FSM SUPREME COURT APPELLATE DIVISION

YOSILYN CARL, as the administrator of the Estate of Linda Carl, Appellant, vs. FEDERATED STATES OF MICRONESIA DEVELOPMENT BANK, Appellee.	)	APPEAL CASE NO. P2-2020 (Civil Action No. 2019-003)

OPINION

Argued: December 20, 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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HEADNOTES

Debtors' and Creditors' Rights; Judgments – Payment and Satisfaction; Jurisdiction – Subject -Matter

If 6 F.S.M.C. 801 were to afford relief, it would be as an affirmative defense, not as a bar to jurisdiction. Carl v. FSM Dev. Bank, 23 FSM R. 525, 530 n.3 (App. 2022).

Statutes – Construction

A statute must be given its plain meaning wherever possible. Carl v. FSM Dev. Bank, 23 FSM R. 525, 531 (App. 2022).

Debtors' and Creditors' Rights; Judgments – Payment and Satisfaction; Statutes – Presumptions

Under the plain meaning of 6 F.S.M.C. 801, a presumption arises that a judgment is satisfied after

20 years. Carl v. FSM Dev. Bank, 23 FSM R. 525, 531 (App. 2022).

Statutes – Presumptions
There are three types of statutory presumptions: permissive inferences, mandatory rebuttable presumptions, and conclusive mandatory presumptions, and the court's task is to determine which type the statute provides. Carl v. FSM Dev. Bank, 23 FSM R. 525, 531-32 (App. 2022).

Statutes – Construction – "May" and "Shall"; Statutes – Presumptions
The use of "shall" as opposed to "may" in a statutory presumption rules out the conclusion that it creates a permissive inference, but "shall be presumed" does not provide an answer to the question of whether the mandatory presumption is rebuttable or conclusive. Carl v. FSM Dev. Bank, 23 FSM R. 525, 532 (App. 2022).

Judgments – Action on a Judgment; Statutes – Presumptions
Statutory presumptions are rebuttable unless the law otherwise provides, and 6 F.S.M.C. 801 does not otherwise provide. Carl v. FSM Dev. Bank, 23 FSM R. 525, 532 (App. 2022).

Debtors' and Creditors' Rights; Judgments – Payment and Satisfaction; Statutes – Presumptions
The rebuttability of the 6 F.S.M.C. 801 presumption that a judgment is satisfied after 20 years avoids unreasonable results. Carl v. FSM Dev. Bank, 23 FSM R. 525, 532 (App. 2022).

Evidence – Burden of Proof; Statutes – Presumptions
A presumption governed by FSM Evidence Rule 301 does not shift the burden of proof; instead only imposing on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. Rebuttal occurs when a reasonable finder of fact can find the evidence sufficient to support the nonexistence of the presumed fact. Carl v. FSM Dev. Bank, 23 FSM R. 525, 533 (App. 2022).

Civil Procedure – Summary Judgment; Evidence – Interpretation of Rules
When no FSM case law is on point concerning the residual effect of a rebutted presumption on summary judgment, and since the FSM rules on presumptions, FSM Evid. R. 301, and summary judgment, FSM Civ. R. 56, are patterned after rules in the United States, the court may look for guidance to United States decisions interpreting similar rules. Carl v. FSM Dev. Bank, 23 FSM R. 525, 533 n.5 (App. 2022).

Civil Procedure – Summary Judgment – Procedure
A summary judgment movant has the burden of showing that it is entitled to judgment as a matter of law as to elements over which it has the burden as well as affirmative defenses. Carl v. FSM Dev. Bank, 23 FSM R. 525, 533 (App. 2022).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Judgments – Action on a Judgment; Statutes – Presumptions
The basic rule is that summary judgment is proper only when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. But if the plaintiff in an action on a judgment, moving for summary judgment, has established with evidence that a reasonable finder of fact could find sufficient to support that the judgment had not been satisfied, and thereby rebutted the presumed fact that it had, the nonmovant cannot still point to the age of the judgment, as creating an inference of satisfaction to defeat summary judgment because, while on a summary judgment motion, any facts and inferences therefrom must be viewed in the light most favorable to the nonmoving party, an inference must be consistent with the evidence to be considered. Carl v. FSM Dev. Bank, 23 FSM R. 525, 534 (App. 2022).

Civil Procedure – Summary Judgment – Grounds – Particular Cases; Judgments – Action on a Judgment; Statutes – Presumptions

When, in light of the judgment's payment history and the lack of any evidence to the contrary, satisfaction of the judgment cannot be reasonably inferred merely from the judgment's age, summary judgment for the movant was appropriate based on this uncontroverted evidence. Carl v. FSM Dev. Bank, 23 FSM R. 525, 534-35 (App. 2022).

Evidence – Judicial Notice

A request to take judicial notice of the court file in another case will be denied when it is untimely and when the request is insufficient in failing to indicate what records in the court file and what facts therein need to be noticed. Carl v. FSM Dev. Bank, 23 FSM R. 525, 535-36 n.6 (App. 2022).

Judgments – Action on a Judgment

Neither 6 F.S.M.C. 802 (1)(a) nor 6 F.S.M.C. 1404 limit actions on judgments to the domestication of judgments. Carl v. FSM Dev. Bank, 23 FSM R. 525, 535 (App. 2022).

Debtors' and Creditors' Rights – Orders in Aid of Judgment; Transition of Authority

Although 6 F.S.M.C. 1404 makes reference to the High Court – it is a carryover provision from the Trust Territory Code – it has been applied to FSM Supreme Court proceedings. Carl v. FSM Dev. Bank, 23 FSM R. 525, 535 n.7 (App. 2022).

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Courts – Recusal

To overturn a trial judge's denial of a motion to recuse, an appellant must show an abuse of discretion by the trial judge; the appellate court will not merely substitute its judgment for that of the trial judge. Carl v. FSM Dev. Bank, 23 FSM R. 525, 535 (App. 2022).

Civil Procedure– Motions – For Enlargement; Civil Procedure – Summary Judgment – Procedure

Concerns a party may have about the pace of the litigation before the trial division may properly be addressed by a motion for enlargement of time or, in the context of responding to a motion for summary judgment, requesting additional time to conduct discovery pursuant to Civil Procedure Rule 56(f), which provides that if it appears from the affidavits of a party opposing summary judgment that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment; or may order a continuance to permit affidavits to be obtained, or depositions to be taken, or discovery to be had; or may make such other order as is just, and such requests should be freely granted if an adequate case is made for the request. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Decisions Reviewable

An issue not presented to and ruled upon by the trial court cannot properly come before the appellate division for review. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Standard – Civil Cases – Factual Findings

Appellate courts do not make factual findings. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Standard – Civil Cases ; Appellate Review – Standard – Civil Cases – Factual Findings

Appellate courts review questions of law that a trial court ruled upon de novo; by contrast, a trial court's factual determinations are reviewed under a clearly erroneous standard. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

An abuse of discretion by the trial court occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which

the court could rationally have based its decision. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Constitutional Law – Case or Dispute – Mootness

A court is precluded from making pronouncements on the basis of a hypothetical, abstract, or academic issues, or when the matter is moot. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Decisions Reviewable; Appellate Review – Standard – Civil Cases

A party is bound by the theory advanced in the trial court, and cannot urge a ground for relief which was not presented there, particularly where the party had ample opportunity to raise the issues in the trial court instead of presenting them for the first time on appeal. Carl v. FSM Dev. Bank, 23 FSM R. 525, 536 (App. 2022).

Appellate Review – Dismissal

An appellate court will dismiss an appeal when the trial division record supports affirmance, even if in some instances for reasons for that are different than those on which the trial division made its decision. Carl v. FSM Dev. Bank, 23 FSM R. 525, 537 (App. 2022).

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COURT'S OPINION

DENNIS L. BELCOURT, Associate Justice:

This is an appeal from a final judgment in FSM Development Bank v. Yosilyn Carl, as the administrator of the Estate of Linda Carl, Civil Action No. 2019-003 (Pon. 2019) entered a judgment on December 30, 2019, finding Defendants below, Yosilyn Carl, in her capacity as Administrator of the Estate of Linda Carl, and the Estate of Yoshiro Carl, jointly and severally to Plaintiff FSM Development Bank ("the Development Bank") in the amount of $50,215.98. We affirm the trial division's judgment on reasons stated herein and dismiss the appeal.

I. BACKGROUND

On February 11, 1999, a judgment, in the amount of $45,137.79, was entered in favor of the Development Bank, and against Linda Carl and the Estate of Yoshiro Carl in Federated States of Micronesia Development Bank v. Linda Carl, Civil Action No. 1996-060 ("Civil Action No. 1996-060"). The judgment was by stipulation among the Development Bank, Linda Carl, and the Estate of Yoshiro Carl and was in favor of the Development Bank. It carried (by stipulation) interest at the rate of 7% per annum. Civil Action 1996-60 was an action on a promissory note made by the Carls in favor of the Development Bank, assignment of a lease and granting of a chattel mortgage. The alleged principal amount was $70,000. On Linda Carl's passing, on motion of the Development Bank, Yosilyn Carl, who was appointed as administrator of Linda Carl's estate, was substituted into this litigation in place of Linda Carl.

On January 8, 2019, the Development Bank filed the complaint in Civil Action No. 2019-003, from which this appeal arose, as an action on a judgment, naming as defendants Yosilyn Carl and the Estate of Yoshiro Carl[1] and seeking Declaratory Relief that the judgment in 1996-060 was a valid final judgment and an existing continuing obligation of defendants, an order rebutting the presumption of repayment of that

[1] Initially named in the caption simply as "Yosilyn Carl," the Complaint identifies her in her capacity as administrator and the caption was subsequently corrected to identify her in her capacity as administrator of Linda Carl's estate. On the other hand, references in the pleadings and briefs tend to refer to the other defendant simply as "the Estate of Yoshiro Carl," as opposed to by the name of the estate's representative, Fred Carl. For reasons of continuity, this opinion will refer to the Defendants as Yosilyn Carl (or Ms. Carl) and the Estate of Yoshiro Carl, although both judgment debtors are in reality decedents' estates.

judgment, and an order that the judgment remains subject to enforcement in the trial court.[2] The judgment being sued upon is the judgment in Civil Action 1999-060, upon which the defendants allegedly still owed, as of January 3, 2019, the amount of $49,394.18 in judgment principal and interest. On February 11, 2019, the Estate of Yoshiro Carl filed an answer, contending, *inter alia*, that Yosilyn and her siblings, as well as their attorney, should be ordered to pay the unpaid balance of the judgment, and attorneys' fees and costs, for refusing to allow rentals for Yoshiro Carl's building to pay for the judgment. On February 28, 2019, Yosilyn Carl filed an answer to the complaint, alleging, *inter alia*, repayment of the loan in full, citing to 6 F.S.M.C. 801 ("a judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered.").

On March 12, 2019, the Development Bank filed a motion for summary judgment against the Defendants under FSM Civil Rule 56, on the grounds that there exists no genuine issue of material fact and the Development Bank is entitled to judgment as a matter of law. The Development Bank offered as evidence the judgment in Civil Action 1996-060, of wch it requested judicial notice, and an affidavit testifying to the history of principal and interest obligations and payments on the judgment.

On April 29, 2019, Defendant the Estate of Yoshiro Carl filed a response to the motion for summary judgment that reiterated the grounds stated in its February 28, 2019 answer to the complaint.

On May 6, 2019, Defendant Yosilyn Carl filed an opposition to the motion for summary judgment and a motion to dismiss pursuant to FSM Civil Rule 12(b)(1) (lack of jurisdiction over the subject matter). Both the opposition and the motion to dismiss were based on the age of judgment being sued upon, over twenty years as of her filing, arguing that under 6 F.S.M.C. 801 that the judgment is past its "statutory expiration date."

On October 21, 2019, the trial division, Associate Justice Larry Wentworth presiding, issued an order [FSM Dev. Bank v. Carl, 22 FSM R. 365 (Pon. 2019).] denying Ms. Carl's motion to dismiss and partially granting the Development Bank's motion for summary judgment, finding the court had subject-matter jurisdiction, 6 F.S.M.C. 801 serving at most as an affirmative defense to be addressed in the context of the motion for summary judgment. As to that motion, the trial court division found that 6 F.S.M.C. 801, which creates a presumption that a judgment has been satisfied after twenty years "does not come into play" due to the filing of an action on the judgment within the twenty-year time-frame set forth in 6 F.S.M.C. 802(1)(a), which tolled 6 F.S.M.C. 802(1)(a).

Although finding for the Development Bank on liability, thus issuing partial summary judgment, the trial division noted an apparent discrepancy that prevented granting of a complete summary judgment, requiring the Development Bank to rectify the discrepancy by November 21, 2019 and affording defendants until December 12, 2019 to file a response.

On November 21, 2019, the Development submitted a report and affidavits in response to the trial division's order. On December 30, 2019, the trial division issued an order noting receipt of the Development Bank's submission and the lack of a response thereto by either defendant. In the order the trial division directed the clerk to enter judgment against the defendants, jointly and severally, for the principal amount of $11,867.79, plus interest of 7% per annum, including previously accrued interest ($8,259.27 through November 21, 2019 plus $88.92 per day since then) as well as any reasonable costs taxed by January 20, 2020. The clerk entered judgment on December 30, 2019, and only Ms. Carl, appealed, filing her notice on February 10, 2020.

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[2] Described as a "civil action on a judgment" in 6 F.S.M.C. 1404. *See, e.g.*, Walter v. Chuuk, 10 FSM R. 312, 316 (Chk. 2001) (civil actions on judgment).

II. Discussion

A. *Issues*

The issues stated by the Development Bank and Yosilyn Carl, are substantially similar—i.e., whether there are errors in granting Development Bank's motion for summary judgment and denying Ms. Carl's motion to dismiss. Additionally, Ms. Carl states as an issue "[w]hether the presiding judge should have disqualified himself on questions of impartiality, prejudice, and on other ethical and statutory grounds."

B. *Whether the Trial Division Should Have Denied Summary Judgment and Granted the Motion to Dismiss Based on the Presumption in 6 F.S.M.C. 801*

Ms. Carl argues that the trial court's order granting summary judgment was erroneous and contrary to law. *See* Nahnken of Nett v. United States, 7 FSM R. 581, 585-86 (App. 1996) (appellate court applies *de novo* the same standard in reviewing a trial court's grant of summary judgment as that used by a trial court under FSM Civ. R. 56). The trial division granted partial summary judgment on the basis of the showing that the prima facie elements for an action on a judgment: the judgment in Civil Action No. 1999-060 was valid and remained unpaid. The factual basis put forward by Ms. Carl, both in opposition to the motion for summary judgment and in support of her motion to dismiss, was that the judgment had (as of the time of the motions) been in existence for over twenty years. Thus is the basis for her legal conclusion that the Development Bank's lawsuit is barred by 6 F.S.M.C. 801, which states that "[a] judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered," precluding summary judgment against her and perhaps warranting relief in her favor (if not a motion to dismiss[3]). Ms. Carl argues that an interpretation that 6 F.S.M.C. 801 creates anything other than an irrebuttable presumption of satisfaction of the judgment at twenty years violates the FSM Judicial Guidance Clause and of legislative intent.

The Development Bank disputes that 6 F.S.M.C. 801 was a bar to the trial division's proceeding, contending that the passage of twenty years on a judgment creates a rebuttable presumption, a presumption it claimed it rebutted by various items of record in this matter, including Ms. Carl's efforts to avoid payment of the judgment.

In contrast, the trial division, declining to determine whether the presumption in 6 F.S.M.C. 801 is rebuttable or irrebuttable, is irrelevant here: "[b]ecause the timely filing of this action [Civil Action No. 2019-03] has tolled the statutory time period, the statute, 6 F.S.M.C. 801, that creates a presumption of satisfaction after the twenty years has passed, does not come into play." [FSM Dev. Bank v. Carl, 22 FSM R. 365, 375 (Pon. 2019).]

a. *Relevance of 6 F.S.M.C. 801 to this Case*

Since the presumption in 6 F.S.M.C. 801 is the lynchpin of Ms. Carl's case, and the trial division found it irrelevant to the proceeding below, the relevance of 6 F.S.M.C. 801 is an appropriate place to start.

The language of 6 F.S.M.C. 801 is plain. It bears repeating: "[a] judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered." Thus, on its face, the presumption in 6 F.S.M.C. 801 applies to a decision by an FSM court concerning the status of the judgment, be it to issue a writ of execution, issue an order in aid of judgment, or recognize or grant a new judgment in an action on a judgment, after "the expiration of twenty years after it is rendered."

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[3] Ms. Carl's Motion to Dismiss was made under FSM Civil Rule 12(b)(1), lack of jurisdiction. As the trial division correctly pointed out, if 6 F.S.M.C. 801 were to afford relief, it would be as an affirmative defense, not as a bar to jurisdiction.

The trial division concluded instead that filing of Civil Action No. 2019-003, tolled the operation of the presumption of 6 F.S.M.C. 801. In other words, It did so relying on caselaw from other jurisdictions. First, it cited 50 C.J.S. *Judgment* § 961.d, at 550, which relied on In re Murray's Estate, 5 N.E.2d 717, 718-19 (N.Y. 1936). Murray's Estate had before it a specific statute establishing a conclusive presumption: "Section 44 provides that a judgment is conclusively presumed to be paid unless within twenty years the debtor . . . makes a payment . . . ."

Then it relied on two California cases involving former California Code of Civil Procedure § 681 (effective until June 30, 1983) which provided a 10-year enforcement period for judgments but permitted enforcement of judgments after that period on a motion to the court justifying the failure to collect the judgment. In the first case, Alonso Inv. Corp. v. Doff, 551 P.2d 1243, 1246 (Cal. 1976), the court concluded that a writ of execution executed and returned before the ten year statute of limitations on enforcement was effective without the necessity to file a making the justification to the court. The court in Doff was tasked with harmonizing two statutory provisions, limitation on obtaining an issuance of a writ of execution, and § 685, a provision for obtaining permission by court order to obtain subsequent enforcement. Section 685 by its terms applied to any judgment sought to be "enforced or carried into execution after the lapse of 10 years from the date of its entry." The California Supreme Court resolved the slight ambiguity by concluding that the writ of execution issued before the ten year limit could still be "enforced or carried into execution" after ten years, without seeking court permission.

The second California case, United States Capital Corp. v. Nickleberry, 174 Cal. Rptr. 814 (Cal. Ct. App. 1981) involved a judgment debtor asserting a laches defense against his judgment creditor who delayed until just before the end of the ten year period filing an action on the judgment. The court quoted Doff, but did not elucidate a principle or provide any additional analysis that would help this Court understand why it should delay implementation of the 6 F.S.M.C. 801 rebuttable presumption on either the old judgment, Civil Action 1999-060, or the determination of whether to issue the new judgment, Civil Action 2019-003.

Therefore, this Court finds that the authorities cited by the trial division are of a narrow statutory nature or otherwise inapposite to the question at hand. This Court is therefore left with no basis for departing from the plain meaning of 6 F.S.M.C. 801 ("[a] judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered."). A statute must be given its plain meaning wherever possible. Shrew v. Sigrah, 13 FSM R. 30, 33 (Kos. 2004). Under the plain meaning of 6 F.S.M.C. 801, a presumption arose that the judgment in Civil Action No. 1999-060 had been paid and satisfied as of February 11, 2019.

The 6 F.S.M.C. 801 presumption of payment and satisfaction was therefore already in place on March 12, 2019, when the Development Bank filed its motion for summary judgment, and it was certainly in place when the trial division partially granted the motion and later entered an order directing the clerk to enter judgment. Since the trial division granted summary judgment on the basis, in which we herein decline to concur, that 6 F.S.M.C. 801 did not apply, we, in our *de novo* review of the grant of summary judgment, Allen v. Kosrae, 15 FSM R. 18, 21 (App. 2007), must determine what is the appropriate disposition of this appeal. That disposition hinges in part on whether the presumption in 6 F.S.M.C. 801 is rebuttable.

b. *A Rebuttable Presumption*

This Court finds that law, logic and precedent support rebuttability of the presumption in 6 F.S.M.C. 801. As a starting point, the language of 6 F.S.M.C. 801 is consistent with rebuttability of the presumption. Ms. Carl's assertion that irrebuttability is compelled by the Judicial Guidance Clause is a thinly clothed argument that the plain meaning of 6 F.S.M.C. 801, i.e., "shall be presumed," establishes a conclusive mandatory presumption.

In past decisions, this Court has spoken of three types of presumptions: permissive inferences, mandatory rebuttable presumptions, and conclusive mandatory presumptions. Harper v. Chuuk State Dep't

of Admin. Servs., 19 FSM R. 147, 154 (Chk. 2013). Our task is to determine to which type does 6 F.S.M.C. 801 provide.

The use of "shall" as opposed to "may" in 6 F.S.M.C. 801 rules out the conclusion that it creates a permissive inference. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM R. 1, 5 (App. 1997). However, "shall be presumed" does not provide an answer to the question whether the mandatory presumption is rebuttable or conclusive.[4] Rather, we must look beyond the wording of 6 F.S.M.C. 801 to determine whether it is rebuttable. For the following reasons, this Court finds that the presumption in 6 F.S.M.C. 801 is rebuttable, not conclusive.

First, under FSM law, presumptions are rebuttable unless it is specified in the law that they are not:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

FSM Evid. R. 301. Thus, presumptions are rebuttable unless the law otherwise provides. 6 F.S.M.C. 801 does not otherwise provide, stating only that "[a] judgment of any court shall be presumed to be paid and satisfied at the expiration of twenty years after it is rendered."

Second, FSM case law at the state level supports the rebuttability of the presumption that judgments are paid or satisfied after 20 years. *See* Kama v. Chuuk, 18 FSM R. 326, 335-36 (Chk. S. Ct. Tr. 2012) (Chuuk's failure to pay judgment was not a "a willful policy to avoid payment of judgments" by taking advantage of Chuuk's 20-year presumption (6 TTC 301, which is identical to 6 F.S.M.C. 801), as that presumption was rebuttable). The FSM Constitution, Article XI, section 11, directs this court to consult and apply sources from the Federated States of Micronesia."

Third, in common with the trial division's tolling theory, rebuttability avoids unreasonable results. It is undisputed that the complaint initiating the action on the judgment herein was filed on January 8, 2019, a little less than 20 years after the judgment itself was entered, which was February 11, 1999. Thus, as of the date of filing of the complaint, the judgment was not subject to the presumption in 6 F.S.M.C. 801, nor was the action on the judgment barred by 6 F.S.M.C. 802(1)(a) (setting forth a twenty (20) year statute of limitations for actions on judgments). Under Ms. Carl's interpretation of 6 F.S.M.C. 801, an action on a judgment, such as that filed by the Development Bank, approximately 19 years, 11 months after the judgment was entered, would almost immediately be subject to dismissal—with only thirty-four (34) days to obtain confirmation before the irrebuttable presumption takes effect. Thus, Ms. Carl's interpretation of 6 F.S.M.C. 801, that it creates an irrebuttable presumption against judgments at twenty years, would create highly impracticable results for actions on judgments filed close to the twenty year anniversary. As it must be presumed that, by creating identical statutory periods in 6 F.S.M.C. 801 and 6 F.S.M.C. 802(1)(a), a judgment obtained at any time within the twenty (20) year statute of limitations on an action on a judgment would have some reasonable prospect of being enforceable, FSM v. Aliven, 16 FSM R. 520, 533 (Chk. 2009) (a statutory construction that ends in an absurd result must be rejected) and Michelsen v. FSM, 3 FSM R. 416, 426 (Pon. 1988) (court selects among alternative interpretations that which produces reasonable result), we conclude that the presumption in 6 F.S.M.C. 801 is rebuttable.

Since the trial division granted summary judgment under the assumption, which we do not follow, that the rebuttable presumption in 6 F.S.M.C. 801 did not apply to the determination to grant summary judgment, we, in our *de novo* review of the grant of summary judgment, Allen v. Kosrae, 15 FSM R. 18, 21 (App. 2007),

[4] Note the statute is unambiguous in application to actions on judgments but not as to whether it is rebuttable.

must determine what is the appropriate disposition of this appeal in light of our determination that it does apply.

Our determination of that disposition begins with FSM Evidence Rule 301 (presumptions) and FSM Civil Rule 56 (summary judgment). Rule 301 tracks an earlier version of U.S. Federal Rule of Evidence 301. A presumption governed by the FSM's version of Rule 301 does not shift the burden of proof, instead only imposing on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. In the presence of given facts (called "basic facts"), which in this case consist of a twenty (20) year old judgment, 6 F.S.M.C. 801 requires that the judgment creditor come forward with evidence to rebut or meet the presumption that the judgment has been "paid and satisfied" (the presumed fact).

Rule 301 does not specify what quantum of evidence needs to be produced to rebut a presumption, and courts applying identically phrased versions of Rule 301 have come to varied conclusions. We adopt the conclusion of one treatise that rebuttal occurs when a reasonable finder of fact "could find the evidence sufficient" to support the nonexistence of the presumed fact (in this case, the nonexistence of full satisfaction of the judgment). 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM,, JR., FEDERAL PRACTICE AND PROCEDURE § 5126 (2d ed. 2005).[5]

As the movant for summary judgment, the FSM Development Bank had the burden of showing that it is entitled to judgment as a matter of law as to elements over which it has the burden as well as affirmative defenses, such as the claim by Ms. Carl that she had paid the debt and that the debt was presumed satisfied. Nahnken of Nett v. United States, 7 FSM R. 581, 596 (App. 1996) (A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material issue and the moving party is entitled to a judgment as a matter of law.); Eot Municipality v. Elimo, 20 FSM R. 482, 489 (Chk. 2016) ("Regardless of whether the non-movants have filed a written opposition, a plaintiff, when moving for summary judgment, must also overcome all of the adverse parties' affirmative defenses in order to be entitled to summary judgment.")

The Development Bank's motion for summary judgment brought forward evidence, in the form of an affidavit and an attachment setting forth the payment history of the judgment in Civil Action No. 1999-060. Ms. Carl responded by raising the presumption in 6 F.S.M.C. 801. If it were left at that, the rebuttable presumption in 6 F.S.M.C. 801 would have required that the trial division deny the Development Bank's motion for summary judgment.

Although the trial division stated in its order granting partial summary judgment that the presumption in 6 F.S.M.C. 801 that the judgment has not been satisfied was not invoked, it nevertheless denied the motion insofar as it would have awarded a dollar amount (only finding liability), based on a patent error in those records. It thus found the defendants liable but did not state the amount. In the order, the trial division gave the Development Bank a deadline for submitting liability calculations, with response deadlines for defendants. After the Development Bank submitted new affidavits and exhibits, and defendants did not submit any, the trial division issued an order on the amount so established, completing its summary judgment determination by issuing its December 30, 2019 order to enter judgment, implicitly finding that there was no material issue of fact and that the Development Bank was entitled to judgment as a matter of law in the amount of $50,215.98 in principal and accrued interest, plus interest to accrue in the future.

This Court finds that the evidence before the trial division was sufficient both to rebut the presumption

[5] As there appears to be no FSM case law on point concerning the residual effect of a rebutted presumption on summary judgment, and for the reason that the FSM rules on presumptions, FSM Evid. R. 301, and summary judgment, FSM Civ. R. 56, are patterned after rules in force in the United States, we may look for guidance to United States decisions interpreting similar rules. This Court turns to U.S. cases for possible guidance. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 507 (App. 2016); Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM R. 514, 518 n.2 (Chk. 2003).

created by 6 F.S.M.C. 801 and to satisfy the Development Bank's "initial burden of showing, through the pleadings, depositions, etc., that there are no triable issues of fact." Alik v. Kosrae Hotel Corp., 5 FSM R. 294, 295-96 (Kos. 1992).

An issue that has not been addressed, and which we address now, is whether, having successfully rebutted the presumed fact (the satisfaction of the judgment) the Development Bank could on the same record also satisfy the requirement for summary judgment. Phrased in another way, the issue is whether the rebuttable presumption precludes summary judgment, even after rebuttal.

In U.S. cases, there are decisions finding that a rebuttable presumption in favor of the nonmovant precludes summary judgment against him. *See* Southcross Commerce Ctr., LLP v. Tupy Properties, LLC, 766 N.W.2d 704 (Minn. Ct. App. 2009) (rebuttable presumption in favor of nonmovant that its occupation of leased commercial presence made it an assignee created a genuine issue of material fact precluding summary judgment on claim of its rent obligation; RBC Ministries v. Tompkins, 974 So.2d 569 ((Fla. Dist. Ct. App. 2008) (rebuttable presumption by showing various factors of undue influence in will execution precludes summary judgment—movant claimed to have rebutted presumption).

Other cases find that a movant may obtain summary judgment having rebutted the presumption in favor of nonmovant. Jaramillo v. Ramos, 460 P.3d 460 (Nev. 2020) (conclusive negation of rebuttable presumption in *res ipsa loquitur* case could be basis for movant doctor to obtain summary judgment). Horsley v. Essman, 763 N.E.2d 245 (Ohio Ct. App. 2001) (defendant rebutted a statutory presumption that his cow was at large due to his want of due care; court notes that presumption was of the "bubble-bursting variety" with the effect that the "rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact." However, defendant was not entitled to summary judgment because of other evidence of lack of due care).

Faced with the two lines of authority, this Court finds some benefit from looking at principles to reconcile them. Olter v. National Election Comm'r, 3 FSM Intrm. 123, 132 (App. 1987). The principles at issue here are those underlying the rules of summary judgment. The basic rule is that "summary judgment is proper only when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Albert v. George, 15 FSM R. 574, 579 (App. 2008). If the Development Bank has established with evidence that a reasonable finder of fact could find sufficient to support that the judgment had not been satisfied, and thereby rebutted the presumed fact, the question remains whether Ms. Carl can still point to the unrebutted basic fact, i.e. the age of the judgment, as creating an *inference* of satisfaction that would defeat summary judgment.

We find that she may not. While on a motion for summary judgment, any facts and inferences therefrom must be viewed in the light most favorable to the nonmoving party, Berman v. Santos, 7 FSM R. 231, 235 (Pon. 1995), an inference must be consistent with the evidence to be considered. Este v. FSM, 4 FSM R. 132, 138 (App. 1989) ("[a]n inference is not permitted if it cannot reasonably be drawn from the facts in evidence.") *See also* Mulero-Rodriguez v. Ponte Inc. 98 F.3d 670, 672 (1st Cir. 2000) ("[a]n inference is reasonable only if it can be drawn from the evidence without resort to speculation"); Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d, 877, 883 (8th Cir. 1978) (an inference cannot be drawn in opposition to directed verdict where evidence is "so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided").

The facts in evidence are that Ms. Carl stopped all voluntary payments in 2014, and, after a garnishment payment occurred in 2017, obstructed subsequent garnishment. Supp. App. at 31-39. In light of the foregoing and the lack of any evidence to the contrary,[6] satisfaction of the judgment cannot be

[6] For the first time on appeal, Ms. Carl asked that this court take judicial notice of the complaint in Civil Action 2015-010 (Linda Carl v. Anna Mendiola). In addition to being untimely, for which it may be denied per FSM

reasonably inferred merely from the judgment's age. Summary judgment for the Development Bank was appropriate based on this uncontroverted evidence.

2. *Other Issues*

Ms. Carl raises numerous other issues, which, while they deserve some discussion, do not warrant relief. For example, she takes issue whether an action on a judgment is even available as an option for the Development Bank to continue the enforceability of the judgment. However, she does not present any credible argument or evidence to support this issue on appellate review. Neither the statutes, i.e., 6 F.S.M.C. 802 (1)(a) or 6 F.S.M.C. 1404,[7] limits actions on judgments to domestication of judgments, as Ms. Carl would suggest.

A good portion of Ms. Carl's discusses concerns about the fairness of the judge and the process. These concerns were either not raised below or not adequately proven. Ms. Carl offers speculative statements about the timing of the Development Bank's filing of a motion for summary judgment, i.e., that the Development Bank's dispositive motion was filed one day after the trial court case was assigned to Associate Justice Larry Wentworth, which purportedly confirms that there is some unorthodox alliance between the presiding justice and the Development Bank legal counsel.

However, not only does Ms. Carl fail to present any evidence of such collusion, but the issue of a relationship between the presiding justice and an attorney representing a party was never presented to the trial court for its consideration and ruling. As this Court has explained, in "order to overturn the trial judge's denial of a motion to recuse, the appellant must show an abuse of discretion by the trial judge. Jano v. King, 5 FSM R. 326, 330 (App. 1992). The appellate court will not merely substitute its judgment for that of the trial judge. *Id.*[8]

Ms. Carl has presented a series of claims and assertions that are unsupported by any credible evidence, either in the trial court record that is now on review, or from any other independent source. She maintains that the filing of the complaint in the trial court for this appeal is an "attempt at hijacking," the judgment entered on February 11, 1999, in the case of Federated States of Micronesia Development Bank v. Yosilyn Carl, Civil Action No. 1996-060.

Similarly, she describes the routine advancement of the adjudication of a trial court matter as

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v. Moroni, 6 FSM R. 575, 579 (App. 1994), the request is insufficient in failing to indicate what records in the court file and what facts therein need to be noticed. FSM Evid. R. 201(d). The request is denied.

[7] 6 F.S.M.C. 1404 reads as follows:

> Enforcement of judgment may also be effected, if the Trial Division of the High Court deems justice requires and so orders by the appointment of a receiver, or receivers, by taking possession of property and disposing of it in accordance with the orders of the Court, or by a civil action on the judgment, or in any other manner known to American common law or common in courts in the United States.

Although this section makes reference to the High Court—it is a carryover provision from the Trust Territory Code—it has been applied to FSM Supreme Court proceedings. *See, e.g.*, FSM Dev. Bank v. Carl, 20 FSM R. 592, 594 (Pon. 2016) (garnishment remedy).

[8] The record here shows that this recusal issue was only previously presented to this Court's Appellate Division in the manner of a Petition for a Writ of Prohibition. FSM App. R. 21. That case was captioned as: Yosilyn Carl v. Associate Justice Larry Wentworth, Appeal No. P2-2001 (App. 2021). This Court issued a decision on March 23, 2021, denying the requested writ; a subsequent order denying a petition for rehearing was issued on April 22, 2021. Carl v. Wentworth, 23 FSM R. 196 (App.), *reconsideration denied*, 23 FSM R. 249 (App. 2021). In summary, the case for recusal was found by the appellate division to be wanting. Nothing in this appeal changes our conclusions.

reflected in pleadings and orders as a matter of "timing," noting that "timing gives away the behind-scene planning of 'once one particular judge gets on this FSMDB case, then FSMDB can start its pitch . . . .'" These are issues or theories being raised for the first time with this Court, in this appeal and are speculative, not being supported by any evidence from which such could reasonably have been inferred.

Concerns Ms. Carl may have had about the pace of the subject litigation before the trial division may properly have been addressed by a motion for enlargement of time or, in the context of responding to a motion for summary judgment, requesting additional time to conduct discovery pursuant to FSM Rule of Civil Procedure 56(f), which provides as follows;

> When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In accord with other jurisdictions that have adopted a summary judgment rule modeled after the Federal Rules of Civil Procedure, 56(f) requests should be freely granted. Kessey v. Frontier Lodge, Inc., 42 P.3d 1060, 1063 (Alaska 2002) ("Alaska's mandate that Alaska Civil Rule 56(f) requests be 'freely granted' corresponds to recognition that Federal Rule of Civil Procedure 56(f) should be applied with a 'spirit of liberality.'"). *See also* 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2740, at 402–03 (3d ed. 1998).[9]

The movant of course needs to make a case for such requests. If an adequate case is made but the request is not adequately addressed at the trial division level, these steps could establish a record for an ultimate appeal or even extraordinary relief. Ms. Carl's requests for enlargements of time and continuances were not denied. She did not request additional time to oppose summary judgment pursuant to Rule 56(f).

As this Court has consistently held, an "issue not presented to and ruled upon by the trial court cannot properly come before the appellate division for review." FSM v. Moroni, 6 FSM R. 575, 579 (App. 1994). Moreover, appellate courts do not make factual findings. Goya v. Ramp, 14 FSM R. 305, 307 n.1 (App. 2006). Indeed, an appellate court should be reluctant to substitute its judgment for that of the trial judge. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 511 (App. 2016). Instead, appellate courts review questions of law that a trial court ruled upon *de novo*. Helgenberger v. Bank of Hawaii, 19 FSM R. 139, 143 (App. 2013). A trial court's factual determinations, by contrast, are reviewed under a clearly erroneous standard. *Id.* at 143. *See* Senda v. Mid-Pac Constr. Co., 5 FSM R. 277, 280 (App. 1992) (standard of review on a question of the sufficiency of the evidence is whether it is clearly erroneous); Opet v. Mobil Oil Micronesia, Inc., 3 FSM R. 159, 165 (App. 1987) (standard of review on appeal on the issue of the sufficiency of the evidence is very limited – only findings that are clearly erroneous can be set aside). Similarly, an abuse of discretion by the trial court occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. Jano v. King, 5 FSM R. 326, 330 (App. 1992). A court is precluded from making pronouncements on the basis of a hypothetical, abstract, or academic issues, or when the matter is moot. Helgenberger, 19 FSM R. at 144.

In addition, a party is bound by the theory advanced in the trial court, and cannot urge a ground for relief which was not presented there, particularly where the party had ample opportunity to raise the issues in the trial court instead of presenting them for the first time on appeal. Paul v. Celestine, 4 FSM R. 205, 210 (App. 1990). *See* George v. Nena, 12 FSM R. 310, 319 (App. 2004) (an issue raised for the first time

[9] Note that the substance of Federal Rule 56 subsection (f) was amended and now appears as 56 subsection (d). Federal Rule 56 as a whole was rewritten in 2010. Since the FSM version tracks the old version of the Federal rule, US decisions predating the rule change remain on-point for FSM purposes.

on appeal is waived). Here, the arguments advanced by Ms. Carl do not show any error by the trial court when it either granted the Development Bank's motion for summary judgment, or, in turn, entered a judgment in favor of the Development Bank.

III. CONCLUSION

This Court finds that the record before the trial division support affirmance of the judgment in favor of the Development Bank, even if in some instances for reasons for that are different than those on which the trial division made its decision. *See* Nahnken of Nett v. United States, 7 FSM R. 581, 589 (App. 1996) (affirmance on different grounds).

We hereby dismiss this appeal.

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FSM SUPREME COURT TRIAL DIVISION

IN THE MATTER OF ATTORNEY YOSLYN G. SIGRAH, Respondent Attorney.	)	DPA NO. 003-2018

DECISION IMPOSING DISCIPLINE

Larry Wentworth
Associate Justice

Hearing: April 20, 2021
Submitted: May 26, 2021
Decided: November 30, 2021
Discipline Imposed: April 20, 2022

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HEADNOTES

Evidence – Judicial Notice

While the court has no difficulty taking judicial notice that the Chief Justice entered an order in