

**IN THE SUPREME COURT OF GUAM**

**GUAM HOUSING AND URBAN RENEWAL AUTHORITY (GHURA),**  
**A Public Body Corporate and Politic,**  
Plaintiff/Appellant/Respondent

**vs.**

**DONGBU INSURANCE COMPANY, LTD.**  
**(fka KOREA AUTOMOBILE FIRE AND MARINE INSURANCE CO., LTD.)**  
Defendant/Appellee/Petitioner

Supreme Court Case No. CVA00-029  
Superior Court Case No. CV0183-95

**OPINION**

**Cite as: 2002 Guam 3**

**Filed: March 22, 2002**

Petition for Rehearing  
Hagåtña, Guam

Appearing for Plaintiff/Appellant/Respondent:

Daniel J. Berman, Esq.  
Berman, O'Connor & Mann  
Suite 503, Bank of Guam Bldg.  
111 Chalan Santo Papa  
Hagåtña, Guam 96910

Appearing for Defendant/Appellee/Petitioner:

Thomas C. Sterling, Esq.  
Klemm, Blair, Sterling & Johnson  
Suite 1008, Pacific News Bldg.  
238 Archbishop F.C. Flores St.  
Hagåtña, Guam 96910

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BEFORE: PETER C. SIGUENZA, JR., Chief Justice, F. PHILIP CARBULLIDO, Associate Justice, and BENJAMIN J.F. CRUZ, Justice *Pro Tempore*.

**CARBULLIDO, J.:**

[1] Petitioner Dongbu Insurance Company, Ltd. filed a petition for rehearing following the opinion issued by this court in *GHURA v. Dongbu Ins. Co.*, 2001 Guam 24. Dongbu argued that this court overlooked or misapprehended a point of law when it declined to consider the lower court’s denial of Dongbu’s motion to dismiss for failure to prosecute. We grant the petition for rehearing after concluding that a cross-appeal did not need to be filed for our review of the issue, and consider the merits of the matter without the submission of further briefs or arguments by the parties. We find that the trial court did not abuse its discretion in denying Dongbu’s motion to dismiss for failure to prosecute.

**I.**

[2] Respondent Guam Housing and Urban Renewal Authority (hereinafter “GHURA”) filed suit against Petitioner Dongbu Insurance Company, Ltd. (hereinafter “Dongbu”), seeking payment on an insurance claim. The lower court granted Dongbu’s motion for summary judgment upon a finding that GHURA’s claim was barred by the policy’s provision requiring that all claims be filed within one year after the inception of loss. GHURA appealed the judgment. On review, this court adopted the doctrine of equitable tolling and found that application of the doctrine to the facts of this case raised genuine issues of material fact. *GHURA*, 2001 Guam 24, ¶¶ 14, 24. Therefore, we reversed the trial court’s grant of summary judgment and remanded the case for further proceedings. *Id.* ¶ 26.

[3] In its appellate brief, Dongbu argued that even if this court were to find equitable tolling saved GHURA's claim, there existed an alternative ground for affirming the lower court's ruling. Specifically, Dongbu had made a motion in the lower court to dismiss the case for lack of prosecution. The motion to dismiss was denied, but the court alternatively fined GHURA One Thousand Dollars (\$1,000.00) in attorney's fees and costs for its failure to move the case forward. Dongbu argued on appeal that the trial court abused its discretion by denying the motion to dismiss, and asserted that the lower court's error provided an alternative ground for upholding the dismissal of GHURA's case.

[4] In its opinion, this court found that Dongbu's failure to cross-appeal precluded our review of this issue. Relying on the Guam Rules of Appellate Procedure (hereinafter "GRAP") 3(a) and 4, we declined to review the trial court's decision denying Dongbu's motion to dismiss. *Id.* ¶ 25. Dongbu now petitions for rehearing, arguing that this court erred in finding that a cross-appeal was necessary.

## II.

[5] This court may grant a petition for rehearing pursuant to Rule 31 of the Guam Rules of Appellate Procedure. This court also maintains jurisdiction over final judgments of the Superior Court pursuant to 7 GCA §§ 3107 and 3108(a) (1994).

## III.

[6] The only issues addressed herein are whether Dongbu was required to file a cross-appeal on the denial of the motion to dismiss for failure to prosecute, and if so, whether the trial court erred in denying that motion. No other issues decided in 2001 Guam 24 are raised for reconsideration.

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**A. Cross-Appeal**

[7] Guam Rules of Appellate Procedure Rules 3(a) and 4(a) govern the timely filing of a notice of cross-appeal. When Dongbu raised as error the lower court's denial of its motion to dismiss for failure to prosecute, this court found that GRAP 3(a) and 4(a) precluded consideration of the issue. *Id.* Dongbu now maintains that the matter falls within a judicially created exception to the general cross-appeal rule.

[8] The exception, recognized by the U.S. Supreme Court and adopted in this jurisdiction in *Leon Guerrero v. Look*, 2001 Guam 22, is that "an appellee is entitled to assert any ground supported by the record regardless of whether the argument was rejected or ignored by the trial court, so long as the appellee's rights under the judgment are not enlarged." *Leon Guerrero*, 2001 Guam 22 at ¶ 37; *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560, 564 (1924). GHURA argues that the cross-appeal exception does not apply to the facts of this case because even if the court were to find that GHURA's failure to prosecute warranted dismissal, this finding would provide no ground for affirming the trial court's grant of *summary judgment*. While we recognize the distinction drawn by GHURA, we find it unpersuasive given the facts of this case. Here, the dismissal by a motion to dismiss for failure to prosecute supports the lower court's judgment of dismissal, even though the latter dismissal was granted as a summary judgment.

[9] In *In re Appointment of Independent Counsel*, 766 F.2d 70 (2d Cir. 1985), the court reached a similar conclusion. On an appeal from a dismissal on the merits, the appellee raised the issue of standing without the filing of a cross-appeal. *Independent Counsel*, 766 F.2d at 73, 75. Citing to *American Railway*, the court found that the matter was properly before it since the appellee's position simply supported the lower court's judgment of dismissal. *Id.* at 75. In other words, whether the case was

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dismissed for lack of standing or on its merits, the ultimate judgment of dismissal made by the lower court was upheld. A similar finding can be made with respect to the facts before us. Whether GHURA's case is dismissed for a failure to prosecute or by a grant of summary judgment, the case ends with dismissal. Dismissal under either scenario supports the lower court's judgment. Thus, the issue can be raised without the filing of a cross-appeal as long as the appellee is seeking affirmance of the court's judgment without enlarging its own rights.

[10] There are situations in which dismissal on an alternative ground can result in an appellee enlarging his own rights. In *Conover v. Lein*, 87 F.3d 905 (7th Cir. 1996), the court found that without the filing of a cross-appeal, it did not have the jurisdiction to modify a judgment dismissing the case without prejudice to a judgment dismissing the case with prejudice. *Conover*, 87 F.3d at 908. Such a change in the judgment's preclusive effect would enable the appellee to "enlarge his rights under a judgment in the absence of a cross-appeal." *Id.*; see also *Greenwell v. Aztar Ind. Gaming Corp.*, 268 F.3d 486, 494 (7th Cir. 2001) (requiring a cross-appeal to modify a judgment to make it a judgment on the merits dismissing a claim with prejudice rather than a procedural order of dismissal without prejudice).<sup>1</sup>

[11] There is the potential for a similar difference in preclusive effect here with one significant distinction - the preclusion works in the opposite direction. The grant of summary judgment is with prejudice whereas dismissal for failure to prosecute may be granted either with or without prejudice. See *Davis v. Operation Amigo, Inc.*, 378 F.2d 101, 103 (10th Cir. 1967) ("under Rule 41(b), F.R.Civ.P. . . . a case may be

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<sup>1</sup> Further examples in which courts have found an enlargement of rights include challenging attorney's fees, *Alford v. City of Lubbock*, 664 F.2d 1263, 1272-73 (5th Cir. 1982); seeking an adjustment of awarded damages, *Turpen v. City of Corvallis*, 26 F.3d 978, 980 (9th Cir. 1994); and modifying the disposition of a counterclaim, *Am. States Ins. Co. v. Nethery*, 79 F.3d 473, 478 (5th Cir. 1996). 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3904 (2d ed. 1992 & Supp. 2001).

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dismissed with prejudice for want of prosecution. The exercise of this power by the trial judge is discretionary . . .”) (footnote omitted); *see also Benjamin v. Aroostook Med. Ctr.*, 57 F.3d 101, 108 (1st Cir. 1995) (modifying a lower court’s order of dismissal with prejudice for failure to prosecute to a dismissal without prejudice). Thus, instead of an enlarging of rights, a dismissal for failure to prosecute may actually work to lessen Dongbu’s rights.

[12] When faced with this scenario, the Third Circuit still required the filing of a cross-appeal. *EF Operating Corp. v. Am. Bldgs.*, 993 F.2d 1046, 1048 (3rd Cir. 1993) (refusing to review the lower court’s denial of a motion to dismiss for lack of personal jurisdiction as an alternative ground upon which to affirm the grant of a summary judgment). However, we decline to follow the Third Circuit, finding that in this situation, the distinction is one that lacks any difference in result. *See* 15A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3904 n.7 (Supp. 2001) (discussing *EF Operating* and concluding that the requirement of a formal cross-appeal in these circumstances failed to serve any useful purpose). Should affirming the lower court’s judgment on Dongbu’s alternative ground change the preclusive effect of the judgment, the difference would only result in a lessening of Dongbu’s own rights. The raising of an alternative ground that lessens an appellee’s own rights does not require the filing of a cross-appeal. *See Leon Guerrero*, 2001 Guam 22 at ¶ 37; *cf. Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1495 n.3 (D.C. Cir. 1995) (referring to *American Railway* in finding that on an appeal from a grant of summary judgment, the filing of a cross-appeal is unnecessary for review of the lower court’s denial of a motion to dismiss for failure to join an indispensable party); *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 203 & n.1 (1st Cir. 1988) (considering, without the filing of a cross-appeal, a procedural defect as an alternative ground to support the lower court’s denial of a motion for a new trial).

[13] Dongbu was not enlarging its rights by raising for review the lower court's error in denying its motion to dismiss. It was simply asserting a defense of the judgment in its favor. Therefore, a cross-appeal was not necessary for our review of the matter as an alternative ground for affirming the lower court's judgment.

### **B. Motion to Dismiss**

[14] The denial of a motion to dismiss for failure to prosecute is reviewed for a clear abuse of discretion. *Santos v. Carney*, 1997 Guam 4, ¶ 4. Under this standard, the decision of the lower court will not be reversed unless we have "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *Id.* (quotation omitted).

[15] Pursuant to the Guam Rules of Court Rule 7(D), a failure to serve an at issue memorandum constitutes a per se failure to prosecute. Guam Ct. R. 7(D); *see also Santos*, 1997 Guam 4 at ¶ 5 n.1. However, a court's finding of a failure to prosecute does not mandate dismissal under GRCP 41(b). Rule 41(b) empowers the court to dismiss an action on a plaintiff's failure to prosecute; it remains within the court's discretion whether to exercise that power. In *Santos*, this court set forth five factors for determining whether sanctions are appropriate for a failure to prosecute:

- (1) the public's interest in expeditious resolution of litigation;
- (2) the court's need to manage its docket;
- (3) the risk of prejudice to the defendants;
- (4) the public policy favoring the disposition of cases on their merits; and
- (5) the availability of less drastic sanctions.

*Santos*, 1997 Guam 4 at ¶ 5 (citation omitted).

[16] We turn first to the risk of prejudice that may be suffered by Dongbu as a result of this delay. Dongbu's position is that the damages claimed by GHURA existed prior to the earthquake, and that GHURA's delay in prosecuting the case has adversely affected its ability to litigate its position. While

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GHURA's failure to prosecute may have prejudiced Dongbu's ability to defend this position, the degree of prejudice must still be weighed against the remaining four factors.

[17] The public and court's interests can be considered together. *Id.* ¶ 7. In *Santos*, this court acknowledged that Rule 41(b) is a proper docket management for certain situations, and that the trial courts of Guam may consider prevailing local conditions in administering their dockets. *Id.* ¶ 4. Here, approximately thirty months passed between the time that GHURA filed its complaint and the time that Dongbu filed its motion to dismiss for failure to prosecute. Although a lack of prosecution is apparent, this court defers to the trial court to determine whether the delay was reasonable because the trial court is in the best position to determine how much delay can be endured before the docket becomes unmanageable. *Id.* ¶ 5; *see also Henderson v. Duncan*, 779 F.2d 1421,1423 (9th Cir. 1986).

[18] The remaining two factors in the *Santos* test include the public policy favoring disposition on the merits and the availability of lesser sanctions. *Santos*, 1997 Guam 4 at ¶ 5. Courts are encouraged to consider lesser sanctions as an alternative to granting dismissal. *See Hamilton v. Neptune Orient Lines, Ltd.*, 811 F.2d 498, 500 (9th Cir. 1987); *see also Dahl v. City of Huntington Beach*, 84 F.3d 363, 366 (9th Cir. 1996). The law prefers that a matter be disposed of on its merits, and thus dismissal is viewed as a "harsh penalty . . . to be imposed only in extreme circumstances." *Henderson*, 779 F.2d at 1423. In the instant case, the lower court exercised its discretion and elected to issue a monetary fine instead of granting the motion to dismiss. A thirty month delay does not constitute such an extreme circumstance so as to warrant a finding that this exercise of discretion was an abuse of discretion.

[19] Weighing all of the above factors, we find that the facts here do not warrant a finding that the lower court abused its discretion by denying Dongbu’s motion to dismiss. Although there was a finding that GHURA failed to move the case forward, the court was acting within its discretion when it issued lesser sanctions.

### CONCLUSION

[20] After considering Dongbu’s petition for rehearing, we find the filing of a cross-appeal was not necessary for review of the lower court’s denial of Dongbu’s motion to dismiss for failure to prosecute. We hold that the lower court did not abuse its discretion by denying the motion and alternatively issuing lesser sanctions. The case is remanded for further proceedings in accordance with our opinion as stated in *GHURA v. Dongbu*, 2001 Guam 24.

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BENJAMIN J.F. CRUZ  
Justice *Pro Tempore*

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F. PHILIP CARBULLIDO  
Associate Justice

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PETER C. SIGUENZA, JR.  
Chief Justice