

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

BANK OF SAIPAN,
as Executor of the Estate of LARRY LEE HILLBLOM,
Petitioner

v.

SUPERIOR COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Respondent

v.

CARLSMITH BALL WICHMAN CASE & ICHIKI,
Real Party in Interest

OPINION AND ORDER

Cite as: *Bank of Saipan v. Superior Court (Carlsmith)*, 2001 MP 7

Original Action No. 2000-004

Submitted on Briefs October 5, 2000

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, JOHN A. MANGLONA, Associate Justice, and ALBERTO C. LAMORENA III, Special Judge¹

PER CURIAM:

¶1 [1,2] The Bank of Saipan (“Petitioner” or “Executor”), as Executor of the Estate of Larry Lee Hillblom, filed a Petition for Writ of Mandamus to direct the Superior Court to vacate its order of July 6, 2000 granting Defendants’ Motion for Partial Summary Judgment. *See Bank of Saipan v. Carlsmith*, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting Defendants’ Motion for Partial Summary Judgment). We have jurisdiction over extraordinary writs pursuant to our general supervisory powers. N.M.I. Const. art. IV, § 3; 1 CMC § 3102(b). Petitioner claims that in granting Defendants’ Motion for Partial Summary Judgment, the Superior Court misapplied the Commonwealth Rules of Civil Procedure. *See Bank of Saipan v. Carlsmith*, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Petition for Writ of Mandamus Re: Partial Summary Judgment at 4). We agree, and therefore **GRANT** the petition.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 [3] The main issue is whether this Court should grant writ relief. This issue turns on whether the Superior Court erred in granting the motion for partial summary judgment. We discuss below the standard of review on a petition for writ of mandamus. On appeal, we review a motion for summary judgment *de novo*. *Borja v. Rangamar*, 1 N.M.I. 347, 355 (1990).

FACTS AND PROCEDURAL BACKGROUND

¹ Honorable Alberto C. Lamorena III, Presiding Judge of the Guam Superior Court, sitting by designation.

¶3 Unless otherwise noted, the following facts are from the order which is the subject of this original proceeding:²

¶4 In June 1995 the Superior Court declared Larry Lee Hillblom (“Hillblom”) dead after a plane carrying him was lost at sea. At his death, Hillblom’s assets included a number of shares in DHL International, Ltd. (“DHLI”). The terms of a Shareholder’s Agreement subjected the shares to a buy-back provision upon a shareholder’s death. The purchase price would be the fair market value, to be determined by DHLI’s board of directors.

¶5 The Shareholder’s Agreement required DHLI to give notice of its intent to exercise the buy-back provision within 75 days of receiving formal notice of Hillblom’s death. Carlsmith Ball Wichman Case & Ichiki (“Carlsmith”), as attorneys for the Estate, served DHLI with formal notice of Hillblom’s death in February 1996, eight months after Hillblom was declared dead. That same month, the Superior Court removed Carlsmith as counsel for the Estate.

¶6 In March 1996, DHLI tendered the purchase price, but the Special Administrator³ refused to deliver the shares. DHLI then instituted arbitration proceedings pursuant to the Shareholder’s Agreement, resulting in a settlement of \$282 million in exchange for the shares. The probate court approved the settlement.

¶7 The First Amended Complaint in this matter, filed on December 3, 1999, alleges several causes of action arising out of alleged legal malpractice committed during Carlsmith’s representation of the

² See *Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki*, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting Defendants’ Motion for Partial Summary Judgment).

³ The Probate Court suspended Petitioner from serving as Executor and appointed William Webster as Special Administrator after DHLI received formal notice of Hillblom’s death. (Order Granting Defendants’ Motion for Partial Summary Judgment at note 1). Petitioner resumed its position as Executor in May 1997. *Id.*

Executor. The first and second claims for relief were based on Carlsmith's alleged failure to provide prompt formal notice of Hillblom's death to DHLI, resulting in lost benefit in the form of immediate financial gain to the Estate, or a longer period to exercise the buy-back provision, or otherwise. Some of the acts which form the basis of the complaint took place between May 1995 and February 1996.

¶18 On May 12, 2000, Carlsmith filed a Motion for Partial Summary Judgment pursuant to Com. R. Civ. P. 56(d). Defendants' argued that during the proceedings before the Probate Court seeking that court's approval of a settlement with DHLI and the Estate over the disputed DHLI shares, the Executor and its counsel, Stephen Bomse, made statements to the court which should be accepted as undisputed facts for purposes of granting partial summary judgment in the instant action. The Executor and Bomse's statements allegedly indicated that the delayed notice of Hillblom's death did not harm the Estate. Carlsmith argued that the Estate had reversed its position subsequent to the settlement with DHLI and was now alleging that the Estate was harmed because "prompt" notice of Hillblom's death was not given to DHLI. Defendants' further invoked the doctrine of judicial estoppel to support its argument that the Estate was precluded from claiming that they had suffered damage from the delay in providing formal notice of Hillblom's death. The basis of defendants' judicial estoppel argument was the allegedly inconsistent prior statement regarding notice made during the Probate Court proceedings described above by the Executor and the Estate's counsel.

¶19 The Estate argued and presented evidence that the statements in question were taken out of context, and that the discussions regarding delayed notice in question only related to DHLI's ability to value and raise money for the stock purchase, and not to the harm suffered by the Estate by the delay in notice by defendants. Among other evidence of the harm suffered to the Estate by the delay in question, the Estate presented an affidavit from Bomse, in which Bomse asserted that the delay gave

DHLI a strategic advantage that “negatively impacted the Estate’s ability to negotiate, litigate, or arbitrate a higher stock purchase price for the Estate compared to what was ultimately negotiated.”

Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting Defendants’ Motion for Partial Summary Judgment 8).

¶10 In agreeing with Carlsmith and rejecting the Estate’s position, the Superior Court first identified the statement the Executor was precluded from denying:

[i]n preparing [for the arbitration] the Special Administrator . . . considered at length whether an argument should be made in the Arbitration related to the question of “notice.” After investigation of the relevant facts and careful consideration of the options, counsel for the Executor concluded that there were not adequate grounds to pursue such an argument and that therefore it would not be in the Estate’s best interest to do so.

Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting Defendants’ Motion for Partial Summary Judgment at 4). The court then discussed the three reasons presented by the Executor why pursuing the issue of delayed notice would not be in the best interest of the Estate. *Id.* at 4. Finally, the court addressed the following statement made by the Executor:

Most important, the fact that notice was not given earlier did not harm the Estate . . . [T]here was more than enough time for DHLI to value the Estate’s stock so that a purchase decision could be made. In fact, even with no time pressure the valuation process was completed in 85 days. There is no doubt that the time process could have been completed in a slightly shorter time period if necessary. In addition, there is no reason to believe that a prosperous company such as DHLI, with existing credit facilities in excess of \$300 million, would have been unable to obtain the necessary financing to purchase the shares within 105 days of notice being given. In short, the extra time that DHLI had to conduct its valuation was of no benefit to DHLI and had no material adverse effect on the Estate.

Id. at 5 (internal citations omitted).

¶11 In analyzing the transcripts of the probate proceedings, the court also cited to Bomse’s

statements. *Id.* at 5-6. The court extensively quoted Bomse’s statements regarding settlement and the Estate’s best interest to support the Superior Court’s contention that the Estate’s claims that it was harmed by Carlsmith’s delay in providing notice were unsupportable. *Id.* at 7-9. The court found Carlsmith’s position on the Executor and Bomse’s notice statements “more tenable,” and the Estate’s position “speculative and conclusory.” *Id.* at 9.

¶12 As such, the court granted the motion on July 7, 2000. Petitioner timely filed this Petition for Writ of Mandamus.

ANALYSIS

A. Writ Relief Is Appropriate Where the Superior Court Erred in Granting Partial Summary Judgment

¶13 [4] This Court has jurisdiction over extraordinary writs pursuant to its general supervisory powers. *Taimanao v. Superior Court*, 4 N.M.I. 94, 96 (1994); *Tenorio v. Superior Court*, 1 N.M.I. 1, 7 (1989). In reviewing the request for a petition of mandamus, this Court considers the five factors set forth in *Tenorio*:

- (1) The party seeking the writ has no other adequate means, such as direct appeal, to attain the relief desired.
- (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal.
- (3) The lower court’s order is clearly erroneous as a matter of law.
- (4) The lower court’s order is an oft-repeated error, or manifests a persistent disregard of applicable rules.
- (5) The lower court’s order raises new and important problems, or issues of law of first impression.

Tenorio at 9-10.

¶14 In applying the *Tenorio* factors to a particular case, there will not always be a bright-line

distinction, and the guidelines themselves often raise questions as to degree. *Id.* at 10. Rarely if ever will a case arise where all guidelines point in the same direction or even where each guideline is applicable.⁴ The decision whether to issue a writ calls for a cumulative consideration and balancing of these factors. *Villacrusis v. Superior Court*, 3 N.M.I. 546, 550 (1993).

¶15 [5] The first two factors are similar and may be considered together. *Office of the Attorney Gen. v. Superior Court (Fabricante)*, Orig. No. 99-001 (N.M.I. Sup. Ct. June 28, 1999) (Opinion at 8). Here, while Petitioner will undoubtedly incur further expense in proceeding to trial before appealing the partial summary judgment issue, unnecessary cost or delay alone are not sufficient grounds for writ review. *Id.* at 9. However, in reviewing a writ petition pursuant to our supervisory mandamus authority, we are concerned with more than the injury to the Petitioner; we are concerned with the effect of the challenged order on the operation of the courts. *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1303 (9th Cir. 1982). In this case, ordering the Superior Court to deny partial summary judgment will foster the efficient operation and administration of the courts, because it will be more efficient to settle this question now instead of forcing the courts to expend their precious resources on a full trial, appeal, and subsequent remand.

¶16 [6,7] As for the third factor, a ruling is clearly erroneous as a matter of law where the Court is firmly convinced that the lower court has erred in deciding a legal question. *Id.* 1306. However, a lower court's order need not be "clearly" erroneous in supervisory mandamus cases where the writ petition raises an important question of law of first impression, the answer to which would have a

⁴ The final two factors, by definition do not coexist: "[T]he fourth contemplates a case presenting an oft-repeated error, and the fifth a case presenting a novel question. Where one of the two is present, the absence of the other is of little or no significance." *Nakatsukasa v. Superior Court*, Orig. No. 99-006 (N.M.I. Sup. Ct. Dec. 27, 1999) (Opinion at 3 n.2) (internal citation omitted).

substantial impact on the administration of the lower courts. *Nakatsukasa v. Superior Court*, Orig. No. 99-006 (N.M.I. Sup. Ct. Dec. 27, 1999) (Opinion at 3) (internal citation omitted). In cases in which the U.S. Supreme Court has reviewed an appellate court's exercise of supervisory authority, it has not required that the district court's order be "clearly erroneous" before granting mandamus relief. *In re Cement Antitrust Litig* at 1307. In supervisory mandamus cases involving questions of law of major importance to the administration of the courts, the purpose of our review and the reason for our correcting an error made by a trial judge is to provide necessary guidance to the courts and to assist them in their efforts to ensure that the judicial system operates in an orderly and efficient manner. *Id.* Thus the Court will exercise its mandamus authority even though the lower court's order cannot be said to be "clearly erroneous."

¶17 Here, a direct appeal does not provide an adequate means of resolving this issue. This case arose in 1995. Petitioner has a valid concern that the passage of time coupled with the effort and expense might well result in an inability to retry this matter after appeal, as well as an increased and unnecessary burden on the courts. Discovery has been slow and limited. No trial date has been scheduled. In addition, if the partial summary judgment stands, discovery will not be permitted on one aspect of Petitioner's damages claim. Consequently, Petitioner may be unable to preserve any relevant evidence on this aspect of damages upon retrial after an appeal. The trial court's limitation on discovery will severely and unjustifiably weaken the damages claim, an injustice the Court must correct now instead of waiting for an appeal.

B. The Lower Court's Order Is Clearly Erroneous as a Matter of Law

¶18 The Petitioner argues that the prerequisites for applying Rule 56(d) of the Commonwealth Rules of Civil Procedure were not present in the trial court. Petition for Writ of Mandamus at 33.

Specifically, Petitioner argues that Carlsmith’s Rule 56(d) Motion for Partial Summary Judgment was procedurally incorrect inasmuch as it did not accompany or follow any other Rule 56 motion and because it sought to limit the Estate’s right to damages by piecemeal attack on portions of the Estate’s claims. *Id.* Moreover, Petitioner asserts that there remains substantial controversy based on genuine issues of material facts over the Estate’s claims to damages. *Id.* We agree.

1. Rule 56(d) Cannot Be Used as a Stand-Alone Motion

¶19 Rule 56(d) states:

CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Com. R. Civ. P. 56(d).⁵

¶20 [8] We adopt the view of a majority of jurisdictions that hold Rule 56(d) does not permit an independent motion to obtain summary judgment on part of a claim.⁶ Specifically, the primary purpose

⁵ Our Rule 56(d) is analogous to its federal counterpart. Interpretations of counterpart federal rules are helpful in interpreting the Commonwealth Rules of Civil Procedure. *Ada v. Sadhwani’s, Inc.*, 3 N.M.I. 304, 311 (1992); *Mafnas v. Commonwealth*, 2 N.M.I. 248, 264 (1991).

⁶ *See, e.g., Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 1123 (E.D. Cal.2000); *Warner v. United States*, 698 F. Supp. 877, 878-879 (S.D. Fla. 1988) (declaring “a party may not make an independent Rule 56(d) motion” for finding of fact on issue that does not dispose of entire cause of action); *In re Aircrash Disaster Near Warsaw, Poland*, 979 F. Supp. 164, 167 (E.D.N.Y. 1997); *Arado v. General Fire Extinguisher Corp.*, 626 F. Supp. 506, 509 (N.D. Ill. 1985) (stating that “piecemealing of a single claim” and “issue-narrowing” is improper under Rule 56(d)); *Saylor v. Fayette R. Plumb, Inc.* 30 F.R.D. 176 (E.D. Pa. 1962); *Kendall McGaw Lab., Inc. v. Community Mem’l Hosp.*, 125 F.R.D. 420 (D.N.J. 1989) (finding that, except for liability, Rule 56 movant may ask court for judgment on less than entire claim only in wake of full-blown motion under either Rule 56(a) or 56(b)); *Capitol Records, Inc. v. Progress Record Distrib. Inc.*, 106 F.R.D. 25 (N.D. Ill. 1985) (stating Rule 56(d) does not allow party to bring motion for mere factual adjudication and that a party may not move for partial summary judgment “on less than

of Rule 56(d) is to save the serviceable fruits of a court's denial of a procedurally accurate, but ultimately unsuccessful motion for summary judgment.⁷ As such, Rule 56(d) is not designed as a stand-alone motion, but as an ancillary tool to a motion for summary judgment. *Id.* In sum, Rule 56(d) permits a court to determine some material facts that appear without substantial controversy, but **only** when a party has unsuccessfully moved for full summary judgment under Rule 56(a) or (b). *Oberweis Dairy, Inc. v. Associated Milk Producers, Inc.*, 553 F. Supp. 962, 970-71 (N.D. Ill. 1982).

¶21 [9] Carlsmith contends in its reply brief that the CNMI Superior Court has specifically stated that partial summary judgments are authorized by Com. R. Civ. P. 56(d). We disagree. We find the two cases mentioned in the Superior Court's order are distinguishable and not binding. More importantly, the doctrine of stare decisis does not compel one trial court, much less an appellate court, to follow the decision of another trial court. *Starbuck v. City and County of San Francisco*, 556 F.2d 450, 457 n.13 (9th Cir. 1977).

¶22 In *Wiseman v. Flores*, Civ. No. 96-1270 (N.M.I. Super. Ct. Jan. 14, 1998) (Order) the Superior Court granted in part a full motion for summary judgment. Shortly after the ruling in its favor, the plaintiff brought a motion under Rule 56(d). This case is therefore procedurally distinguishable because the plaintiff's Rule 56(d) motion was brought after a full summary judgment motion, in which the Superior Court made findings of undisputed fact.

¶23 Moreover, *Wiseman* is substantively distinguishable because the material facts in question were undisputed by the parties. *Wiseman* at 2. The evidence involved the sequence of granting land by a

a single claim").

⁷ See, Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 10B Federal Practice and Procedure: Civil 3d § 2737 at n.10 (1998).

written deed instrument. *Id.* at 2. The parties were in agreement regarding the existence, timing, and parties to whom the land was deeded. *Id.* at 2. The conflict to be resolved between the parties was limited to applying the appropriate law to the contradictory testimonial evidence based on the undisputed facts. *Id.* at 4-8. In making its final determination, the Superior Court correctly determined the testimony could not be used to contradict the terms of a deed that was clear on its face. *Id.* at 8.

¶24 In *Ja v. Yeol*, Civ. No. 97-0962 (N.M.I. Super. Ct. Jan. 26, 1998) (Order Granting Plaintiff's Motion for Partial Summary Judgment), the court's determination of the parties' legal rights under a lease was a liability question (and not a damages question) and could have been adjudicated under Rule 56(c). There was no apparent challenge by the defendant to the plaintiff's right to seek partial summary judgment. Additionally, the validity of the lease in question was not in dispute between the parties. *Id.* at 2. Rather, the court was asked to decide the issue of legal liability pursuant to the lease in question. *Id.*

¶25 As a practical matter, the Court finds that there is a substantial risk of facing motion after motion for stand-alone, non-dispositive partial summary judgment motions based upon the Superior Court's decision. As other jurisdictions have indicated:

Rule 56(d) is not to be viewed as a device to obtain adjudications of non-dispositive fact issues. Use of Rule 56(d) for such purposes would draft every district court into performing the task, properly the responsibility of the litigants under this Court's (and every other court's) standard form of pretrial order, of narrowing the issues for trial. Any such result would be unacceptable, because it would make every case on this court's calendar fair game for such a summary judgment' motion before the case goes to trial. Judicial calendars are far too large to permit so onerous and impermissible a use of judicial resources.

SFM Corp. v. Sundstrand Corp., 102 F.R.D. 555 (N.D. Ill. 1984). We find that this type of piecemeal litigation should be avoided in order to maintain the integrity of the judicial process.

2. Carlsmith Did Not Meet its Burden of Proof in Moving for Summary Judgment

¶26 [10] The moving party on a motion for summary judgment has the burden to show no genuine issues of material fact exist. Com. R. Civ. P. 56; *Cabrera v. Heirs of Castro*, 1 N.M.I. 172, 176 (1990); *Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993). The moving party bears the initial and ultimate burden of establishing its entitlement to summary judgment. *Santos v. Santos*, 4 N.M.I. 206, 210 (1994) (citations omitted). This burden includes the need to conclusively establish that the facts alleged by the non-moving party are not susceptible of an interpretation that might give rise to the cause of action alleged. *Adickes v. Kress*, 398 U.S. 144, 160 n.22, 90 S. Ct. 1598, 1610 n.22 (1970). Consequently, where the evidence supporting the summary judgment motion does not conclusively establish the absence of every genuine issue of material fact, “summary judgment must be denied even if no opposing evidentiary matter is presented.” *Id.* at 160.

¶27 [11] As the Superior Court acknowledged, all inferences to be drawn from the underlying facts are viewed in a light most favorable to the non-moving party. *Rios v. Marianas Pub. Land Corp.*, *supra*, 4 N.M.I. at 210. Therefore, given a choice between multiple inferences, the Court must choose those inferences most favorable to the party opposing the motion for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962). Even if the facts are undisputed, they may still give rise to more than one inference. As the court stated in *In re Varrasso*:

Undisputed facts do not always point unerringly to a single, inevitable conclusion. And when facts, though undisputed, are capable of supporting conflicting yet plausible inferences—inferences that are capable of leading a rational fact finder to different outcomes in a litigated matter depending on which of them the fact finder draws—then the choice between those inferences is not for the court on summary judgement.

In re Varrasso, 37 F.3d 760, 764 (1st Cir. 1994).

¶28 Petitioner argued that Carlsmith’s delay of formal notice of death to DHLI and its shareholders damaged the Estate. Petitioner included Bomse’s affidavit stating that the delay in notice gave DHLI a strategic advantage that “negatively impacted the Estate’s ability to negotiate, litigate, or arbitrate a higher stock purchase price for the Estate compared to what was ultimately negotiated.” Carlsmith argued that Bomse had made past statements that the estate was not harmed from the delay.

¶29 The Superior Court agreed with Carlsmith’s interpretation of Bomse’s past statements and held that Bomse’s affidavit was inconsistent with his prior comments. “Therefore, viewing the evidence in the light most favorable to Plaintiff, the court finds Defendants’ position *more tenable*.” *Bank of Saipan v. Carlsmith*, Civ. No. 98-0973 (N.M.I. Super. Ct. July 6, 2000) (Order Granting Defendants’ Motion for Partial Summary Judgment) (Opinion at 9) (emphasis added).

¶30 [12] We find that the Superior Court erred in granting defendant’s motion for summary judgment. It is not the function of the Superior Court to decide which position is “more tenable” when evaluating a motion for summary judgment. As stated above, the burden on a motion for summary judgment is on the moving party and all evidence should be viewed in the light most favorable to the non-moving party. The court chose an inference which it believed – that the estate was not harmed. The trial court on summary judgment may not pick between two reasonable inferences. The choice must be left to the trier of fact. *In re Varraso*, 37 F.3d 760, 764 (1st Cir. 1994). A trial court cannot weigh the evidence and make findings on disputed factual issues on a motion for summary judgment. *Rios v. Marianas Pub. Land Corp.*, *supra*, 3 N.M.I. at 518-519 (trial court cannot weigh evidence and make findings on disputed factual issues on summary judgment). Questions of intent are factual questions which are particularly inappropriate for summary judgment. *Riley v. Pub. School Sys.*, 4 N.M.I. 85, 88 (1994); *Marianas Island Airport Auth. v. The Ralph Parsons Co.*, 1 CR 181, 188

(1981).

¶31 With regards to the Petitioner's request for this Court to address the doctrine of judicial estoppel, this Court declines to address that issue.

CONCLUSION

¶32 For the foregoing reasons, we GRANT the petition for writ of mandamus. We therefore ORDER the Superior Court to vacate its order granting Carlsmith's Motion for Partial Summary Judgment and instead issue an order denying Carlsmith's Motion for Partial Summary Judgment, because there are disputed material facts which should properly be adjudicated through discovery and may be potentially determined at trial by a jury.

DATED this 15th day of June _____ 2001.

/s/ Miguel S. Demapan

MIGUEL S. DEMAPAN, Chief Justice

/s/ John A. Manglona

JOHN A. MANGLONA, Associate Justice

/s/ Alberto C. Lamorena III

ALBERTO C. LAMORENA III, Special Judge