

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

**PACIFIC AMUSEMENT, INC., *et al.*,
Plaintiffs/Appellees,**

v.

**FRANK B. VILLANUEVA, *et al.*,
Defendants/Appellants.**

Supreme Court Appeal No. 03-033-GA
Civil Action No. 02-0378-A

ORDER

Cite as: *Pacific Amusement, Inc. v. Villanueva*, 2005 MP 14

BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*

DEMAPAN, Chief Justice:

¶ 1 On August 2, 2005, we issued our Opinion in this case and dismissed the appeal. *Pacific Amusement, Inc. v. Villanueva*, 2005 MP 11. On August 16, 2005, Appellee Pacific Amusement, Inc. (“Pacific”) filed its *Bill of Costs on Appeal* pursuant to Commonwealth Rule of Appellate Procedure 39(a). Thereafter, on September 1, 2005, Pacific filed an *Appellee’s Request for Attorney’s Fees*. In response, Appellant, Frank B. Villanueva, *et al.* (“Government”) filed an *Objection to Appellee’s Request for Attorney’s Fees*. The Court will therefore take up in this order two issues before us: the bill of costs on appeal and attorney fees on appeal.

¶ 2 This Court shall first address the issue of costs on appeal. In determining whether the Court should award an Appellee costs, three factors are controlling. First, the appeal must be disposed of in a manner allowing for costs to be taxed. Next, the costs must be of a type provided for in our rules. Finally, the *Bill of Costs* must be filed with our Court within a timely manner.

¶ 3 Our rules provide that costs may be awarded to an Appellee if an appeal is dismissed. Commonwealth Rule of Appellate Procedure 39(a) provides, in pertinent part: “[e]xcept as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the Court” Because the appeal ended in a dismissal, Pacific is entitled, under this provision, to tax its costs against Government.

¶ 4 The types of costs to which an appellee is entitled under this provision are limited. Commonwealth Rule of Appellate Procedure 39(b) lists the following costs as taxable on appeal:

Costs incurred in the preparation and assembling of the record, the cost of the transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed as costs of the appeal in favor of the party entitled to costs under this rule.¹

Accordingly, Pacific requested the following costs to be awarded: \$396.45 for copying costs and \$264.00 for costs associated with acquiring the transcript of proceedings, for a total of \$660.45. These are the types of costs allowable in this context. Therefore, Pacific’s request for costs is reasonable and satisfactory.

¶ 5 A party desiring costs must file “an itemized and verified bill of costs . . . with the Clerk, with proof of service, within 14 days after the entry of judgment.” Com. R. App. P. 39(c). The judgment was entered on August 2, 2005, and Pacific timely filed its *Bill of Costs on Appeal* on August 16, 2005. Pacific served Villanueva with a copy of its *Bill of Costs on Appeal* the same day. Villanueva did not file any objection to Pacific’s *Bill of Costs on Appeal*, and even if he did, the objection was improper and untimely filed.²

¶ 5 The Court finds this to be a proper case in which to award Appellee Pacific the costs of the appeal. The original appeal was dismissed for lack of jurisdiction. Copying and filing charges are the types of costs that are awarded under these circumstances. Finally,

¹ Com. R. App. P. 39(b).

² Villanueva filed *Appellant’s Objection to Appellee’s Request for Attorney’s Fees* on September 12, 2005. Even if we were to consider this a proper objection to the bill of costs, it was not timely filed. “Objections to the bill of costs shall be filed within 10 days of service on the party against whom costs are to be taxed . . .” Com. R. App. P. 39(c).

Pacific timely filed the *Bill of Costs of Appeal*. Therefore, Pacific's request for *Bill of Costs on Appeal* is approved.

¶ 6 The second issue addressed is the matter of attorney fees on appeal. A party who requests attorney fees on appeal must do so in a manner consistent with appellate procedure. Pacific's request for attorney fees is based on two arguments. First, Pacific argues that this appeal was frivolous and it should therefore be compensated pursuant to Commonwealth Rule of Appellate Procedure 38(a) and (b). Second, Pacific argues that an appellee is eligible to recover attorney fees of an appeal pursuant to Commonwealth Rule of Appellate Procedure 39(d). For the reasons discussed below, both of these arguments are misguided.

¶ 7 In order for this Court to consider awarding attorney fees under Rule 38(a) or (b), it must first conclude that the appeal was frivolous. Rule 38(a) provides that “[i]f this Court determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee, including reasonable attorney’s fees.”³ A frivolous appeal is one “in which no justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.” *Commonwealth v. Kawai*, 1 N.M.I. 66, 72 n. 4 (1990) (citing BLACK’S LAW DICTIONARY, 601 (5th ed. 1979)). In order for this Court to award sanctions under this provision, it must be clear that there is absolutely no legal or factual basis upon which the appellant relied. In *Kawai*, this Court ordered sanctions because it was clear from the record and briefs submitted that counsel had no legal or factual basis for appeal. See *Commonwealth v. Borja*, 3 N.M.I. 156, 172 n. 15 (1992). Sanctions of this sort are awarded when the Court can find no legitimate reason for the party to have brought the case on appeal.

³ Com. R. App. P. 38(a).

Kawai, 1 N.M.I. at 72; *see also Rosario v. Quan*, 3 N.M.I. 269 (1992) (denying a request for attorney fees based on lack of proof of bad faith). This Court rendered its Opinion dismissing the appeal based on lack of jurisdiction. In our Opinion, we made no conclusions about the legal and factual arguments presented to us by the Government. *Pacific Amusement, Inc.*, 2005 MP 11. Instead, we found that the appeal was untimely and dismissed solely for that reason. *Id.* at ¶ 21. Therefore, the Court declines to award Pacific attorney fees based on Rule 38(a). Accordingly, Pacific’s request pursuant to Rule 38(b) is also denied.⁴

¶ 8 Finally, Pacific is not entitled to attorney fees under Rule 39(d). Commonwealth Rule of Appellate Procedure 39(d) states: “[a] request for attorney’s fees in compliance with Rule 28(m) shall be filed with the Clerk of this Court” Accordingly, in order to request attorney fees under Rule 39(d), Pacific must have complied with Rule 28(m). Rule 28(m) provides:

Any party in a civil case who intends to seek attorney’s fees for the appeal must include a short statement to that effect and must identify the authority under which the attorney’s fees will be sought. Failure to comply with this provision may constitute a waiver of such fees, in whole or in part.

¶ 9 While Pacific did file a *Request for Attorney’s Fees* on September 1, 2005, they failed to comply with Rule 28(m). Rule 28 covers the requirements for briefs on appeal. Thus, the request must be made in the initial filing with this Court and not as an afterthought. Pacific never requested attorney fees for the appeal in their appellate brief.⁵ Since

⁴ “Sanctions are imposed under [Rule 38(a)] for many of the reasons that sanctions are imposed under [Rule 38(b)].” *Lucky Dev. Co., Ltd. v. Tokai, U.S.A., Inc.*, 3 N.M.I. 79, 99 (1992) (*quoting Tenorio v. Superior Court*, 1 N.M.I. 112, 122 n.5 (1990)).

⁵ The subject of the appeal was based on attorney fees at the Superior Court. While Pacific discussed those attorney fees in detail in their brief, they never made a statement requesting attorney fees on appeal.

compliance with Rule 28(m) is necessary before the Court may grant a request for attorney fees pursuant to Rule 39(d), this Court finds that Pacific is not entitled to the attorney fees as requested.

¶ 10 IT IS HEREBY ORDERED that Pacific's *Bill of Costs on Appeal* in the amount of \$660.45 is GRANTED, and the request for attorney fees is DENIED. The mandate shall be modified accordingly to add the costs awarded Pacific herein.⁶

SO ORDERED this 21st day of September 2005.

/s/
MIGUEL S. DEMAPAN, Chief Justice⁷

⁶ For the reasons of the Order, Pacific's *Motion for Leave to File Reply to Objection to Request for Attorney's Fees* is also denied.

⁷ As this Court is only modifying the mandate regarding costs, this order is issued by the Chief Justice. "An order regarding costs may be made by one justice." Com. R. App. P. 39(c). Further, motions, except ones dismissing or otherwise determining an appeal or other proceeding, may be decided by a single justice. Com. R. App. P. 27(d).