Becheserrak v. Koror State, 2 ROP Intrm. 327 (1991)
KATSUTOSHI BECHESERRAK, et al.,
Appellants,

v.

KOROR STATE, et al.,
Appellees.

CIVIL APPEAL NO. 4-88
Civil Action No. 160-86

Supreme Court, Appellate Division
Republic of Palau

Appellate decision
Decided: May 20, 1991

Counsel for Appellants: Michael W. Dotts

Counsel for Appellees: Mark Doran

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice; ROBERT A. HEFNER, Associate Justice.

NGIRAKLSONG, Associate Justice:

BACKGROUND

Appellants filed their complaint in 1986. Hearings were held for injunctive relief and Appellee's motion to dismiss the case on September 26, 1986 and October 9, 1987, respectively. No testimony or evidence was taken at these hearings. In March of 1988, the Trial Court granted Koror State's Motion to dismiss the case and vacated the injunctive relief it had previously granted to Appellants.

Appellants timely filed their Notice of Appeal and a "Notice to Clerk of Courts to prepare record" on April 4, 1988. The notice requested ". . . the transcript of the testimony offered or taken during the hearing on various motions for the Court, ⊥328 evidence offered or received, and all rulings, instructions, acts, or statements or exceptions of counsels (sic), written briefs of the parties, and all matters to which the same relate, including the complaint and answer, amendment to the complaint, and pre-trial conference orders, motions, temporary restraining orders, argument before the Court . . ." (emphasis added). On April 19, 1988, the Clerk of Courts informed Appellants' counsel of the estimated cost of the transcript and on April 27, 1988, $100.00 was paid.

Appellants' counsel died in August of 1989. The Chief Justice held two status

conferences and allowed Appellants up to September 25, 1990, to obtain new counsel. (Chief Justice's Orders of May 28, 1990, and July 24, 1990). The present counsel filed his appearance on September 25, 1990, and thereafter, renewed the same designation of record that his predecessor filed. The Clerk of Courts on October 11, 1990, first estimated that two weeks would be needed to complete the record. Five days later, the Clerk informed Appellants that the tape on the October 9, 1987, proceedings was blank. Appellants' counsel advised the Clerk to transcribe the proceedings of the September 6, 1986 hearing. The transcript of the proceedings was filed on November 1, 1990. The certification of the record was issued on November 8, 1990, and Appellants filed their opening brief on December 7, 1990, 29 days after the issuance of the certificate.

Appellees filed their motion to dismiss the appeal on November 30, 1990, and Appellants filed their opposition to the motion on November 7, 1990.

⊥329 DISCUSSION

ROP R. App. Pro. 31(b) is the operative rule:

> Time of Filing . Appellant's brief shall be filed within forty-five (45) days after the notification (service) of certification of the record by the Clerk of the Trial Court or after entry of the trial court order settling the transcript, whichever shall occur last; or if a transcript is not designated or is waived, then within forty-five (45) days after the filing of the notice of appeal . . . (emphasis added).

Appellees argue that ROP R. App. Pro. 10(b) and (c) provide that a transcript is limited to testimony and evidence. Since there was no evidence and testimony adduced at the Trial Court, the request for transcript was a "nullity". From this, Appellees essentially urge the Court to treat Appellants' request for transcript as if the "transcript was not designated" under Rule 31(b) and therefore the 45 days for Appellants' brief to be filed began on April 4, 1988, the date the notice of appeal was filed.

Appellants argue that they requested the transcript and, therefore, the 45 days began when the Clerk served the certification of record. When the Clerk did serve the certification, Appellants filed their opening brief 29 days thereafter.

ROP R. App. Pro. 10(b) provides that any party desiring to raise an issue on appeal depending on any part of the evidence shall order and pay for the transcript of the testimony which is to be prepared. Rule 10(c) speaks of "transcript of testimony" and "transcript of any testimony." The word "transcript" under Rule 10(b) and (c) is confined to testimony and evidence. ⊥330 Accordingly, we hold that the word "transcript" is limited to testimony and evidence.

Since none of the trial court hearings dealt with testimony and evidence, the Clerk should have served the certification of record on the date the notice of Appeal was filed. The Clerk's failure to serve the certification of record on the date the notice of appeal was filed was an error.

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SHOULD APPEAL BE DISMISSED?

Appellees urge the Court to dismiss the appeal under ROP R. App. Pro. 31(c), citing, *A.J.J. Enterprises v. Renguul, et al.* , Civil Appeal No. 7-90 (July 8, 1990); *Uodelchad v. Iechad*, Civil Appeal No. 7-88, (April 2, 1990); *Kebekol et al. v. Palau Election Commission, et al.* , 1 ROP Intrm. 654 (App. Div. Sept. 14, 1989); *ROP v. The Olbiil Era Kelulau* , 1 ROP Intrm. 562 (App. Div. January 20, 1989); *Ramon et al. v. Umedib* , 1 ROP Intrm. 564 (App. Div. January, 1989); and *Silmai v. The Pension Fund Board of Trustees* , 1 ROP Intrm. 631 (App. Div. May, 1989).

We decline to dismiss the appeal for the following reasons. First, all the above-cited cases are distinguishable from the case before us. In each of them, either a notification of the certification of the record was served, the transcript was not designated or the transcript was waived. There was no confusion or ambiguity as to when Appellants' brief was supposed to be filed, and Appellants' failure to file their opening brief on time was without good cause. *Silmai, supra*.

⊥331 Second, we believe there has been some confusion as to what "transcript" includes. The general rule is that an appellant must include on the record "all matters necessary for the determination of the issues presented by the appeal." 9 J. Moore, *Moore's Federal Practice* , para. 210.05(1) (2d Ed 1983). And "all matters" may, if necessary for determination of the issues presented for review, include the transcript of any hearing. *Id.*; *see also* 4 Am. Jur. 2d, *Appeal and Error* sec. 404 and 464. In fact, this Court has recently read the word "transcript" to be quite inclusive:

> Appellant's unique reliance on the idea that there is a supposed ambiguity in the meaning of the word "transcript" and that this ambiguity amounts to good cause for not filing his brief on time, has no merit. Whatever else Appellant may have thought a transcript might or might not be, it clearly must include a record of the oral proceedings of the hearing.

A.J.J. Enterprises, supra. The "oral proceedings of the hearing" in the Trial Court did not deal with testimony and evidence. Adding to this legal ambiguity, the Clerk's acceptance of the Appellants' request to transcribe the Trial Court proceedings may have misled Appellants into a false sense of security.[1]

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[1] In *Echerang Lineage v. Tkel*, Civil Appeal No. 22-84 (October 21, 1988) the Court said ". . . we find that the initial eighteen (18) months hiatus was attributable to Court personnel and, therefore, not chargeable to Appellant." In *Remeliik v. Luii*, 1 ROP Intrm. 592 (App. Div. April 12, 1989), the Court said of the Clerk's failure to produce a certain transcript ". . . it would not be appropriate to punish the appellants for these administrative problems . . . ."

⊥332 Third, Appellee's have not shown prejudice to them as a result of the delay. At oral argument, counsel for Appellees conceded that the Koror State Government has been functioning normally in spite of the pendency of this appeal. Where an appellee has failed to show prejudice as a result of the appellant's failure to meet the time limitations of Rule 31(c), the appellee's motion to dismiss the appeal should be denied. *Marcaida v. Rascoe*, 569 F.2d 828, 830 (5th Cir. 1978); *Nakatani v. Nishizono*, 1 ROP Intrm. 718 (App. Div. October 10, 1989).

Finally, Appellees argue that it is the duty of Appellants to see that the record is properly presented before the Appellate Court. In the case at bar, Kaleb Udui paid $100.00 to the Clerk, then did nothing for 16 months.

Rule 11 of the Federal Rules of Appellate Procedure imposes a duty on appellants to see that the necessary record is properly presented to the Appellate Court. This Court adopted its Appellate Rules from the Federal Appellate Rules, but intentionally omitted Rule 11. Hence, until we adopt Rule 11, we may not apply it indirectly by way of case law.[2]

⊥333 With the foregoing, Appellee's motion to dismiss the appeal is DENIED.

[2] A review of the Rules should consider adoption of Rule 11 of the F.R.A.P.

⊥334 HEFNER, Justice, dubitante:

My colleagues have determined under the facts of this case the appellants should not be denied their right to be heard on the merits of their appeal. On the face of it, that is difficult to argue with.

On the other hand, the appellants filed their notice of appeal three years and over one month ago and it is just as difficult to justify such a long delay in the prosecution of the appeal.

There is no doubt in my mind that appellants' original counsel as well as the appellants themselves are guilty for most of this delay. There is also no doubt the Clerk's failure to serve the certification of record on the date the notice of appeal was filed was an error and contributed to the delay.

My doubt arises because of the message this opinion conveys to counsel who practice in this court. It appears to me we are allowing counsel who are trained in the law to rely on lay court personnel or at least use them as a shield to avoid the consequences of their lack of diligence.

My fellow justices on this panel have deemed this case to be distinguishable from all the other cases in which the appeal was dismissed. Most, if not all, of those cases involved less delay than this case. Since the ruling here affects the procedural processing of appeals which my colleagues are intimately and consistently involved and which I ⊥335 participate only on an as needed basis, I defer to their judgment but do express my doubt as to how well the appellate process is functioning in allowing an appeal such as this one to proceed.