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

IN RE: DOUGLAS F. CUSHNIE,
Petitioner.

SUPREME COURT NO. 2011-SCC-0028-PET
ORIGINAL ACTION

SLIP OPINION

Cite as: 2012 MP 3

Decided April 4, 2012

Earle A. Partington, Saipan, MP, for Appellant.
Mark B. Hanson, Saipan, MP, for Appellee.
BEFORE: JOHN A. MANGLONA, Associate Justice; ROBERT J. TORRES, Justice Pro Tem; F. PHILIP CARBULLIDO, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Petitioner Douglas F. Cushnie ("Cushnie") files this petition for writ of mandamus ("Petition") requesting that the trial court be ordered to set aside its Order in Aid of Judgment ("OAJ") because the OAJ was contrary to the mandate issued by this Court in the underlying action of *Matsunaga v. Matsunaga*, 2006 MP 25, because it improperly included prejudgment interest on a portion of the damages award. The Petition fails to address the applicable law governing mandamus relief and is therefore DENIED.

I

¶ 2 *Matsunaga* was originally a dispute between an attorney, Douglas F. Cushnie ("Cushnie"), and his client, Elizabeth Matsunaga ("Elizabeth" or "Respondent"). Cushnie negotiated a sale of real property for Elizabeth and he collected $150,000 as a fee for negotiating the sale, $8,500 as a portion of rental fees intended for his client that he placed in her trust account, and $2,008.50 in additional attorney's fees. He was subsequently disqualified from representing Elizabeth and ordered to return the $2,008.50. When Cushnie failed to return the $2,008.50, Elizabeth filed suit against him claiming breach of fiduciary duties and breach of the duty of due diligence. The trial court agreed with Elizabeth and found Cushnie had breached his fiduciary duty to his client by failing to provide a timely accounting of fees and by improperly transferring $8,500 from his trust account to his general account as an advance of legal fees without notice or explanation to his client. The trial court also concluded that these breaches were done with knowledge and constituted unethical behavior. Accordingly, the trial court ordered Cushnie to: (1) disgorge $50,000 of the $150,000 fee for failing to account properly; (2) return the $8,500 he took from her trust account and transferred to his general account; and (3) pay back the original $2,008.50 in fees that he had already been ordered to return following his disqualification. Cushnie appealed.

¶ 3 On appeal, we found in favor of Elizabeth[1] and affirmed the trial court's holding. We found that, in accordance with the trial court's findings, Cushnie "was required to forfeit or disgorge $50,000 because he failed to account properly; $8,500 which he took as an advance; and $2,008.50 in fees that he never repaid pursuant to a previous order." *Matsunaga*, 2006 MP 25 ¶¶ 1, 14. Thus, three separate amounts constitute the damages that were awarded to Elizabeth by the trial court and subsequently affirmed by this Court on appeal; these amounts are undisputed. Following the issuance of the *Matsunaga* opinion, this Court issued a mandate affirming the holding of the trial court with regard to damages and stating in full:

> For the reasons set forth in its Opinion issued this date, the Supreme Court has REVERSED the Superior Court's holding that Appellee/Cross-Appellant Cushnie's right against interference in private

[1] It is unclear from the record but some time prior to the filing of the present Petition, Elizabeth passed away and her estate has been substituted as the real party in interest.

> contracts was violated by 2 CMC §§ 4941 and 4942 and the Superior Court's finding that 30% was a reasonable fee.
> The Supreme Court AFFIRMS the decision of the Superior Court which entered a judgment for $2,008.50 plus pre-judgment interest at a rate of 9% per annum and an additional $58,500 with interest pursuant to 7 CMC § 4101 against Cushnie. The Supreme Court also AFFIRMS the Superior Court's denial of Cushnie's motion for sanctions and the Superior Court's denial of both Cushnie's demand for a jury trial and renewed demand for a jury trial.

Matsunaga v. Matsunaga , No. CV-04-0020-GA[2] (NMI Sup. Ct. January 26, 2007) (Mandate at ¶¶ 1-2).

¶ 4 Thereafter, on August 24, 2011, Elizabeth sought and was granted an OAJ. The OAJ states in relevant part:

> 1. The Court ORDERS defendant Douglas F. Cushnie to pay plaintiff the sum of $50,000 without prejudgment interest. Mr. Cushnie SHALL pay post-judgment interest as provided by 7 CMC § 4101.
>
> 2. The Court ORDERS defendant to pay plaintiff the sum of $8,500, plus prejudgment interests [sic] per the Original Ruling and post-judgment interest as provided by 7 CMC § 4101.
>
> 3. The Court ORDERS defendant to pay plaintiff the sum of $2,008.50, plus prejudgment interest per the Original Ruling and post-judgment interest as provided by 7 CMC § 4101.

Matsunaga v. Cushnie, Civ. No. 97-0043 (NMI Super. Ct. August 24, 2011) (Order in Aid of Judgment at 5). According to the Petition, the OAJ must be set aside "insofar as it purports to award [the Respondent] prejudgment interest on the $8,500 . . . ." *In re Cushnie*, No. 2011-SCC-0028-PET (NMI Sup. Ct. Sept. 30, 2011) (Petition for Writ of Mandamus at 2) ("Petition for Writ of Mandamus"). Cushnie argues that the mandate did not award prejudgment interest on the $58,500 and the trial court improperly modified the mandate by including prejudgment interest on $8,500 of the $58,500.

¶ 5 We have jurisdiction to review the Petition pursuant to 1 CMC § 3102(b), which provides that we shall have original jurisdiction to issue writs of mandamus and all other writs necessary. *Tenorio v. Superior Court*, 1 NMI 1, 7 (1989).

II

¶ 6 Parties seeking relief from the action of a trial court have two paths to appellate review: appeals and extraordinary writs. *Office of the Att'y Gen. v. Superior Court*, 1999 MP 14 ¶ 8. Writs of mandamus are a form of extraordinary relief and "reserved for the most dire of instances when no other relief is available." *Commonwealth v. Namauleg*, 2009 MP 13 ¶ 5 (quoting *Commonwealth v. Superior Court*, 2008 MP 11 ¶ 9). Parties do not have any inherent procedural right to mandamus relief. *Id.* Thus, we have established narrow circumstances whereby mandamus relief is an appropriate remedy. *See, e.g.,*

[2] Civil Cases No. CV-04-0019-GA and No. CV-04-0020-GA were consolidated into one case. This case number represents the consolidates cases.

NMI Scholarship Bd. v. Superior Court, 2007 MP 10 ¶ 1; *Namauleg*, 2009 MP 13 ¶ 5; *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 16.

¶ 7 In the Commonwealth, we have clearly established five factors that must be considered in the determination of whether writs for mandamus are the appropriate remedy. *Tenorio*, 1 NMI at 8; s*ee also Commonwealth v. Pua*, 2006 MP 19 ¶ 19 (the court analyzes writs of mandamus pursuant to the five *Tenorio* factors); *Nakatsukasa v. Superior Court*, 1999 MP 25 ¶ 9 (the court has adopted a five-part standard to govern the issuance of mandamus); *Sekisui House, Ltd. v. Superior Court*, 1999 MP 21 ¶ 10 (the decision to issue an extraordinary writ calls for a cumulative consideration of five factors); *Office of the Att'y Gen.*, 1999 MP 14 ¶ 10 (there are five factors that must be considered before granting mandamus). The five governing factors are:

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

Tenorio, 1 NMI at 9-10.

¶ 8 Notwithstanding the fact that this jurisdiction has wholly relied upon these five factors when scrutinizing the appropriateness of a petition for a writ of mandamus and that the law as first articulated in *Tenorio* is the controlling law in this jurisdiction, Cushnie utterly fails to address these factors. Instead, Cushnie argues generally that the trial court improperly interpreted the mandate and that mandamus is an appropriate method for a party seeking to enforce the terms of an appellate court's mandate.[3] Petition for Writ of Mandamus at 3, 4. Respondent maintains that mandamus relief is not available because Cushnie has not articulated a reason why mandamus is appropriate and because he has completely failed to demonstrate that any of the five *Tenorio* factors are applicable.[4] We agree with Respondent.

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[3] In his Reply, Cushnie argues that Respondent's counsel does not have standing to appear in this matter and also asserts, for the first time, the affirmative defense of laches. Each of these arguments are summarily rejected. First, Cushnie served Respondent's attorney in this matter and the same attorney appeared at the OAJ hearing. Therefore, Cushnie should not have waited until his Reply to raise this argument. *See Manglona v. Commonwealth*, 2005 MP 15 ¶ 39 (as a general matter, we will not consider an argument raised for the first time on appeal). Further, Cushnie cites no legal authority in support of his argument. *Rosario v. Camacho*, 2001 MP 3 ¶ 60 (we are not required to address an issue in the absence of cited authority). As for his assertion of laches, affirmative defenses raised for the first time in reply briefs should not be addressed. *Fitial v. Duk*, 2001 MP 9 ¶ 29.

[4] We are unable to accurately cite to the Respondent's Answer because it is void of paragraph numbers, page numbers, or any other meaningful way to identify portions of the answer.

¶ 9 First, Cushnie's failure to properly argue the *Tenorio* factors would require the court to address multiple issues a party did not properly brief. *Rosario*, 2001 MP 3 ¶ 60 (noting that the Court need not address issues in the absence of cited authority regarding an argument raised on appeal). For example, Cushnie fails to present any arguments showing: (1) that he has no other adequate means to obtain relief – such as a direct appeal; (2) that he will be damaged or prejudiced in a way not correctable on appeal; (3) that the trial court was clearly erroneous as a matter of law;[5] (4) that the lower court's order is an oft-repeated error, or manifests a persistent disregard of applicable rules; or (5) that the lower court's order raises new and important problems, or issues of law of first impression. A complete review of these five issues is a prerequisite to the granting of mandamus relief. *See Tenorio*, 1 NMI at 9-10. Moreover, the petitioner "bears the burden of demonstrating that it lacks other adequate means for obtaining relief, and that it will be irreparably damaged or prejudiced on appeal." *Bank of Saipan v. Superior Court*, 2001 MP 5 ¶ 11 (citations omitted). Cushnie has not met this burden.

¶ 10 We note that even if Cushnie had properly addressed the *Tenorio* factors, mandamus would not be warranted in this instance. As to the first two *Tenorio* factors, the issue of whether the trial court violated a Supreme Court mandate or erroneously executed the Supreme Court's mandate has been squarely before this Court via the normal appellate process. *Wabol v. Villacrusis*, 4 NMI 314 (1995); *Loren v. E'Saipan Motors, Inc*., 1 NMI 133 (1990). Thus, we do not find Cushnie has no other adequate means to attain the desired relief or that he will be damaged in a way not correctable on appeal.

¶ 11 The fourth and fifth *Tenorio* factors also weigh against the granting of mandamus in this case. As to factor four, this is the first time a petition for mandamus has been filed to enforce a mandate and issues of mandate enforcement are rarely before the Court. *C.f. Pac. Amusement Inc. v. Villanueva III*, 2006 MP 8 (considering whether to *sua sponte* recall earlier mandate issued by Court); *Wabol*, 2000 MP 18 (considering whether trial court complied with mandate); *Aldan-Pierce v. Mafnas*, 1999 MP 11 (considering whether trial court complied with mandate); *Loren*, 1 NMI at 134-39 (considering whether trial court erred by failing to consider mandate). Therefore, the Petition does not present an oft-repeated error or represent a persistent disregard for applicable rules. As for factor five, issues regarding mandate interpretation and the application and operation of mandates have been before this Court before and case law has been firmly established addressing all of these issues. *See Pac. Amusement Inc.*, 2006 MP 8; *Wabol*, 2000 MP 18; *Aldan-Pierce*, 1999 MP 11; *Loren*, 1 NMI at 134-39. Thus, the Petition does not present a novel issue.

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[5] The Petition addresses the merits of the OAJ and argues that the OAJ is erroneous. However, the applicable standard – "clearly erroneous as a matter of law" – is not addressed.

¶ 12 Examining factor three requires an analysis of the substance of the Petition. The third *Tenorio* factor will weigh towards granting the petition when the trial court was clearly erroneous as a matter of law. *Bank of Saipan*, 2001 MP 5 ¶ 13 (citation omitted) (internal quotation marks omitted). A trial court is clearly erroneous when the reviewing court is "firmly convinced" that the lower court has erred as a matter of law. *Id.* (citation omitted).

¶ 13 The trial court judgment awarded prejudgment interest and the order reads:

> [t]he Court believes that Mr. Cushnie was aware, or should have been aware, that his actions were unethical and [sic] breach of duty. Therefore, the Court orders that this entire amount, $8,500, be forfeited . . . . In addition the Court orders that Mr. Cushnie pay prejudgment interest of 9% annum for the period beginning on the date each individual transfer from the client trust account was made and ending on the date of this order."

Matsunaga v. Cushnie, Civ. No. 97-0043 (NMI Super. Ct. June 29, 2004) (Findings of Fact and Conclusions of Law at 14). The trial court addresses the award of prejudgment interest again at the conclusion of its order:

> On the plaintiff's second cause of action, breach of fiduciary duty in the Diamond Hotel matter, the Court finds in favor of the plaintiff and ORDERS defendant Douglas F. Cushnie to pay plaintiff the sum of $58,500. In addition, Mr. Cushnie SHALL pay prejudgment interest per the order above and post-judgment interest as provided by 7 CMC § 4101."

Id. at 16. Thus, the trial court unambiguously awarded prejudgment interest on the $8,500.

¶ 14 On appeal, we upheld and affirmed the trial court's award stating:

> The trial court also held that while Cushnie's fee was reasonable, he was required to forfeit or disgorge $50,000 because he failed to account properly; $8,500 which he took as an advance; and $2,008.50 in fees that he never repaid pursuant to a previous order. We affirm the decision below, but reverse the trial court's finding that 2 CMC § 4941 and 2 CMC § 4942 are unconstitutional.[6]

Matsunaga, 2006 MP 25 ¶ 1. This indicates a clear affirmation of the trial court's award of prejudgment interest. We later state that Respondent shall be awarded "$50,000 in legal fees plus the $8,500 advance and $2,008.50 offset, including the award of prejudgment interest." *Matsunaga*, 2006 MP 25 ¶ 31. Although the latter statement does not state *what* the award of prejudgment interest is, it clearly upholds *an* award of prejudgment interest. Turning to the language of the remaining opinion for guidance, it is clear that the damages awarded by the trial court were affirmed in all respects. Thus, reading this excerpt in concurrence with the trial court award, it can be concluded that the Supreme Court upheld the trial court's award of prejudgment interest on the $8,500.

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[6] The portion of the trial court's holding that was reversed is not relevant to the issue before us. Sections 4941 and 4942 limit the amount of fees that attorneys are permitted to charge for legal services brought pursuant to Article XII of the NMI Constitution. 2 CMC §§ 4941, 4942.

¶ 15 However, in the conclusion of the appellate decision we restate our affirmation of the damages award in a different way: "We AFFIRM the decision of the Superior Court which entered a judgment for $2,008.50 plus pre-judgment interest at a rate of 9% per annum and an additional $58,500 with interest pursuant to 7 CMC § 4101 against Cushnie." *Matsunaga*, 2006 MP 25 ¶ 48. This sentence misstates what the trial court awarded. It is this paragraph – found in the conclusion of the opinion – that the mandate draws its language from and replicates almost identically. But this particular paragraph of the appellate opinion is not an accurate summation of either the trial court award or the ultimate findings on appeal. Thus, the language in the mandate is not an accurate description of the trial court award or of the subsequent affirmation of the trial court by this Court. The mandate clearly affirms the damages awarded by the trial court but misstates *what* they are affirming. Therefore, we turn to the law governing the interpretation of mandates.

¶ 16 Trial courts have a duty to strictly comply with a mandate. *Loren*, 1 NMI at 138. The mandate at issue presents a troubling conundrum: strict compliance with one portion of the mandate requires a deviation from another part of the mandate. If we only read that portion of the mandate which states "judgment for $2,008.50 plus pre-judgment interest at a rate of 9% per annum and an additional $58,500 with interest pursuant to 7 CMC § 4101 against Cushnie" then no prejudgment interest should be awarded to Cushnie. Conversely, it is also readily apparent that the trial court's award of damages was affirmed by the mandate so the trial court only had to enter judgment in line with the decision it had already made. Moreover, because remand was not included as part of the instruction to the trial court, the trial court had no authority to alter its award of prejudgment interest. *See Wabol*, 2000 MP 18 ¶ 12 n.3 ("only those matters left open by the mandate may be reviewed on remand.") (citation omitted).

¶ 17 In essence, the trial court had to strictly comply with either the affirmation of its judgment, or the erroneous summation of the trial court award. The trial court chose to affirm its decision, as directed by the mandate, and issued its OAJ accordingly. We have recognized that in some instances, the trial court orders following remand may diverge from the mandate but must be "consistent with the spirit of the appellate decision . . . . " *Wabol*, 2000 MP 18 ¶ 16 (citations omitted) (internal quotation marks omitted). Additionally, "[a] mandate cannot be applied in a vacuum, and must be interpreted in light of the appellate court's opinion." *Town House Dep't Stores, Inc. v. Ahn*, 2003 Guam 6 ¶ 16 (citations omitted). Therefore, the trial court was permitted to interpret the mandate in light of the opinion and thus OAJ was not clearly erroneous as a matter of law.

III

¶ 18 Petitioner Cushnie fails to address the law governing mandamus and thereby fails to present arguments necessary for a proper review of mandamus relief. Accordingly, we DENY the Petition and HEREBY lift the stay on the OAJ.

SO ORDERED this 4th day of April 2012.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ROBERT J. TORRES
Justice Pro Tem

CARBULLIDO, F.P., concurring:

¶ 19 I concur with the result reached by the majority that denial of the Petition is appropriate where the petitioner wholly fails to address the governing law. However, having agreed with Respondent "that mandamus relief is not available because Cushnie has not articulated a reason why mandamus is appropriate and because he has completely failed to demonstrate that any of the five *Tenorio* factors are applicable," I would not have discussed the merits of the Petition and I find it unnecessary to engage in an analysis of the *Tenorio* factors. *See supra* ¶ 8.

/s/
F. PHILIP CARBULLIDO
Justice Pro Tem