STATE OF TRUK, ex rel. YOSIUO SWAIN, et al.,
Plaintiffs-Appellants

v.

ERHART ATEN, GOVERNOR OF TRUK STATE, et al.,
Defendants-Respondents

Civil Appeal No. 420

Appellate Division of the High Court

November 17, 1986

Appeal from dismissal of suit by public employees against former governor of the State of Truk, alleging "privatization program" of governor, resulted in work going to private contractors that was normally performed by public employees in violation of various laws. The Appellate Division of the High Court, Munson, Chief Justice, affirmed in part, reversed in part, and remanded for findings consistent with its opinion.

1. **Appeal and Error—Discretion To Review**

   Conclusions of law are freely reviewable by an appellate court.

2. **Actions—Dismissal**

   Trial court erred in dismissing suit by public employees against former governor of the State of Truk, alleging privatization program violated, among other provisions, the Truk State Charter, where evidence indicated former governor entered into private sector contracts on a whim, regardless of appropriations or available funds, a practice prohibited by the Charter.

3. **Statutes—Purpose**

   The purpose of the Truk State Financial Management Act is to ensure that public funds are used only as provided by law. F.M.A. § 2.

4. **Statutes—Construction**

   Where governor of the State of Truk instituted "privatization program" in which various public works projects were contracted to the private sector, and where funds to pay the contracts were never appropriated, and resulted in a deficit, the acts of the governor violated the Truk State Financial Management Act. F.M.A. § 2.

5. **Statutes—Construction**

   Suit by public employees against former governor of State of Truk stated a cause of action for violation of the State Budget Act, prohibiting expenditure of state funds absent a legislative budget bill or an appropriation.

6. **Statutes—Construction**

   Trial court properly found that former governor of Truk had not violated the Executive Branch Organization Act (EBOA) by letting public works contracts to private firms. E.B.O.A. § 6.

7. Statutes—Construction

In suit by public employees against former governor of State of Truk, where former governor had entered into private sector contracts for public works projects, the trial court erroneously found that Public Service System Act (PSSA) had not been violated, since PSSA requires certification for all services exempted from it and mandated that former governor produce evidence of certifications.

8. Appeal and Error—De Novo Review

An appellate court reviews conclusions of law on a *de novo* basis.

9. Trial—Agreement of Counsel—Opening Statement

Opening statement is not evidence and in fact can be waived.

10. Trial—Parties—Dismissal

Dismissal of a party following the opening statement of opposing counsel is proper when it contains admissions which are fatal to plaintiff's case.

11. Trial—Parties—Dismissal

Trial court improperly dismissed a defendant following the opening statement of counsel, since the opening statement did not contain admissions fatal to plaintiff's case.

12. Trial—Conduct of Trial

The conduct of a trial is left to the discretion of the trial court.

13. Trial—Conduct of Trial

Decision by trial court as to the conduct of a trial will be overturned only where a party can show the court abused that discretion.

14. Trial—Parties—Dismissal

In suit by state employees against former governor of the State of Truk, court did not abuse its discretion in determining that legislature's Special Investigating Committee (SIC) should not be a party to the lawsuit.

15. Trial—Conduct of Trial

Trial court is given great latitude in the conduct of the trial.

16. Civil Procedure—Motion for Continuance—Discretion

The granting of a motion for a continuance is within the sound discretion of the trial court.

17. Civil Procedure—Motion for Continuance—Discretion

In suit by state employees against former governor of the State of Truk, court did not abuse its discretion in denying plaintiff's motion for a continuance.

18. Evidence—Depositions—Admissibility

The admissibility of a deposition is within the sound discretion of the trial judge, and the judge's finding will not be overturned absent an abuse of discretion.

19. **Evidence—Depositions—Admissibility**

In suit by state employees against former governor of the State of Truk, deposition was erroneously excluded from evidence, where the court did not review the deposition *in camera*.

20. **Evidence—Documents—Admissibility**

In suit by public employees against former governor of Truk, trial court erred in refusing to admit into evidence documents, where at prior hearing in same case court had found the documents authentic.

21. **Evidence—Documents—Admissibility**

Admission of documentary evidence is left to the sound discretion of the trial court.

22. **Evidence—Documents—Admissibility**

In suit by public employees against former governor of Truk, trial court's exclusion of 1983 audit report was erroneous.

23. **Evidence—Documents—Admissibility**

In suit by public employees against former governor of Truk, trial court's ruling admitting into evidence 1984 audit report was upheld.

24. **Contracts—Quantum Meruit**

Where a municipality accepts the benefits of an invalid contract, the party with whom it dealt is entitled to *quantum meruit* unless there is a lack of good faith.

Counsel for Plaintiffs-Appellants:	W. H. WHITAKER, ESQ., Micronesian Legal Services Corporation, Truk Office
Counsel for Defendant-Respondent Manual D. Crisostomo and Manual D. Crisostomo, Inc. (MDCI)	GARY D. HULL, ESQ.
Counsel for Defendant-Respondent ECCG (Electrical Contracting Corporation of Guam) and L. D. Williamson	GEORGE M. BUTLER, ESQ., and ROBERT L. KEOGH, ESQ.

Before MUNSON, *Chief Justice*, HEFNER*, *Associate Justice*

* Chief Judge of the Commonwealth Trial Court, designated as Temporary Justice by United States Secretary of the Interior.

MUNSON, *Chief Justice*

Plaintiffs-appellants appealed the Trial Division's decision pursuant to Rule 33(b), dismissing their suit. On November 3, 1986, this court issued an Order of Remand affirming in part, reversing in part, and remanding the case for further proceedings consistent with its order. That order also stated that a more complete opinion would follow explaining the reasons for the court's ruling. This opinion serves that purpose.

Erhart Aten was Governor of Truk State from 1978 to 1985. He instituted a "privatization program" beginning in 1981 in which various public works projects were contracted to the private sector.

On December 22, 1983, plaintiffs-appellants, being nineteen employees of the Truk Department of Public Works (DPW), received notices that they would be terminated from their positions at DPW. These terminations were due to the privatization program.

On February 3, 1984, the nineteen employees, hereinafter collectively referred to as Swain, as private attorneys general pursuant to the Truk Financial Management Act, filed a complaint for declaratory and injunctive relief against defendants-appellees Erhart Aten, Governor of the State of Truk, and Patrick Mackenzie, Director of the Department of Treasury of the State of Truk (hereinafter collectively referred to as Aten). The suit alleged that the privatization program violated the Executive Branch Organization Act of 1980 and the Truk State Public Service System Act. The thrust of Swain's complaint was that the privatization program resulted in work going to private contractors that was normally performed by DPW. Additionally, Swain alleged that public funds had not been appropriated for payment of these contracts. He argued that incurring these obligations without available funds violated

the Truk State Charter, the State Budget Act of 1982, and the State Financial Management Act.

Swain sought injunctive relief precluding the termination of his job. He also sought a declaratory judgment that Aten had violated the above laws and an injunction mandating future compliance with these laws. Finally, Swain sought to have the contracts declared null and void.

Following a hearing on February 6, 1984, a temporary restraining order was issued, restraining the governor from, *inter alia*, terminating plaintiffs-appellants' employment with DPW. The order also prohibited the governor from disbursing public funds to private sector businesses, contracted to perform services previously performed by DPW.

On February 17, 1984, the temporary restraining order was reformed into a preliminary injunction by agreement of counsel. The preliminary injunction included the language of the temporary restraining order. In addition, it restrained Aten from transferring government property to the private sector and from using a non-existent emergency as a pretext for circumventing the restraints imposed by the preliminary injunction.

Prior to trial, Swain filed an amended complaint, adding particulars to the original complaint. Aten moved to file a third-party complaint against the private contractors to whom he had awarded the contracts. The motion was granted by stipulation. The Special Investigating Committee of the Truk Legislature (legislative committee) was given leave to intervene as a party plaintiff. The court issued a preliminary injunction mandating that the governor submit a budget message to the Second Legislature by August 31, 1984.

Swain's motion for leave to amend the complaint for a second time was granted. This complaint sought: (1) to have 23 contracts entered into by third-party defendant

contractors with Truk State declared void *ab initio* on grounds of fraud and collusion; (2) to have five of the 23 contracts declared void for violating the Public Contracts Act; (3) to have all contracts declared void for violating those laws enumerated in the first and second amended complaints; (4) a declaratory judgment that Truk State was not liable for any sums owing under the specified contracts; and (5) a judgment for damages in excess of $1,600,000 to Truk State from third-party defendants.

During the month of August, 1985, the trial court was inundated by motions and memoranda from all parties. The trial commenced on August 26, 1985. Initially, third-party defendant contractors Kyo Ngo Company, Pak Chilsoon, J & S Construction Company, Champang Melpel, Tosiuo Irons, and L.T.J. Electrical Construction Company were dismissed from the suit. The court made the following rulings on the motions before it:

1. Aten's motion to dismiss the legislative committee as plaintiff-intervenor was granted.

2. The legislative committee's motion for a continuance was denied.

3. Subpoenas that had been issued by the court at the request of the legislative committee were quashed.

4. MLSC's draft of a pre-trial order was accepted as the court's order and executed by all counsel.

5. Third-party defendants' motion to suppress the deposition of Charles Boddy was granted.

6. Mr. Whitaker's request to have Mr. Bruce, the former legislative committee counsel, serve as co-counsel was denied.

7. Defendants-appellees' motion in limine to exclude evidence of fraud by the governor was granted without objection.

8. Swain's motion for a protective order requiring Mr. Hull, counsel for third-party defendants, to cease and desist from harassing and intimidating witnesses was denied.

Swain presented his opening argument at the commencement of the trial. Mackenzie's attorney moved to dismiss Mackenzie following the opening statement. That motion was granted.

Following the six-day presentation of Swain's case, Aten moved to dismiss. The motion was granted orally from the bench.

Swain appealed. The Appellate Division of the High Court ordered the Trial Division to enter a written judgment. The Trial Division did so on March 7, 1986, *nunc pro tunc* to August 31, 1985.

On July 14, 1986, Swain moved for judgment. This motion purported to be a stipulated judgment signed by plaintiffs-appellees' counsel and defendants-appellees, the newly-elected Governor, Director of Finance, and Attorney General. The Appellate Division denied the motion.

The issues presented on this appeal are:

1. Whether the trial court erred in dismissing plaintiffs' action.

2. Whether the trial court properly dismissed defendant Mackenzie after Swain's counsel failed to mention him during the opening statement.

3. Whether the trial court abused its discretion by refusing to allow Thomas Bruce to join as plaintiffs' co-counsel.

4. Whether the trial court erred by denying Swain's motion for a continuance to take additional testimony.

5. Whether the trial court erred in suppressing the Boddy deposition because it contained numerous errors, was not signed by Boddy, did not conform to the stipulation

regarding depositions, and because Boddy was not served with a witness subpoena.

6. Whether the trial court erred in refusing to admit into evidence the Boddy-Crisostomo joint venture agreement.

7. Whether the trial court erred in denying the admissibility of the 1983 and 1984 Touche Ross audit reports.

8. Whether the trial court abused its discretion in denying Maile Bruce the opportunity to testify.

ANALYSIS

1. WHETHER THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' ACTION.

This suit alleged violations of the Truk State Charter, the State Budget Act of 1982, the State Financial Management Act, the Executive Branch Organization Act of 1980, and the State Public Service System Act. These will be discussed individually in the order given.

THE TRUK STATE CHARTER

The Truk State Charter (Charter) was passed in 1977. The Charter states in relevant part:

> Section 319. Appropriation Bills not to be in excess of available revenues.—Appropriation bills enacted by the Legislature shall not provide for the appropriation of funds in excess of amounts as are available or estimated to be available from revenues raised pursuant to the tax laws or other revenue laws of the district government and received or estimated to be received from tax laws and other revenue laws of the Trust Territory or from any other source.
>
> Section 220. Withdrawals and obligations to be authorized by law. —No money shall be withdrawn from the district government treasury except in accordance with appropriations made by law. No obligation for the payment of money shall be incurred except as authorized by law. Unobligated appropriations outstanding at the end of the period of time specified by law shall be void.

Section 221. Submission by Governor of budget and bills to Legislature.—The Governor shall submit to the Legislature, at a time prescribed by law, a budget setting forth a complete plan of proposed expenditures and anticipated receipts of the district government for the ensuing fiscal year, together with other information as the legislature may require. The budget shall be submitted in a form prescribed by law.

The Governor shall also, upon the opening of each regular session of the legislature, submit bills to provide for proposed expenditures and for any recommended additional revenues by which the proposed expenditures are to be met. Such bills shall be introduced in the legislature upon the opening of each regular session.

The trial court ruled, as a matter of law, that the Charter was not implemented until December, 1982. The court determined that the Charter took effect with the passing of the Truk Budget Act. The court did not explain this ruling.

This ruling was erroneous. There is nothing in the Charter that indicates it is not self-implementing.

[1] Conclusions of law are freely reviewable by an appellate court. *Official Creditors' Committee of Fox Markets, Inc. v. Ely*, 337 F.2d 461 (9th Cir. 1964), *cert. denied*, 380 U.S. 978 (1965). A careful review of the Truk State Charter indicates that it took effect upon its passage by the Congress of Micronesia and approval by High Commissioner Adrian Winkel on October 7, 1977.

The Charter requires appropriations for all money withdrawn from the Treasury. Truk District Charter § 220. No obligation can be incurred except as authorized by law. *Id.* Section 219 prohibits appropriations in excess of available revenues.

The evidence indicates that former Governor Aten entered into contracts on a whim, regardless of appropriations or available funds. This practice is prohibited by the Charter. The result of this practice was a several million dollar deficit.

[2] The trial court erred in dismissing Swain's suit because he properly alleged and proved a violation of the Charter.

THE TRUK FINANCIAL MANAGEMENT ACT

[3] The purpose of the State Financial Management Act (FMA) is to ensure that public funds are used only as provided by law. FMA § 2. Section 5(1) of the FMA requires that "[e]very right of expenditure from the general fund shall be by obligation of appropriated sums." Section 6(2) prohibits the treasurer from acknowledging a claim unless it is for the purpose specified by an appropriation. Section 8 makes it a crime for an officer or employee of Truk to obligate funds unless funds are available and have been appropriated for that purpose.

The trial court interpreted the Act to require that the treasurer must ensure that Truk received a benefit for the money it expended on contracts. The court ruled that since the contracts were performed, there was no loss of public funds. These findings are not on point.

[4] The FMA allows funds to be obligated only when appropriated and only when available. Swain showed that the funds to pay the contracts entered into by Aten were never appropriated. He further showed that these contracts resulted in a $2.94 million deficit in 1983. There were no available funds to satisfy these obligations. These acts violated the FMA.

THE STATE BUDGET ACT

The State Budget Act (SBA) prohibits expenditure of state funds absent a legislative budget bill or an appropriation. SBA § 7. The Act was passed December 14, 1982 by a legislative override of Governor Aten's veto. Section 9 of the SBA states that it takes effect on becoming law—December 14, 1982.

[5] The trial court erroneously concluded that the SBA took effect in May, 1984. Aten argues that the governor's responsibility to submit a budget under the SBA did not begin until fiscal year 1984. This may be true; however, § 7 prohibits the treasurer from disbursing money from any source without an appropriation. Strictly interpreting this section, any expenditure after December 14, 1982 had to be accomplished through appropriation or the budget bill. The law was not observed in this case. Swain has proven a cause of action under the SBA.

THE EXECUTIVE BRANCH ORGANIZATION ACT OF 1980

[6] The Executive Branch Organization Act of 1980 (EBOA) states that DPW shall *provide* for the construction, maintenance, and operation of improvements and facilities. EBOA § 6. Swain argues that § 6 requires DPW to perform all public works functions, including construction of infrastructure. The trial court ruled that Aten had not violated the EBOA by letting contracts to private contractors because DPW was incapable of performing them. The court implicitly ruled that Aten had discretion to let these contracts. This is a reasonable interpretation of the EBOA. The act requires that DPW provide various services and perform certain functions. It is reasonable to conclude that these functions could be carried out by private contractors. The trial court's finding that Aten had not violated the EBOA by letting contracts to private contractors is supported by the facts and the law, and is affirmed.

THE PUBLIC SERVICE SYSTEM ACT

[7] The Public Service System Act (PSSA) was enacted to provide security in employment for public employees. The PSSA requires that all work be performed by public servants unless the personnel officer has certified that the

work should be exempted. To qualify as an exempted service, a job must be special or unique, non-permanent, essential to the public interest, and normal public service recruitment must be impractical. PSSA § 8(1)(g). The trial court found that the PSSA had not been violated because it applied only to government employees, not employees of independent contractors. This finding overlooks § 8(1)(g) of the PSSA which requires certification for all services exempted from it. Swain maintains that only six of the contracts were certified. The complaint called into question 31 contracts. The PSSA mandates that Aten produce evidence of the additional certifications.

2. WHETHER THE TRIAL COURT PROPERLY DISMISSED MACKENZIE AFTER SWAIN'S COUNSEL FAILED TO MENTION HIM DURING THE OPENING STATEMENT.

Truk trial assistant Camillo Noket presented Swain's opening statement. He was interrupted by opposing counsel. The court stopped him four times, as well. The court told Noket to "just get into it, Camillo, okay? Let's not waste time on details." (Tr. 81.) The court also pointed out that "all these facts are known. You don't have to cover the same ground. Let's get to the crux of the case." *Id.*

Defense counsel moved to dismiss Mackenzie following Noket's opening statement. This motion was based on the fact that Mackenzie's name was not mentioned. Noket also failed to argue a theory under which Mackenzie was liable. Noket objected and stressed to the court that Mackenzie was responsible for disbursing public funds to satisfy the obligations incurred by the contracts. (Tr. 87.) The trial court granted Mackenzie's motion.

The practice of dismissing a party following the opening statement of counsel is unique to American jurisprudence. 5 A.L.R.3d 1405, 1411. However, it is not a practice fol-

lowed throughout the United States. *See, e.g., Haley v. Western Transit Co.*, 76 Wis. 344, 45 N.W. 16 (1890) (practice of granting dismissal after the opening statement is not followed in Wisconsin).

This is an issue of first impression in the Trust Territory. It involves two questions: (1) Whether, as a matter of law, dismissal of a party following the opening statement of counsel is proper; and (2) whether, assuming dismissal is proper, the trial court abused its discretion by dismissing Mackenzie.

[8] The trial court implicitly concluded as a matter of law that dismissal of a party following opening argument is proper. An appellate court reviews conclusions of law on a *de novo* basis. *Official Creditors' Committee of Fox Markets, Inc. v. Ely, supra.*

This question involves a policy decision. The strongest reason to adopt this practice is that it promotes judicial efficiency by eliminating meritless claims at the outset of trial rather than waiting until all the evidence has been presented. *See, generally*, 5 A.L.R.3d 1405. However, "it is an extreme measure, fraught with danger, and . . . the power of the courts in this regard should be exercised sparingly and with much caution." *Id.* at 1417 (footnotes omitted).

[9] One factor militating against this practice is the possibility of dismissing a meritorious claim. The opening statement is not evidence and in fact can be waived. *Lampka v. Wilson Line of Washington, Inc.*, 325 F.2d 628 (D.C. App. 1963). It is peculiar that an error in this statement could result in dismissal. *Id.* at 629.

Courts that condone this practice have varying standards for granting dismissal. The most liberal view is that summary dismissal following opening statement is appropriate when the opening statement consists of conclusions and not facts. *Ambrose v. Detroit Edison Co.*, 380 Mich. 445, 157

N.W.2d 232 (1968). A less extreme view permits summary dismissal where plaintiff fails to show that a cause of action clearly exists. *Palazzi v. Air Cargo Terminals, Inc.*, 244 Cal. App. 2d 190, 52 Cal. Rptr. 817 (1966). The most stringent standard permits summary dismissal only when the opening statement contains admissions which are fatal to plaintiff's case. *Samuels v. Spangler*, 441 S.W.2d 129 (Kentucky 1969). There also is support for the proposition that dismissal after the opening statement is available only if the suit is based purely on a question of law. *Brady v. Ratkowsky*, 69 Okla. 193, 171 P. 717 (1918).

[10] We now adopt the most stringent test, that is, permitting dismissal following the opening statement only when it contains admissions which are fatal to plaintiff's case. It is an extreme measure and can result in great hardship to the unwary or unsophisticated advocate. Noket was a trial assistant who apparently fell into this trap. The stringent test is justified to preclude similar results. As to the first question, whether, as a matter of law, dismissal of a party following the opening statement of counsel is proper, we answer in the affirmative.

[11] The second question is whether the trial court abused its discretion by granting the motion. Actually, the trial court appears to have been using a more liberal standard than the one now adopted by this court. The trial court's ruling was incorrect because Noket's opening statement did not contain admissions which were fatal to Swain's case. On remand, the trial court shall reinstate the current Director of Finance to nominally replace Mackenzie. The relief sought by Swain is injunctive and the new director shall stand in Mackenzie's place.

3. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW THOMAS BRUCE TO JOIN PLANTIFFS AS CO-COUNSEL.

The Truk State Legislature's Special Investigating Committee (SIC) initially was allowed to intervene. Ted Mitchell represented the committee. He later withdrew and was replaced by Thomas Bruce. The committee was dismissed on the morning of trial. Swain's counsel asked the court to allow Thomas Bruce to serve as co-counsel. The court refused. Swain cites this as error.

[12, 13] The conduct of a trial is left to the discretion of the trial court. *Zinn v. Ex-Cell-O Corp.*, 148 Cal. 2d 56, 306 P.2d 1017, 1034 (1957). The decision will be overturned only where a party can show the court abused that discretion. *Id.*

[14] The trial court decided that the SIC should not be a party to the lawsuit. (Tr. 60.) Mr. Bruce was the legislative counsel and represented the SIC. Dismissing the SIC but permitting Mr. Bruce to serve as Swain's co-counsel would have been illusory. The SIC would have remained, in effect, a party to the suit. This does not amount to an abuse of discretion. The trial court's ruling is affirmed.

4. WHETHER THE TRIAL COURT ERRED BY DENYING SWAIN'S MOTION FOR A CONTINUANCE TO TAKE ADDITIONAL TESTIMONY.

[15, 16] The trial court is given great latitude in the conduct of the trial. *Zinn v. Ex-Cell-O Corp., supra.* The granting of a motion for a continuance is within the sound discretion of the trial court. *Reeg v. Shaughnessy*, 570 F.2d 309 (10th Cir. 1978).

[17] Swain requested a continuance to take the testimony of Charles Boddy and Charles Baker. The court feels that the trial court did not abuse its discretion in denying Swain's motion for a continuance. Due to the other rulings in this case, this issue is of no further import.

5. WHETHER THE BODDY DEPOSITION WAS PROPERLY EXCLUDED BECAUSE IT CONTAINED NUMEROUS ERRORS, WAS NOT SIGNED BY BODDY, DID NOT CONFORM TO THE STIPULATION REGARDING DEPOSITIONS, AND BECAUSE HE WAS NOT SERVED WITH A WITNESS SUBPOENA.

On July 23, 1984, Charles Boddy's deposition was taken by Swain's counsel. Attorneys for Aten, Mackenzie and Crisostomo were present. Boddy was not present at trial. Crisostomo's Motion to Suppress the Boddy deposition was granted on the morning of trial. The trial court cited several reasons for the suppression: (1) Swain failed to file the deposition tapes with the court, in accordance with a stipulation to do so; (2) Boddy had not read and corrected the deposition; and (3) there were patent material defects in the transcript of the deposition. The court found the deposition unreliable as a result of these irregularities.

[18] The admissibility of a deposition is within the sound discretion of the trial judge. *Reeg v. Shaughnessy, supra.* The trial judge's finding will not be overturned absent a showing of abuse of discretion. *Id.* at 37.

This court is reluctant to overturn a ruling of the trial court that is based on its discretion. However, it appears from the record that this may be an appropriate instance.

Swain contends that the Boddy deposition contains confessions by Boddy that he agreed to accept kickbacks from interested parties in exchange for contracts. This is the very crux of Swain's case. One of his theories of the case is that defendants-respondents illegally let out the contracts in question. Boddy was Director of Public Works when Aten was governor. What better evidence could there possibly be to bring this issue to light?

Further, the court deems it was pertinent that in exercising its discretion, the trial court was obligated to review the deposition. The trial court could have then weighed the

magnitude of the testimony against the purported irregularities and determined the admissibility of the deposition.

[19] On remand, the trial court shall review the deposition *in camera* and determine if the relevant parts are reliable. If so, it shall admit those portions of the deposition that are both relevant and reliable. However, those portions shall only be admissible against Crisostomo and Williamson.[1]

6. WHETHER THE TRIAL COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE THE BODDY/CRISOSTOMO JOINT VENTURE AGREEMENT.

Exhibit 34 is a Joint Venture Agreement entered into between M. D. Crisostomo and Charles Boddy on February 2, 1983. It involves the Rota, CNMI airport construction project. (Tr. 279.)

This document was originally supplied to the trial court at the preliminary injunction hearing. Counsel for Swain made it clear to the trial court that he wished to have a ruling on the authenticity of the document for trial purposes so he would not be forced to bring in a witness to authenticate it. (Pr. Inj. Tr. 14.) The court found that it was authentic. Defendant's counsel concurred. *Id.* at 15. The trial court signed an order declaring that the document was authenticated for purposes of this case. The court further stated that "[a]ny documents presented for admission as exhibits need not be further authenticated." *Id.* Prior to trial, the court stated that it would incorporate all of the evidence introduced at the temporary restraining order and permanent injunction hearings into evidence for the trial. (Tr. 61.)

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[1] Williamson was not a party to the lawsuit on the date of the Boddy deposition, July 23, 1984. However, he was served as a party defendant in December, 1984, and therefore he had eight months to reopen Boddy's deposition, or conduct other discovery to cross-examine Boddy on testimony harmful to him.

The court then reversed these previous rulings during the trial. It determined that its earlier rulings were incorrect and that the Boddy-Crisostomo Joint Venture Agreement was not self-authenticating. It denied admitting the agreement because it was not authenticated.

Swain relied on the court's earlier rulings that the agreement was admissible. To deny its admissibility in the course of the trial was an injustice to plaintiffs. It was not possible for them to anticipate this change of heart by the trial court.

Aten cites *Hulihee v. Heirs of Hueu(K)*, 57 Haw. 312, 555 P.2d 495 (1976), for the proposition that the admission of a document in a prior proceeding does not satisfy the authenticity requirement in a subsequent proceeding. *Hulihee* is not on point. In *Hulihee*, the court found that it was not bound by an authenticity ruling made 59 years earlier by a different court in a different case. Clearly, a ruling made months earlier by the same court in the same case can and should be relied on by parties to the case.

[20] This ruling appears to transcend the fine line between sound discretion and abuse of discretion. It is reversed.

7. WHETHER THE TRIAL COURT ERRED IN DENYING THE ADMISSIBILITY OF THE 1983 AND 1984 TOUCHE ROSS AUDIT REPORTS.

Swain attempted to introduce 1983 and 1984 audit reports compiled by Touche Ross at the request of the governor. A portion of the 1983 report was admitted. The 1984 report was not admitted.

[21] As pointed out by Aten, the admission of this evidence is left to the sound discretion of the trial court. *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 403 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 427. The 1983 report was deemed irrelevant and therefore inadmissible.

According to Swain, the audit report, *inter alia*, showed that there was a $2.39 million deficit for DPW in 1983.

[22] Swain's complaint states that Aten entered into contracts that were illegal because they resulted in a deficit. The 1983 audit report perhaps is evidence of that result. The report had previously been admitted at the preliminary injunction hearing. Mr. Daniel Fitzgerald, the Director of Audit Operations for Touche Ross, testified that the report was the best compilation of the records found in Truk State Finance. For these reasons, the court's ruling on the 1983 report is reversed. It shall be admitted into evidence.

[23] The 1984 audit report was offered while former defendant Mackenzie was on the stand. He took no part in the compilation of the report. He could not testify as to its authenticity or accuracy, prerequisites for admissibility. For this reason, the trial court's ruling as to the 1984 report is affirmed.

8. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MAILE BRUCE THE OPPORTUNITY TO TESTIFY.

Swain attempted to call Maile Bruce to the witness stand. She was going to testify about out-of-court statements made by Boddy. The court refused to let her testify because (1) she was not on the witness list in the pre-trial order; (2) she was present during the taking of Boddy's deposition, which had been previously ruled inadmissible; (3) she was counsel for the prosecution in a criminal case against two of the third-party defendants; and (4) she interjected herself into the proceeding from the audience and argued that she should be allowed to testify.

As indicated earlier, the court believes that the Boddy deposition is extremely relevant to the fair disposition of this suit. However, the decision as to its admissibility is left with the trial court. If the trial court feels that the

deposition does not conform to the acceptable standards for admissibility, Maile Bruce can supply the trial court with the substance of Boddy's testimony since she was there. Should the court find the deposition to be admissible, there will be no need for her to testify.

Finally, if the trial court deems that the deposition is inadmissible, and that Maile Bruce cannot testify, then, and only then, the trial court shall allow Boddy and/or Charles Baker to testify on the subject matter of the discussions among Crisostomo, Williamson and Boddy.

[24] At this point, the court deems it provident to supply the trial court with some guidance to assist it in the final disposition of this case. Because the contracts are void as a matter of law, the defendants must prove that the contracts were entered into in good faith. Showing of good faith is defined as lack of bad faith. McQuillin, *Municipal Corporations*, § 29.112, p. 517. If defendants prove they acted in good faith, they are entitled to *quantum meruit*. *Luzerne Township v. Fayette County*, 330 Penn. 247, 199 A. 327 (1938). In *Luzerne*, the Supreme Court of Pennsylvania set out the general rule that where a municipality accepts the benefits of an invalid contract, the party with whom it dealt is entitled to *quantum meruit*. *Id.* at 330. *Luzerne* is still good law, *Township of Ridley v. Pipe Maintenance Services*, 477 A.2d 619 (Penn. 1984), and this court adopts its sound reasoning.

But should the trial court determine that defendants acted in bad faith, or acquired the subject contracts by fraud or collusion, defendants are entitled to nothing. *Miller v. McKinnon*, 124 P.2d 34 (Cal. 1942). In *Miller*, a citizen of Santa Clara County brought suit to challenge various contracts let out by Santa Clara for construction work. Miller alleged that these contracts were let out in violation of competitive bidding requirements. Miller further

alleged that the costs were "padded" to allow for excessive profits.

The California Supreme Court held that since the contracts were entered into without complying with the competitive bidding statute, they were void and unenforceable. *Id.* at 37. The court found that the competitive bidding requirement was mandatory. Therefore, a contract outside of the statutory requirement was without force and effect. *Id.* at 38. The court pointed out that persons dealing with a government agency are presumed to know the law and, as such, act at their peril. *Id.* The *Miller* court held that defendants were not entitled to any relief, including *quantum meruit*. We choose to follow *Miller* only upon a showing of lack of good faith on defendants' part.

For these reasons, we affirm in part, reverse in part, and remand to the trial court for findings consistent with this opinion and the order annexed to it dated November 4, 1986.