document into the file without Captain Skilling knowing it, as opposed to Captain Skilling inadvertently putting it there himself.

Given the foregoing, especially Defendant's transparent intent, expressed to and corroborated by his supervisor Captain Skilling, that he wanted to prove a point to him, not to generate a false or forged record to be officially relied upon, I find that there is a reasonable doubt as to whether Defendant violated § 524 or § 529 and find him not guilty of Counts I and II.

With regard to the counts alleging attempted violations of § 524 or § 529, Counts III and IV, an attempt is a specific intent crime, and the act constituting the attempt must be done with the intent to commit the particular crime. FSM v. Mumma, 21 FSM R. 387, 400-01 (Kos. 2017). Insofar, as with violations of § 524 and § 529, the requisite intent includes a purpose, the proof of such purpose is also required to show an attempt of such crimes. As there is no proof of such purpose, I find Defendant not guilty as well of Counts III and IV.

This Court is not tasked with determining in this criminal proceeding whether Defendant behaved appropriately in all respects as a sworn officer of the FSM National Police. This Court, in this proceeding, other than making a determination of whether or not the Defendant is guilty of the crimes charged, makes no comment as to the appropriateness of Defendant's conduct in any other respect.

For the reasons above, it is adjudged that Defendant Henly is not guilty of Counts I, II, III and IV, and he is therefore acquitted.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

PERDUS I. EHSA and TIMAKIO EHSA Appellants, vs. FEDERATED STATES OF MICRONESIA DEVELOPMENT BANK, Appellee.	)	APPEAL CASE NO. P3-2016 (Civil Action No. 2007-035)

OPINION

Argued: September 22, 2021
Decided: April 6, 2022

BEFORE:

Hon. Dennis L. Belcourt, Associate Justice, FSM Supreme Court
Hon. Chang B. William, Temporary Justice, FSM Supreme Court*
Hon. Mayceleen JD Anson, Temporary Justice, FSM Supreme Court**

*Chief Justice, Kosrae State Court, Tofol, Kosrae
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

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For the Appellee: Nora E. Sigrah, Esq.
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HEADNOTES

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Judgments – Relief from Judgment

Since a Rule 60(b) motion for relief from judgment is addressed to the trial court's sound discretion, an appellate court generally uses the abuse of discretion standard to review a trial court's denial of relief from a judgment. An abuse of discretion occurs when: 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence on which the court rationally could have based its decision. Such abuses must be unusual and exceptional; an appeals court will not merely substitute its judgment for that of the trial judge. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 517-18 (App. 2022).

Appellate Review – Decisions Reviewable

When a litigant raises an issue for the first time on appeal, he or she is generally deemed to have waived the right to challenge the issue. The general rule is that an issue not raised below will not be considered for the first time on appeal. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 518 (App. 2022).

Appellate Review – Decisions Reviewable; Jurisdiction – Subject-Matter

Having failed to raise before the trial court any issue they now argue on appeal, the appellants have waived their right to present those issues on appeal, unless the trial court committed plain error or some other, recognized exception. Subject-matter jurisdiction is such an exception. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 518 (App. 2022).

Appellate Review – Decisions Reviewable; Jurisdiction – Subject-Matter

It is well established that the presence or lack of subject-matter jurisdiction can be raised at any time, by any party, or even by the court, and, once raised, it must be considered. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 518 (App. 2022).

Appellate Review – Frivolous Appeals

An appeal that the appellate court finds lacking in merit, does not warrant the *sua sponte* imposition of sanctions when the appellate decision making the issue meritless was issued after the appellants lodged the appeal. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 518 n.3 (App. 2022).

Appellate Review – Decisions Reviewable; Appellate Review – Standard – Civil Cases – Law of the Case

The law of the case doctrine posits that ordinarily an issue of fact or law decided on appeal may not be reexamined either by the trial court on remand or by the appellate court on subsequent appeal, but it is subject to three exceptions: 1) the evidence at a subsequent trial is substantially different; 2) there has been an intervening change of law by a controlling authority; and 3) the earlier decision is clearly erroneous and would work a manifest injustice. Only in extraordinary circumstances may a court sustain a departure from the law of the case doctrine on the ground that a prior decision was clearly erroneous. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 518 (App. 2022).

Banks and Banking; Constitutional Law – Foreign and Interstate Commerce

The FSM's creation of the Development Bank was implied or incidental to the power to regulate banking and foreign and interstate commerce. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 519 (App. 2022).

Constitutional Law – Foreign and Interstate Commerce; Separation of Powers – Legislative

Since the subject matter of Congress's appropriation is not limited, the funding of a loan program for economic development purposes comes within the scope of the appropriation power and regulation of commerce., and structuring such a program is an incidental or implied power to the express power to do both. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 519 (App. 2022).

Appellate Review – Decisions Reviewable

The appellants' failure to raise certain issues when they sought relief in the trial court from the prior judgment means that when the issues were raised for the first time in a second appeal, they are waived, and, if error, are manifestly not error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings and are not jurisdictional in nature. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 519 (App. 2022).

Business Organizations – Corporations – Liability

Typically, the alter ego doctrine applies to do equity by ignoring a corporation's separate status to avoid injustice or fraud by the person asserting such status. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 519 n.4 (App. 2022).

Bankruptcy; Bankruptcy – Discharge

Bankruptcy law does not allow individual debtors to obtain a bankruptcy discharge through Chapter 3. Ehsa v. FSM Dev. Bank, 23 FSM R. 514, 519 n.4 (App. 2022).

* * * *

COURT'S OPINION

DENNIS L. BELCOURT, Associate Justice:

At issue in this appeal is the Appellants' challenge to a January 6, 2016 trial-court order denying their request for relief from a default judgment. FSM Civ. R. 60(b)(4). This challenge arises from the case of: Federated States of Micronesia Development Bank v. Ehsa, Civil Action No. 2007-035. For the reasons stated below, this appeal is denied and the trial-court order of January 6, 2016 is hereby affirmed.

I. BACKGROUND

For this appeal, the background is simple: the FSM Development Bank loaned money to Pacific Foods & Services, Inc. ("Pacific"). The individual Appellants, Perdus Ehsa and Timako Ehsa, were unconditional continuing guarantors on Appellees' indebtedness. After Pacific defaulted, the Development Bank filed suit against all the guarantors, including the Appellants. The trial-court record shows that the Appellants were each properly served with a summons and a copy of the complaint. Thereafter, when no answer was filed, a default judgment was entered against the Appellants, jointly and severally, on December 28, 2007, in the amount of $2,018,234.28.

More than six (6) years later, on February 17, 2014, the Defendant-guarantors filed a motion for relief from the default judgment under Rule 60(b)(4) of the Court's Rules of Civil Procedure, which provides that court may relieve a party of a final judgment if the judgment is void. In their motion for relief, the Appellants raised various arguments to show that the judgment in question was void on the grounds that the trial court lacked subject-matter jurisdiction over the case. First, the Appellants argued that their signatures on the promissory note as guarantors were on different pages of the loan document, and therefore not valid.

Second, the Appellants argued that the signature of a third guarantor was a case of mistaken identity, which they characterize as fraud, and, in turn, a basis to void the default judgment entered against them. Third, the Appellants argued that the default judgment was void because it exceeded the amount prayed for in the complaint, and also because it was incorrectly premised on the defendants being jointly and severally liable for the loan.

In its order of January 6, 2016, the trial court rejected all of the Appellants' arguments for relief from the default judgment that had been entered in the case. The trial court first explained that none of the arguments raised by the Appellants actually related to the trial court's subject-matter jurisdiction over the case. From there, the trial court reasoned that the various arguments lacked merit. For example, whether the guarantors signed different pages of the promissory note was of no significance, as they had, in fact, signed the promissory note as guarantors. Similarly, the fact that one of the guarantors was eventually relieved from the judgment at issue here did not, in and of itself, relieve the other two guarantors who are the Appellants in this appeal of their legal liability for the loan in question. Lastly, as the trial court explained, there is nothing in the promissory note that would suggest that the Appellants' liability here would be anything other than joint and several.[1]

II. ISSUES ON APPEAL

In their appeal the Appellants, raise three new issues concerning the trial court's purported lack of subject-matter jurisdiction over the case. First, the Appellants challenge the existence of the Development Bank on the grounds that while Congress only has the constitutional authority to regulate banking, it does not also have the power to establish an entity like the Development Bank. Second, the Appellants argue that the trial court's entry of a default judgment is inconsistent with Article IX, section 11 of the FSM Constitution which mandates that decisions of the Court be consistent with Micronesian custom and tradition. Third, the Appellants argue that it was inequitable for the trial court to enter a judgment against the individual guarantors as the primary borrower, Pacific Foods & Services, Inc. ("Pacific"), entered bankruptcy protection, and, thereafter, began making court-ordered payments towards the satisfaction of the judgment in the case.

None of these issues, however, were ever presented to the trial court for adjudication. Instead, the Appellants maintain for the first time ever in this appeal that the trial court should have, *sua sponte* and affirmatively, established its subject-matter jurisdiction over this case before rendering a default judgment. In its brief, the Appellee correctly notes that the arguments now being advanced by the Appellants were not previously argued before the trial court. In addition, and more significantly, the Appellants' argument regarding the existence and legality of the Development Bank were issues that were actually raised in a prior appeal, *see* FSM Dev. Bank v. Ehsa, 20 FSM R. 498 (App. 2016), which this Court's Appellate Division expressly rejected.[2]

III. DISCUSSION

As this Court has explained, an "appellate court reviews a trial court denial of a Rule 60(b) motion under an abuse of discretion standard." Panuelo v. Amayo, 12 FSM R. 365, 372 (App. 2004). An abuse of discretion occurs when: 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record

[1] With regard to the Appellants' second argument raised before the trial court, the record shows the third guarantor to the promissory note at issue here was supposed to have been the Appellant Perdus Ehsa's daughter, Ellen Mae T. Ehsa Manlapaz, but it was instead the purported signature of Mr. Ehsa's wife, Ellen T Ehsa. In any event, the record in this case further shows that the third guarantor, Ellen Mae T. Ehsa Manlapaz, was granted relief from the default judgment entered against her based upon the fact that she did not actually sign the promissory note at issue in this case.

[2] The record for this appeal shows that the Appellants did not file a reply brief. FSM App. R. 28(c).

contains no evidence on which the court rationally could have based its decision. Such abuses must be unusual and exceptional; an appeals court will not merely substitute its judgment for that of the trial judge. *Id.* at 372. Since a Rule 60(b) motion for relief from judgment is addressed to the court's sound discretion, an appellate court generally reviews the trial court's denial of relief from a judgment using the abuse of discretion standard. Setik v. FSM Dev. Bank, 21 FSM R. 505, 514 (App. 2018).

The exception to this level of appellate review, however, is when "a litigant raises an issue for the first time on appeal, in which case, he or she is generally deemed to have waived the right to challenge the issue . . . ." Panuelo v. Amayo, 12 FSM R. 365, 372 (App. 2004). Indeed, the general rule is that an issue not raised below will not be considered for the first time on appeal. People of Eauripik ex rel. Sarongelfeg v. Osprey Underwriting Agency, Ltd., 21 FSM R. 214, 232 (App. 2017); Palsis v. Kosrae, 17 FSM R. 236, 241 n.2 (App. 2010) (an issue raised for the first time on appeal is waived); Hartman v. Bank of Guam, 10 FSM R. 89, 95 (App. 2001) (an issue raised for the first time on appeal is waived. An exception to this rule is in the case of plain error, or error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings); Damarlane v. United States, 7 FSM R. 510, 512-13 (App. 1996) (the record on appeal must be sufficient to permit the court to ensure that the issues on appeal were properly raised before the trial court). Here, having failed to raise before the trial court any of the issues they now argue on appeal, the Appellants have waived their right to present those issues on appeal, unless the trial court committed plain error, or some other, recognized exception. Hartman, 10 FSM R. at 95 (an issue raised for the first time on appeal is waived; an exception to this rule is in the case of plain error, or error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings).

Subject-matter jurisdiction is such an exception. Nelson v. FSM Nat'l Election Dir., 16 FSM R. 414, 419 (App. 2009) (a court's subject-matter jurisdiction may be raised at any time by a party or by the court). With regard to the assertion that the trial court lacked subject-matter jurisdiction, it is well established that the presence or lack of subject-matter jurisdiction can be raised at any time, by any party, or even by the court. Bualuay v. Rano, 11 FSM R. 139, 145 (App. 2002). Indeed, once raised, it must be considered. *Id.* at 145. A decision by a court without subject-matter jurisdiction is void, and such occurrences should be avoided. *Id.* Here, however, the argument advanced in this appeal by the Appellants – that the Development Bank is not a legally created entity of the national government, beyond the power granted to Congress under the Constitution – has previously been considered and rejected by this Court in an earlier appeal from trial-court case now before us on appeal. Specifically, in the case of FSM Development Bank v. Ehsa, 20 FSM R. 498 (App. 2016), this Court affirmed a trial court order which rejected Appellants' argument that the Development Bank was unlawfully established, as well as the argument that the Bank is not an entity of the FSM national government, based upon lack of standing.[3]

However, this Court's authority to revisit the above decision is subject to the law of the case doctrine, which "posits ordinarily 'an issue of fact or law decided on appeal may not be reexamined either by the [trial] court on remand or by the appellate court on subsequent appeal.'" Heirs of Henry v. Heirs of Akinaga, 21 FSM R. 310, 312-13 (App. 2017). The law of the case doctrine is subject to three exceptions, which are "'(1) [t]he evidence at a subsequent trial is substantially different; (2) there has been an intervening change of law by a controlling authority; and (3) the earlier decision is clearly erroneous and would work a manifest injustice." *Id.* "Only in extraordinary circumstances may [a] court sustain a departure from the 'law of the case' doctrine on the ground that a prior decision was clearly erroneous." *Id.* Appellants are unable to demonstrate the existence of any of these exceptions and therefore this Court is barred from considering

[3] The opinion in FSM Development Bank v. Ehsa, 20 FSM R. 498 (App. 2016), was issued after the Appellants lodged this appeal. Although this Court finds this appeal lacking in merit, it does not find that it warrants *sua sponte* imposition of sanctions. FSM App. R. 38; Heirs of Henry v. Heirs of Akinaga, 18 FSM R. 207, 210 (App. 2012) (if an appellee seeks damages under Appellate Rule 38, there is a two-step process for the court to consider: first, it must be determined that the appeal was frivolous and second, it must be determined that sanctions are appropriate). *See* FSM Dev. Bank v. Yinug, 12 FSM R. 437, 440 (App. 2004).

their jurisdictional challenge to FSMDB under the law of the case doctrine. The first two exceptions are inapplicable, as the prior proceeding was the same, and there have been no intervening changes in the law.

As to the third exception, Appellant has made no showing that the court's ruling on standing—that Appellants would still face their guaranty obligation even were this Court to lack jurisdiction--was clearly erroneous and that it works a substantial injustice. Beyond that, they would face a further hurdle in challenging Congress's policy-making and appropriation authority for creating FSMDB as a national government instrumentality. This Court has previously held that creation of the Development Bank was implied or incidental to regulation of banking and foreign and interstate commerce. See FSM Dev. Bank v. Ehsa, 18 FSM R. 608, 619 (Pon. 2013). *See* FSM v. Udot Municipality, 12 FSM R. 29, 50 (App. 2003) (the Constitution affords Congress great latitude in making policy decisions through the process of enacting legislation); Udot Municipality v. FSM, 9 FSM R. 418, 420 (Chk. 2000) (referring to Congress's appropriating authority under the FSM Constitution, Article IX, section 3(a)). The framers of the Constitution, as indicated in Standing Committee Report No. 33 of the Committee on Governmental Functions, October 10, 1975, intended "that the subject matter of appropriation should not be limited." II J. of Micro. Con. Con. 820 (1975). Funding a loan program for economic development purposes would come within the scope of the appropriation power and regulation of commerce. Structuring such a program is an incidental or implied power to the express power to do both. This Court does not find clear error or substantial injustice in the prior ruling finding that Appellants' challenge to FSMDB's jurisdiction lacked merit.

The two other issues Appellants raised on appeal—entry of a default judgment as inconsistent with Micronesian custom and tradition and inequity of holding Appellants to their guaranty obligation while the primary borrower, Pacific, is discharged—if error, are manifestly not error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. Nor are they jurisdictional in nature. Ehsa, 20 FSM R. at 507-08 (in the interests of finality, the concept of void judgments is narrowly construed; a judgment is not void merely because it may be erroneous or because the precedent upon which it was based is later altered or even overruled). Appellants' failure to raise these issues when it sought relief from the prior judgment from the trial court means that they are waived.[4]

IV. CONCLUSION

For the reasons stated above, we hereby reject this appeal, and affirm the trial-court order of January 6, 2018. This appeal is hereby dismissed.

* * * *

[4] Even if we were to consider Appellants' bankruptcy issue, the reorganization accompanied by a discharge in bankruptcy by Pacific, would not discharge the Appellants' liability to the Appellee for the debt at issue here, as Pacific is a separate, distinct legal entity from each of the individual Appellants. While the resumption of payments by Pacific of payments under the approved bankruptcy plan occurred, it did not by the terms of Appellants' guaranties (Supp App. 68-71) relieve Appellants of their obligations under the guaranties to be liable for the balance of Pacific's indebtedness after its discharge. Appellants' argument that they were alter egos of Pacific and should therefore be able to assert the discharge as a defense, while creative, is unsupported by the law. Typically, the alter ego doctrine applies to do equity by ignoring the separate status to avoid injustice or fraud by the person asserting such status. Smith v. Nimea, 19 FSM R. 163, 174 (App. 2013). Applying the alter ego doctrine as Appellant requests would perversely reward them for their failure to observe corporate separateness and would effectively circumvent bankruptcy law, which does not allow individual debtors to discharge in a Chapter 3 bankruptcy. Panuelo v. Sigrah, 22 FSM R. 341, 353 n.3 (Pon. 2019). Contrary to Appellants' brief, Pacific's bankruptcy was filed under Chapter 3, not Chapter 2, of title 31 of the FSM Code.