FSM SUPREME COURT TRIAL DIVISION

BIARITA ROBERT,	)	CIVIL ACTION NO. 2015-1001
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK PUBLIC UTILITY CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

ORDER INDICATING THE COURT'S WILLINGNESS TO GRANT VACATUR

Larry Wentworth
Associate Justice

Decided: September 28, 2020

APPEARANCES:

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HEADNOTES

Judgments – Relief from Judgment

Civil Procedure Rule 60(b)(6) is the proper vehicle for the relief of vacatur of a judgment. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 49 (Chk. 2020).

Judgments – Relief from Judgment

An FSM court must first consult FSM sources of law, but when no FSM court has yet construed an aspect of an FSM Civil Procedure Rule 60(b) which mirrors a similar U.S. civil procedure rule, the court may look to U.S. sources for guidance. Thus, when FSM courts have not previously considered Rule 60(b)'s application to vacatur of judgments, the court may consult U.S. authority. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 49 n.1 (Chk. 2020).

Judgments – Relief from Judgment

When a final judgment has been entered and properly appealed, the trial court has the jurisdiction, without appellate court permission, to both consider and to deny a Rule 60(b) motion, but the trial court has no jurisdiction to grant a Rule 60(b) motion while an appeal is pending, although, if, after considering the motion, the trial court is inclined to grant it, the court may indicate on the record that it would do so if the appeal case were dismissed or remanded. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 49 (Chk. 2020).

Appellate Review – Dismissal; Judgments – Relief from Judgment

When a Rule 60(b) movant obtains a trial court statement that the trial court is willing to grant Rule 60(b) relief but cannot do so because the matter is on appeal, the usual procedure is for the movant to take that statement to the appellate court and ask that court to remand the matter to the trial court so that the trial court can grant the Rule 60(b) motion. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 49-50 n.2 (Chk. 2020).

Appellate Review – Dismissal; Judgments – Relief from Judgment

When all parties are joint Rule 60(b) movants who want remand to trial court to grant relief, they may avail themselves of the quicker and surer Appellate Rule 42(b) joint dismissal route instead of waiting for the appellate court to assemble a panel that will then consider and act on the motion to remand because all parties to an appeal may jointly dismiss the appeal on their own without an appellate court order by following the Appellate Rule 42(b) procedure. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 50 n.2 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Relief under Rule 60(b)(6) requires extraordinary circumstances, which usually means that the movant himself was not at fault for his predicament, and it is also a basic principle that post-judgment vacatur should issue only in extraordinary circumstances. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 50 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case, but can only be used when the ground for relief is not one included in Rule 60(b) paragraphs (1) through (5), and vacatur

is not a ground for relief included in Rule 60(b) paragraphs (1) through (5). Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 50 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Factors that should inform the trial court's consideration of a motion under Rule 60(b): 1) that final judgments should not lightly be disturbed; 2) that the Rule 60(b) motion is not to be used as a substitute for appeal; 3) that the rule should be liberally construed in order to achieve substantial justice; 4) whether the motion was made within a reasonable time; 5) whether–if the judgment was a default or a dismissal in which there was no consideration of the merits–the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; 6) whether, if the judgment was rendered after a trial on the merits, the movant had a fair opportunity to present his claim or defense; 7) whether there are intervening equities that would make it inequitable to grant relief; and 8) any other factors relevant to the justice of the judgment under attack. These factors are to be considered in the light of the great desirability of preserving the principle of the finality of judgments. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 50 (Chk. 2020).

Judgments – Relief from Judgment – Time Limits

The threshold question is whether the Rule 60(b) motion is timely. Although there is no set time limit on Rule 60(b)(6) motions, the motion must be made within a reasonable time. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

That the finality of an April 20, 2020 judgment should not be lightly disturbed weighs against vacatur, as does that the appellant should not use vacatur as a substitute for its pending appeal, and also weighing against vacatur, is that the judgment was rendered after a lengthy trial during which both sides had a more than fair opportunity to present their claims or defenses. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Liberally construing Rule 60(b)(6) would, in a close case, increase the likelihood that vacatur might be granted, especially when no equities have intervened between the April 20, 2020 judgment and the parties' August 26, 2020 joint motion that would make it inequitable to grant vacatur. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Courts, that embrace the equitable nature of vacatur, determine the propriety of granting vacatur by weighing the benefits of settlement to the parties and to the judicial system (and thus to the public as well) against the harm to the public in the form of lost precedent. The precise application of this approach will vary case by case. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Generally, when an opinion sets a precedent, that is a ground to deny vacatur. A party's desire to avoid the potential legal precedent set by an order does not qualify for Rule 60(b)(6) relief because such result would fall far short of the necessary exceptional circumstances for justifying vacatur. That is because judicial precedents are presumptively correct and valuable to the legal community as a whole, and they are not merely property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Courts; Judgments

Trial court decisions are not binding precedents or controlling law, but are only persuasive authority. A trial court judge's decision is not binding precedent in either a different trial court, the same trial court, or

even upon the same judge in a different case. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 51 (Chk. 2020).

Civil Procedure – Stare Decisis; Courts; Judgments

A trial court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply, and its only significance is as information, and would not be affected even if the reviewing court intoned in its most solemn voice that the trial court's decision would have no precedential value whatsoever. A trial court opinion is not binding on any court beyond its use in its own case, and instead is only valuable as persuasive authority. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Courts; Judgments

A trial court's decision, whether published in a reporter or not, binds only the parties in that case and no judge in any other case. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Courts; Judgments – Relief from Judgment – Grounds

A state court judge is not bound to follow the FSM Supreme Court trial court's conclusions of state law, since they would only be persuasive authority, and also a state court trial judge would first look to any authority from the appellate courts above the trial judge before consulting other trial courts if appellate precedent was absent. The national trial court's conclusions of state law would thus have less precedential value or persuasive authority that would weigh against vacatur. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Courts; Judgments – Relief from Judgment – Grounds

The value of maintaining persuasive authority of mostly state law does not weigh heavily against vacatur. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Judgments – Relief from Judgment – Grounds; Settlement

If settlement is reached after entry of the decision on the merits of the appeal, settlement ordinarily should not be the occasion for vacating opinions or judgment. So too, if the parties settle following an appellate decision that remands for further proceedings, the appellate decision will not be vacated. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 n.4 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Some courts hold that being a "repeat player" in the judicial system favors vacatur when the "repeat player" seeks vacatur as part of a settlement, because, as a "repeat player" that party is primarily concerned with the precedential effect of the trial court decision, but it is often unjust to allow repeat players – institutional litigants – to obtain vacatur because freely granting vacatur hurts one-time players in the legal system while benefitting institutional litigants who have the greatest incentive to remove adverse precedent from the books. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Courts; Judgments – Relief from Judgment – Grounds

The concern for precedent takes on a special tone when a court suspects that an institutional litigant seeks to manipulate the growth of the law by settling out unfavorable rulings–perhaps at a premium–and awaiting favorable rulings in sympathetic cases to press on for appellate decision. Hence the rule that the parties cannot win vacatur simply by agreeing to it, and the approach that demands special reason to accede to the parties' bargain. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 52 (Chk. 2020).

Judgments – Relief from Judgment – Grounds; Settlement

Exceptional circumstances for vacatur do not include the mere fact that the settlement agreement provides for vacatur. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 53 (Chk. 2020).

Judgments – Relief from Judgment – Grounds; Settlement

Settlement by the parties is a desideratum of any dispute resolution system. Yet importantly, it is not always the sole or even dominant desideratum, but there is some authority that courts should look more favorably on a joint motion for vacatur when the court had earlier urged settlement of the matter and prompted the parties to begin settlement negotiations. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 53 (Chk. 2020).

Judgments

The court may use uncontradicted testimony that neither side mentioned or argued as an important basis for its judgment because of the principle that every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 53 (Chk. 2020).

Judgments – Relief from Judgment – Grounds

Vacatur must benefit the public interest. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 53 (Chk. 2020).

Judgments – Relief from Judgment – Grounds; Public Utilities

The public interest is not served only by the preservation of precedent but is also served by settlements when previously committed judicial resources are made available to deal with other matters, advancing the efficiency of the courts, another benefit to the public interest is that the public utility party would then be able to spend less of its resources on lawyers and litigation and more on providing and maintaining important public services. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 54 (Chk. 2020).

Judgments – Relief from Judgment; Judgments – Relief from Judgment – Grounds

When three circumstances qualify, in the court's view, as just extraordinary enough that the court, in the exercise of its sound discretion, could grant vacatur of its judgment, but the court cannot do so because it lacks jurisdiction since an appeal is pending, the court will indicate on the record that it would grant the Rule 60(b)(6) relief requested, but that it cannot do so unless the appeal case is first dismissed or remanded and jurisdiction returned to the trial court, and will await any action in that regard. Robert v. Chuuk Public Utility Corp., 23 FSM R. 44, 54 (Chk. 2020).

* * * *

COURT'S OPINION

LARRY WENTWORTH, Associate Justice:

This now comes before the court on the parties' Joint Motion to Vacate Judgment and Portions of Findings of Fact and Conclusions of Law Pursuant to FSM Civil Rule 60(b)(6) as a Condition of Settlement, filed August 26, 2020. The court hereby indicates that it is willing to grant the motion, but presently cannot because it lacks the jurisdiction to do so while an appeal is pending.

I. PROCEDURAL BACKGROUND

A. *Judgment and Appeal*

After a lengthy trial on the merits, the court, on April 20, 2020, issued its Findings of Fact and Conclusions of Law, in which it found the defendant, Chuuk Public Utility Corporation ("CPUC"), liable to the plaintiff, Biarita Robert, on her nuisance and trespass claims, and awarded her $5,209.50 in damages. The clerk entered the judgment the same day.

CPUC appealed that final judgment. The appeal was docketed as C1-2020. Robert then sought an order in aid of judgment to collect her judgment since no stay had been ordered. The July 28, 2020 order in aid of judgment hearing was, at the parties' request, recessed because they stated that settlement discussions were again underway.

B. *Motion for Vacatur*

On August 26, 2020, the parties filed a joint Rule 60(b)(6) motion for relief from the judgment in the form of vacatur. The parties agreed to a conditional settlement, in which CPUC will pay Robert a sum somewhat higher than the judgment amount and CPUC will not pursue its appeal. Implementation of this settlement is conditioned on the trial court granting their motion to vacate the April 20, 2020 Judgment and, at a minimum, to vacate certain parts of its Findings of Fact and Conclusions of Law, so that those findings and conclusions will not have any precedential value and cannot be used as collateral estoppel.

The parties jointly contend that extraordinary circumstances exist for the court to use its equitable powers to vacate the judgment because no significant public interests are affected by the proposed vacatur; because the court earlier had encouraged settlement; because vacatur would encourage finality through the conditional settlement; because Robert would receive immediate payment and CPUC would avoid the risk of the case being used as collateral estoppel in future similar litigation; because CPUC is a "repeat player" before the courts; because the key testimony on which the court based its negligence finding was evidence neither side paid much attention to or bothered to argue; and because the court's conclusions of law were conclusions on state law issues so that their precedential value is low.

II. Nature and Scope of a Rule 60(b)(6) Motion

The parties correctly identify Civil Procedure Rule 60(b)(6) as the proper vehicle for the relief they seek – vacatur of a judgment. *See, e.g.*, Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 121 (4th Cir. 2000).[1]

A. *Rule 60(b) Motions While an Appeal Is Pending*

But when, as here, a final judgment has been entered and properly appealed, the trial court has the jurisdiction, without appellate court permission, to both consider and to deny a Rule 60(b) motion, but the trial court has no jurisdiction to grant a Rule 60(b) motion while an appeal is pending, Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 (App. 2008), although, if, after considering the motion, the trial court is inclined to grant it, the court may indicate on the record that it would do so if the appeal case were dismissed or remanded.[2] FSM Dev. Bank v. Ehsa, 20 FSM R. 286, 289 (Pon. 2016); Stinnett v. Weno, 8

[1] An FSM court must first consult FSM sources of law, but when no FSM court has yet construed an aspect of an FSM Civil Procedure Rule which mirrors a similar U.S. civil procedure rule, the court may look to U.S. sources for guidance. *See, e.g.*, Berman v. College of Micronesia-FSM, 15 FSM R. 582, 589 n.1 (App. 2008); Primo v. Pohnpei Transp. Auth., 9 FSM R. 407, 413 n.3 (App. 2000); Tom v. Pohnpei Utilities Corp., 9 FSM R. 82, 87 n.2 (App. 1999). FSM Civil Procedure Rule 60(b) is similar to the U.S. federal Rule 60(b), and FSM courts have not previously considered that rule's application to vacatur of judgments.

[2] When a Rule 60(b) movant obtains a trial court statement that the trial court is willing to grant Rule 60(b) relief but cannot do so because the matter is on appeal, the usual procedure is for the movant to take that statement to the appellate court and ask that court to remand the matter to the trial court so that the trial court can grant the Rule 60(b) motion. Stinnett v. Weno, 8 FSM R. 142, 145 n.1 (Chk. 1997); Walter v. Meippen, 7 FSM R. 515, 518 (Chk. 1996).

FSM R. 142, 145 & n.1 (Chk. 1997); Walter v. Meippen, 7 FSM R. 515, 517-18 (Chk. 1996).

Therefore, the court will consider the parties' joint Rule 60(b)(6) motion and either deny it or indicate on the record that the court would be willing to grant the motion if jurisdiction over this matter was returned to the trial court.

B. *Rule 60(b)(6) Requirements*

Relief under Rule 60(b)(6) requires "extraordinary circumstances," which usually means that the movant himself was not at fault for his predicament. Arthur v. FSM Dev. Bank, 16 FSM R. 653, 659 (App. 2009). It is also a "basic principle that post-judgment vacatur should issue only in extraordinary circumstances." Neumann v. Prudential Ins. Co. of Am., 398 F. Supp. 2d 489, 492 (E.D. Va. 2005). Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case, but can only be used when the ground for relief is not one included in Rule 60(b) paragraphs (1) through (5), Johnson v. Rosario, 21 FSM R. 7, 12 (Pon. 2016); In re Contempt of Jack, 20 FSM R. 452, 459 (Pon. 2016). Vacatur is not a ground for relief included in Rule 60(b) paragraphs (1) through (5).

A previous FSM Supreme Court decision stated:

> [F]actors that should inform the [trial] court's consideration of a motion under Rule 60(b): (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether–if the judgment was a default or a dismissal in which there was no consideration of the merits–the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Contempt of Jack, 20 FSM R. at 460 n.3 (quoting Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981)). "These factors are to be considered in the light of the great desirability of preserving the principle of the finality of judgments." Seven Elves, 635 F.2d at 402.

III. ANALYSIS

The court now turns to consideration of the parties' joint motion, and will discuss the relevant factors. Only Contempt of Jack factor # 5 (involving default judgments and dismissals) lacks any relevance whatsoever to the parties' joint motion.

Since, in this case, all parties are joint Rule 60(b) movants, they may avail themselves of the quicker and surer Appellate Rule 42(b) joint dismissal route instead of waiting for the appellate court to assemble a panel that will then consider and act on the motion to remand. (All parties to an appeal may jointly dismiss the appeal on their own without an appellate court order by following the Appellate Rule 42(b) procedure.)

A. *Within a Reasonable Time (Factor # 4)*

The threshold question is whether the Rule 60(b) motion is timely. Although there is no set time limit on Rule 60(b)(6) motions, the motion must be made within a reasonable time. Ehsa v. FSM Dev. Bank, 20 FSM R. 498, 508 (App. 2016). This motion was made four months after the April 20, 2020 entry of judgment. That appears to be within a reasonable time. The court thus deems it timely.

B. *General Relevant Factors (# 1, 2, 3, 6, and 7)*

Factors 1, 2, and 6 do not favor granting vacatur. That the finality of the April 20, 2020 judgment should not be lightly disturbed weighs against vacatur, as does that CPUC should not use vacatur as a substitute for its pending appeal. Also weighing against vacatur, is that the judgment was rendered after a lengthy trial during which both sides had a more than fair opportunity to present their claims or defenses.

Factors 3 and 7 generally weigh in favor of vacatur. Liberally construing Rule 60(b)(6) would, in a close case, increase the likelihood that vacatur might be granted. Also, no equities have intervened between the April 20, 2020 judgment and the parties' August 26, 2020 joint motion that would make it inequitable to grant vacatur.

Thus, factor 8, "any other factors relevant to the justice of the judgment under attack" – the judgment sought to be vacated, has the most bearing on the parties' motion. In particular, the court must examine any special considerations relevant to vacatur.

C. *Other Relevant Factors (# 8)*

Courts, that embrace the equitable nature of vacatur, "determine the propriety of granting vacatur by weighing the benefits of settlement to the parties and to the judicial system (and thus to the public as well) against the harm to the public in the form of lost precedent. The precise application of this approach will vary case by case." Hartford Cas. Ins. Co. v. Crum & Forster Specialty Ins. Co., 828 F.3d 1331, 1336 (11th Cir. 2016).

1. *Judicial Precedents*

The parties state that CPUC would benefit from a vacatur because the April 20, 2020 decision could not be used as precedent. Generally, when an opinion sets a precedent, that is a ground to deny vacatur. Mahoney v. Babbitt, 113 F.3d 219, 222 (D.C. Cir. 1997); Committee on Oversight & Gov't Reform v. Sessions, 344 F. Supp. 3d 1, 13 (D.D.C. 2018). "[A] party's desire to avoid the potential legal precedent set by an order does not qualify for Rule 60(b)(6) relief. . . . [S]uch result would fall far short of the necessary exceptional circumstances for justifying vacatur." Tustin v. Motorists Mut. Ins. Co., 668 F. Supp. 2d 755, 763 (N.D.W. Va. 2009). That is because "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 26, 115 S. Ct. 386, 392, 130 L. Ed. 2d 233, 243 (1994). The U.S. Bancorp court was referring to appellate court (the U.S. Circuit Courts of Appeal) precedents, not to trial court "precedents."

However, trial court decisions are not binding precedents or controlling law, Setik v. Mendiola, 21 FSM R. 537, 560-61 (App. 2018), but are only persuasive authority. "A decision of a [trial] court judge is not binding precedent in either a different [trial court], the same [trial court], or even upon the same judge in a different case.'" Camreta v. Greene, 593 U.S. 692, 709 n.7, 131 S. Ct. 2020, 2033 n.7, 179 L. Ed. 2d 1118, 1134 n.7 (2011) (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02[1][d], at 134-26 (3d ed.

2011)).

"A [trial] court decision binds no judge in any other case, save to the extent that doctrines of preclusion (not stare decisis) apply. Its only significance is as information, and would not be affected even if the reviewing court intoned in its most solemn voice that the [trial] court's decision would have no precedential value whatsoever." Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993). A trial court opinion is not binding on any court "beyond its use in [its own] case, and instead is only valuable as persuasive authority." Jewish War Veterans v. Mattis, 266 F. Supp. 3d 248, 253 (D.D.C. 2017). A trial "court's decision, whether published in a reporter or not, binds only the parties in *that* case and 'no judge in any other case.'" Daubert v. NRA Group, LLC, 861 F.3d 582, 395 (3d Cir. 2017) (emphasis in original) (quoting Gould, 11 F.3d at 84).

The court's April 20, 2020 decision accordingly has value only as persuasive authority, not as binding precedent. Furthermore, almost all of the court's conclusions of law were conclusions of state law.[3] Not only would a state court judge not be bound to follow those conclusions, since they would only be persuasive authority, but also a state court trial judge would first look to any authority from the appellate courts above the trial judge before consulting other trial courts if appellate precedent was absent. The national trial court's conclusions of state law would thus have less precedential value or persuasive authority that would weigh against vacatur. Hartford Cas. Ins. Co., 828 F.3d at 1336.

Accordingly, the April 24, 2020 decision carries little weight as precedent. The value of maintaining that persuasive authority of mostly state law does not weigh heavily against vacatur.[4]

2. *"Repeat Player"*

The movants contend that CPUC's status as a "repeat player" before the courts is a circumstance favoring vacatur. Some courts hold that being a "repeat player" in the judicial system favors vacatur when the "repeat player" seeks vacatur as part of a settlement, because, as a "repeat player" that "party is *primarily* concerned with the precedential effect of the [trial court] decision." Motta v. District Dir. of Immigration, 61 F.3d 117, 118 (1st Cir. 1995) (emphasis in original).

But it is often unjust to allow repeat players – institutional litigants (such as CPUC) – to obtain vacatur because "[f]reely granting vacatur hurts one-time players in the legal system while benefitting institutional litigants . . . who have the greatest incentive to remove adverse precedent from the books." McMellon v. United States, 528 F. Supp. 2d 611, 614 (S.D.W. Va. 2007).

> The concern for precedent may take on a special tone when a court suspects that an institutional litigant seeks to manipulate the growth of the law by settling out unfavorable rulings–perhaps at a premium–and awaiting favorable rulings in sympathetic cases to press on for appellate decision. Hence the rule that the parties cannot win vacatur simply by agreeing to it, and the approach that demands special reason to accede to the parties' bargain.

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[3] The only conclusion that was not one of state law, was a conclusion that CPUC's negligence and nuisance liability did not rise to the level of an unconstitutional taking of Robert's property.

[4] Of course, the opposite is true of appellate opinions. "If settlement is reached after entry of the decision on the merits of the appeal, settlement ordinarily should not be the occasion for vacating opinions or judgment. So too, if the parties settle following an appellate decision that remands for further proceedings, the appellate decision will not be vacated." 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10.2, at 619-20 (3d ed. 2008) (footnote omitted).

13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.10.2, at 597 (3d ed. 2008). These warnings would seem applicable to this case because CPUC is an institutional litigant while Robert is a one-time player.

But the danger that CPUC will take advantage of one-time player Robert to shape legal authority to its liking is lessened by the fact that, although Robert is a one-time player, Micronesian Legal Services Corporation, her counsel, appears frequently on behalf of similarly-situated, one-time players who sue CPUC on similar claims. Thus, it is less likely that CPUC can bury adverse legal rulings so that future litigants will be unaware of them since their counsel should be aware of them (although they might not be able to fully use these rulings to their clients' benefit).

3. *Extraordinary or Exceptional Circumstances Present*

There are, however, three circumstances that, taken together, may, in this close case, qualify as exceptional or extraordinary enough to outweigh the factors favoring denial of vacatur. These "exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur." U.S. Bancorp Mortgage Co., 513 U.S. at 29, 115 S. Ct. at 392, 130 L. Ed. 2d at 244.

First, the court, before trial, did encourage the parties to settle. They tried, but they were unable to agree then. "To be sure, settlement by the parties is a desideratum of any dispute resolution system . . . . Yet importantly, it is not always the sole or even dominant desideratum."[5] Neumann, 398 F. Supp. 2d at 493. Settlement, although important, is not the dominant desideratum here. However, there is some authority that courts should look more favorably on a joint motion for vacatur when the court had earlier urged settlement of the matter and prompted the parties to begin settlement negotiations. Hartford Cas. Ins. Co., 828 F.3d at 1336; *see also* Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc., 150 F.3d 149, 151 (2d Cir. 1998) (court suggested that the parties should try to negotiate a settlement and assigned staff counsel to mediate the matter); Doe v. Hreib, 384 F. Supp. 3d 137, 139 (D. Mass. 2019) ("the equities favor vacatur when a court expressly instigates settlement discussions"). In this case, after the court had decided the parties' pretrial motions, it noted, from the bench, that the case was ripe for settlement, and urged the parties to pursue that path. The parties then started negotiations but were unsuccessful.

Second, one of the court's key factual findings was based on a CPUC employee's undisputed testimony, which both sides virtually ignored and left unconsidered. Robert did not argue it to bolster her claims and CPUC neither dwelt on it (possibly on purpose) nor tried to rebut it. This is exceptional, even extraordinary. The court used this uncontradicted testimony as an important basis for its judgment because of the principle that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings," FSM Civ. R. 54(c), and this key factual finding was a basis of the court's conclusion that CPUC had been negligent, thus entitling Robert to judgment.

Third, vacatur must benefit the public interest. U.S. Bancorp Mortgage Co., 513 U.S. at 26, 115 S. Ct. at 392, 130 L. Ed. 2d at 243 (judgments "should stand unless a court concludes that the public interest would be served by a vacatur"). Here, vacatur would benefit the public interest by conserving judicial resources. It would conserve judicial resources on the appellate level because the appeal would not have to be briefed; an appellate panel would not have to be assembled and travel to Chuuk; and the appeal would not have to be argued before the panel, which would have to research it and then prepare and issue an opinion. If CPUC were to obtain a favorable result in the appellate court, that result would more likely be

[5] A desideratum is "something desired as essential or needed: something that is sought for or aimed at." WEBSTER'S THIRD NEW INT'L DICTIONARY 611 (1961).

an order for a new trial instead of a reversal. Thus, vacatur might also conserve significant future trial court resources.

The "public interest is not served only by the preservation of precedent . . . [but] is also served by settlements when previously committed judicial resources are made available to deal with other matters, advancing the efficiency of the . . . courts." Hartford Cas. Ins. Co., 828 F.3d at 1337. Another benefit to the public interest is that CPUC, a Chuuk public corporation, would then be able to spend less of its resources on lawyers and litigation and more on providing and maintaining important public services.

These three circumstances, with the greatest emphasis on the second, qualify, in the court's view, as just extraordinary enough that the court, in the exercise of its sound discretion, could grant vacatur of the April 20, 2020 Judgment and Findings of Fact and Conclusions of Law, but, as noted above, *supra* pt. II.A., the court cannot do so now because it lacks jurisdiction since an appeal is pending.

IV. CONCLUSION

The court therefore indicates on the record that it would grant the Rule 60(b)(6) relief requested, but that it cannot do so unless the appeal case is first dismissed or remanded and jurisdiction returned to the trial court. The court will await any action in that regard.

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