IN THE SUPREME COURT OF GUAM

KINI B. SANANAP, IOWANA M. SANANAP AND THE 40 LOT OWNERS (OF 33 LOTS) LISTED IN EXHIBIT "1" TO THE FIRST AMENDED COMPLAINT,
Plaintiffs-Appellees

v.

CYFRED, LTD., A GUAM CORPORATION; ENRIQUE BAZA, JR.; ELEANOR B. PEREZ; DONGBU INSURANCE COMPANY AND DOE DEFENDENTS 1-10,
Defendants-Appellants.

Supreme Court Case No.: CVA06-011
Superior Court Case No.: CV1448-02

OPINION

Cite as: 2008 Guam 10

Appeal from the Superior Court of Guam
Argued and Submitted on February 14, 2008
Hagåtña, Guam

Appearing for Plaintiffs-Appellees:
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BEFORE: ROBERT J. TORRES, JR., Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; RICHARD H. BENSON, Justice *Pro Tempore*.

TORRES, C.J.:

[1] Defendants-Appellants Cyfred, et al. ("Cyfred") appeal a summary judgment awarding attorneys' fees to Plaintiffs-Appellees Sananap, et al. ("Homeowners"). Cyfred failed to show good cause as to why its Notice of Appeal was not defective or why suspending the Guam Rules of Appellate Procedure in this particular case is in the interest of justice. Moreover, while this court accepts, *sua sponte*, Cyfred's Amended Notice of Appeal, the Amended Notice of Appeal is untimely with respect to the appeal of the First Amended Judgment, and we therefore dismiss the appeal of the First Amended Judgment. The Amended Notice of Appeal, however, timely appeals the lower court's March 19, 2007 dismissal of the Motion to Amend the First Amended Judgment. The dismissal of this motion for lack of jurisdiction is reversed and remanded with instructions to either deny the motion or seek leave of this court to grant it.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] On September 27, 2002, Kini and Iowana Sananap ("the Sananaps") filed a complaint against Cyfred alleging that it failed to provide water and sewer lines, among other things, to residents of the Gill-Baza Subdivision in Yigo. The Sananaps subsequently filed an Amended Complaint that included as plaintiffs all of the Homeowners now participating in this appeal. On June 12, 2006, the lower court granted the Homeowners partial summary judgment with respect to the sewer line but reserved the issue of damages for a later decision.

[3] On June 20, 2006, the Homeowners made a Second Motion for Partial Summary Judgment with regard to the issue of damages, attorneys' fees, and costs. On August 1, 2006, the lower court issued its Findings of Fact and Conclusions of Law with regard to the Second

Motion for Partial Summary Judgment. The court awarded $74,420.29 in fees and costs to attorney Wayson Wong and $50,894.14 to attorneys Alicia Limtiaco and Donna Cruz.

[4] Cyfred's Notice of Appeal was received by the Superior Court at 1:10 PM on September 22, 2006. Earlier that same day, at 8:41 AM, the First Amended Judgment resulting from the August 1, 2006 Findings of Fact and Conclusions of Law was filed in the Superior Court. About two hours later, at 10:23 AM, a Notice of Entry on Docket was mailed to the parties. The Notice of Appeal refers only to the Findings of Fact and Conclusions of Law filed August 1, 2006 and not to the First Amended Judgment filed that same morning.

[5] On December 22, 2006, Cyfred filed a Motion to Amend the First Amended Judgment with regard to the award of attorneys' fees. On March 19, 2007, the lower court dismissed the motion on the grounds that the issue was already on appeal to the Supreme Court and therefore beyond the lower court's jurisdiction. Cyfred then filed an Amended Notice of Appeal with this court on March 30, 2007. The Amended Notice of Appeal purported to appeal the August 1, 2006 Findings of Fact and Conclusions of Law, the September 22, 2006 First Amended Judgment, and the March 19, 2007 Decision and Order. The Amended Notice of Appeal also limited the issue on appeal to the award of attorneys' fees.

II. JURISDICTION AND STANDARD OF REVIEW

[6] This court has jurisdiction over appeals of a final judgment. 48 U.S.C. § 1424-1(a)(2) (Westlaw through Pub. L. 110-243 (2008)); 7 GCA §§ 3107, 3108(a) (2005). However, under 7 GCA § 3107(b) (2005)[1] this court has the power to "make and promulgate rules governing the

[1] In 2004, the Organic Acts were amended to give the Supreme Court of Guam direct authority to promulgate rules of procedure. United States Pub. L. 108-386:1 (Oct. 30, 2004). Therefore, more recent amendments to the Guam Rules of Appellate Procedure are made pursuant to 48 U.S.C. § 1421-1(a)(6) (Westlaw 2008) rather than 7 GCA § 3107(b). *See, e.g.*, Promulgation Order No. 07-003-01 (Feb. 21, 2007).

practice and procedure in the courts," which has resulted in our promulgation of the Guam Rules of Appellate Procedure. Failure to comply with these Rules may result in a dismissal of the appeal. Guam R. App. P. ("GRAP") 3(a) (2007). In particular, the case before us suffers from two defects that must be addressed before reaching the merits. First, the Notice of Appeal refers to the August 1, 2006 Findings of Fact and Conclusions of Law ("Findings") rather than a final judgment. Second, the Notice of Appeal is untimely with respect to the Findings to which it refers.

[7] Cyfred also appeals the March 19, 2007 Decision to dismiss for lack of jurisdiction its motion to amend the First Amended Judgment. The standard of review for a dismissal due to lack of jurisdiction is *de novo*. *Sac & Fox Nation of Oklahoma v. Cuomo*, 193 F.3d 1162, 1165 (10th Cir. 1999).

III. DISCUSSION

A. Pre- and Post-Judgment Notices of Appeal

[8] Under the Guam Rules of Appellate Procedure, a notice of appeal is subject to the requirement that it "shall designate the judgment, order, or part thereof appealed from." GRAP 3(c)(1)(B) (2007). An exception to the rule that a Notice of Appeal must specifically refer to the judgment or order appealed from appears in Rule 4(a):

> A notice of appeal filed after the announcement of decision, sentence or order, but before entry of the judgment or order, shall be treated as being filed after such entry and on the date thereof. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil or criminal docket and notice is given to the parties of this entry by the Clerk of the Superior Court.

GRAP 4(a) (2007). By implication, a notice of appeal filed during the period between a decision and a final judgment must be read to refer to the judgment. *See Firstier Mortgage Co. v. Investors Mortgage Ins. Co.*, 498 U.S. 269, 275 (1991) ("[Federal Rule of Appellate Procedure

4(a)(2)] permits a premature notice of appeal from that bench ruling to relate forward to judgment and serve as an effective notice of appeal *from the final judgment.*" (emphasis in original)).[2] No such exception exists for notices of appeal filed *after* a final judgment has been entered.

[9] The exact moment at which a judgment is deemed entered for purposes of the time for appeal has been interpreted twice by this court. In *Gill v. Siegel*, the court rejected the interpretation that the time for filing of an appeal began to run when the parties *received* notice of the judgment's entry on the docket. 2000 Guam 10 ¶¶ 7-9. In *Sky Enterprise v. Kobayashi*, the court made clear that "Rule 4(a) requires both entry and notice of entry to start the time for an appeal." 2002 Guam 24 ¶ 16. More precisely, "the filing of the notice of entry effectively gives notice to the parties of the entry of the judgment on the docket and is sufficient to begin the thirty-day limit for filing a notice of appeal." *Id.* ¶ 17. In the instant case, the time for appeal began to run at 10:23 AM on September 22, 2006, when the notice of entry of the judgment on the docket was filed. The filing of a notice of entry of judgment also ends the period within which one could take advantage of the premature-notice-of-appeal exception in GRAP 4(a). As a result, Cyfred's reference to the Findings in its Notice of Appeal (filed at 1:10 PM, September 22, 2006) was untimely in that it was filed more than thirty days after the Findings was docketed on August 1, 2006. *See* GRAP 4(a). If the Notice of Appeal had instead referred to the First Amended Judgment docketed that same morning, it would have been timely.

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[2] Because the Guam Rules of Appellate Procedure are substantially similar to the Federal Rules of Appellate Procedure, we look to federal case law for guidance.

B. Whether the Appeal should be Dismissed

[10] The next question this court must answer is whether non-compliance with Rule 3(c),[3] under the circumstances presented here, deprives this court of jurisdiction to hear the appeal. A number of cases stand for the proposition that compliance with certain procedural rules is "'mandatory and jurisdictional.'" *Browder v. Dir. Ill. Dep't of Corr.*, 434 U.S. 257, 264 (1978) (quoting *United States v. Robinson*, 361 U.S. 220, 229 (1960)) (referring to the 30 day time limit for appeal under Fed. R. App. P. 4(a) and 28 U.S.C. § 2107). "[A]lthough a court may construe the Rules [of Appellate Procedure] liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988). Thus, if Cyfred's defective Notice of Appeal rises to the level of a jurisdictional defect, dismissal is mandatory.

[11] In *Torres*, the petitioner failed to include his name in the notice of appeal, although he was referenced in an abstract sense by the phrase "et al.". *Id.* at 318 None of the parties disputed the fact that the omission was due to a clerical error. *Id.* at 313. Despite this, the United States Supreme Court found that the omission of the petitioner's name deprived the Court of Appeals of jurisdiction. *Id.* at 317. The Court also explained the relationship between the Rule 3 requirements and Rule 4, which governs the time within which a party can appeal:

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[3] **Rule 3—Appeals, Notice.**

. . . .

(c) Content of the Notice of Appeal.

(1) The notice of appeal shall:

(A) specify the party or parties taking the appeal; and

(B) shall designate the judgment, order, or part thereof appealed from.

GRAP 3(c) (2007).

> Rule 2 gives courts of appeals the power, for "good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." . . . . The exception pertinent to this case forbids a court to "enlarge" the time limits for filing a notice of appeal, which are prescribed in Rule 4. We believe that the mandatory nature of the time limits contained in Rule 4 would be vitiated if courts of appeals were permitted to exercise jurisdiction over parties not named in the notice of appeal. *Permitting courts to exercise jurisdiction over unnamed parties after the time for filing a notice of appeal has passed is equivalent to permitting courts to extend the time for filing a notice of appeal.* Because the Rules do not grant courts the latter power, we hold that the Rules likewise withhold the former.

Id. at 314-15 (emphasis added). The relationship between Rule 3 and Rule 4 is even more relevant to the instant case because Cyfred never timely appealed even the Findings designated in its Notice of Appeal. In fairness, however, *Torres* can be distinguished from the present case in that failing to designate the First Amended Judgment rather than the underlying Findings provides greater notice to the opposing party than does failing to designate that party at all. *See Id.* at 318 ("The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.").[4]

[12] In *Brooks v. Toyotomi Co.*, the Sixth Circuit decided the adequacy of a notice of appeal that read in its entirety: "Comes the plaintiff, Edith Brooks, and submits her notice of appeal in this case." 86 F.3d 582, 584 (6th Cir. 1996) (quotation marks omitted), *abrogation on other grounds recognized by United States v. Webb*, 157 F.3d 451, 452-53 (6th Cir. 1998). The court stated that "[i]t is now well established that the requirements of Rule 3 are jurisdictional—and, as the *Torres* Court noted, 'a litigant's failure to clear a jurisdictional hurdle can never be

[4] In a strongly worded dissent, Justice Brennan argued that Rule 2 gave the courts the power to suspend the Rules in such a situation. *Id.* at 324-25 (Brennan, J., dissenting) ("The Court identifies no policy supporting, let alone requiring, this harsh rule, which I believe is patently inconsistent not only with the liberal spirit underlying the Federal Rules, but with Rule 2's express authorization permitting courts of appeals to forgive noncompliance where good cause for such forgiveness is shown."). Rule 3 was subsequently amended to allow reference to parties generally, especially in class action suits. 1993 Amendments, Note to subdivision (c). Those same amendments also appear in GRAP 3. *See, e.g.* GRAP 3(c)(3) ("In a class action . . . the notice of appeal is sufficient if it names one person qualified to bring the appeal . . . .").

'harmless'' . . . ." *Id.* at 586 (quoting *Torres*, 487 U.S. at 316 n.3). The court also explained that "[n]otwithstanding the absence of prejudice . . . a defective notice of appeal can never confer jurisdiction on an appellate court unless 'the filing is timely under Rule 4 and conveys the information required by Rule 3(c).'" *Id.* (quoting *Smith v. Barry*, 502 U.S. 244, 249 (1992)).

[13] One exception is where the notice of appeal is "'the functional equivalent of what the rule requires,'" an exception the court of *Brooks* declined to apply. *Id.* (quoting *Smith*, 502 U.S. at 248).[5] This is not surprising, considering that the notice of appeal at issue in *Brooks* simply announced the intention to appeal without designating the party, judgment, or even the court. *Id.* at 584. By contrast, Cyfred's Notice of Appeal only fails to designate the correct judgment. The question before this court is whether the incorrect reference to the Findings constitutes "the functional equivalent of what the rule requires." *Smith*, 502 U.S. at 248.

[14] The effect of failing to designate a judgment was addressed in *Constructora Andrade Gutierrez, S.A. v. American Int'l Ins. Co.*, 467 F.3d 38 (1st Cir. 2006). The court in *Constructora* refused to accept jurisdiction over an order (among several in the underlying case) that was not included in the original notice of appeal. *Id.* at 44-45. The court claimed to "construe those requirements [of Rule 3] liberally" but noted that the "principle of liberal construction does not . . . excuse noncompliance with the Rule [whose] dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." *Id.* at 44 (quoting *Smith v. Barry*, 502 U.S. at 248). Unlike the present case, however, *Constructora* may not have involved a mistake but rather a deliberately narrow appeal. *See id.* (finding that the appellant "knew the limited scope of its original notice of appeal as evidenced by its amended notice").

[5] The court proceeded to reach the merits without deciding the issue of jurisdiction, reasoning that the outcome would be the same whether they dismissed the case or reached the merits. *Brooks*, 86 F.3d at 587. This unusual approach was later criticized in *United States v. Webb*. 157 F.3d 451, 453 (6th Cir. 1998).

[15] Perhaps the closest analog of the present case is *In re I.S.*, 611 S.E.2d 467 (N.C. Ct. App. 2005). In *In re I.S.*, a North Carolina court considered an appeal where, due to a "mere scrivener's error," an otherwise timely appeal mistakenly referenced an earlier order. 611 S.E.2d at 471. Like the notice of appeal at issue here, the notice of appeal in *In re I.S.* was untimely with respect to the earlier, unappealable order. *Id.* The court stated that "[f]ailure to comply with the requirements of Rule 3 of our Rules of Appellate Procedure requires the dismissal of the appeal as this rule is jurisdictional."[6] *Id.* Unfortunately, this statement may have been dicta considering that the court subsequently exercised its discretionary power of certiorari under Rule 21(a)(1) of the North Carolina Rules of Appellate Procedure and revived the untimely appeal "[i]n light of the serious consequences of the termination of parental rights, the lack of objection to this error by appellees and the fact that the order referenced in the notice of appeal was clearly an error . . . ." *Id.* This court does not possess an analogous power to revive untimely appeals.

[16] In another similar case, *F.T.C. v. Hughes*, a party made an untimely appeal from a judgment that would have been timely with respect to the denial of a Rule 60(b) motion for a new trial. 891 F.2d 589, 591 (5th Cir. 1990). In dicta, the court speculated that "[i]f the Notice of Appeal were sufficient to bring the order denying the Rule 60(b) motion before this [c]ourt, we would pass upon [the] order . . . ." *Id.* It declined to do so, however, because the Rule 60(b) denial was an order that the appellant "did not intend to appeal and neither party briefed, which presents issues different from those presented . . . on appeal, and which is governed by a standard of review different from the attempted appeal." *Id.* In the present case, the conclusions of the

[6] Rule 3 of the North Carolina Rules of Appellate Procedure is substantially similar to Rules 3 and 4 of the Guam Rules of Appellate Procedure. *Compare* N.C. R. App. P. 3(d) (2006) (requiring that a notice of appeal "shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken"), *and* N.C. R. App. P. 3(c) (defining time limits), *with* GRAP 3(c)(1) (2004) ("The notice of appeal shall . . . specify the party or parties taking the appeal; and . . . shall designate the judgment, order, or part thereof appealed from."), *and* GRAP 4(a) (defining time limits).

Findings are nearly identical to the conclusions found in the First Amended Judgment and are subject to the same standard of review. This suggests that the court of *Hughes* would have considered the present appeal despite its defective notice.

[17] Incorrectly designating a judgment or order is not necessarily fatal to an appeal. In *Ward v. Reyes*, this court adopted the rule that an appeal of a Rule 59 motion to reconsider may be interpreted as an appeal of the underlying judgment. 1998 Guam 1 ¶ 7 (citing *Washington State Health Facilities Ass'n v. Dep't of Soc. and Health Servs.*, 879 F.2d 677, 681 (9th Cir.1989)); *see also Foman v. Davis*, 371 U.S. 178, 181 (1962) (allowing an appeal to refer to the judgment rather than the denial of the motion to vacate the judgment if the intention of the parties is clear and no prejudice results). However, we also warned that "[i]n other cases, where Guam Rules of Appellate Procedure Rule 3(c) is not strictly complied with, this Court may not be so lenient." *Ward*, 1998 Guam 1 ¶ 7. Moreover, *Ward* and *Foman* considered notices of appeal that were timely with respect to both the designated judgment and the intended judgment. In the case before us, the notice of appeal was untimely with respect to the Findings.

[18] Unfortunately, all of the cases mentioned above are distinguishable in some way from the case before us. We therefore turn to the purpose of the notice of appeal, which is "to advise the opposing party that an appeal is being taken from a specific judgment . . . ." *Markam v. Holt*, 369 F.2d 940, 942 (5th Cir. 1966). "[S]uch notice should . . . contain sufficient information so as not to prejudice or mislead the appellee." *Id.*; *see also Torres*, 487 U.S. at 318 ("The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal.") At oral argument, the Homeowners admitted that they were not prejudiced by the incorrect reference to the Findings in the Notice of Appeal. In fact, both parties were able to fully brief the relevant issues. Because the Homeowners were neither

prejudiced nor misled by the defective Notice of Appeal, we hold that it is within our jurisdiction to interpret Cyfred's Notice of Appeal as "the functional equivalent of what the rule requires." *Smith*, 502 U.S. at 248. This court therefore has jurisdiction to consider the appeal of the First Amended Judgment should we decide, in our discretion, to do so.

[19] This court may exercise its discretion and suspend the requirements of Rule 3(c) under the authority of Rule 2, which states:

> *In the interest of justice* or of expediting a decision *or for other good cause shown*, the Supreme Court may, except as otherwise provided in Rule 11(b) of these Rules, suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its decision.

GRAP 2 (2007) (emphasis added). According to Rule 3(a), "[f]ailure of an Appellant to take any step other than the timely filing of the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal." GRAP 3(a). Thus, if Cyfred fails to show good cause as to why its Notice of Appeal was defective, and if suspending Rule 3(c) is not in the interest of justice, this court may take any appropriate action, including dismissal of the appeal.

[20] One might reasonably infer that Cyfred wrote the Notice of Appeal with the intention of relying on the premature-notice-of-appeal exception in GRAP 4(a). The document itself reads "[r]espectfully submitted this Thursday, August 10, 2006." Appellants' Excerpts of Record ("ER"), Tab 20, at 179 (Notice of Appeal). For whatever reason, it was not submitted until the afternoon of September 22, 2006 and no effort was made to correct the reference to the Findings. *Id.* at 178. Had Cyfred mistakenly attempted to file a premature appeal, and had it promptly informed this court of the error, we might have been more inclined to suspend the rules for good

cause shown. Instead, Cyfred denies that it was attempting to take advantage of Rule 4(a) and continues to argue that its Notice of Appeal is GRAP compliant.

[21] At oral arguments, Cyfred's attorney claimed that he had no knowledge that the judgment had been filed the very morning he had submitted his notice of appeal. He states that "[t]he judgment was filed but my knowledge of it having been filed did not occur before the time that I submitted the Notice of Appeal in the afternoon." Transcript ("Tr."), 10:07:53 (Oral Arguments, Feb. 14, 2008). He must therefore have intended to submit the Notice of Appeal before the First Amended Judgment and thereafter rely upon Rule 4(a) relating to premature appeals. Yet, he also admits "I did prepare [the Notice of Appeal] back at the beginning of August. I saw what was . . . what was [sic] irregularities in the process and . . . yet I had to wait because of Rule 4.1." Tr., 10:12:32 (Oral Arguments). Based on these two statements it is not even clear whether Cyfred intended to file its Notice of Appeal before or after the First Amended Judgment was entered. There is therefore no basis upon which we can find that the defective Notice of Appeal was the result of a scrivener's error or an error in timing rather than a misapplication of our Rules of Appellate Procedure.

[22] Under the right circumstances, a misapplication of our Rules may be excusable for good cause shown. However, Cyfred's attorney refused to acknowledge that the Notice of Appeal was even defective at all. At oral arguments, he stated "I believe there is an ambiguity in the rule, and I believe that I did comply with the rule." Tr., 10:11:35 (Oral Arguments). The ambiguity to which he refers is apparently the reference to a "part thereof" in Rule 3(c). GRAP 3(c)(1) ("The notice of appeal shall . . . designate the judgment, order, or part thereof appealed from."). Cyfred argued that by designating the Findings that preceded the First Amended Judgment, it was actually appealing a "part thereof." Tr., 10:09:56 (Oral Arguments). Not only do we

disagree with this theory, but we find the wording of Rule 3(c) to be completely unambiguous. The reference to a "part thereof" means a part *of the judgment or order itself.* Thus, for example, when Cyfred narrowed its appeal in the Amended Notice of Appeal to include only the issue of attorneys' fees, it was appealing only a part of the First Amended Judgment as allowed under Rule 3(c).

[23] Had Cyfred provided this court with some legal authority supporting its interpretation of Rule 3(c), we might have reason to accept its interpretation or to suspend the rule for good cause shown. *See* GRAP 2. However, Cyfred did not so do. In its reply brief, Cyfred's response regarding the timeliness of its Notice of Appeal was a mere two sentences: "The Guam Rules of Appellate Procedure, and this [c]ourt's precedent, when applied to the facts in this case, show no such tardiness. Cyfred's appeal was timely." Appellants' Reply Br. at 4 (Sept. 14, 2007). When asked at oral arguments why he did not more fully address the issue in the Reply Brief, Cyfred's attorney replied "[w]e have been deluged with constant and shifting [unintelligible] motions . . . there's a limit . . . there really is a limit . . . to what I can do to accomplish everything that I have to do." Tr., 10:13:20 (Oral Arguments). Although we recognize that the practice of law can often place tremendous demands on one's time, we will not suspend our Rules of Appellate Procedure merely to accommodate attorneys with insufficient time to properly address arguments on appeal. We therefore hold that Cyfred did not show good cause as to why it submitted a defective Notice of Appeal.

[24] We could also suspend Rule 3(c) "[i]n the interest of justice," but we decline to do so. GRAP 2. While we strive to avoid dismissing meritorious claims on technicalities, "[t]he principle that 'mere technicalities' should not stand in the way of deciding a case on the merits is more a prescription for ignoring the . . . Rules than a useful guide to their construction and

application." *Torres*, 487 U.S. at 319 (Scalia, J., concurring). Failure to comply with our Rules must have consequences, and we believe dismissal of the appeal is the appropriate remedy in the present case. Cyfred is appealing an award of attorney's fees, which constitutes only about a quarter of the total award. Thus, in one sense, this dispute concerns the size of an award rather than the central issue of liability. We believe that dismissal under these circumstances would not be unduly harsh. Moreover, as discussed in more detail below, the lower court may still entertain Cyfred's Rule 65(b) motion to reconsider the award of attorneys' fees. We are confident, therefore, that a dismissal will further our policy of encouraging compliance with our Rules, while at the same time avoiding substantial injustice to the parties.

C. The Effect of the Amended Notice of Appeal

[25] Cyfred filed an Amended Notice of Appeal with this court on March 30, 2007. The Amended Notice of Appeal purports to appeal the August 1, 2006 Findings of Fact and Conclusions of Law, the September 22, 2006 First Amended Judgment, and the March 19, 2007 Decision and Order. It also limits the issue on appeal to the award of attorneys' fees.

[26] It is not clear where Cyfred derived its purported power to amend its own Notice of Appeal, but legal authorities suggest that power lies with the appellate court. *See Stuart v. U.S.*, 23 F.3d 1483, 1485 (9th Cir. 1994). However, the procedural hurdles to amending a notice of appeal are set low, and an amended notice of appeal can be accepted by an appeals court even without a formal motion. *Id.* We therefore accept, *sua sponte*, the Amended Notice of Appeal.

[27] The Amended Notice of Appeal is, however, untimely with respect to the First Amended Judgment of September 22, 2006 because it was filed more than thirty days after entry of the judgment. In theory, Cyfred's Motion to Amend the First Amended Judgment could have extended the time to appeal if it were styled as a Rule 60(b) motion and made within ten days of

the First Amended Judgment. *See* GRAP 4(a)(4)(vi) (2007). However, the Motion to Amend the First Amended Judgment was not made until December 22, 2006, about three months after the First Amended Judgment issued. Therefore the belated attempt to appeal the First Amended Judgment, and by implication the Findings, must be dismissed.

[28] All that remains, then, is Cyfred's appeal of the March 19, 2007 Decision and Order. Cyfred's Amended Notice of Appeal was filed March 30, 2007 and timely appealed the March 19, 2007 Decision and Order. In that Decision the lower court disposed of the Motion to Amend the Amended Judgment by dismissing for lack of jurisdiction. In doing so, the court remarked that "[b]ased upon a preponderance of the evidence and for reasons cited above, the Court will not reverse or reconsider its previous decision as to attorney's fees because that matter is already up on appeal." ER, Tab 33, at 249 (Decision and Order, Mar. 19, 2007). The "reasons cited above" include that "[t]he Court is without jurisdiction to aid Defendant in its request [because] the issue of attorney's fees is already up on appeal . . . ." *Id.*

[29] The United States Supreme Court has held that it has the jurisdiction to consider a dismissal for lack of jurisdiction, even though the court below disclaims that such jurisdiction even exists. *Hohn v. United States*, 524 U.S. 236, 246-47, 253 (1998). In *Hohn*, the Court reasoned that if it lacked the authority to review dismissals for lack of jurisdiction, then "decisions to dismiss for want of jurisdiction would be insulated entirely from review by this Court." *Id.* at 247 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 743, n.23 (1982)). Thus the dismissal, but not the underlying issue of attorneys' fees, can be reviewed by this court. The standard of review for a dismissal due to lack of jurisdiction is *de novo*. *Sac & Fox Nation of Oklahoma*, 193 F.3d at 1165.

[30] Indeed, Cyfred's appeal of the March 19, 2007 Decision and Order has merit. The lower court incorrectly interpreted the law in Guam regarding its authority to hear Rule 60(b) motions with respect to a matter on appeal. The lower court cited to dicta in *Hemlani v. Flaherty* stating that "[w]e have previously held that the filing of a notice of appeal divests the lower court of jurisdiction over the matters on appeal . . . ." 2002 Guam 10 ¶ 6. However, a careful reading of *Hemlani* reveals that the actual holding was that a lower court has jurisdiction to *deny* a Rule 60(b) motion, but cannot *grant* the motion unless this court gives it leave to do so:

> [W]e adopt the rule of the majority of circuit courts, that the lower court retains jurisdiction to consider and deny a Rule 60(b) motion after a notice of appeal has been filed. The denial of such a motion does not disturb appellate jurisdiction and, if promptly issued, are [sic] certainly in aid of the appeal. However, after a notice of appeal is filed, the lower court lacks jurisdiction to grant Rule 60(b) relief, and may not do so without a remand from this court.

2002 Guam 10 ¶ 10. The lower court therefore erred in refusing to even consider the Rule 60(b) motion to reconsider.

[31] We reverse the dismissal for lack of jurisdiction and grant a limited remand for the lower court to deny the motion if it so chooses. If, on the other hand, it is inclined to grant the motion, *Hemlani* explains that the proper procedure is for the trial judge to prepare an order to that effect and then allow the moving party to submit that order to this court along with a request for remand. 2002 Guam 10 ¶ 11. On appeal, either the grant or denial of a Rule 60(b) motion is reviewed for abuse of discretion. *In re N.A.*, 2001 Guam 7 ¶ 13; *In re Hammer*, 940 F.2d 524, 525 (9th Cir. 1991). However, this court cannot reach the underlying issue of whether the award of attorneys' fees was properly made. *See Floyd v. Laws*, 929 F.2d 1390, 1400 (9th Cir. 1991) ("An appeal from a denial of a Rule 60(b) motion brings up only the denial of the motion for review, not the merits of the underlying judgment.").

IV. CONCLUSION

[32] Although this court has jurisdiction to interpret Cyfred's Notice of Appeal as an appeal of the First Amended Judgment, we decline to do so. Cyfred's Amended Notice of Appeal is also untimely with respect to the First Amended Judgment because it was filed more than thirty days after entry of the judgment. The appeal of the First Amended Judgment is therefore **DISMISSED** for failure to comply with the Guam Rules of Appellate Procedure. In addition, the lower court's March 19, 2007 Decision to dismiss the Motion to Amend the Amended Judgment is hereby **REVERSED**. On limited remand, the lower court may either deny the motion or seek leave, guided by the procedure set forth in this opinion, to grant the motion.

Original Signed By: Richard H. Benson

RICHARD H. BENSON
Justice *Pro Tempore*

Original Signed By: F. Philip Carbullido

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Robert J. Torres

ROBERT J. TORRES, JR.
Chief Justice