discuss selecting a titleholder in accordance with family tradition. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

A meaningful family meeting cannot be based on the practice of private meetings by individual candidates and their immediate supporters. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

The meeting must provide "a meaningful opportunity" to the family to decide for itself whether or not it can select a new titleholder. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

Without 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 Land and Titles Division really has no business entertaining *matai* title cases. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

The court has no jurisdiction to entertain a *matai* disputes in the absence of meaningful family attempts to select a *matai*. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

In selecting the successor to a *matai* title, the family should not be held hostage to the impetuous agenda of a single family member, who happens to know where the Office of the Territorial Registrar is located as well as the well-beaten path to the courthouse. *In re Matai Title Tago*, MT No. 05-15 (Land & Titles Div. July 1, 2016) (order to dis. for lack of subject matter jurisdiction).

In a case or controversy relating to *matai* titles, the trier of fact are the Associate Judges. *In re Matai Title Pagofie*, MT No. 07-15 (Land & Titles Div. Dec. 16, 2016) (op. & order).

Traditional Determination of Matai⁷⁴

Customs and tradition for selecting the next holder of a *matai* title are fluid and subject to modification by the family. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

A.S.C.A. §§ 1.0401-.0414 are designed and were enacted to preserve the *matai* system as a fundamental feature of Samoan culture and customs. *In re Matai Title Sagapolutele*, MT No. 09-15 (Land & Titles Div. June 9, 2016) (order invalidating successor *matai* claim, referring selection process to family & dismissing action).

The culture and customs require the family to meet in accordance with the family's traditions to select the successor to fill a family's vacant *sa'o* title. *In re Matai Title Sagapolutele*, MT No. 09-15 (Land & Titles Div. June 9, 2016) (order invalidating successor *matai* claim, referring selection process to family & dismissing action).

The meeting must provide a meaningful opportunity to the family members to thoroughly deal with the title vacancy and determine if a successor titleholder can be selected. *In re Matai Title Sagapolutele*, MT No. 09-15 (Land & Titles Div. June 9, 2016) (order invalidating successor *matai* claim, referring selection process to family & dismissing action).

Just because certain individuals can then lay claim to mutual family ties, this fact does not give rise to any culturally cognizant merger of two separate and distinct *matai* and family institutions. *In re Matai Title Pagofie*, MT No. 07-15 (Land & Titles Div. Dec. 16, 2016) (op. & order).

Statutory Qualifications for Title⁷⁵

Finding the first titleholder that could be identified and counting the generations from said titleholder to each claimant is a proper application of the Sotoa Rule. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

⁷⁴ See MATAI TITLE DISPUTES—Procedural Rules

⁷⁵ See MATAI TITLE DISPUTES—Traditional Determination of Matai

A claimant who is more familiar with the family associated with the *matai* title the claimant seeks is better qualified to assume leadership of that family. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

Although the fact that a claimant prevails on the third statutory requirement does not mean they will automatically prevail on the fourth statutory requirement, the value of a *matai* to his or her family, village, and government depends, to some degree, on his or her forcefulness, character, personality, and knowledge of Samoan customs. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

A claimant who has worked for the American Samoa Government is, generally, more valuable to the village and country. *In re Matai Title Le'i*, MT No. 06-14 (Land & Titles Div. April 13, 2016) (order den. mot. for recons./new trial).

In *matai* title disputes, the court is guided by the four criteria set out in A.S.C.A. § 1.0409(c): (1) best hereditary right; (2) clan support; (3) forcefulness, character and personality, and knowledge of Samoan customs; and (4) value to family, village, and country. *In re Matai Title Aoelua*, MT No. 07-14 (Land & Titles Div. June. 23, 2016) (op. & order).

REAL PROPERTY

Communal Lands⁷⁶

A case concerning a dispute between two Samoan families asserting adverse claims to land is squarely within the bailiwick of this court. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

Parties involved in controversies concerning communal land must comply with the prerequisite administrative proceedings before the Secretary of Samoan Affairs before the court can assert subject matter jurisdiction.

A.S.C.A. §§ 43.0302(b) and 43.0303 afford the court limited jurisdiction to make certain interlocutory orders, including preliminary injunctions, before the parties have complied with the administrative proceedings.

⁷⁶ See REAL PROPERTY—Alienation of Land

Limited jurisdiction is granted the court to make certain interlocutory orders before the parties have completed the Office of Samoan Affairs' administrative proceedings, and such limited jurisdiction does not include the authority to grant a party leave to amend the complaint for permanent injunction.

Alienation of Land

The alienation enactments are merely concerned with instruments affecting title to native land. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

Instruments affecting title to native land under the alienation enactments are void and quite meaningless without gubernatorial assent. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

The Governor's role in matters related to instruments affecting title to native lands pertains to the implementation of legislative policy against the monopolistic ownership of land and improvident alienation of communal lands by those charged with the management and control thereof. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

This familiar executive role--implementing legislative policy--should not, however, be conflated with the equally familiar role of the judiciary to determine land disputes. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

Where the subject matter of a land dispute is a tract of land delimited in metes and bounds and can be identified and determined, meaningful judgment can be rendered without a survey. *Aumoeualogo v. Pulu*, LT No. 09-15 (Land & Titles Div. Aug. 16, 2016) (order den. mot. for sum. j.)

Registration of Land⁷⁷

Compliance with A.S.C.A. § 37.0101 et. seq., is not a bar to relief.

Landlord-Tenant

A lessor is entitled to evict a tenant at the expiration of the lease or when the lessee has breached the lease. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

⁷⁷ See REAL PROPERTY—Alienation of Land

Failure to pay rent is a breach of the lease. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

A party who has properly terminated a lease is entitled to immediate possession of the premises. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

Substantial improvements made to the property by the tenant do not change the lessor's right to request the tenant to vacate the premises after the lease is legally terminated. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

A tenant who makes repairs and improvements to the property in good faith, however, is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

A tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time set by the court. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

When a tenant continues to occupy the property after elapse of a reasonable time from notice to quit, that tenant is liable for rent for such period as he continues to occupy the property. *Williams v. Chand*, LT No. 15-14 (Land & Titles Div. Feb. 19, 2016) (op. & order).

When a person occupies property with the owner's permission but without any provisions for rent, a tenancy at will is created. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

In a tenancy at will, the owner retains the right to require the tenant notice to quit, but the tenant is entitled to reasonable notice to quit. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

Substantial improvements made to the property by the tenant do not change the owner's right to require a tenant to vacate the premises; however, a tenant who makes repairs and improvements to the property in good faith is entitled reimbursement for the actual expenses in improving the property or for the amount by which the improvements enhanced the value of the property, whichever is less. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

A tenant who makes repairs and improvements to the property in bad faith is only entitled to remove fixtures and possessions within the time

set by the court. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

When the landlord allows the tenant to improve the property, the tenant is a good-faith improver. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

A tenant who makes improvements without the consent of the owner is not a good-faith improver. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

The general rule is that attorney's fees are not recoverable except when statute dictates or the opposing party acted in bad faith, wantonly, or oppressively. *Dionne v. Wai*, LT No. 07-11 (Land & Titles Div. May 24, 2016) (op. & order).

TORTS

Government Tort Liability Act

The *Fono* has provided for a carefully delimited waiver of sovereign immunity, specifically reserving the government's immunity from suit for *any claim* arising out of false imprisonment, false arrest, malicious prosecution, abuse of process. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

Damages⁷⁸

The court cannot summarily award the government's money to a party without any sort of hearing or any sort of showing. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

The well-established principle of the "American Rule" does not allow the prevailing litigant to claim attorney's fees from the loser. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

The Territory has embraced and followed the American Rule with only narrowly circumscribed exceptions. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

⁷⁸ See REAL PROPERTY—Landlord-Tenant

In rare exceptional cases, the court may assess attorney's fees under its inherent power. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

The rationale behind fee-shifting is punitive. *Leuluai v. Am. Samoa Gov't*, CA No. 55-15 (Trial Div. Feb. 18, 2016) (order den. pet'r's mot. for att'y fees).

WORKMEN'S COMPENSATION

Purpose and Origin⁷⁹

The American Samoa Workmen's Compensation Act is largely drawn from the 1927 version of the Longshore and Harbor Worker's Compensation Act. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

In construing and applying the American Samoa Workmen's Compensation Act, this court has consistently referred to the federal regulations and judicial holdings related to the Longshore and Harbor Worker's Compensation Act. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

Compensation Award

The remedy under the American Samoa Workmen's Compensation Act is exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife unless an employer fails to secure payment of compensation as required by the American Samoa Workmen's Compensation Act. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

Employer Liability

The American Samoa Workmen's Compensation Act provides that every employer who has in the Territory one or more employees is subject to the American Samoa Workmen's Compensation Act and liable for compensation for injury to or death of his employees arising out of and in the course of employment. *Faalele v. Pac. Stevedoring Servs.*, CA

⁷⁹ See AMERICAN SAMOA GOVERNMENT—The Federal Government, Constitution, and Laws of American Samoa

No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

Judicial Review^{80, 81}

Judicial review of an order of workmen's compensation by the administrative law judge is available under A.S.C.A. § 32.0652. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

The Court finds that A.S.C.A. § 32.0652 did not vest final appellate judicial review of workmen's compensation orders with the Trial Division. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

The Court finds that the plain language of A.S.C.A. § 32.0652 does not bar any further review of the Trial Division's workmen's compensation-related decisions. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

Under A.S.C.A. § 3.0208(c), the Appellate Division has previously heard cases on appeal from the trial court regarding workmen's compensation orders and has never seen fit to discuss whether it might or might not have jurisdiction in such a case due to A.S.C.A. § 32.0652(a). *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

Although A.S.C.A. § 32.0652(a) limits the scope of judicial review of workmen's compensation orders to whether the order is "in accordance with law," the Court has never held that this limitation on the scope of review limits the Appellate Division's ability to hear an appeal from a trial court's order. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

This Court has previously held that errors of law under A.S.C.A. § 32.0652(a) can be reviewed and remedied by each level of the reviewing courts. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

The Appellate Division has jurisdiction to review a trial court's order in workmen's compensation cases under A.S.C.A. § 3.0208(c). *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

⁸⁰ See ADMINISTRATIVE LAW—Judicial Review of Administrative Decisions

⁸¹ See CIVIL PROCEDURE—Initial Matters

The statutorily imposed scope of judicial relief available under the Workmen's Compensation Act is far narrower than afforded by the Administrative Procedures Act to the Appellate Division. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

The standard of judicial review in workmen's compensation cases is not the "substantial rights of the petitioner have been prejudiced" standard established by the Administrative Procedures Act, but the "not in accordance with law" standard established by A.S.C.A. § 32.06S2(a). *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

The Court has jurisdiction under A.S.C.A. § 3.0208 (c) to hear the appeal from the Trial Division's final decision on the workmen's compensation case. *Longline Servs., Inc. v. Workmen's Comp. Comm'r*, AP No. 15-14 (App. Div. Mar. 24, 2016) (order den. mot. to dismiss).

Assuming for the sake of argument that Congress has not preempted the field with its enactment of the Longshore and Harbor Worker's Compensation Act, then quite clearly, A.S.C.A. § 32.0522 deprives this court of jurisdiction to entertain any causes for wrongful death and survivor actions under A.S.C.A. § 43.5001 and § 43.5002. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

Assuming for the sake of argument that federal law governs, then the Longshore and Harbor Worker's Compensation Act's A.S.C.A. § 32.0522 counterpart, viz; 33 U.S.C. § 905(a), is applicable. This enactment would equally deprive this court of jurisdiction over any other non Longshore and Harbor Worker's Compensation Act causes for which the employer may otherwise be liable. *Faalele v. Pac. Stevedoring Servs.*, CA No. 30-15 (Trial Div. Feb. 25, 2016) (order to dismiss for want of subj. matter juris.)

A compensation order becomes effective when filed in the Office of the Workmen's Compensation Commissioner and, unless proceedings for the suspension or setting aside of such order are instituted, becomes final at the expiration of the thirtieth day thereafter. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

Once the workmen's compensation order is filed with the Workmen's Compensation Commission, a party has 30 days to initiate injunction proceedings in the Trial Division of the High Court to suspended or set aside the compensation order. *Am. Samoa Gov't v. Workmen's Comp.*

Comm'n, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

Judicial review of a workmen's compensation order is limited to whether the order was "in accordance with law. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

The initiation of injunction proceedings in the Trial Division does not automatically stay payments awarded by the workmen's compensation order. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

Workmen's compensation payments may only be stayed pending a final decision upon an application for an interlocutory injunction and where the court finds that irreparable damage would otherwise ensue to the employer. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

If an employer fails to comply with a workmen's compensation order making an award that has become final, any beneficiary of such award may apply to the High Court of American Samoa for the enforcement of the order. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).

If the workmen's compensation order was made, and served in accordance, with law and the employer has failed to comply, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise. *Am. Samoa Gov't v. Workmen's Comp. Comm'n*, CA No. 27-15 (Trial Div. Aug. 16, 2016) (order enforcing award of benefits and dismissing pet'r's action).