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

HEALTH PROFESSIONAL CORPORATION,

Petitioner,

v.

SUPERIOR COURT FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,

Respondent,

BANK OF GUAM, and
SABLAN CONSTRUCTION CO., LTD.,

Real Parties in Interest.

ORIGINAL ACTION NO. 04-002-OA

ORDER DENYING PETITION FOR WRIT OF MANDAMUS

Cite as: *Health Prof'l Corp. v. Superior Court*, 2004 MP 25

Saipan, Northern Mariana Islands
Decided December 7, 2004

FOR PUBLICATION

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BEFORE: ALEXANDRO C. CASTRO, Acting Chief Justice, JOHN A. MANGLONA, Associate Justice, and TIMOTHY H. BELLAS, Justice *Pro Tempore*

PER CURIAM:

¶1 Petitioner Health Professional Corporation ("HPC") filed a Petition for a Writ of Mandamus to compel the trial court to resume a jury trial. HPC asserts that the trial court erred in declaring a mistrial. Because of the inadequacy of the record before us to determine whether or not the trial court erroneously declared a mistrial, the Petition is DENIED.

I.

¶2 On November 17, 2004, during the jury trial in this matter, Bank of Guam stipulated to the admission of HPC's exhibit binder except for Exhibits 2 and 22. HPC wanted to introduce several exhibits for questioning during the examination of HPC's first witness, Marcie Tomokane. During the examination of Tomokane, counsel for HPC provided counsel for Bank of Guam a binder containing one set of exhibits to ensure that Exhibit 2 had been removed from the binder.[1] Counsel for Bank of Guam reviewed this binder containing the exhibits and then provided it to one of the jurors. Counsel for HPC then gave seven other binders to the bailiff for distribution to the jury,[2] which would enable them to refer to the exhibits during questioning of the witness.

¶3 During the questioning of Tomokane, the trial court ordered a mid-afternoon recess and the jury was excused from the courtroom. After the recess, the jury was escorted back into the courtroom to continue the examination of Tomokane. At the end of Tomokane's examination, the jurors were dismissed for the day and were ordered to return the next morning.

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[1] It is not clear whether Exhibit 22 was in the binder and subsequently removed, or if it was ever in the binder at all.

[2] Bank of Guam maintains that counsel for HPC "informed the Court that he gave seven (7) other binders to the jury," not the bailiff. Declaration of Victorino DLG Torres ¶4; Notice of Errata Regarding Real Party in Interest Bank of Guam's Answer to Health Professional Corporation's Petition for Writ of Mandamus and Declaration of Victorino DLG Torres filed on November 23, 2004.

¶4 After the jurors left the courtroom, counsel for Bank of Guam noticed that the exhibit binders were missing and immediately made a motion to have the exhibits returned to the clerk. The trial court judge ordered the bailiff to retrieve the exhibits from the jurors. The judge then expressed his dissatisfaction, referencing his rule that allows only "one set of exhibits to be provided to the entire panel."[3]

¶5 On the morning of November 18, 2004, Tomokane informed counsel for Bank of Guam that the jurors had the exhibits during the previous day's mid-afternoon recess during her cross-examination. Thereafter, Bank of Guam moved for a mistrial based on "the violations of court rules and potential and/or actual prejudice against Bank of Guam."[4]

¶6 The bailiff testified that he had escorted the jurors to the jury room and was still holding the door open when the clerk instructed him to retrieve the exhibit binders.[5] Tomokane testified that she saw some of the jurors carrying the exhibit binders into the courtroom after the mid-afternoon recess. The trial court subsequently granted Bank of Guam's motion for a mistrial.

¶7 HPC moved the court for reconsideration of its declaration of a mistrial. The judge stated he would ask the jurors some questions to determine what happened. Bank of Guam objected to the *ex-parte* communication.[6] At the afternoon hearing, the judge informed the parties that he had questioned the jurors and determined that the jurors had taken HPC's exhibits into the jury room pursuant to the bailiff's instructions. The judge stated that he had asked the questions in writing

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[3] Declaration of Victorino DLG Torres at ¶10. *See also* HPC Petition at 8 ("The trial judge pointed out to plaintiff [sic] counsel that that is not the rule he has established for the court. And the rule is that unless the parties stipulate otherwise, only one exhibit was supposed to be given to the jury panel and the exhibit is supposed to be passed on to the jurors so all can see and [sic] examined."). We are not aware of any established court rules in the Commonwealth that have similar provisions. Without a formal publication of this rule used by the trial court, we question if proper notice is provided to attorneys appearing before the trial court.

[4] Declaration of Victorino DLG Torres at ¶12. It is not clear from the record what court rule was violated.

[5] Declaration of Pedro M. Atalig at ¶16. Bank of Guam makes no reference to the bailiff's testimony.

[6] HPC, however, states that all of the parties agreed to the trial court's questioning of the jurors. Declaration of Pedro M. Atalig at ¶18.

which required a "yes" or "no" response. He further stated that his inquiry showed that the jurors had HPC's exhibits in the jury room and had the opportunity to review them for at least fifteen minutes.[7]

¶8 Consequently, the trial court maintained its prior declaration of a mistrial. HPC now seeks a writ of mandamus to compel the trial court to resume the jury trial with the same jury panel.

II.

¶9 We have jurisdiction over this original action pursuant to Article IV, Section 3 of the Northern Mariana Islands Constitution and Title 1 Section 3102(b) of the Commonwealth Code.

III.

¶10 A petition for a writ of mandamus is a drastic remedy and is only to be used in extraordinary situations. *Tenorio v. Superior Court*, 1 N.M.I. 1, 9 (1989) (*citing Will v. United States*, 389 U.S. 90, 95, 88 S. Ct. 269, 273, 19 L. Ed. 2d 305, 310 (1967)). A writ of mandamus is warranted only in exceptional situations that equate to a judicial "usurpation of power" such that the application of this extraordinary remedy is justified. *Id*. Courts are "extremely reluctant to grant a writ of mandamus." *In re Ford Motor Co.*, 751 F.2d 274, 275 (8th Cir. 1984).

¶11 When deciding whether or not to issue a writ of mandamus, we analyze each case by applying the following five factors set forth in *Tenorio*:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief desired;

2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;

3. The lower court's order is clearly erroneous as a matter of law;

4. The lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; and

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[7] It is not clear how long the jurors remained in the jury room with the HPC exhibits or if the jurors discussed theexhibits.

5. The lower court's order raises new and important problems, or issues of law of first impression

Tenorio, 1 N.M.I. at 9-10 (citations omitted).

¶12 In applying these guidelines to a case, a bright-line distinction will not always exist. *Id*. at 10. These guidelines themselves often raise questions of degree such as how clearly the trial court's order is wrong as a matter of law or to what extent petitioners are harmed if extraordinary relief is withheld. *Id*. (*citing Bauman v. U.S. Dist. Court*, 557 F.2d 650, 655 (9th Cir. 1977)). The factors are cumulative and proper adjudication will require a balancing of conflicting indicators. *Id*.

¶13 In this case, however, HPC has failed to provide an adequate record which allows for appropriate application of the *Tenorio* factors. In support of its legal arguments, HPC proffers declarations of its counsel, Pedro M. Atalig. It has not provided copies of any order or transcript from the trial court. In HPC's reply brief, there are several references to "Superior Court's Order Dated November 18, 2004,"[8] however, it failed to provide a copy of the order.

¶14 Failure to provide the relevant trial court orders or transcripts does more than prevent us from providing sound legal analysis – it is also a violation of the Commonwealth Rules of Appellate Procedure. The Rules provide, in pertinent part:

> The petition [for a writ of mandamus] *shall* contain a statement of the facts necessary for an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and *copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition*.

Com. R. App. P. 21(a) (emphasis added).

¶15 We have previously held that when a petitioner for a writ has failed to provide copies of the trial court's orders or transcripts, it is "impossible to find clear error" (by the trial court).

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[8] HPC's Reply Brief at 5-6.

Paulis v. Superior Court, 2004 MP 10 ¶ 30. Other jurisdictions have similarly found that an inadequate record prevents an appellate court from finding a trial court was in error. *W. Virginia v. Miller*, 459 S.E.2d 114, 125 (W. Va. 1995) ("[S]hould an appellant spurn his or her duty and drape an inadequate or incomplete record around this Court's neck, this Court, in its discretion, either has scrutinized the merits of the case insofar as the record permits or has dismissed the appeal if the absence of a complete record thwarts intelligent review."); *Rothbaum v. Arkansas Local Police and Fire Ret. Sys.*, 55 S.W.3d 760, 761-62 (Ark. 2001) ("Here, the record contains neither the order of the Board denying [appellant's] request for a hearing, nor the final order of the circuit court dismissing his cause of action . . . Without either of these orders in the record, there is nothing before us on which to rule.").

¶16 Based on the record before us, we cannot say that the trial court's decision to declare a mistrial was clearly erroneous as a matter of law. Nothing presented in either the parties' briefs or declarations leaves us with a definite and firm conviction that a mistake has been made, and we will not speculate as to the factual and legal validity of the trial court's analysis when the record is deficient.[9] This holding is harmonious with the policy of this court disfavoring piecemeal appeals. *Feliciano v. Superior Ct.* (*In re Estate of Hillblom*), 1999 MP 3 ¶ 27.

IV.

¶17 Because of the inadequacy of the record before us to determine whether or not the trial court erroneously declared a mistrial, the Petition is DENIED.

SO ORDERED this 7th day of December 2004.

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[9] What is certain is the procedural reality of this case. Had the trial court not declared a mistrial, the case could have proceeded to a jury verdict and Bank of Guam could have appealed citing juror misconduct. As such, notions of judicial economy support a decision to decline to remand this case when facts supporting a clearly erroneous finding are lacking. Remand results in the continuation of this trial, a likely appeal, and the possibility of a second full trial. Deference to the trial court's ruling results in the termination of the current trial in its early stages and prevents the potential for having two full-length trials in the Superior Court.

/s/_____
ALEXANDRO C. CASTRO
Acting Chief Justice

/s/_____
JOHN A. MANGLONA
Associate Justice

/s/_____
TIMOTHY H. BELLAS
Justice P*roTempore*