

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

BANK OF SAIPAN, INC.,
Appellant,

v.

ACTING SECRETARY OF COMMERCE FERMIN M. ATALIG,
in his official capacity as the **COMMONWEALTH OF THE NORTHERN**
MARIANA ISLANDS DIRECTOR OF BANKING,
pursuant to 4 CMC § 6105(a),
Appellee,

and

RANDALL T. FENNELL, in his official capacity as
FORMER RECEIVER FOR THE BANK OF SAIPAN,
Real Party in Interest.

SUPREME COURT APPEAL NOS. 02-029-GA & 03-008-GA
SUPERIOR COURT CIVIL ACTION NO. 02-0268B

OPINION

Cite as: *Bank of Saipan, Inc. v. Atalig, 2005 MP 3*

Saipan, Northern Mariana Islands
Submitted November 12, 2003
Decided March 7, 2005

Counsel for Bank of Saipan:

Mair, Mair, Spade & Thompson
Suite 4-B, Horiguchi Building, Garapan
P.O. Box 7917, S.V.R.B.
Saipan, MP 96950

Calvo and Clark, LLP
HSBC Building
Mariana Heights Business Park
PMB 951
P.O. Box 10001
Saipan, MP 96950

Counsel for Randall T. Fennell:

Richard W. Pierce
Law Office of Richard W. Pierce
2nd Floor, Alexander Building, San Jose
P.O. Box 503514
Saipan, MP 96950

Counsel for Sec. of Comm. Fermin M.
Atalig:

Benjamin I. Sachs, Assistant Attorney
General
James D. Livingstone, Assistant
Attorney General
Office of the Attorney General
2nd Floor, Juan A. Sablan Memorial
Building, Capitol Hill
Caller Box 10007
Saipan, MP 96950

FOR PUBLICATION

BEFORE: VIRGINIA SABLAN ONERHEIM, MICHAEL J. BORDALLO, and JESUS C. BORJA, Justices *Pro Tempore*

VIRGINIA SABLAN ONERHEIM, Justice *Pro Tempore*:

¶ 1 Appellant Bank of Saipan, Inc. (“Bank”) seeks to vacate the trial court’s orders granting immunity and indemnification to the temporary receiver for the Bank of Saipan, Randall T. Fennell (“Fennell”). This Court has jurisdiction over judgments and orders of the trial court pursuant to Article IV, Section 3 of the Northern Mariana Islands Constitution and Title 1 Section 3102(a) of the Commonwealth Code.¹ After careful consideration this Court finds that these orders of immunity and indemnification were prematurely issued and are hereby REVERSED.

I.

¶ 2 The issues presented before this Court are: (1) whether the trial court erred when it issued its September 27, 2002 and December 31, 2002 orders exonerating Fennell and conferring immunity and indemnification upon him where there was no live suit or controversy against Fennell and (2) whether the extent of the immunity granted was excessive. The standard of review for whether the trial court erred in granting immunity is *de novo*.²

II.

¶ 3 On April 30, 2002, the Acting Secretary of Commerce Fermin M. Atalig (“Secretary of Commerce”), in his official capacity as the CNMI Director of Banking, filed an *Ex Parte Petition for Appointment of Receiver for Bank of Saipan Under 4 CMC § 6106(f)* (“Petition”) in the trial court. On the same day, the trial court appointed Fennell as temporary receiver for the

¹ Appellant Bank of Saipan asserted that the “collateral order” doctrine may alternatively be applied. Because these orders are final and appealable, the application of the “collateral order” doctrine is unnecessary. Furthermore, Fennell and the Secretary of Commerce conceded this point. “The Order discharging and exonerating Mr. Fennell was final and appealable.” *Joint Opposition Brief of Appellees Acting Secretary of Commerce Fermin M. Atalig and Randall T. Fennell* at 1.

² *Rayphand v. Tenorio*, 2003 MP 12 ¶¶ 2-3.

Bank with restricted powers for a “limited duration not to exceed thirty days.”³ On May 10, 2002, the trial court: (1) extended the duration of Fennell’s term “until such time as [the Secretary of Commerce] or the Receiver moves the Court to substitute a new receiver or to terminate the receivership” and (2) expanding his powers beyond those initially granted by the trial court’s April 30, 2002 order.⁴

¶ 4 Fennell served as receiver for the Bank of Saipan from April 30, 2002 to September 27, 2002. The Bank alleged that during the course of Fennell’s term as receiver, Fennell and the trial court engaged in improper *ex parte* communications. In addition, the Bank alleged that Fennell was a conflicted receiver due to hostility lingering from previous litigation in which Fennell represented a client having adversary interests to those of the Bank. The Bank filed *Respondent’s Emergency Motion to Replace Temporary Receiver* on May 17, 2002, in the trial court.⁵ The CNMI Government separately sought Fennell’s replacement and through the office of the Attorney General, it filed a *Motion for Substitution of Receiver* on May 24, 2002 in the trial court. The trial court eventually replaced Fennell as receiver with Antonio S. Muna on September 27, 2002.⁶

³ *Order Granting Petition for Appointment of Receiver*, issued on April 30, 2002.

⁴ *Clarification of Order Granting Petition for Appointment of Receiver*, issued on May 10, 2002.

⁵ In addition, proceedings on similar issues were simultaneously ongoing in this Court. On May 28, 2002, the Bank filed a *Petition for Writ of Mandamus* in this Court to remove Fennell from the receivership and appoint a new receiver, reassign the case to another judge, and vacate certain orders issued by the trial court in this case. After oral arguments on this matter, the parties negotiated a stay and submitted a *Stipulation and Order for Stay of Proceeding* on November 7, 2002. Pursuant to this Stipulation, this Court ordered a stay of the proceedings on November 13, 2002. A status conference was held on August 12, 2003, in which the parties requested leave to file additional briefing in this matter. Such leave was granted and on August 26, 2003, the Court lifted the stay. The writ was denied by this Court on August 12, 2004 due to changed circumstances after this stay by the parties ended. *Bank of Saipan v. Superior Court*, 2004 MP 15. In particular, a new receiver was in place, a new judge was assigned to the case, and no *ex parte* communications were taking place in the trial court. *Id.*

⁶ *Order Appointing Antonio S. Muna as Receiver*, issued September 27, 2002.

While Fennell was the receiver, he filed a request to exonerate himself on August 9, 2002, in the trial court.⁷ On September 24, 2002, the trial court held a hearing on Fennell's request for exoneration. On September 27, 2002, the trial court issued an *Order Granting the Receiver's Request for Exoneration* ("Exoneration Order"), which gave Fennell full judicial immunity from suits arising out of Fennell's duties as Receiver. In addition, the Exoneration Order provided that the Bank must indemnify Fennell in any such suit. In that Exoneration Order, the court made the following findings:

1. On April 30, 2002, this court appointed Randall Fennell ("Mr. Fennell") as Temporary Receiver for the Bank.
2. Upon appointment, Mr. Fennell, acting as an officer of this court and in full accordance with this court's orders, performed all the necessary and required duties of Receiver. At all times during his tenure as Receiver, Mr. Fennell acted in the best interests of the Bank and its depositors. Mr. Fennell provided reports this court [sic] as to the Bank's condition.

The court finds that Mr. Fennell did an exceptionally good job in the face of an exceptionally difficult undertaking. The court also finds that Mr. Fennell's actions in preserving assets and protecting the depositors of the Bank of Saipan were done in a professional and exemplary manner.

3. In releasing Mr. Fennell from this court's service, the court exonerates and confers full judicial immunity upon Mr. Fennell. "As court-appointed officers, receivers enjoy protections when following courts' orders . . . 'Court appointed receivers act as arms of the court and are entitled to share the appointing judge's absolute immunity provided that the challenged actions are taken in good faith and within the scope of the authority granted to the receiver.'" *INF Enter v. Donnellon*, 729 N.E.2d 1221, 1222 (Ohio Ct. App. 1999) (quoting *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995)); see also *Hervey v. Dyer*, 972 P.2d 42, 45 (Okla. Civ. App. 1998) (stating that it is well recognized that a receiver appointed by and acting on behalf of the court shares the court's immunity from liability). It is further ordered that the Bank and the Receivership shall indemnify Mr. Fennell for any and all claims arising from Mr. Fennell's actions as Receiver.
4. Mr. Fennell is ordered to submit his billings and invoices for approval and

⁷ *Memorandum in Support of Request to Exonerate Receiver*, filed on August 9, 2002. The Bank filed a *Memorandum in Opposition to Request to Exonerate Receiver* on August 23, 2002. Fennell filed *Receiver's Reply to Opposition to Exoneration for Receiver* on August 30, 2002.

payment.⁸

These are all of the findings of the trial court in the Exoneration Order.

¶ 6 The trial court later amended this order on December 31, 2002, with an *Order Granting Randall T. Fennell's Final Billings and Request for Clarification on Order of Exoneration* (“Clarification Order”) stating that “[i]t is further ordered that the Bank and the Receivership shall defend and indemnify Mr. Fennell for any and all claims arising from Mr. Fennell’s actions as Receiver.”⁹ No claims were filed against Fennell when these orders were entered. The Bank now appeals the Exoneration Order and Clarification Order while the Secretary of Commerce and Fennell argue that the orders should be upheld.

III.

¶ 7 The Bank argues that immunity conferred upon receivers is qualified and not absolute. Further, the Bank maintains that receivers must act in good faith in order to be immune and this immunity is determined by the court in which the receiver is sued, not the receivership court. The Bank contends that the trial court’s grant of immunity to Fennell was unprecedented as it was conferred prior to any live controversy before the court in which Fennell’s actions were challenged. The Bank goes on to describe allegations of Fennell’s misconduct as receiver. Finally, the Bank argues that its obligation to defend and indemnify Fennell against “any and all claims” is overbroad.

¶ 8 Fennell and the Secretary of Commerce¹⁰ counter by arguing that a receiver’s discharge cuts the receiver off from future liability. They conclude that since the Bank had a chance to sue

⁸ *Order Granting the Receiver’s Request for Exoneration* (“Exoneration Order”), issued September 27, 2002.

⁹ *Order Granting Randall T. Fennell’s Final Billings and Request for Clarification on Order of Exoneration*, issued December 31, 2002.

¹⁰ Fennell and the Secretary of Commerce filed a joint opposition brief.

Fennell before his discharge and did not, the Bank has waived its right to complain about Fennell's conduct after the trial court has discharged and exonerated him. They also assert that the receivership may still be sued, albeit with a different receiver.¹¹ They challenge the Bank's allegations of misconduct by him as receiver. Lastly, Fennell and the Secretary of Commerce maintain that the Bank's duty to defend and indemnify Fennell is fair.

¶ 9 It is widely supported that receivers are entitled to immunity. “[R]eceptors are court officers who share the immunity awarded to judges.”¹² That immunity, however, is limited – even judges are not entitled to absolute immunity for their actions.¹³ Furthermore, when judges are sued they can then move for dismissal based on immunity. Here, however, Fennell did not move for dismissal based on immunity because there was no suit filed against Fennell.

¶ 10 Fennell and the Secretary of Commerce have cited no legal authority in which any court granted immunity prior to a suit filed against the receiver. Whether or not a receiver is entitled to immunity is “to be resolved at a plenary hearing with sworn witnesses and documentary proof, so that the question of law as to whether the Receiver breached any duty owing a fiduciary may be fairly resolved.”¹⁴ Perhaps Fennell is entitled to some sort of immunity should a subsequent suit be filed against him, but that is to be determined by analysis of the facts before the court hearing that suit.

¹¹ “The official liability remains with the receivership, but it now lies with [the new receiver], who would be sued, officially, while the property remains in the custody of the trial court. See *McNulta v. Lochridge*, 141 US 327, 332, 12 S.Ct. 11, 13, 35 L.Ed. 796 (1891).” *Joint Opposition Brief of Appellees Acting Secretary of Commerce Fermin M. Atalig and Randall T. Fennell* at 20.

¹² *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1303 (9th Cir. 1989) (citing *Kermit Constr. Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 2 (1st Cir.1976)); see also *Property Mgmt. & Invs., Inc. v. Lewis*, 752 F.2d 599, 602 (11th Cir.1985); *T & W Inv. Co., Inc. v. Kurtz*, 588 F.2d 801, 802 (10th Cir.1978); *Bradford Audio Corp. v. Pious*, 392 F.2d 67 (2nd Cir.1968).

¹³ “Judges are afforded absolute immunity when they (1) perform a normal judicial function; unless they are (2) acting in the clear absence of all jurisdiction.” *Davis v. Bayless*, 70 F.3d 367, 373 (5th Cir. 1995) (citing *Stump v. Sparkman*, 435 U.S. 349, 357-60, 98 S. Ct. 1099, 1105-06, 55 L. Ed. 2d 331, 339 (1978)).

¹⁴ *149 Clinton Ave. N., Inc. v. Grassi*, 382 N.Y.S.2d 185, 188 (N.Y. App. Div. 1976).

¶ 11 The receivership may still be sued even though there is a new receiver, but only for suits against the receiver in his *official* capacity. Suits may still be forthcoming against Fennell in his *personal* capacity. “If the receiver exceeds the authority granted by the court or fails to use ordinary care, the general rule is that he or she may be sued in a *personal* capacity.”¹⁵ Immunity is conditioned on the requirements that “the challenged actions are taken in good faith and within the scope of the authority granted to the receiver.”¹⁶ Therefore, receivers may generally be entitled to qualified immunity but they may be held personally liable if they act in bad faith or outside the scope of authority granted by the court.¹⁷

¶ 12 It was impossible to determine if Fennell met these requirements, however, because there was no case or controversy against Fennell before the trial court. “The ripeness doctrine prevents courts from deciding theoretical or abstract questions that do not yet have a concrete impact on the parties.”¹⁸ With no live controversy before the trial court, the court could not determine whether “the challenged actions were taken in good faith.”

¶ 13 This pre-suit grant of immunity is without statutory or caselaw support in the Commonwealth or in any other jurisdiction. None of the receivership cases cited by Fennell and the Secretary of Commerce involved immunity conferred in advance. There is no precedent for a trial court ordering such a sweeping grant of immunity before any suit has been initiated before trial.

¶ 14 In addition to the premature confirmation of immunity to Fennell, the obligation of the

¹⁵ *INF Ent., Inc. v. Donnellon*, 729 N.E.2d 1221, 1222 (Ohio Ct. App. 1999) (emphasis added).

¹⁶ *Davis*, 70 F.3d at 373 (citations omitted).

¹⁷ See 16 FLETCHER CYCLOPEDIA OF PRIVATE CORP. §§ 7864, *et seq.* (2004); 75 C.J.S. *Receivers* § 192 (2002); 65 AM. JUR. 2D *Receivers* § 295 (2001).

¹⁸ *Assiniboine and Sioux Tribes of Fort Peck Indian Reservation v. Bd. of Oil and Gas Conservation of Montana*, 792 F.2d 782, 787-88 (9th Cir.1986) (citations omitted).

Bank to defend and indemnify Fennell for “any and all claims” is patently overbroad. It is appropriate for a court to order indemnification and the obligation to defend for “all cases arising out of acts done or omitted by receivers *honestly and in good faith* in the exercise of the authority derived from their appointment and in an honest endeavor to discharge their duties as officers of the courts.”¹⁹ Here, however, the Exoneration Order and Clarification Order made no mention of the requirement of honesty or good faith. Instead, these Orders simply provide that Fennell is indemnified for “any and all claims,” without any prerequisite at all. Consequently, the grant of indemnity here by the trial court is likely too broad and over-reaching. Because the Court finds that the Exoneration and Clarification Orders were prematurely issued, however, the issue of whether the immunity granted was excessive is moot and need not be ruled on by the Court.

IV.

¶ 15 This Court finds that the trial court’s Exoneration Order and Clarification Order granting immunity and indemnification to Fennell are premature. As such, these rulings of the trial court are hereby REVERSED.

SO ORDERED this 7th day of March, 2005.

/s/
VIRGINIA SABLAN ONERHEIM
Justice *Pro Tempore*

/s/
MICHAEL J. BORDALLO
Justice *Pro Tempore*

/s/
JESUS C. BORJA
Justice *Pro Tempore*

¹⁹ *Mo. & K. I. Ry. Co. v. Edson*, 224 F. 79, 83 (8th Cir. 1915) (emphasis added).

FILED
CNMI
SUPREME COURT
DATE: 3-10-05 1:10
BY: *[Signature]*
CLERK OF COURT

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

BANK OF SAIPAN, INC.,

Petitioner-Appellant,

v.

ACTING SECRETARY OF COMMERCE FERMIN M. ATALIG,
in his official capacity as the COMMONWEALTH OF THE NORTHERN
MARIANA ISLANDS DIRECTOR OF BANKING,
pursuant to 4 CMC § 6105(a),

Respondent-Appellee,

and

RANDALL T. FENNELL, in his official capacity as
FORMER RECEIVER FOR THE BANK OF SAIPAN,

Real Party in Interest.

2005 MP 3

SUPREME COURT APPEAL NOS. 02-0029-GA & 03-0008-GA
SUPERIOR COURT CIVIL ACTION NO. 02-0268B

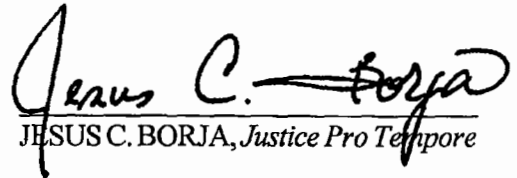
ERRATA

| | |
|--------------------|--|
| CNMI SUPREME COURT | |
| ORIGINAL | |
| Update | |
| Docket | |
| Scan | |

¶1 On March 7, 2005, this Court issued its Opinion in the above captioned appeal. It incorrectly listed the citation as *Bank of Saipan, Inc. v. Atalig*, 2005 MP 2.

¶2 The correct citation is *Bank of Saipan, Inc. v. Atalig*, 2005 MP 3.

SO ORDERED this 10th day of March 2005.


JESUS C. BORJA, *Justice Pro Tempore*