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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 SUPPLEMENTAL BRIEF RE JURISDICTION

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STATEMENT OF SUPPLEMENTAL ISSUES

1. Does the Judgment in this case comply with all requirements for a Judgment under Rule 58(a)(1) of the Guam Rules of Civil Procedure ("GRCP")?

2. Even though the Judgment filed on March 30, 2016 ("Judgment") in this case may not comply with all of the requirements of Rule 58(a)(1) of the GRCP, does such defect deprive this court of jurisdiction to hear an appeal predicated on that document?

3. Assuming that the defect in the Judgment would otherwise deprive this court of jurisdiction, does Rule 58(b)(2)(B) of the GRCP nonetheless permit this appeal to proceed based on the Amended Findings of Fact, Conclusions of Law, and Order filed on October 30, 2015 ("Amended Findings")?

SUMMARY OF SUPPLEMENTAL ARGUMENTS

> Nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.
>
> Bankers Trust Co. v. Mallis, 435 U.S. 381, 385-86, 98 S.Ct.1117, 55 L.Ed.2d 357 (1978)

Appellant-Movant Dr. Joel Joseph submits the following supplemental briefing, per Order of this Court filed November 3, 2016 herein. For the reasons set out below, a technical defect in the form of a final judgment does not deprive this Court of jurisdiction to determine an appeal.

ARGUMENT

I. REQUIREMENTS FOR A JUDGMENT UNDER RULE 58(a)(1)

Rule 58(a)(1) of the GRCP provides that every judgment must be set forth on a separate document. This Court has recognized that a judgment which incorporates another document may not comply with the separate document requirement under Rule 58 of the GRCP. *See* Dept. of Rev. & Tax. v. Civil Service Commission, 2007 Guam 17, at ¶ 11, n.4 (noting, without deciding, the issue of the propriety of the judgment therein which incorporated another document).

Other courts have noted that a judgment must be "self-contained." Local Union No.1992 of IBEW v. Okonite Co., 358 F.3d 278, 284 (3d Cir. 2004); Mullane v. Chambers, 333 F.3d 322 (1st Cir. 2003); Saipan Lau Lau Dev. v. Superior Court, 2000 MP 16, at ¶ 11.

The commentators note that a judgment should be self-contained and not refer, for purposes of completeness or explanation, to other documents. *See* 12 *Moore's Fed. Practice 3d,* section 58.05[4][a], at p. 58-24; 11 Wright & Miller, *Federal Practice & Procedure: Civil 3d*, section 2785, at pp. 32-34 (the better view is that a judgment should not incorporate other documents by reference).

A judgment "should be complete and self-contained" in order to comply with the federal model of Rule 58. Otis v. City of Chicago, 29 F.3d 1159, 1163

(7th Cir. 1994) (judgment should be a self-contained document saying who has won and what relief has been awarded).

In this case, the Judgment did not state which party prevailed, or what relief had been awarded. Instead, the Judgment merely stated:

> [T]he Court hereby enters its **JUDGMENT** as set forth in the Findings of Fact and Conclusions of Law and Amended Findings of Fact and Conclusions of Law attached hereto and incorporated by reference as though fully set forth herein.
>
> Appellant's Excerpts of Record ("ER") at 0067 (Judgment, ll. 20-24 (Mar. 30, 2016)).

The Judgment issued by the lower court was a separate document, but it did not fully comply with Rule 58 in that it was not self-contained. However, even though the Judgment in this case did not comply with all requirements of Rule 58, that does not mean that this Court lacks jurisdiction over this appeal, as discussed below.

II. THE SEPARATE JUDGMENT REQUIREMENT OF RULE 58 IS NOT JURISDICTIONAL

A. Purpose of Separate Judgment Provision was to Create Greater Certainty as to Time for Filing an Appeal

Rule 58 of the GRCP is modeled after a similar Rule 58 of the Federal Rules of Civil Procedure ("FRCP"). The "Separate Judgment" provision of Rule 58 of the FRCP was added in 1963. As noted in the Advisory Committee Notes, the amended rule was intended to: "eliminate uncertainties by requiring that there be a

judgment set out on a separate document—distinct from any opinion or memorandum." This was to prevent uncertainty which had arisen when an opinion or memorandum had contained "some apparently directive or dispositive words," and created doubt as to if and when the time in which to appeal had begun to run. *See* FRCP Rule 58.

An example of how that uncertainty was resolved by the amended Rule 58 is set out in United States v. Indrelunas, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973). In that case, a jury verdict in favor of plaintiffs was entered on the docket, but a formal judgment was not entered until sometime later. The Supreme Court held that, in light of the amendment to Rule 58, the appeal was timely in that it was the entry of the judgment, not the verdict, which triggered the time for appeal. United States v. Indrelunas, *supra*, at 221.

The Ninth Circuit has recognized that the sole purpose of the separate document requirement under Rule 58 is to clarify when the time for appeal begins to run. Noli v. Commissioner, 860 F.2d 1521, 1525 (9th Cir. 1988); Harris v. McCarthy, 790 F.2d 753, 756 (9th Cir. 1986).

As noted by that court, "the separate entry requirement was intended to add clarity to the time requirement, not confusion." Hollywood v. Santa Monica, 886 F.2d 1228, 1232 (9th Cir. 1989). In United States v. Nordbock, 38 F.3d 440, 442, n.1 (9th Cir. 1994), the court rejected the appellee's claim that the court lacked

jurisdiction over the appeal due to the lack of a separate judgment, noting that this provision of Rule 58 should be interpreted to *prevent* the loss of the right to an appeal, not to facilitate that loss.

It is with this understanding that courts have held that non-compliance with the separate entry provision of Rule 58 is not jurisdictional as discussed below.

B. The Lack of a Separate Entry under Rule 58 does Not Violate the Final Judgment Rule

In Bankers Trust Co. v. Mallis, 435 U.S. 381, 385-86, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978), the district court's opinion and order stated that the complaint was dismissed, but no separate judgment was ever entered. The Supreme Court held that: "it could not have been intended that the separate document requirement of Rule 58 be such a categorical imperative that the parties cannot waive it." Bankers Trust Co. v. Mallis, *supra*, at 384. As the district court, and the parties, had understood that the opinion and order was the final decision in the case, the Supreme Court found that the court of appeals properly determined the appeal.

Other circuits have reached the same conclusion that the lack of a separate judgment in compliance with Rule 58 does not deprive the appellate court of jurisdiction over the appeal. *See* de Jesus-Mangal v. Rodriquez, 383 F.3d 1, 5 (1st Cir. 2004) (even though there was no separate judgment, appellate court may properly exercise jurisdiction over the appeal when the district court's order was clearly intended to dispose of the case, and the appellee briefed the case as a final

appealable order); Quinn v. Hayes, 234 F.3d 837, 843 (4th Cir. 2000) (non-compliance with Rule 58 no bar to subject matter jurisdiction when order on appeal was a final decision entered on docket, and there was no objection by appellee).

See also Trotter v. Regents of Univ. of N.M., 219 F.3d 1179, 1183 (10th Cir. 2000) (because Rule 58 was designed solely to eliminate uncertainty, separate document requirement does not apply when there was no question about the finality of the trial court's decision); Pack v. Burns Int'l. Security Service, 130F.3d 1071, 1073 (D.C. Cir. 1997) (Remand to district court to enter a judgment conforming to Rule 58 would serve no practical purpose; motion to dismiss appeal denied).

The commentators are in accord. *See* 12 *Moore's Federal Practice 3d* §58.06[1], at p. 58-34 (Satisfaction of separate entry provision of Rule 58 is not considered a jurisdictional requirement or prerequisite).

Even if there has not been compliance with the separate entry provision of Rule 58, that does not mean that the final judgment rule has been implicated. Rather, the critical question is whether the trial court intended to terminate the litigation.

The final judgment rule requires a party to assert all claims of reversible error in a single appeal following a final judgment on the merits. Hawaiian Rock Products Corp. v. Ocean Housing, Inc., 2016 Guam 4, at ¶16 (Decision and Order

which did not resolve all remaining issues did not constitute a final judgment). The main purpose of the final judgment rule is to avoid multiple, piecemeal appeals. As noted by this Court:

> The final judgment rule is intended to reduce the appellate court's interference with the trial judge's pre-judgment decisions, minimize a party's ability to harass opponents through multiple appeals, and to promote the efficient administration of justice.
>
> Rojas v. Rojas, 2007 Guam 13 at ¶13.

See also Hermiston v. City and County of San Francisco, 627 F.3d 1273, 1279 (9th Cir. 2010) (applying practical, rather than technical, construction of that rule to hold that remand order was final for purposes of appeal, as no danger of piecemeal appeals).

In instances where a trial court has intended to terminate the litigation, non-compliance with the separate entry provision of Rule 58 does not prevent the appellate court from exercising jurisdiction. First Ins. Funding Corp. v. Fed. Ins. Co., 284 F.3d 799, 804, n.1 (7th Cir. 2002); Kalvinskas v. Calif. Inst. of Tech., 96 F.3d 1305, 1307, n.3 (9th Cir. 1995) (lack of separate judgment does not defeat jurisdiction when there has been a timely appeal of a final order).

See also Kirkland v. Legion Ins. Co., 343 F.3d 1135, 1140 (9th Cir. 2003); Williams v. Borg, 139 F.3d 737, 739-40 (9th Cir. 1996) (separate judgment provision is not jurisdictional for appeal); Eberhart v. O'Malley, 171 F.3d 1023,

1024 (7th Cir. 1994) (While compliance with Rule 58 heads off any uncertainty about whether the district court has finished with the case, such compliance is not jurisdictional).

The authorities cited above demonstrate that the lack of the entry of a separate document under Rule 58 does not deprive an appellate court of jurisdiction over an appeal. In this case, there was a separate document—a Judgment—which was entered by the trial court. *A fortiori*, this Court has jurisdiction over this appeal.

C. The Technical Defect in the Final Judgment Herein does Not Deprive this Court from Jurisdiction over this Appeal

A technical defect in a final order or judgment does not divest the appellate court from jurisdiction over the appeal. Spitz v. Tepfer, 171 F.3d 443, 448 (7th Cir. 1998); Casey v. Albertson's Inc., 362 F.3d 1254, 1259 (9th Cir. 2004) (lack of separate judgment no basis to reopen case when the court, and the parties, had treated a district court order as final). *See also* Board of Trustees of Western Conference, etc. v. H.F. Johnson, Inc., 830 F.2d 1009, 1012 (9th Cir. 1987) (separate judgment provision of Rule 58 is not jurisdictional, and may be waived either expressly or by implication).

As noted by the Ninth Circuit, even when there is no separate judgment, if the court order clearly evidences the judge's intention that it is the court's final act in the matter, and the parties proceed before the appellate court as if a separate

judgment had been entered, Rule 58 does not require dismissal of the appeal. Long v. County of Los Angeles, 442 F.3d 1178, 1184, n.2 (9th Cir. 2006).

In this case, the trial court clearly treated its judgment as final and as terminating the litigation below, as it was a separate document entitled "Judgment." Dr. Joseph treated the Judgment as final, by filing his Notice of Appeal within thirty (30) days of its entry on the docket. The Department of Public Health and Social Services ("DPHSS"), the Appellee in this case, did not seek dismissal of the appeal on the ground that there was no final judgment, nor did DPHSS so contend at the oral argument held on October 27, 2016, herein. While Dr. Joseph noted a technical defect in the form of the Judgment on appeal, in that it is not self-contained as required by Rule 58 of the GRCP, that defect does not deprive this court of jurisdiction over this appeal.

III. ALTERNATIVELY, THE AMENDED FINDINGS MAY BE DEEMED A JUDGMENT UNDER RULE 58(b)

As discussed above, it is well-established that the lack of a separate entry under Rule 58 does not deprive the appellate court of jurisdiction over an appeal following an order terminating a case. A technical defect in the form of a judgment does not render an appeal thereof premature. However, even if the law were otherwise, this Court would still have jurisdiction over this appeal by virtue of Rule 58(b).

This Court has previously held that an order, as opposed to a judgment, which disposes of the remaining issues in a case may be deemed a final judgment for purposes of appeal. A decision and order granting a motion to enforce settlement is a final appealable order when it resolved all remaining issues in the case. Sharrock v. McCoy, 2016 Guam 7, at ¶ 40. Similarly, an order which disposed of all remaining issues in a domestic case constituted an appealable final judgment. Marriott v. Marriott, 2014 Guam 28, at ¶ 9.

Rule 58(b)(2)(B) of the GRCP provides that when a separate judgment is not issued within one hundred fifty (150) days from the entry of an order disposing of the case, a judgment will be deemed to have been entered for purposes of appeal. A party then has thirty (30) days in which to file an appeal of that order.

In this case, the trial court issued its Amended Findings on October 30, 2015. The one hundred fifty (150) day period under Rule 58(b)(2)(B) ran on March 28, 2016. Dr. Joseph filed his Notice of Appeal on April 25, 2016, which was within thirty (30) days of the Amended Findings becoming final, such that his appeal was timely. The Notice of Appeal expressly stated that the Amended Findings were a subject of the appeal. ER at 0068 (Notice of Appeal (Apr. 25, 2016)).

The case below was initiated by Dr. Joseph filing a motion for return of property pursuant to Title 8 of the Guam Code Annotated Section 35.45. Dr.

Joseph's motion sought the return of the property seized by DPHSS in its raid on his clinic. ER at 0008 (M. P. & A. Mot. for Return of Prop. Seized (Oct. 10, 2014)).

In determining Dr. Joseph's motion, the trial court initially ordered the return of the property seized by DPHSS, excepting certain controlled substances. ER at 0034-0035 (Order (Feb. 18, 2015)). The trial court then held an evidentiary hearing to determine the remaining issue in the case: whether those controlled substances should also be returned to Dr. Joseph. Appellee's Supplemental Excerpts of Record at 35 (Transcript, at p. 2, ll. 18-24 (Evidentiary Hearing, Feb. 20, 2015)). Following that hearing, the court issued Findings of Fact/Conclusions of Law on July 7, 2015. ER at 0091 (Record on Appeal ("R.A."), Doc. Seq. No. 34 (Finds. Fact & Concl. L. (Jul. 7, 2015))). DPHSS moved to amend those findings, and the court, without opposition from Dr. Joseph, issued its Amended Findings on October 30, 2015. (R.A., Doc. Seq. No. 42 (Amended Finds. Fact & Concl. L. (Oct. 30, 2015))).

The court's Amended Findings resolved the disposition of the remaining items of property, and thus completely resolved the issue raised by Dr. Joseph's motion. As such, the Amended Findings may be deemed a judgment pursuant to Rule 58(b)(2)(B).

CONCLUSION

Based on the foregoing, regardless of any technical defect in the form of the Judgment, this Court has jurisdiction over this appeal.

Dated this 15th day of November, 2016.

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By _____
MITCHELL F. THOMPSON

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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 2,671 words, excluding the parts of the brief otherwise exempted from Rule 16(a)(7)(B)(iii).

Dated this 15th day of November, 2016.

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CERTIFICATE OF SERVICE

I, **MITCHELL F. THOMPSON**, do hereby certify that on the 15th day of November, 2016, I caused to be served on the following person(s) a copy of the **MOVANT-APPELLANT'S SUPPLEMENTAL BRIEF RE JURISDICTION** by delivering and leaving a copy of same at the office of counsel for Appellee, as follows:

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Dated this 15th day of November, 2016.

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