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. 03-0033-GA
Civil Action No. 02-0378-A

ORDER

Cite as: ***Pacific Amusement, Inc. v. Villanueva III, 2006 MP 8***

FOR PUBLICATION

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice *(dissenting);* and JOHN A. MANGLONA, Associate Justice

DEMAPAN, Chief Justice:

¶1 Pacific Amusement, Inc.'s Request for a Full Panel Review brings to the attention of this Court an important jurisdictional question. The Clerk of Court issued the mandate before the request for a full panel review was made. We may only recall a mandate in very exceptional circumstances. For the reasons discussed in this order, we decline to recall the mandate.[1] Therefore, Pacific Amusement, Inc.'s Request for a Full Panel Review is DENIED.

I.

¶2 On August 2, 2005, we issued our Opinion in this case and dismissed the appeal. On August 16, 2005, Appellee Pacific Amusement, Inc. ("Pacific Amusement") 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*. On September 6, 2005, the Clerk of Court issued the mandate that the appeal was dismissed for lack of jurisdiction. On September 21, 2005, this Court issued an order awarding Pacific Amusement costs, but denying attorney's fees.[2] On September 26, 2005, the Clerk of the Supreme Court issued a Request to Add on to the Mandate. Finally, on September 30, 2005, Pacific Amusement requested a view by the full panel of the order denying attorney's fees.

¶3 The request for attorney's fees was filed before the mandate issued. Therefore, this Court properly retained jurisdiction over the original request and properly issued the

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[1] As discussed *infra*, a mandate affects the jurisdiction of this Court to hear any further matters. Therefore, we must decide this question even though a Request to Recall the Mandate has not been filed.

[2] A single justice issued the order.

original order awarding costs but denying attorney's fees. The mandate was issued, however, before the most recent request for the full panel review. This poses a jurisdictional problem for this Court. This problem was not simply created by this Court. All parties are aware of the mandate and are generally required to either a) request for a stay of the mandate, or b) file the request for full panel review before the mandate is issued.[3]

¶4 Commonwealth Rule of Appellate Procedure 41 states that the mandate of the court "shall issue after 30 days from the entry of judgment, unless time is shortened or enlarged by order. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court." Thus, a Request for Full Panel Review does not automatically stay the mandate.[4] Instead, the mandate will only be stayed under these circumstances upon request of the parties or upon order of this Court.

II.

¶ 5 In determining whether we have jurisdiction in this matter, we first look to the law regarding mandates. If this Court has an inherent power to recall a mandate, we next consider the circumstances under which a mandate may be recalled. Finally, we shall look to the underlying matter to consider whether a recall of the mandate is justified.

A. Mandate

1. General Rule—Final Order

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[3] It would have been most appropriate in this case to file a Request to Stay the Mandate at the time the Request for Attorney's Fees was filed.

[4] It should be noted, however, that the Request for Full Panel Review was filed after the mandate had already been issued. The proper course of action for the Appellee in this case would have been to make a Request to Stay the Mandate at the same time as filing the original Request for Attorney's Fees.

¶ 6 A mandate "brings the proceedings in a case on appeal to a close and removes it from the jurisdiction of the appellate court, returning it to the court below." *United States v. Riviera*, 844 F.2d 916 (2nd Cir. 1988). The transmittal of the mandate to the lower court revests the lower court with the jurisdiction over the case. Thus, the general rule is that a mandate is a final order. *See Veteto v. Yocum*, 792 So. 2d 1117 (Ala. Civ. App. 2001); *Hrabszuk v. John Lucas Landscaping*, 888 P.2d 367 (Colo. App. 1994) (function of mandate is to establish finality of court's judgment, to restore jurisdiction in tribunal from which appeal or petition is taken, and to communicate court's judgment to that tribunal); *State ex rel. Frazier & Oxley, L.C. v. Cummings*, 2003 WL 22387720 (W. Va. 2003) (the "mandate" of an appellate court is its order formally advising the lower court of its decision and makes the end of appellate jurisdiction and the return of the case to the lower tribunal for such proceedings as may be appropriate); *People v. Agard*, 680 N.Y. S.2d 155 (1998) (federal court of appeals' control over case comes to an end once mandate issues and only regains jurisdiction if it recalls mandate).

2. Recall of a Mandate

a. Inherent Authority of a Court

¶ 7 Our Commonwealth Rules of Appellate Procedure are silent on the recall of a mandate. In such an absence, we turn to the common law. In *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 140 L.Ed.2d 728 (1998), the United States Supreme Court has recently held that "[c]ourts of appeals have inherent power to recall their mandates, subject to review for an abuse of discretion, but in light of the profound interests in repose attaching to the mandate of a court of appeals, the power can be exercised only in extraordinary circumstances, and is one of last resort, *to be held in reserve against grave,*

unforeseen contingencies." The idea that a recall of the mandate is an inherent authority of a court was also expressed, albeit little analysis, in *Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324, 104 S. Ct. 7, 8-9, 77 L.Ed.2d 1426 (Renquist, J., in chambers) (1983). The federal circuit courts have also found that absent statutory authority, the power to recall a mandate is inherent. *See Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (DC. Cir. 1972).

b. Need to Show Special Reason

¶8 While there is a doctrine for recall of a mandate for "good cause" and the need to "prevent injustice,"[5] the "power to recall mandates should be exercised sparingly and is not be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final." *Estate of Iverson v. Comm'r*, 257 F.2d 408, 409 (8th Cir. 1958) (*quoted by Greater Boston*, 463 F.2d at 277-78). The power of a court to recall a mandate must be "exercised sparingly." *Sargent v. Columbia Forest Products, Inc.*, 75 F.2d 86, 89. (2nd Cir. 1996) (*quoting Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277, (cert. denied *sub. nom*). It should also be reserved for "exceptional circumstances." *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50 (2nd Cir. 1985) (cert denied). As the court explained in *Sargent*, "the reason for parsimony in the exercise of our power to recall a mandate is the need to preserve finality in judicial proceedings." *Sargent, supra*, at 89.

¶9 In *Boston and DMaine Corp v. Town of Hampton*, 7 F.3d 281 (1st Cir. 1993), the First Circuit Court of Appeals found that "[e]ven if Court of Appeal's authority to recall

[5] A more detailed discussion of those terms is contained *infra*.

mandate still exists, it should be exercised sparingly and only upon showing of exceptional circumstances, and resort to recall power *should not be used simply as a device for granting late rehearing*." (emphasis added) The DC Circuit finds that "a mandate once issued will not be recalled by an appellate court except by order of the court for good cause shown; the "good cause requisite for recall of mandate is the showing of need to avoid injustice." *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 789 (DC. Cir. 1972). In this case, the court further stated that the "power of an appellate court to recall its mandate should be exercised sparingly to be availed of freely as the basis for granting rehearings out of time for purpose of changing decision *even assuming court becomes doubtful of the wisdom of its decision*." (emphasis added, citation omitted) The court also found that "in determining whether to recall its mandate and appellate court should adhere to the principle that there must be a special reason, "exceptional circumstances" in order to override the strong policy of repose, that there be an end to litigation." *Id.* The court also ruled that an "appellate court may revise its mandate to prevent injustice when the judgment contains an instruction on point or in an application not deliberately intended by the court that would operate, unless changed to require the district court to issue an unjust order."

¶10 The Ninth Circuit case of *Zipfel v. Halliburton Co.*, 861 F.2d 565 (9th Cir. 1988), is interesting in that the court did in fact recall the mandate. The court explained that the authority to recall a mandate may be exercised for "good cause" or to "prevent injustice." *Aerojet-General*; *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). This power, however, should be exercised only in exceptional circumstances. *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986). The court

also identifies that "whether the power is exercised at all falls within the discretion of the court, but such discretion should be employed to recall a mandate only when good cause or unusual circumstances exists sufficient to justify modification or recall of a prior judgment." *American Iron and Steel Institute v. EPA*, 560 F.2d 589, 594-95 (3rd Cir. 1997) (cert. denied).

¶11 The United States Supreme Court in *Calderon*, *supra*, citing Rule of Civ. Proc. 60(a) and Rule of Appellate Procedure 41 the court stated

> Where Court of Appeals recalls its mandate to revisit the merits of its earlier decision denying habeas relief, in case not involving clerical error in judgment, fraud on the court, or stay pending disposition of suggestion for rehearing en banc, State's interests in finality are all but paramount, without regard to whether the Court of Appeals predicates the recall on a procedural misunderstanding or some other irregularity occurring prior to its decision; absent strong showing of actual innocence, State's interests in actual finality outweigh the prisoner's interest in obtaining yet another opportunity for review.

523 U.S. 538, 557, 118 S. Ct. 1489, 1502, 140 L.Ed.2d 728. Therefore, there are limited circumstances in which a court may exercise the power to recall a mandate. These circumstances are when there was a clerical error, fraud on the court, avoidance of differences in results to cases pending at the same time, or a need to revise unintended instmction to trial court that produces unjust result, or other grounds of injustice. *Id. See also, Greater Boston*, 463 F.2d 278-80.

c. Particular Grounds for Recalling Mandate

i. Correction of a Clerical Error

¶12 The clearest reason for recall or revision of an appellate mandate is to correct clerical mistakes. *Greater Boston,* 462 F.2d at 278. This power is expressly confirmed

for district courts by Commonwealth Rule of Civil Procedure 60.[6] Thus, it is also an inherent power of this Court. *See, e.g. Kinnear-Weed Corp. v. Humble Oil*, 296 F.2d 215 (5th Cir. 1961). *See also, Calderon, supra*, and *Greater Boston, supra*.

ii. Fraud on the Court, or Other Misconduct Affecting Integrity of Judicial Process

¶13 The United States Supreme Court has ruled that a court can always set aside a decision that was obtained by fraud. *Hazel-Atlas Glass Co. v. Hart-Empire Co.*, 322 U.S. 238, 64 S. Ct. 997, 88 L.Ed 1250 (1944). In Hazel-Atlas, the Court stated that the "deep-rooted policy in favor of the repose of judgments" and the interest in finality, must yield to the overriding interest of "correcting injustices which, in certain instances, are deemed sufficiently gross to demand a rigid adherence to the term rule" where enforcement of the judgment is "manifestly unconscionable." 322 U.S. at 244-45, 64 S.Ct. at 1000, *citing Pickford v. Talbott,* 225 U.S. 651, 657, 32 S. Ct. 687, 56 L.Ed. 1240.

¶14 The idea a court may set aside a decision obtained by fraud allows a court to recall a mandate under such circumstances. In, *Cord v. Smith*, 370 F.2d 418 (1966), the Ninth Circuit found that it may set aside at any time a mandate that was procured by effecting a fraud on the court. *Id* at 423. The "spirit of the 'fraud on the court' rule is applicable whenever the integrity of the judicial process or functioning has been undercut---certainly in any instance of misconduct by a party." *Greater Boston*, 462 F.2d at 279.

iii. Avoidance of Differences in Results to Cases Pending at the Same Time and Uniformity of the Law

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[6] Rule 60(a) states: "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party...."

¶15 In most instances where appellate courts have found special reason for disturbing finality in the interest of justice, the underlying consideration has been the interest of avoiding differences of result for cases pending at the same time. In *United States v. Ohio Power Co*, 353 U.S. 98, 99, 77 S.Ct. 652, 1 L. Ed.2d 683 (1957), the Court explained that the interest of "uniformity in the application of the principles announced in those two companion cases," and stated "that the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of our rules." In *Sun Oil Co. v. Burford*, 130 F.2d 10, 13 (5th Cir 1942), the court recalled a mandate entered earlier at the same time to avoid any injustice due to an intra-circuit conflict.

¶16 Courts are willing to recall a mandate when a higher court changes the state of the law. For instance, in *Verrilli v. City of Concord*, 557 F.2d 664 (9th Cir. 1977), the Court of Appeals remanded an appeal to the district court for determination of facts bearing on request for attorney fees. They did so in light of a United States Supreme Court decision that held that private attorney general theory for award of fees could not be justified. The Ninth Circuit later felt that its own ruling was erroneous in view of the change of law and also was an unintended unjust result. Therefore, they recalled the mandate. One should note that the unintended and erroneous ruling was so deemed after the United States Supreme Court made a decision on the state of the law.

iv. Need to revise unintended instruction to trial court that produces unjust result

¶17 Another principle upon which a Court may rely to recall a mandate is the need for a revision to "prevent injustice [that] may come where an appellate judgment contains an instruction---on a point or in application that was not deliberately intended by the

appellate court—that would operate unless changed, to require the district court to issue an unjust order." *Greater Boston,* 462 F.2d at 279. The need for this doctrine is interrelated with the "mandate" rule, which prohibits the district court from departing from the appellate instruction without special leave. *Briggs v. Pennsylvania R. Co*, 334 U.S. 304, 306, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948). In this interest of justice, this Court would not with to bind the district court to order an unjust order, especially if such was the result of an unintentional directive of this court.

v. Other grounds of injustice

¶18 This Court may recall a mandate for other grounds of injustice in order to restrain enforcement of a judgment to avoid an unconscionable injustice. While the bounds of this injustice may not be clearly defined, we may look to the common law to discern how other courts have treated "exceptional circumstances" which may cause an unconscionable result if enforced. In considering other grounds of injustice, this Court must continuously be mindful that the "sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, 523 U.S. 538, 550, 118 S. Ct. 1489, 1498, 140 L.Ed.2d 728.

B. Underlying case

1. The September Order Denying Attorney's Fees (Rule 38)

¶19 Upon further review, the argument of the September Order that a denial of attorney's fees would not be granted simply because the merits of the case were not reached does not clearly examine the important issues raised by the parties. Indeed, the analysis of the Court did not explain what "frivolous" means and why this appeal did not fit within that meaning. Thus, a fresh look at the issues presented is warranted.

2. "Frivolousness"

¶20 In order for this Court to consider awarding attorney's fees under Rules 38 (a) or (b), it must first conclude that the appeal is 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." 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 it can ever succeed." *Commonwealth v. Kawai*, 1 N.M.I. 66, 72 n.4 (1992). 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 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." *Commonwealth v. Borja*, 3 N.M.I. at 72. This Court has also required a showing of bad faith in order to award sanctions under this section. *See Rosario v. Quan*, 3 N.M.I. 269.

¶21 Looking through the procedural history of this case, and the state of the law at the time the appeal was brought before the Court, it does not seem that it was "readily recognizable as devoid of merit." Pacific Amusement first made a Motion to Dismiss. Rather than immediately grant that motion, the Court instructed both parties to brief the matter. The parties then appeared at oral arguments, presenting in detail not only the question of jurisdiction, but also issues of the appeal. This Court ultimately dismissed the case for lack of jurisdiction.

¶22 In its Opinion, this Court disagreed with Pacific Amusement's argument that the issue of liability was not conclusively determined because no evidentiary hearing was

held to determine the extent of the public benefit conferred by the taxpayer suit case of action. *Pacific Amusement v. Villanueva,* 2005 MP 11, ¶10. This Court also held in that Opinion that "an order which establishes liability without fixing the amount of recovery may be final and immediately appealable only if the determination of damages will be "mechanical and uncontroversial." *Id* at ¶11. While this Court found that "it is conceivable a hearing might raise issues, the determination of which might alter any final issues to be appealed," the Government had a colorable question of law upon which to rely for this appeal.

¶23 Earlier CNMI cases do not provide much analysis on what "bad faith" means. Instead, there are examples of egregious behavior which warranted sanctions. Most recently, this Court awarded sanctions in *He v. Commonwealth*, 2003 MP 3. In that case, the imposition of sanctions was based on several factors, including the willful pursuit of the appeals, "including a delayed briefing schedule, despite knowledge that the underlying orders are invalid." The defendants further compounded "their misconduct by failing to explain how the standards they present differ from those employed by trial courts, conflating motions to dismiss with motions for summary judgment, making large conclusory arguments, and consistently taking sources out of context or otherwise using them inappropriately." *Id* at ¶. 19. In footnote 12, this Court in *He* even gives the example that the defendants completely misstated the law in their brief. Footnote 13 explains how deeply flawed and poor the arguments were for a number of reasons, stating "any number of these mistakes might be forgiven were it not for the fact that Defendants' analysis is so deeply flawed."

¶24 Looking over the *He* case, it is clear that sanctions should have been imposed by this Court—willful and bad faith prosecution, misstating the law to this Court, willfully conflating dismissals with summary judgments, making large conclusory arguments without support from any authority, using sources inappropriately. All of these things combined are surely sanctionable. To contrast, there is only one "charge" against the Government in this case—untimeliness. This Court did not remark in its opinion that it suspected the Government of bad faith.

¶25 In *He*, the court sanctioned the Government by ordering it to pay the Court $250. In the face of all of that, correctly finding it was a frivolous appeal, the Court didn't even go as far as awarding a sizable sum of attorney's fees. In this case, with much less evidence of sanctionable behavior, Pacific Amusement is now demanding this Court award them with an award exponentially higher than this Court has ever awarded before. Indeed, Pacific Amusement is requesting an amount of $40,000 for fees associated with this appeal.[7]

¶26 The Government's outrageous behavior in *He* should be clearly distinguishable from the case at bar. Rather than a multitude of errors and malicious misrepresentations made in that case, the only argument in this case is that the Government should be sanctioned because it filed its appeal after disposition but before the costs were determined and was thus untimely. This Court noted in its Opinion that there are

[7] Declaration of Paul Trombetta, p.3. During oral arguments, the Court requested Pacific Amusement to submit its fees in litigating this matter, both in whole and as to the appeal. This Court also requested an itemized accounting of the fees. On July 20, 2004, this Court then issued an additional order further requesting the itemized accounting of costs and fees associated with this litigation. In Appellee's *Response to Court Order* of August 9, 2004, the total fees of the litigation were over $140,000. Id (last page of Exhibit A).

situations in which orders are final and appealable, even if the attorney's fees have not been set.

3. Sanctions are Discretionary

¶27 Pacific Amusement argues that because they asked for a Motion to Dismiss and because it was eventually granted, this Court must grant them attorney's fees. In so arguing, Pacific Amusement ignores that fact that ultimately it is within the discretion of this Court to determine whether or not such a sanction is warranted. Pacific Amusement continuously uses language that would lead this Court to believe that it should receive an award of attorney's fees as a matter of right. This language is misleading to the Court and erroneous.

C. Discussion

¶28 As pointed out earlier, this Court is faced with a procedural problem. The mandate was issued before the Request for the Full Panel Review. This problem was further compounded by the fact that Pacific Amusement did not request to stay the mandate.[8] As a mandate is a jurisdictional issue, we must first determine whether or not we would like to exercise our inherent authority to recall the mandate *sua sponte*.

¶29 It is clear that the finality of the mandate should only be disturbed under exceptional circumstances or where a grave miscarriage of justice would occur. We have also outlined traditional reasons which are so "special" as to give rise to a recall. We may easily disregard most of those categories, as they are inapplicable in this case. Nothing before us suggest that there has been a clerical error, fraud upon the court, a

[8] It further complicates the present request that no request has been made to recall the mandate.

change in the law, or an unintended instruction which would mandate the district court to issue an unjust order. Thus, we are left to consider whether this situation falls within the general category of "other grounds of injustice."

¶30 While the grounds of injustice are open to interpretation, it is helpful to consider what circumstances were not enough to warrant a recall of a mandate. In *Calderon*, supra, the U.S. Supreme Court reversed the Ninth Circuit's recall of a mandate, despite several circumstances which were unusual. In that case, the Court of Appeals (panel) originally denied Thompson's motion to recall the mandate. Two days later, however, the full court voted to consider en banc whether to recall the earlier mandate "to consider whether the panel decision of our court would result in a fundamental miscarriage of justice." *Calderon v. Thompson*, 120 F.3d 1042, 1043.[9] The en banc majority asserted extraordinary circumstances justified its order recalling the mandate because, "but for procedural misunderstandings by some judges of this court, an en banc call would have been made and voted upon at the ordinary time." *Id.* at 1048. It appears that the procedural misunderstandings involved an off-panel judge who requested an opportunity to make a belated call for a vote to rehear the case en banc. The judge stated that the panel's decision had been "circulated shortly before a law clerk transition" in the judge's chambers, and that "the old and new law clerks assigned to the case failed to communicate." *Calderon*, 523 U.S. 538, 551, 118 S.Ct. 1489, 1499, 140 L.Ed.2d 728.

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[9] In *Calderon*, Thompson was convicted of rape and murder and was given the death penalty. The Governor of California held a hearing on whether to grant clemency to Thompson. After hearing arguments and reviewing the materials submitted on his behalf, the Governor agreed with the trial court judge that "it would be an absolute tragedy and travesty of justice to even seriously consider clemency in this case." The California Supreme Court also rejected all pleas in this case. 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728. To be sure, most of the complicated procedural history of this case, including the California courts, federal courts, and the governor are outside the scope of the question before us.

Another judge seconded the motion, because he did not see the original motion and asked, "Did I miss it?" *Id.* In light of these events, the U.S. Supreme Court held that

> Measured even by standards of general application, the Court of Appeals' decision to recall the mandate rests on the most doubtful of grounds. A mishandled law clerk transition in one judge's chambers, and the failure of another judge to notice the action proposed by the original panel, constitute the slightest of bases for setting aside the "deep rooted policy in favor of the repose of judgments." *Hazel-Atlas Glass Co.*, *supra* at 244, 64 S.Ct., at 1000.

Id. Thus, the Court found that even these usual circumstances were not enough—in fact, the "slightest of bases"—to justify a recall of a mandate.

¶31 Even assuming we have become doubtful of the wisdom of our September Order, that doubt is still not enough to justify a recall of the mandate. See *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (DC. Cir. 1972)(the "power of an appellate court to recall its mandate should be exercised sparingly to be availed of freely as the basis for granting rehearings out of time for purpose of changing decision *even assuming court becomes doubtful of the wisdom of its decision*). In this case, however, we do not doubt the wisdom of the decision. While the analysis of the September Order could have been expanded, the behavior of the Government in this case does not compare to the behavior this Court has previously found sanctionable. The argument by Pacific Amusement seems to be—we won the appeal, therefore this Court must award attorney's fees. Pacific Amusement argues that the appeal was frivolous, because the Government appealed the issuance of a "final order." While this Court ultimately decided that indeed the appeal was untimely, the Court did not adopt the arguments of Pacific Amusement. The Court, in fact, disagreed with the reasoning relied upon by Pacific Amusement. On the other hand, this Court correctly acknowledged that there are instances in which an

appeal may be brought before attorney's fees are set. In doing so, the Court gave credence to the arguments relied upon by the Government (even if they found that the Government was not within the meaning of that law). Therefore, the end result of the September Order was correct and no recall of the mandate is justified.

¶32 It should further be noted that we are faced with a decision to recall the mandate in order to accept a Request for Full Panel Review. In *Boston and DMaine Corp v. Town of Hampton*, 7 F.3d 281 (1st Cir. 1993), the First Circuit Court of Appeals found that "[e]ven if Court of Appeal's authority to recall mandate still exists, it should be exercised sparingly and only upon showing of exceptional circumstances, and resort to recall power *should not be used simply as a device for granting late rehearing*." (emphasis added). The U.S. Supreme Court has also adopted this view, as expressed in Calderon, *supra*. Following this rule, we decline to recall the mandate simply as a device to grant the Full Panel Review.

III.

¶33 For the foregoing reasons, we decline to recall the mandate and, accordingly, Pacific Amusement, Inc.'s request for a full panel review is DENIED.

SO ORDERED this 5th day of April, 2006.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
JOHN A. MANGLONA
Associate Justice

Justice CASTRO, Dissenting

¶34 Although I agree with the conclusion the majority reaches, I must respectfully dissent with the reasons set forth in the opinion. Therefore, for the following reasons, I respectfully dissent.

MANDATE

¶35 Recalling a mandate is an extraordinary remedy and we will exercise our authority to do so only in exceptional circumstances, such as when it is necessary in order to prevent injustice. *Zipfel v. Halliburton Co.,* 861 F.2d 565, 567-68 (9th Cir.1988). We have the power to recall the mandate of a final decision of our court, and to do so *sua sponte. See Malik,* 65 F.3d at 149. Additionally, courts have long recognized the power to recall the mandate as a means of protecting the integrity of their processes and decisions. *Perkins v. Standard Oil Co.,* 487 F.2d 672, 674 (9th Cir.1973). The decision whether to recall the mandate "is entirely discretionary with [the] court." *Feldman v. Henman,* 815 F.2d 1318, 1322 (9th Cir.1987). Because this Court's September 21st Order (hereinafter referred to as "Order Denying Fees") was flawed, I believe it is in the interest of the Court to recall the mandate to protect the integrity of our processes and decisions.

ATTORNEYS' FEES

¶36 When the Court dismissed the Government's appeal, we did so on the grounds that the appeal was untimely and did not fall within any exceptions to the Finality Rule. Specifically, we stated that the Court lacked jurisdiction because there was no issue of national importance involved (*Gillespie* Doctrine) and that: ". . . the September 3, 2003 Order did not involve any right whose legal and practical value would be lost forever without an immediate appeal." Subsequently, the Court denied Pacific's request for fees.

¶37 The Order Denying Fees stated: "[i]n [its published opinion on the matter, the Court] made no conclusions about the legal and factual arguments presented to [it] by the Government." *Pacific Amusement, Inc., v. Villanueva,* 2005 MP 14, ¶ 7. This is a reference to the fact that the Government's appeal was dismissed for lack of jurisdiction and that the Court did not reach the merits of the case. *See id.* This statement, however, invited the response from Pacific indicating that they wanted an award for attorneys' fees specifically because of the untimely nature of the appeal. I think it is apparent that Pacific is correct on this point because the Order Denying Fees too narrowly constricted the terms "merit" and "frivolous," while it did not address the issues raised by the parties. As it pertains to the attorneys' fees, all parties were arguing about the procedural timeliness of the appeal, not the actual substantive merits. For me, the question turns on whether the Government had sufficient legal reason to believe their appeal could be made at the *time* it was made. We have previously, under Rule 39(a), sanctioned parties who brought untimely appeals. *See, e.g., He v. Commonwealth,* 2003 MP 3 (order dismissing appeal awarding costs and imposing sanctions).

¶38 The trial court's Decision and Order dated September 3, 2003 ("September Order") declared Pacific a "person who prevails" under NMI CONST. ART. X § 9. This ruling entitled Pacific to costs and fees. The Government had a choice between paying an indeterminate amount of fees (Pacific had not submitted their fees at the time) or demanding a hearing to contest them. The Government demanded a hearing, but then filed its appeal before the trial court fixed the fee amount. Since the September Order was still under advisement,[1] I don't think the Order could reasonably be considered final.

[1] "However, because the ultimate decision of whether or and how much reimbursement shall be due cannot be answered based on the facts currently in evidence, the Court must continue to keep Pacific Amusement's motion for attorney fees [sic] and costs UNDER ADVISEMENT." Excerpts of Record at 59 (emphasis in original).

It is clear that the Government filed an appeal from a nonfinal order, and then attempted to use exceptions to justify its decision. *See* Appellant's Opposition to Motion to Dismiss. In the instant case, the Government argued that the collateral-order doctrine or the *Gillespie* doctrine allowed its appeal. *See id.* It made both of these arguments but failed to cite legal authority for these propositions. Moreover, the authority that does exist, squarely disfavored the Governments arguments

¶39 The collateral-order doctrine does not apply to Pacific's situation. To come within the collateral order exception to the final judgment rule, the order sought to be appealed must: (1) have conclusively determined the disputed questions; (2) have resolved an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Commonwealth v Hasinto,* 1 N.M.I. 377, 384 n. 6 (1990). An order regarding an unknown amount of attorneys' fees does not fall under the collateral-order exception. *See, e.g., Gates v. Central States Teamsters Pension Fund,* 788 F.2d 1341, 1343 (8th Cir.1986) (an order "finding appellant liable for attorneys' fees and costs but without determining the specific amount of that award is not a final and appealable order"); *Hastings v. Maine-Endwell Central School Dist.*, 676 F.2d 893, 896 (2nd Cir. 1982) (dismissing appeal for lack of jurisdiction and suggesting *trial court* award attorneys' fees for frivolous appeal); *In re Estate of Henry,* 634 P.2d 615, 618 (Haw. Ct. App. 1981) (order awarding attorney's fees is not reviewable under the collateral order doctrine where attorney's services were not yet complete); *Shipes v. Trinity Indus. Inc.,* 883 F.2d 339 (5th Cir.1989) (finding that an order granting interim attorneys' fees did not satisfy the collateral order doctrine because the order could be effectively reviewed upon entry of final judgment). Ignoring these cases, however, was not the most serious flaw in the Government's argument. I note that

the Government failed to cite a single case affirming their argument that the appeal could not be pursued at a later date. *See* Appellant's Opposition to Motion to Dismiss. The failure to cite a single case in support of its collateral-order argument indicates that the argument is "devoid of merit," and "that there is little prospect that it can ever succeed." *See, e.g., Kawai*, I N.M.I. at 72 n.4.

¶40 The Government's arguments regarding the *Gillespie* doctrine miss the mark as well. The "*Gillespie* doctrine" is a very narrow exception to the final judgment rule that only applies if: (1) the decision is a marginally final order; (2) the order disposes of an unsettled issue of national significance; and (3) the finality issue is not presented to the appellate court until argument on the merits. *See Gillespie v. U. S. Steel Corp.*, 379 U.S. 148, 152-154 (1964). As there was nothing of national import implicated in the Government's brief, we dismissed this argument.

¶41 If a litigant wants to use, or believes a doctrine applies to his situation, he must support it with case law or face the prospect of losing the argument. *Tyler v. Runyon,* 70 F.3d 458, 464-65 (7th Cir.1995) (deeming argument waived because litigant and attorney failed to cite case law or statutory authority). Here, the Government's arguments were frivolous, and to imply otherwise invites continued frivolous appeals to this Court.

¶42 Frivolity, however, is not enough to ensure sanctions. If Pacific is interested in compensation for a frivolous appeal, it should act within the rules and within the time frame set up by the rules. Pacific failed to do so. Pacific failed to include a request for fees in its brief, and allowed this Court's mandate to expire before filing its Motion for Full Panel Review. Because of these reasons, I can accept the majority's determination that fees are not appropriate.

CONCLUSION

¶43 For the foregoing reasons, I would recall the mandate but deny the request for attorneys' fees on procedural grounds.

/s/
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE