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APPELLATE CASE NO. CVA2016-005

(Superior Court of Guam Special Proceedings Case No. SP0137-14)

IN THE SUPREME COURT OF GUAM

IN THE APPLICATION OF DEPARTMENT OF HEALTH AND SOCIAL SERVICES FOR ADMINISTRATIVE INSPECTION AND SEARCH WARRANT OF WISE OWL ANIMAL HOSPITAL

MOVANT-APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Guam Legislature has provided a remedy (8 G.C.A. Section 35.45) for a person whose property has been wrongfully seized and held by the Government of Guam. The Government-Appellee Department of Public Health & Social Services ("DPHSS") used its own wrongful failure to renew Movant-Appellant Joel Joseph, D.V.M.'s ("Dr. Joseph") Controlled Substance Registration Certificate ("CSR") as a pretext to seize thousands of patient files, computers and medications from Dr. Joseph's clinic. After DPHSS had kept his property for eighteen months, Dr. Joseph filed a motion under 8 G.C.A. Section 35.45 seeking the return of that property. While DPHSS eventually returned much of the property, DPHSS continues to assert meritless grounds to avoid returning all of the property which it wrongfully seized.

Ironically, after devoting much of its brief to its claims that Dr. Joseph waived various issues on appeal, DPHSS itself failed to preserve several of the issues which it asserted in its Appellee's Brief. Further, by failing to address Dr. Jospeh's core substantive argument regarding the interpretation of a critical Guam statute, DPHSS should be deemed to have had conceded that issue. Finally, contrary to DPHSS' claims, Dr. Joseph should not be deemed to have waived the right to assert his issues on appeal.

I. DPHSS HAS WAIVED OR CONCEDED ISSUES ON APPEAL

A. Failure to Address Dr. Joseph's Interpretation of the Guam Import Registration Statute [9 G.C.A. § 67.601(b)]

In his Opening Brief, Dr. Joseph discussed at some length how, pursuant to 9 G.C.A. Section 67.601(b), there was no requirement under Guam law that a person importing Schedule III or IV non-narcotic substances must obtain an import registration. Appellant's Br. at 23-26 (Jul. 20, 2016).

This discussion was advanced in order to demonstrate that the trial court had erred in finding that Dr. Joseph had violated Guam law by importing such substances without an import registration issued by Guam. Excerpts of Record ("ER") at 0042 (Find. Fact & Concl. L. at p. 4, ¶ 7 (Jul. 7, 2015)).

As set forth in that discussion, while there may be a registration requirement for the importation of Schedule I or II substances under Section 67.601(a), there is no such requirement for the importation of non-narcotic Schedule III or IV substances under Section 67.601(b). Critically, DPHSS acknowledged in the case below that *none* of the substances in question were either Schedule I or II. A review of DPHSS' own description of those substances demonstrates that point. ER at 0061 (Opp. to Movant's List, Exh. I (Jan. 6, 2016)).

Consequently, it is striking that DPHSS failed to even address, let alone begin to rebut, Dr. Joseph's interpretation of Section 67.601(b) in its Appellee's

Brief. Given DPHSS' failure to address this interpretation of Section 67.601(b), the Court should deem DPHSS to have conceded this issue.

An appellee who fails to include and properly argue a contention in the appellee's brief takes the risk that the court will view the contention as forfeited. 16AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER, *ET AL.* FEDERAL PRACTICE & PROCEDURE, Civil § 3974.2, p. 274 (4th ed. 2008). Courts have held that the failure of the appellee to respond to an issue raised by the appellant is tantamount to a confession that appellant's contention is correct. *See* Trammell v. State, 622 So.2d 1257, 1261 (Miss. 1993).

Other courts have held that when the appellee fails to discuss an issue in its brief, the appellee is deemed to have waived argument on that issue. *See* Holland v. Gee, 677 F.3d 1047, 1066-67 (11th Cir. 2012).

In this case, DPHSS' failure to even address the interpretation of Section 67.601(b) should be deemed a concession that Dr. Joseph's interpretation is correct. In effect, DPHSS has conceded that the trial court erred to the extent that it held that Dr. Joseph may have violated Section 67.601(b) by importing non-narcotic Schedule III or IV substances.

Rather than address the interpretation of Section 67.601(b) proffered by Dr. Joseph in his Opening Brief, DPHSS instead raised the novel argument—for the

first time on appeal—that since no controlled substances are manufactured on Guam, *all* such substances should be deemed "imported" under a federal regulation [21 C.F.R. § 1301.11(a)]. Appellee's Br. at 26 (Aug. 19, 2016). Under DPHSS' creative new theory, even the receipt of medications on Guam which had been sent from the United States would require a federal import registration.

DPHSS offered no authority for this novel interpretation of the federal regulation. However, a review of relevant authority demonstrates that the federal regulation has no application to the shipment of medications from the United States into Guam.[1] For purposes of that regulation, importation is defined as:

> [T]he bringing in, or introduction of an article into either the jurisdiction of the United States or the customs territory of the United States and from the jurisdiction of the United States into the customs territory of the United States.
>
> 21 C.F.R. § 1300.01.

While Guam is under the jurisdiction of the United States, it is outside the customs territory of the United States. *See* 19 C.F.R. § 7.2(a) and (b). *See also* People of Guam v. Sugiyama, 846 F.2d 570 (9th Cir. 1988) (Guam is outside the customs territory of the United States, and administers its own customs).

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[1] Appellant may properly assert a new argument in its reply brief to address an argument raised for the first time in the appellee's brief. *See* Sadeghi v. I.N.S., 40 F.3d 1139, 1143 (10th Cir. 1994); In re Wildman, 859 F.2d 553, 556, n.4 (7th Cir. 1988).

Thus, the bringing of an article from the jurisdiction (or customs territory) of the United States (*i.e.* the 50 states) into an area outside the customs territory of the United States (*i.e.* Guam) does not constitute importation for purposes of this federal regulation. *See* United States v. Cabaccang, 332 F.3d 622, 630 (9th Cir. 2003) (federal law bans the importation of drugs from Guam to California, but not in the reverse direction).

At the evidentiary hearing below, Dr. Joseph confirmed that some of the substances in question came from the United States mainland:

> MS. RONS: You did not get those drugs from the United States, did you?
>
> DR. JOSEPH: Um, some of them we did, some of them we didn't.

Appellee's Supplemental Excerpts of Record ("SER") at 44 (Transcript ("Tr."), at 37 (Evidentiary Hr'g., Feb. 20, 2015)).

Contrary to DPHSS' claim, Dr. Joseph did not need a federal import registration to receive medications sent from the United States. Under DPHSS' mistaken view of this regulation, receiving medications in Alaska sent there from Oregon (or any other state) would require a federal importation registration. The Ninth Circuit has rejected a similarly misplaced claim in a related context. *See* United States v. Cabaccang, 332 F.3d 622, 631 (9th Cir. 2003) (rejecting claim that

bringing drugs from Portland to Anchorage constituted "importation.") This Court should likewise reject DPHSS' seriously misguided view of this federal regulation.

B. DPHSS Waived its Claims as to the Applicability of 8 G.C.A. Section 35.45

DPHSS argues at some length that Dr. Joseph could not properly use a motion pursuant to 8 G.C.A. Section 35.45 to seek the return of his property seized by the subject search warrant. Appellee's Br. at 17-18. However, DPHSS abandoned this claim in the trial court, and cannot properly re-assert it on appeal.

Preliminarily, a review of DPHSS' response to Dr. Joseph's motion made pursuant to Section 35.45 reveals that there was no challenge raised therein as to the propriety of proceeding through a motion made pursuant to that statute. SER at 1-4 (DPHSS' Response to Mot. Return Property, at 1-4 (Nov. 12, 2014)).

At the evidentiary hearing held in the trial court, DPHSS did belatedly assert an objection to Dr. Joseph's proceeding by motion under Section 35.45. Prior to taking testimony at that hearing, DPHSS made an oral motion to dismiss, based on Dr. Joseph having filed a motion under Section 35.45 instead of pursuing some sort of civil action. DPHSS' counsel argued:

> So, a motion for return of property is just not the appropriate process, you have to ask where is the underlying cause of action.

Dr. Joseph's Supplemental Excerpts of Record ("Dr. Joseph's SER") at 0096 (Aug. 29, 2016) (Tr. at 5, ll. 17-19 (Evidentiary Hr'g., Feb. 20, 2015)).[2]

In response, the trial court noted that:

> I'm just extremely concerned, indeed, that the Government had come in here, and Mr. Rivera did sign this order releasing the other property for Dr. Joseph, but never once did the Court ever hear that it lacked jurisdiction.

SER at 41. (Tr. at 9, ll. 6-9 (Evidentiary Hr'g.)).

Initially, the trial court agreed to take DPHSS' motion to dismiss under advisement. SER at 41 (Tr. at 9, ll. 21-25 (Evidentiary Hr'g.)); Dr. Joseph's SER at 0097 (Tr. at 10, l. 1 (Evidentiary Hr'g.)). However, later in the same hearing, DPHSS expressly withdrew its motion.

> MS RONS: Your Honor, at this time Public Health would move to withdraw this motion to dismiss since we've had the hearing? [*sic*]
>
> THE COURT: You're going to withdraw the Court's lack of jurisdiction as you initially had orally argued this morning?

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[2] Curiously, DPHSS included pages 4 and 6 through 9 of the transcript in its SER, but failed to include page 5.

MS RONS: Yes.

THE COURT: All right. Very well, so withdrawn.

Dr. Joseph's SER at 0098 (Tr. at 94, ll. 8-15 (Evidentiary Hr'g., Feb. 20, 2015)).

Given that DPHSS expressly withdrew its objection to the trial court proceeding pursuant to a motion made under Section 35.45, DPHSS waived any right to argue otherwise on appeal. *See* Imperial v. Suburban Hospital Ass'n., 37 F.3d 1026, 1031 (4th Cir. 1999) (party who abandoned claim for injunctive relief could not properly raise issues related to that claim on appeal); Hargrove v. Fibreboard Corp., 710 F.2d 1154, 1164 (5th Cir. 1983) (party who abandoned a theory at trial level could not properly re-assert that theory on appeal); Oberlin v. Marlin America Corp., 596 F.2d 1322, 1325, n.1 (7th Cir. 1979) (party who abandoned argument regarding personal jurisdiction over one defendant at trial court could not properly raise that claim on appeal).

Even if the Court were to consider DPHSS' previously-abandoned claim that Section 35.45 only applies in a criminal proceeding, that claim is belied by a review of pertinent authority.

In Ensoniq Corporation v. Superior Court, 65 Cal. App. 4th 1537, 77 Cal. Rptr. 2d 507 (1998), the prosecutor caused a search warrant to be issued against

Dattoro based on a complaint by his former employer that Dattoro had stolen its intellectual property. The search warrant was executed and engineering notebooks, computers, notes and similar such property was seized. However, the prosecutor later decided not to file criminal charges against Dattoro.

Even though there was no criminal proceeding pending, Dattoro filed a motion pursuant to California statutes similar to Section 35.45 for the return of his property. Dattoro's former employer sought to intervene in the motion hearing. The appellate court held that the trial court erred in allowing the employer to intervene, and ordered that the property be released to Dattoro.

The Ensoniq case was cited in support of Dr. Joseph's motion in the trial court, and was also cited in his Opening Brief. DPHSS made no effort to distinguish the holding in the Ensoniq case in its Appellee's Brief.

Federal courts, interpreting Rule 41(g) of the Federal Rules of Criminal Procedure, which contains language similar to that of Section 35.45, also recognize that a person against whom no criminal charges have been brought may move for the return of seized property, and that such a motion is deemed a civil equitable proceeding. Ramsden v. United States, 2 F.3d 322, 324 (9th Cir. 1993); In re Return of Seized Property, 270 F.R.D. 576, 578 (S.D. Cal. 2010); In re Seizure of Various Business & Personal Property, 2007 WL 1574114 (E.D. Wa. 2007).

The Court should reject DPHSS' claim that a motion made pursuant to Section 35.45 may only be made in criminal proceedings.

II. DR. JOSEPH'S ISSUES SHOULD NOT BE DEEMED WAIVED ON APPEAL

A. Post-Judgment Motion Not Required

DPHSS seems to argue that Dr. Joseph waived his right to attack the trial court's legal conclusions because he did not file a post-trial motion. Appellee's Br. at 18-19. Curiously, DPHSS cites no pertinent authority for this proposition.

Preliminarily, the Court should disregard DPHSS' assertion simply on the basis that DPHSS failed to offer any authority for this claim. *See* Rahn v. Bd. of Trustees of N. Ill. Univ., 803 F.3d 285, 295 (7th Cir. 2015) (plaintiffs waived argument by their failure to cite any legal authority in support of it); Clayton v. ConocoPhillips Co., 722 F.3d 279, 291 (5th Cir. 2013) (plaintiff waived argument which had no on-point authority supporting it); L & A Contracting Co. v. Southern Concrete Services, 17 F.3d 106, 113 (5th Cir. 1994) (defendant's one-page argument without supporting authority was deemed abandoned as being inadequately briefed).

However, even if the Court did not disregard DPHSS' argument solely on that basis, there is ample authority demonstrating that the law is to the contrary. In fact, it is well-established that a party need not file post-judgment motions in order

to preserve legal issues for appeal. *See* Meinecke v. H&R Block of Houston, 6 F.3d 77, 82, n.2 (5th Cir. 1995) (It has never been the case that a Rule 60(b) motion must be filed as a prerequisite to appeal.); Richardson v. Oldham, 12 F.3d 1373, 1377 (5th Cir. 1994) (motion for reconsideration is not a prerequisite for taking an appeal); Chicago College of Osteopathic Medicine v. George A. Fuller Co., 719 F.2d 1335, 1350, n.2 (7th Cir. 1983) (party need not move for a new trial challenging the alleged errors as a prerequisite to an appeal).

Dr. Joseph raised the issue of no need for an importation permit under Section 67.601(b) in his objections to DPHSS' proposed findings. ER at 0037, ¶¶ 4 and 7 (Obj. by Dr. Joseph to Prop. Finds. Fact & Concl. L., at 2 (Mar. 5, 2015)). There was no need for him to file post-judgment motions to preserve this issue on appeal. DPHSS' unsupported claim that Dr. Joseph was required to file post-judgment motions to preserve this legal issue is meritless.

B. This Court Should Resolve Pertinent Questions of Law

This Court has recognized that there are situations in which the court will entertain arguments made for the first time on appeal. One such situation is when the issue purely involves a question of law. Mack v. Davis, 2013 Guam 13, at ¶42.

Other courts have recognized and applied a similar exception. *See* Kaass Law v. Wells Fargo Bank, 799 F.3d 1290, 1293 (9th Cir. 2015) (Court considered

issue of whether law firm can be sanctioned under federal statute which was raised for the first time on appeal, as it was purely an issue of law); Schneider v. County of San Diego, 285 F.3d 784, 792, n.3 (9th Cir. 2001) (Court considered appellant's claim regarding pre-judgment interest raised for the first time on appeal as the issue was purely a question of law).

Other courts entertain newly-raised arguments which are not dependent on any new or controverted facts and relate generally to the arguments raised below. *See* Anchorage Chrysler Ctr., Inc. v. Daimler Chrysler Motors Co., 221 P.3d 977, 984 (Alaska 2009); Municipality of Anchorage v. Citizens for Representative Governance, 980 P.2d 1058, 1063 (Alaska 1994).

DPHSS argues that Dr. Joseph failed to raise certain issues in the trial court such that the Court should not entertain those issues on appeal. However, a review of those issues discloses that such issues are purely questions of law.

For example, DPHSS refers to the issue of whether or not the burden of proof imposed under 9 G.C.A. Section 67.505 applies to a hearing on motion made pursuant to 8 G.C.A. Section 35.45. This is purely a question of law. Similarly, the issue of whether or not the judgment issued by the trial court complied with Rule 58 of the Guam Rules of Civil Procedure is, once again, purely a question of law.

The resolution of these questions does not depend on any new or controverted facts. Both of these questions of law relate generally to Dr. Joseph's claims below. In his motion, Dr. Joseph asserted that he was proceeding pursuant to Section 35.45. Dr. Joseph's SER at 0093-0094 (Mot. for Return of Property, October 14, 2014). Section 35.45 is not part of the Guam Uniform Controlled Substances Act [Chapter 67, Title 9] ("the Act"). Section 67.505 applies to proceedings under the Act, and Dr. Joseph was not proceeding under the Act.

It is also important to recognize the unusual procedural posture surrounding Dr. Joseph's objection to the issuance of a judgment in this matter. Initially, DPHSS moved for entry of judgment on November 19, 2015. Record on Appeal ("RA"), Docket No. 44 (Mot. Entry Judgment, Nov. 19, 2015). The court filed a judgment on December 14, 2015, several days before Dr. Joseph's opposition to that motion was due.[3] RA, Docket No. 48 (Judgment, Dec. 14, 2015). Dr. Joseph filed a motion to vacate the judgment on December 23, 2015. RA, Docket No. 55 (Mot. Vacate Order, Dec. 23, 2015).

While Dr. Joseph may not have expressly challenged the issuance of a judgment on Rule 58 grounds, Dr. Joseph had challenged the issuance of a judgment in this case. Moreover, Dr. Joseph could hardly have objected to the

[3] Dr. Joseph's opposition was due on December 17, 2015, twenty-eight (28) days after the filing of the motion, pursuant to the trial court's Local Civil Rule CVR7.1(d)(1).

form of the judgment prior to its issuance, as DPHSS did not submit a proposed judgment.

C. Party May Properly Cite Additional Authority in Support of Its Claims on Appeal

Finally, DPHSS also complains that Dr. Joseph did not expressly discuss the significance of the lack of the issuance of a summons in his motion to vacate the judgment in the court below. Appellee's Br. at 15. But this discussion of the lack of a summons was merely additional authority in support of his position that it was not proper to issue a judgment.

Federal courts have rejected similar claims. *See* United States v. Rapone, 131 F.3d 188, 196 (D.C. Cir. 1997) (defendant who demanded trial by jury in contempt case was not precluded from relying on statutory authority not cited previously for that demand on appeal; defendant was not making a new argument but rather was merely offering new authority for his position); Federal Deposit Ins. Co.v. Wright, 942 F.2d 1089, 1094 (7th Cir. 1991) (FDIC was not precluded from citing statutory authority in support of its position on appeal which it had not relied on in the trial court).

Dr. Joseph's position in the trial court was that it was improper or unnecessary for the trial court to issue a judgment in determining his motion made pursuant to 8 G.C.A. Section 35.45. Dr. Joseph's position is the same before this

Court. Dr. Joseph is not precluded from citing additional authority in support of that position in this Court.

DPHSS seems to suggest that a party may not properly rely on additional authority in support of its contentions on appeal which it did not cite at the trial court. DPHSS' suggestion is meritless.[4]

CONCLUSION

Based on the foregoing, the trial court erred in issuing a judgment following the evidentiary hearing on Dr. Joseph's motion made pursuant to 8 G.C.A. Section 35.45. Further, the trial court erred in holding that the importation of Schedule III and IV controlled substances required registration, pursuant to 9 G.C.A. Section 67.601(b). For these reasons, the judgment should be REVERSED, and this matter REMANDED to the trial court for issuance of an order directing the return of all of the substances in question to Dr. Joseph.

Dated this 29th day of August, 2016.

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By _____
MITCHELL F. THOMPSON

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[4] DPHSS somehow interprets that portion of Dr. Joseph's brief as suggesting that the trial court lacked jurisdiction over Dr. Joseph's motion. Appellee's Br. at 16. To clear up any misunderstanding on the part of DPHSS, Dr. Joseph has never asserted such a claim.

GRAP 16(a)(7)(B) Certificate of Compliance with Type-Volume Limitation

This brief complies with the type volume limitation of Rule 16(a)(7)(B) because this brief contains 3,372 number of words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Dated this 29th day of August, 2016.

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By _____
MITCHELL F. THOMPSON

CERTIFICATE OF SERVICE

I, **MITCHELL F. THOMPSON**, do hereby certify that on the 29th day of August, 2016, I caused to be served on the following person(s) a copy of the **MOVANT-APPELLANT'S REPLY BRIEF** and **MOVANT-APPELLANT'S SUPPLEMENTAL EXCERPTS OF RECORD**, by delivering and leaving a copy of same at the office of counsel for Appellee, as follows:

R. Happy Rons, Esq.
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590 S. Marine Corps Drive, Suite 706
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Dated this 29th day of August, 2016.

THOMPSON THOMPSON & ALCANTARA, P.C.
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By _____
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