IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

PACIFIC AMUSEMENT INC., *et al.*,

Plaintiffs-Appellees,

v.

FRANKLIN B. VILLANUEVA, *et al.*,

Defendant-Appellant.

SUPREME COURT APPEAL NO. 03-0033GA
Civil Action No. 02-0378-A

ERRATA

¶1 On August 2, 2005, this Court issued its opinion in the above-captioned appeal.

¶2 The cover page of the opinion contains an error which should be corrected. It currently reads, in pertinent part: "Cite as: *Pacific Amusement, Inc. v. Villanueva,* 2005 MP 18." (emphasis added).

¶3 The citation emphasized above is hereby replaced to read: "Cite as: *Pacific Amusement, Inc. v. Villanueva,* 2005 MP 11."

¶4 The opinion stated herein above is for PUBLICATION.

Dated this 3 day of August 2005.

Cris Kaipat, Clerk of Court

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Defendants/Appellants.

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OPINION

Cite as: *Pacific Amusement, Inc. v. Villanueva,* 2005 MP 11

Argued and submitted on May 12, 2004
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; ALEXANDRO C. CASTRO, *Associate Justice*; JOHN A. MANGLONA, *Associate Justice*

DEMAPAN, Chief Justice:

¶1 Appellants Frank B. Villanueva and the Commonwealth Department of Finance (collectively, the "Government") appeal the trial court's September 3, 2003 Order, in which they were directed to either pay Appellee Pacific Amusement, Inc.'s attorney fees and costs or request a hearing. We DISMISS the appeal based on lack of jurisdiction.

I. Background

¶2 Poker machine operators including Pacific Amusement, Inc. ("Plaintiffs") brought an action against: (1) Frank B. Villanueva in his official capacity as the Acting Director of Finance; (2) the Commonwealth Department of Finance as the entity in charge of regulating the poker machine industry; and (3) Hyun In Corp., *et al.* ("Defendant Operators"). Plaintiffs alleged three causes of action: (1) taxpayer suit; (2) unfair competition; and (3) unfair business practices. Villanueva and the Department of Finance were named as defendants in the first cause of action only.

¶3 Ultimately, all Plaintiffs except Pacific Amusement reached a settlement agreement ("the Settlement Agreement") with the Government. On the basis of the Settlement Agreement, the trial court issued an order dated October 29, 2002, which dismissed the claims of all Plaintiffs except Pacific Amusement. As part of this order, the court directed that the Department of Finance: (1) within specified time periods, verify that the poker machines located in the Northern Mariana Islands were properly licensed and operating in compliance with the applicable rules, regulations, and laws and seize those machines not in compliance; (2) to promulgate regulations that specifically require all pre-existing and new poker machine licensees to be registered with the U.S. Attorney General pursuant to 15 U.S.C. § 1173(a)(3), and to revoke, subject to due process, the licenses of the poker machine operators who fail to register as required; (3) to compile, and keep current, an electronic database listing of, *inter alia*, the

owners of poker machines and the dates of expiration for all machine licenses; and (4) to review the said database of poker machine operators for compliance with the applicable taxes and fees and collect all taxes due. The court also held that if Pacific Amusement prevailed on the first cause of action, the Department of Finance would have to pay the other three Plaintiffs the attorney fees they had incurred through October 16, 2002 with respect to the first cause of action.

¶4 On January 21, 2003, the trial court granted the Government's Motion to Dismiss Amended Complaint as to the first cause of action pursuant to Rules 12(b)(6) and 19 of the Commonwealth Rules of Civil Procedure. On May 14, 2003, Pacific Amusement filed a Second Amended Complaint. On July 25, 2003, the trial court, upon the Government's Motion to Dismiss the Second Amended Complaint, dismissed the first cause of action, based on mootness, because all the substantive relief sought by Pacific Amusement had already been obtained through the Settlement Agreement. Although it dismissed the first cause of action, the court stated that the issue of whether to award attorney fees and costs to Pacific Amusement still remained.

¶5 In its September 3, 2003 Order, the court stated that: "Pacific Amusement is a 'person who prevails' under N.M.I. Const. art. X, § 9," and was "therefore likely entitled to at least nominal reimbursement of fees and costs." *Pacific Amusement v. Villanueva*, Civ. No. 02-0378 (N.M.I. Super. Ct. Sept. 3, 2003) (Order Concerning Plaintiff's Motion for Attorney's Fees at 9) ("Order"). In this Order, the court ordered Pacific Amusement to provide the court and the Government with the specific figures of fees and costs claimed, as well as an itemized accounting. The court also stated that once Pacific Amusement provided the figures and documents ordered, the Government would have to either pay the claimed fees and costs to Pacific Amusement or request a hearing.

II. Issues

¶6 The following are the issues on appeal.

I. Does this Court have jurisdiction to review the present appeal?

II. Did the trial court err when it applied the "catalyst theory" rejected by the United States Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 1841, 149 L. Ed. 2d 855 (2001) in concluding that Pacific Amusement had prevailed against the Government and thus was entitled to attorney fees pursuant to Article X, § 9 of the Commonwealth Constitution?

III. Did Pacific Amusement prevail against the Government with regard to the taxpayer suit cause of action under Article X, § 9 of the Commonwealth Constitution?

III. Discussion

Jurisdiction

¶7 The first issue on appeal is whether this Court has jurisdiction to review the present appeal. "The issue of appellate jurisdiction must always be resolved before the merits of an appeal are examined or addressed." *Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998). Whether jurisdiction can be exercised is a question of law subject to a *de novo* review. *Rajapaksha v. Jayaweera*, 1997 MP 13 ¶ 3, 5 N.M.I. 87, 88.

¶8 Pacific Amusement argues that this Court lacks jurisdiction to review the appeal before us because the Order is a non-final interlocutory order and the Government should only be allowed to appeal after the issuance of an order determining the damage amount. The Government, however, argues that the Order is the equivalent of a final order. Alternatively, the Government argues that even if the Order was deemed an interlocutory order, jurisdiction would still be proper based on the practical finality doctrine (the "Gillespie Doctrine") or under the common law "collateral order" doctrine recognized in *Olopai v. Hillblom*, 3 N.M.I. 528, 530 (1993).

Final Order Analysis

¶9 Generally, only final orders are immediately appealable. *Commonwealth v. Hasinto*, 1 N.M.I. 377, 385 (1990) ("We construe 1 CMC § 3102(a) to grant this Court appellate jurisdiction over Superior Court judgments and orders which are final."). To determine whether an order is final, a court must

examine whether the order fully informed the losing party of the extent of the remedy entered against it. *Westenberger v. Atalig*, 3 N.M.I. 471, 475 n.2 (1993).

¶10 Pacific Amusement argues that the issue of liability was not conclusively determined (*see* Mem. in Further Supp. of Mot. to Dismiss Appeal. at 4) because no evidentiary hearing was held to determine the extent of the public benefit conferred by the taxpayer suit cause of action. We disagree. Article X, § 9 of the Commonwealth Constitution contains the following language:

> A taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. The court shall award costs and attorney fees to any person who prevails in such an action in a reasonable amount relative to the public benefit of the suit.

Under Article X, § 9 of the Commonwealth Constitution, the extent of the "public benefit" conferred by a suit brought by a taxpayer is a question relevant to the damage calculation, not liability determination. Therefore, the trial court has fully determined the liability issue at this time.

¶11 An order which establishes liability without fixing the amount of recovery may be final and immediately appealable only if the determination of damages will be "mechanical and uncontroversial," i.e., a ministerial task. *Westenberger*, 3 N.M.I. at 475 n.2; *but see Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 N.M.I. 79 (1992). Any issue sought to be appealed before such a damage determination is made must not be susceptible to becoming moot or altered by the damage determination. *Skretvedt v. E.I. Dupont de Nemours*, 372 F.3d 193, 201 (3rd Cir. 2004); *Prod. and Maint. Employees' Local 504, Laborers' Int'l Union of N. Am. v. Roadmaster Corp.*, 954 F.2d 1397, 1401 (7th Cir. 1992). A judgment awarding an unspecified amount of attorney fees is ordinarily interlocutory in nature. *Computer Mgmt. Assistance Co. v. Robert F. DeCastro, Inc.*, 220 F.3d 396, 405 (5th Cir. 2000).

¶12 Here, the damage determination encompasses substantial issues and is therefore not merely a ministerial task. In the Order, Pacific Amusement was directed to provide the court and the Government with an accounting detailing the specific figures of fees and costs claimed by Pacific

Amusement. The court ordered the Government to either pay the requested fees and costs to Pacific Amusement or request a hearing. Such hearing was to be in "the nature of a pre-trial conference . . . held to set deadlines for discovery and motions-in-limine and . . . a date for an evidentiary hearing to determine the amount of fees and costs, if any, to be awarded." Order at 9. Computing the money owed to Pacific Amusement is not guaranteed to be mechanical. It is conceivable that a hearing might raise issues, the determination of which might alter any final issues to be appealed. As a result, the issues on this interlocutory appeal are susceptible to being mooted or altered after a hearing, if one is held. Therefore, the Order is not final and cannot be immediately appealed.

Final Judgment Under the "Practical Finality" Doctrine

¶13 Alternatively, the Government argues, this Court retains jurisdiction because the Order would be considered a final judgment under the "practical finality doctrine" or the "*Gillespie* doctrine" derived from *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964). We disagree with the Government.

¶14 In *Gillespie*, the United States Supreme Court held that practical, not technical, considerations are to govern the application of principles of finality. *Id.*, 379 U.S. at 152, 85 S. Ct. at 312; *Oswalt v. Scripto, Inc.*, 616 F.2d 191, 194 (5th Cir. 1980). Like a number of other jurisdictions, we adopt the *Gillespie* doctrine. *See, e.g., Kelly Inn No. 102, Inc. v. Kapnison*, 824 P.2d 1022, 1038 (N.M. 1992); *Mann v. State Farm Mut. Auto. Ins. Co.*, 669 P.2d 768, 770 (Okla. 1983); *Oregon ex rel. Zidell v. Jones*, 720 P.2d 350, 361 (Or. 1986).

¶15 The "*Gillespie* doctrine," however, is a very narrow exception to the final judgment rule. *Way v. County of Ventura*, 348 F.3d 808, 811 (9th Cir. 2003); *Serv. Employees Int'l Union, Local 102 v. County of San Diego*, 60 F.3d 1346, 1349 (9th Cir. 1995) (holding that appeals under *Gillespie* are entertained

only sparingly); *In re Subpoena Served on Cal. Pub. Utils. Comm'n*, 813 F.2d 1473, 1479 (9th Cir. 1987).

¶16 An appellate court may review an otherwise non-final decision under the *Gillespie* doctrine if: (1) the decision is a marginally final order; (2) the order disposes of an unsettled issue of national significance; and (3) the finality issue is not presented to the appellate court until argument on the merits (thereby ensuring that policies of judicial economy would not be served by remanding the case with an important unresolved issue).[1] *Way*, 348 F.3d at 811 (applying *Gillespie*, 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199 (1964)).

¶17 The *Gillespie* doctrine only applies to orders involving unsettled issues of national importance where immediate review would serve the purpose of judicial economy. *All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425, 428 n.2 (9th Cir. 1989); *Kiaaina v. Jackson*, 851 F.2d 287, 290 n.5 (9th Cir. 1988); *In re Subpoena Served on Calif. Pub. Utils. Comm'n*, 813 F.2d at 1479-80. There is no issue of national importance in this case which would require immediate review. Accordingly, we find it unnecessary to proceed further with our analysis under the *Gillespie* doctrine and conclude that the Order was not a final judgment contemplated by the *Gillespie* doctrine.

Final Judgment Rule Exception Under the "Collateral Order" Doctrine

¶18 There is an additional exception to the final judgment rule, based on the common law "collateral order doctrine" adopted by this Court in *Commonwealth v. Hasinto*, 1 N.M.I. 377, 384 n.6 (1990). *See also Olopai*, 3 N.M.I. at 530. Under the "collateral order" doctrine, an appeal may be taken from an

[1] In federal cases, an additional requirement must be met for the application of the "*Gillespie* doctrine": the appellate review will "implement[ ] the same policy Congress sought to promote in [28 U.S.C.] § 1292(b)." *Way v. County of Ventura*, 348 F.3d 808, 811 (9th Cir. 2003). Section 1292(b) of Title 28 of the United States Code provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

order which is collateral to the principal litigation as long as any decision on appeal will not affect the underlying merits of the case. *Hasinto*, 1 N.M.I. at 384 n.6. The application of the collateral order doctrine exception is strictly confined to limited circumstances. *Guo Qiong He v. Commonwealth*, 2003 MP 3 ¶ 14; *Commonwealth v. Guerrero*, 3 N.M.I. 479, 481-82 (1993). It is important that this exception remain limited so that it does not encroach on the general rule that a party is entitled to a single appeal after the final judgment. *Digital Equip. Corp. v. Desktop Direct, Inc*., 511 U.S. 863, 867-68, 114 S. Ct. 1992, 1996, 128 L. Ed. 2d 842, 849 (1994).

¶19 To come within the collateral order exception to the final judgment rule, the order sought to be appealed must: (1) have conclusively determined the disputed questions; (2) have resolved an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Hasinto*, 1 N.M.I. at 384 n.6 (*citing* 24 C.J.S. *Criminal Law* §1672 (1989)); *Olopai*, 3 N.M.I. at 530.

¶20 Here, the Order fails to meet the third prong of the collateral order doctrine because the issue sought to be appealed could be reviewed as part of the final judgment. The only situation where an issue would not be reviewable as part of a final judgment is where it involves "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799, 109 S. Ct. 1494, 1498, 103 L. Ed. 2d 879 (1989); *McLaurin v. Morton*, 48 F.3d 944, 950 (6th Cir. 1995). For example, the issue of whether a government official is immune from answering for his conduct in a civil damages action is immediately reviewable, as the government official's entitlement to such immunity would be lost forever if an immediate appeal of its denial was not allowed and the claiming party was required to go through a trial. *Id.*, 48 F.3d at 950 (*citing Mitchell v. Forsyth*, 472 U.S. 511, 525-26, 105 S. Ct. 2806, 2814, 86 L. Ed. 2d 411 (1985)). By

contrast, the Order did not involve any right whose legal and practical value would be lost forever without an immediate appeal. Accordingly, this appeal does not fall under the collateral order exception.

IV. Conclusion

¶21 In conclusion, we lack jurisdiction to review the merits of the present appeal. We, therefore, do not address the following issues: (1) whether the trial court erred when it applied the "catalyst theory" rejected by the United States Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 1841, 149 L. Ed. 2d 855 (2001) in concluding that Pacific Amusement had prevailed against the Government and thus was entitled to attorney fees pursuant to Article X, § 9 of the Commonwealth Constitution; and (2) whether Pacific Amusement prevailed against the Government with regard to the taxpayer suit cause of action under Article X, § 9 of the Commonwealth Constitution. This appeal is hereby **DISMISSED**.

¶22 **SO ORDERED** this 2nd day of August 2005.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
ALEXANDRO C. CASTRO
Associate Justice

/s/_____
JOHN A. MANGLONA
Associate Justice