FSM SUPREME COURT APPELLATE DIVISION

FOUSTINO STEPHEN, Appellant, vs. STATE OF CHUUK, Appellee.	)	APPEAL CASE NO. C1-2010 (Civil Action No. 2005-1007)
JOAKIM KAMINANGA, Appellant, vs. STATE OF CHUUK, Appellee.	)	APPEAL CASE NO. C2-2010 (Civil Action No. 2005-1006)

OPINION

Argued: January 10, 2011
Decided: March 24, 2011

BEFORE:

Hon. Martin G. Yinug, Acting Chief Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court

APPEARANCES:

For the Appellants: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

For the Appellee: Joses Gallen, Esq.
Attorney General
Office of the Chuuk Attorney General
P.O. Box 189
Weno, Chuuk FM 96942

* * * *

HEADNOTES

Appellate Review – Motions

The appellants' motion to exclude evidence not submitted in the trial court is moot when the appellate court did not rely on that evidence in reaching its decision. Stephen v. Chuuk, 17 FSM Intrm. 453, 457 (App. 2011).

Attachment and Execution – Garnishment

The FSM Supreme Court's power to issue writs of garnishment is clearly discretionary. Stephen v. Chuuk, 17 FSM Intrm. 453, 458 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

The standard of review appropriate for denials of writs of garnishment is the abuse of discretion standard. An abuse of discretion occurs when 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence upon which the court could have rationally based its decision. Stephen v. Chuuk, 17 FSM Intrm. 453, 458 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Those parts of a trial court decision that are findings of fact are reviewed on the clearly erroneous standard. In determining whether a factual finding is clearly erroneous, an appellate court must view the evidence in the light most favorable to the appellee, and if, upon reviewing all the evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made, it may then conclude that the trial court's finding was clearly erroneous, but it cannot substitute its judgment for that of the trial court. Stephen v. Chuuk, 17 FSM Intrm. 453, 458 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Conclusions of law will be reviewed de novo. Stephen v. Chuuk, 17 FSM Intrm. 453, 458 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Even when an appellee has not moved to dismiss the appeal for lack of jurisdiction over a non-final judgment, the appellate court will consider the question because, generally, only final judgments or orders can be appealed. Stephen v. Chuuk, 17 FSM Intrm. 453, 459 (App. 2011).

Appellate Review – Decisions Reviewable

Generally, an order is not final when the substantial rights of the parties involved in the action remain undetermined and when the cause is retained for further action. Accordingly, a decision reserving certain questions for future determination or direction ordinarily cannot be final for the purposes of appeal. Stephen v. Chuuk, 17 FSM Intrm. 453, 459 (App. 2011).

Appellate Review – Decisions Reviewable

When a trial court disposes of a postjudgment motion for writ of garnishment and fully adjudicates the questions of ability to pay and fastest method of payment and when the trial court has not retained for itself the power to review compliance with the order at a specific later date, the trial court's order is final for the purposes of appeal. Stephen v. Chuuk, 17 FSM Intrm. 453, 460 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Inherent within the trial court's description that the size of the judgments is "unwieldy" is a

statement of fact and the recognition that Chuuk had a limited ability to pay and although the appellate court may sympathize with the plaintiffs' frustration, it must not substitute its judgment for that of the trial court without feeling a definite and firm conviction that a mistake has been made and that these statements of fact were "clearly erroneous." Stephen v. Chuuk, 17 FSM Intrm. 453, 460-61 (App. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

When seeking to enforce a judgment against the State of Chuuk, the full set of factors a trial court should consider are: 1) the nature of the judgment, such as whether the judgment is in tort or contract, whether the judgment is full or partial, and whether or not the judgment includes a civil rights component; 2) whether or not the debtor has acted in good or bad faith in its attempts to satisfy the judgment; 3) the length of time the judgment has gone unsatisfied; 4) the ability of the debtor to pay; and 5) the balance of interests. Such factors are best weighed by the trial court. Stephen v. Chuuk, 17 FSM Intrm. 453, 461 (App. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

Statutorily, a motion for an order in aid of judgment requires a hearing at which the trial court assesses the debtor's ability to pay the judgment. Stephen v. Chuuk, 17 FSM Intrm. 453, 461 n.4 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Debtors' and Creditors' Rights – Orders in Aid of Judgment

When a trial court has the power to fashion an alternative remedy, but a party neither files a request for such alternative nor urges it at a hearing for the remedy the party actually requested and when the trial court has not foreclosed the possibility of the alternative remedy, the trial court has not abused its discretion by not fashioning its own relief. Stephen v. Chuuk, 17 FSM Intrm. 453, 462 (App. 2011).

Debtors' and Creditors' Rights – Orders in Aid of Judgment

Upon remand, and as part of the factors for considering orders in aid of judgment, the trial court should spell out the nature of the judgment, so as to provide clarity and avoid obfuscation of issues. Stephen v. Chuuk, 17 FSM Intrm. 453, 462 (App. 2011).

Civil Rights

There are at least three kinds of civil rights violations: 1) cases involving physical injury or deprivation of liberty; 2) cases involving deprivation of preexisting property; and cases involving deprivation of statutorily vested property rights, such as entitlements and government employment. Stephen v. Chuuk, 17 FSM Intrm. 453, 462 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When the parties never briefed the issue of takings in the trial court, that issue is not properly before the appellate court. Stephen v. Chuuk, 17 FSM Intrm. 453, 463 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Civil Rights

When the possible fourth type of civil rights violations – whether a court judgment (state or national) constitutes a property right under the FSM Constitution – was never addressed on the merits by the trial court and was not considered by the court on appeal; when the Barrett appellate decision does not stand for the proposition that a judgment is a property right which affords judgment-creditors due process rights under the national Constitution; and when the trial court appealed from did not state that the plaintiff had a property right in the state court judgment, the question is not properly before the appellate court. Stephen v. Chuuk, 17 FSM Intrm. 453, 463 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When the trial court observed that the question of ejectment was still open and when there is no evidence in the record that the parties have made further motions or filed further briefs on that question, that question is not properly before the appellate court. Stephen v. Chuuk, 17 FSM Intrm. 453, 463 (App. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

These are appeals from the FSM Supreme Court Trial Division's denials of the plaintiffs-appellants' Renewed Motions for Writ of Garnishment on March 24, 2010 ("Orders of Denial"). The cases involve the same counsel and the same defendant-appellee. The two Orders of Denial are identical in content, differing only in caption (docket number and name of plaintiff). For the reasons we set forth below, we find that the trial court has not made clearly erroneous findings of fact, has not made erroneous conclusions of law, and has not abused its discretion in denying the Renewed Motions. We also remand these cases for further determination consistent with this opinion.

I. BACKGROUND

A. *Facts Specific to Stephen*

In 1984, appellee State of Chuuk ("Chuuk") leased four lots of land, including 040-A-14 ("Stephen lot") from appellant Foustino Stephen ("Stephen"); the lease was renewed in 1999 for the same four lots, for the period of May 10, 1999 to May 10, 2004. Chuuk paid the first year of this lease. After Chuuk failed to pay for the second year of the lease, Stephen filed a civil action in Chuuk State Court; the state court entered partial judgment on January 31, 2002, for failure to pay rent for years two and three of the 1999 lease.[1] The principal amount in rent for years four and five was $19,608.00. Stephen moved the court for leave to amend the complaint to include this amount; the court did not act on the motion.

After the lease expired on May 10, 2004, Chuuk continued to use the lots. Stephen then brought Civil Action No. 2005-1007 against Chuuk on March 31, 2005, for the civil rights cause of action of deprivation of property without due process.

On May 2, 2006, Stephen and Chuuk drew up a memorandum of understanding, under which Chuuk was to release three of the lots, continue occupying a portion of the Stephen lot, and make two payments of $30,000.00 each. The parties further agreed that the total debt was $128,515.88. Chuuk released the three lots, made one payment of $30,000.00, and continues to use the Stephen lot.

Stephen moved the trial court for summary judgment on November 8, 2005, and filed a supplemental motion on April 16, 2007. On June 20, 2007, the trial court ordered the parties to brief the court on whether or not the continued occupation and use of the Stephen lot constituted a taking without compensation. The parties have filed no briefs pursuant to that order. The trial court granted judgment in Stephen's favor on July 7, 2008, in the total amount of $101,891.25, and entered an

---

[1] The amount of the partial judgment was $40,110.68, of which Chuuk has paid $3,000.00.

amended judgment on August 12, 2008, clarifying the judgment amount thus: (1) principal of $111,236.37, of which (a) $98,514.88 bears interest from June 20, 2007 and (b) the remainder bears interest from July 17, 2008; (2) $2,160.00 in attorneys' fees and costs; and (3) Chuuk to pay $5,390.00 per year for annual rent on the Stephen lot, commencing July 9, 2008. Chuuk did not appeal either the judgment or the amended judgment.

B. *Facts Specific to Kaminanga*

In 1984, Chuuk leased a portion of lot number 028-A-02 ("Kaminanga lot") from the father of Joakim Kaminanga ("Kaminanga"). The lease was renewed in 1999 for the period of May 11, 1999 to May 11, 2004. Kaminanga is the administrator of his father's estate and the designated owner of the property. The lease agreement contemplated a total of $389,320.00 in lease payments over the life of the lease. Chuuk has paid $223,984.00; the balance is $165,336.00.

After the lease expired on May 11, 2004, Chuuk continued to use the Kaminanga lot. Kaminanga then brought Civil Action No. 2005-1006 against Chuuk on March 30, 2005, for the civil rights cause of action of deprivation of property without due process. Chuuk answered and counterclaimed on April 6, 2005. Chuuk did not answer discovery questions. On September 25, 2006, after several motions to compel, the trial court struck the counterclaim. On December 4, 2006, the court granted Kaminanga's motion to strike Chuuk's answer. On June 20, 2007, the court granted initial judgment for the $165,336.00 in unpaid balances on the lease, and sought further briefing on other issues, including takings. The parties have not filed the briefs as ordered. On June 5, 2008, the court granted an initial judgment and confirmed an award of attorneys' fees. On July 15, 2008, the court entered an amended judgment, setting the principal at $196,812.15, bearing interest commencing July 15, 2008, and additional interest and attorneys' fees and costs totaling $17,345.32. Chuuk did not appeal either the judgment or the amended judgment.

C. *Facts Common to Both Cases*

Stephen and Kaminanga moved for orders in aid of judgment on September 25, 2008. The trial court held the motions in abeyance to allow Chuuk time to pay the judgment through the statutory debt relief fund. On November 27, 2009, after the term of the abeyance expired, Stephen and Kaminanga renewed their motions for order in aid, specifically requesting writs of garnishment. The trial court held hearings on the renewed motions on March 22, 2010 ("Renewed Motion Hearings"), and on March 24, 2010, denied the motions in identical orders. Stephen and Kaminanga filed their notices of appeal on April 26, 2010.

D. *Motion to Exclude*

In their Reply Brief, of October 21, 2010, Stephen and Kaminanga included motions to exclude evidence not submitted at trial. Specifically, the motion requested asked us to exclude copies of: Chuuk S.L. No. 9-07-09, which creates and establishes a Debt Relief Fund; Chuuk S.L. No. 10-10-26, which authorizes and appropriates money from the Debt Relief Fund for the purpose of paying the debts and obligations of Chuuk State Government to priority creditors; Chuuk S.L. No. 10-10-25, which increases sales and alcoholic beverage taxes, and applies the taxes increase to the Debt Relief Fund; lists of court judgments against Chuuk State; and summaries of waivers and releases by state employees.

Because we did not rely on that evidence in reaching our decision, the motion is moot.

II. Issues Presented

Stephen and Kaminanga present the following issues for review, identical in both cases:

1. Did the trial court abuse its discretion in failing to grant a writ of garnishment on March 24, 2010?
2. Was the trial court's decision on March 24, 2010, an erroneous conclusion of law?
3. Were the trial court's findings of fact in its March 24, 2010 decision, clearly erroneous?
4. Is appellant denied due process if he has no remedy to enforce a judgment against a State in the FSM?
5. What is an unreasonably long time for a sovereign state to fail to pay a judgment lawfully entered against the state?
6. What is the power of the trial court to enforce a judgment against a sovereign state when there is no credible attempt to appropriate funds for the payment of such a judgment?
7. Once a judgment lawfully issues against a sovereign state, what is the power of the court to enforce such a judgment, if the state makes no reasonable effort to pay the judgment in a reasonable time?
8. What power does a creditor have to enforce a non-monetary judgment against a State in the FSM?
9. Can the State of Chuuk continue to simply use real property after judgment for trespass has been entered, and the underlying money judgments are not paid?

III. Standards of Review

The FSM Supreme Court's "power to issue writs of garnishment is clearly discretionary." Bank of Guam v. Elwise, 4 FSM Intrm. 150, 152 (Pon. 1989). As such, the standard of review appropriate for the Orders of Denial is the abuse of discretion standard:

> An abuse of discretion occurs when (1) the court's decision is "clearly unreasonable, arbitrary, or fanciful"; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence upon which the . . . court could rationally have based its decision.

Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992) (quoting Heat & Control, Inc. v. Hestor, Inc., 785 F.2d 1017, 1022 (Fed. Cir. 1986) (citations omitted)). Those parts that are findings of fact will be reviewed on the clearly erroneous standard.

> The standard of review of a trial court's factual findings is whether those findings are clearly erroneous. In determining whether a factual finding is clearly erroneous, an appellate court must view the evidence in the light most favorable to the appellee. If, upon reviewing all the evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made, it may then conclude that the trial court's finding was clearly erroneous, but it cannot substitute its judgment for that of the trial court.

Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 24 (App. 2006). Those parts that are conclusions of law will be reviewed *de novo*. Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995).

IV. Analysis

We organized our reasoning in a different way from Stephen and Kaminanga. We first consider

the finality of the Orders of Denial, an issue that was not briefed, but which we raised at oral argument. Second, we analyze the conclusions in the Orders of Denial to determine whether they were issues of fact or issues of law. Third, we consider the question of possible alternatives as a general discussion of discretion. Fourth, we address determining the civil rights character of the underlying case. Fifth, we touch upon the reasonableness of the length of time a state fails to pay a judgment against it. Sixth, we address the power of the courts to enforce a judgment against a state. Finally, we address the issue of takings.

A. *Finality of the Orders of Denial*

Although Chuuk has not moved to dismiss the appeal for lack of jurisdiction over a nonfinal judgment, we consider the question here. Generally, only final judgments or orders can be appealed, but the appellate division may, at its discretion, permit an appeal of an interlocutory order, and in exercising its discretion, the court should weigh the advantages and disadvantages and consider the appellant's likelihood of success before granting permission. Jano, 5 FSM Intrm. at 329. The question, then, is whether the Orders of Denial were final for the purpose of appellate review. "Generally, an order is not final where the substantial rights of the parties involved in the action remain undetermined and where the cause is retained for further action. Accordingly, a decision reserving certain questions for future determination or direction cannot ordinarily be final for the purposes of appeal." 4 AM. JUR. 2D *Appellate Review* § 90, at 714 (1995).

One major case in the FSM regarding the finality of a postjudgment order is Davis v. Kutta, 8 FSM Intrm. 338 (Chk. 1998). In that case, the trial court determined that Chuuk, one of the defendants, had the ability to pay, ordered the defendant to pay the judgment and the costs, and ordered the plaintiff to file a report 60 days thereafter indicating the payment status of the judgment. The trial court wrote:

> The court will revisit this matter on September 15, 1998. On that date plaintiff will file with the court a brief memorandum indicating what the status of payment in this case is with respect to the judgment. If the judgment, attorney's fees, and all accrued interest are not paid in full at that time, the court will then take further action in accordance with this memorandum.

8 FSM Intrm. at 344.

Chuuk appealed this order. Chuuk v. Davis, 9 FSM Intrm. 471, 472 (App. 2000). In dismissing the appeal for lack of finality, the appellate court wrote: "What further action the trial court might have taken is too speculative for us to consider." *Id.* at 474.

However, the appeals before us present a different fact pattern. Here, the distinguishing fact is that the motions for orders in aid, specifically requesting writs of garnishment, were denied. In the Orders of Denial, the trial court noted that "[i]f the State does not take any action to alleviate or resolve the situation, the time may come when a writ of garnishment will be the only remaining recourse." While on first look this language seems "too speculative," the speculation is to a future that is not even a part of the motions which the trial court denied. Further, the Orders of Denial fully adjudicated the question whether Chuuk had the ability to pay the full amount of the judgment:

> Considering the unwieldy size of the plaintiff's judgment, the nature of the underlying claim which is based upon a commercial transaction, and that it has been less than two years since judgment was entered, the court concludes that it has not been such an unreasonably long time since judgment that would require a present resort to the

extraordinary remedy sought.

Order Denying Mot. (Mar. 24, 2010).

In Davis, the language indicates that the trial court anticipated that it may have further work to do pursuant to the order and memorandum itself hat is, the plaintiff needed to file no separate motion for the court to enforce the terms of the order. In the appeals before us, the language of the Orders of Denial and the history of the cases strongly indicate that the trial court was kicking the proverbial can down the road. That is, having decided that Chuuk did not have the ability to pay the full amount, and that not enough time had passed to paint the nonpayment as a civil rights violation, the trial court denied the motions for writ of garnishment, expecting that Stephen and Kaminanga would file renewed motions later, for new determinations of ability to pay, fastest method of payment, and other questions relevant to an order in aid.

Where a trial court disposes of a postjudgment motion for writ of garnishment and fully adjudicates the questions of ability to pay and fastest method of payment, and has not retained for itself the power to review compliance with the order at a specific later date, the trial court's order is final. Thus, we hold that the Orders of Denial which Stephen and Kaminanga appeal were final for the purposes of appeal.

B. *Finding of Fact or Conclusion of Law?*

The first substantive question is whether the conclusion provided by the trial court in the Orders of Denial is a finding of fact or a conclusion of law. Stephen and Kaminanga suggest both in presenting their issues.

In our view, the entirety of the key statement in the Orders of Denial contains both statements of fact and a conclusion of law. The statements of fact are that the size of the plaintiff's judgment is "unwieldy," that the nature of the underlying claim "is based upon a commercial transaction," and that "it has been less than two years since judgment was entered." The conclusion of law is "that it has not been such an unreasonably long time since judgment that would require a present resort to [a writ of garnishment]."

1. *Statements of fact*

The statements of fact include two conclusions of fact and a statement of historical fact. The statement about the age of the judgment is of such a nature that a court can take judicial notice, *i.e.*, it is readily provable by reliable means. The statement that the underlying claim "is based upon a commercial transaction" relies upon a reasonable inference based on the facts, including statements by appellants that the cases had arisen out of properties that were the subject of leases.[2] Finally, the statement that the size of the judgments is "unwieldy" is a conclusion of fact. We appreciate that, because the word "unwieldy" seems like an opinion or judgment, Stephen and Kaminanga may think it was a conclusion of law. However, inherent within that description is the recognition that Chuuk had a limited ability to pay. This conclusion is supported by the evidence at trial, and although we sympathize with Stephen's and Kaminanga's frustration, we must not substitute our judgment for that

[2] We note, however, that the Kaminanga case was never brought in state court, and was brought in national court nearly a year after the expiration of the lease, at which point the underlying claim may reasonably be characterized as a takings claim. Indeed, it was filed as such. We discuss the civil rights aspects of these cases *infra*.

of the trial court without feeling a definite and firm conviction that a mistake has been made. In this case, we do not feel that definite and firm conviction, and accordingly we cannot conclude that these statements of fact were "clearly erroneous."

2. *Conclusion of law*

As noted, the power to issue a writ of garnishment is discretionary. Nonetheless, the exercise of discretion necessarily involves questions of law. We now take this opportunity to set out law to guide the trial division in the future.

The appellate division of the FSM Supreme Court has previously promulgated guidelines for deciding whether to grant or deny requests for writs of execution or garnishment.

> [R]equests for writs of execution or garnishment demand consideration of many factors, including the nature of the judgment, whether or not the debtor has acted in good or bad faith in its attempts to satisfy the judgment, the length of time the judgment has gone unsatisfied. *See* Tipingeni v. Chuuk, 14 FSM Intrm. 539, 543 (Chk. 2007). *These factors are best weighed by the trial court, and we make no attempt here to usurp that dominion.*

Barrett v. Chuuk, 16 FSM Intrm. 229, 235 (App. 2009) (emphasis added).

In the instant cases, the trial court used a different set of factors from that prescribed in Barrett: it considered the size of the judgment, the nature of the underlying transaction, and the length of time the judgment has gone unsatisfied. For this reason, we remand, and in so doing, we add two additional factors to the Barrett factors: ability to pay and balancing interests. Thus, the full set of factors a trial court should consider are: (1) the nature of the judgment, such as whether the judgment is in tort or contract, whether the judgment is full or partial, and whether or not the judgment includes a civil rights component;[3] (2) whether or not the debtor has acted in good or bad faith in its attempts to satisfy the judgment; (3) the length of time the judgment has gone unsatisfied; (4) the ability of the debtor to pay;[4] and (5) the balance of interests.

In keeping with our earlier opinion in Barrett, we emphasize that such factors are best weighed by the trial court.

C. *Alternative Relief and Discretion*

In their briefs, Stephen and Kaminanga allege that the trial court simply gave no relief, and casts the question in light of their initial motions for orders in aid. However, the focus at the Renewed Motion Hearings appeared to be based on Stephen and Kaminanga's demands for writs of garnishment, which the trial court denied. At oral argument, Stephen and Kaminanga's counsel suggested that the trial court had the power to fashion its own relief, such as: issuing a writ to garnish an amount less than the total, based on what it found as Chuuk's ability to pay; garnishing the debt relief fund instead of the portion of tax revenues held by the National Government; or set deadlines for the debt relief

---

[3] *See* Section D, *infra*, for discussion regarding determination of civil rights character.

[4] We note that the Orders of Denial were in response to Stephen and Kaminanga's motion for orders in aid of judgment, and statutorily, such motions require hearings at which the trial court assesses the ability of the debtor to pay the judgment. Thus, this factor is necessarily before the trial court.

commission to make at least a substantial payment toward the judgment.

While Stephen and Kaminanga are correct that a trial court has the power to fashion its own relief, the court had called the Renewed Motion Hearings as hearings for the requested writs of garnishment. At no point during these proceedings did Stephen or Kaminanga urge an alternative remedy. Further, in the Orders of Denial, the trial court did not foreclose the possibility of ever issuing any writ of garnishment; in fact, it wrote that "the time may come when a writ of garnishment will be the only recourse left," suggesting that, as of the time of the Orders of Denial, the court could see possible alternative remedies, none of which were urged by Stephen or Kaminanga.

We hold, then, that where a trial court has the power to fashion an alternative remedy, but a party neither files a request for such alternative nor urges it at a hearing for the remedy the party actually requested, and where the trial court has not foreclosed the possibility of the alternative remedy, the trial court has not abused its discretion.

D. *Determining the Civil Rights Character of the Underlying Case*

As part of the first factor listed in section B, subsection 2, *supra*, a trial court may need to determine the civil rights character of the underlying case. Here, due to Chuuk's continued failure to pay the judgments against it in these cases, Stephen and Kaminanga have asked the courts to treat these cases as civil rights cases. They do not appear to distinguish between the underlying transactions that gave rise to the injury, and the continuing trespass, which is a more familiar form of civil rights violation. They go so far as to challenge the trial court's assertion that the cases were "based upon . . . commercial transaction[s]," arguing that the judgments in the national court were judgments for civil rights violations. However, at no point did the trial court characterize the judgment as one for civil rights violations. In fact, the court ordered further briefing on the takings cause of action; no party followed up on that. Because the three causes of action before the trial court were breach of contract, trespass, and takings; because the trial court specifically ruled on damages and requested separate briefing on the issue of takings; and because the parties ignored the court's order for further briefing, neither the judgment nor this appeal are properly positioned in civil rights violations. Upon remand, and as part of the factors for consideration, *supra*, the trial court should spell out the nature of the judgment, so as to provide clarity and avoid obfuscation of issues.

E. *Reasonableness of Length of Time for Failure by a State to Pay Judgment against It*

Because we hold that length of time a judgment has gone unsatisfied as one of the factors for a trial court to consider in disposing of a request for a writ of garnishment, we do not address it here.

F. *Power of the Courts to Enforce a Judgment against a State*

In their briefs and at oral arguments, Stephen and Kaminanga asked us to affirm the ruling in Barrett that the power of the FSM Supreme Court to garnish state funds for civil rights violations "without distinction between those involving physical injury damages versus those involving purely economic damages." 16 FSM Intrm. at 234. We do so, with the following distinction.

There are at least three kinds of civil rights violations, and possibly a fourth: (1) cases involving physical injury or deprivation of liberty; (2) cases involving deprivation of preexisting property; (3) cases involving deprivation of statutorily vested property rights, such as entitlements and government employment; and (4) cases involving unpaid judgments against the government that have become vested property rights.

These cases do not involve the first or the third kind of civil rights violation. They involve the second, but despite the trial court's order of June 20, 2007, the parties never briefed the issue of takings, so that is not properly before us. The fourth does involve an area of law that is not yet settled in the FSM. Although we recognized the issue in Narruhn v. Chuuk, 17 FSM Intrm. 289 (App. 2010), we held that the question was one of first impression notwithstanding Barrett, because

> the fundamental legal question – whether a court judgment (state or national) constitutes a property right under the FSM Constitution – was never addressed on the merits by the trial court in Barrett and was not considered by the court on appeal. Accordingly, we find, contrary to Narruhn's contention, that Barrett does not stand for the proposition that a judgment is a property right which affords judgment-creditors due process rights under the national Constitution.

Narruhn, 17 FSM Intrm. at 299. We went on to affirm the trial court's abstention on the question.

As we noted in section D, *supra*, the character of the judgments upon which Stephen and Kaminanga requested writs of garnishment is not one of civil rights violations. Further, in Stephen, the one case that involves a judgment from a different court, the trial court whose Order of Denial Stephen appeals did not state that the plaintiff had a property right in the state court judgment. Once again, then, the question is not properly before the court.

G. *Takings*

Stephen and Kaminanga's final question asks whether or not a state can continue to use real property after judgment for trespass has been entered, and the underlying money judgments are not paid. As noted, the record shows no evidence that the parties filed briefs on the takings issue, including the remedy of eviction, pursuant to the trial court's June 20, 2007 order. In the summary judgments issued June 5, 2008 (in Kaminanga) and July 17, 2008 (in Stephen), the trial court observed that the question of ejectment was still open. There is no evidence in the record that the parties have made further motions or filed further briefs on that question. Therefore this question is not properly before us.

VII. Conclusion

In summary, we hold that the trial court has not committed clear error in its findings of fact and has not abused its discretion. Because the trial court applied a different set of factors from that prescribed in Barrett in considering the requests for writs of garnishment, we remand with instructions for the trial court to consider the following factors: (1) the nature of the judgment, such as whether the judgment is in tort or contract, and whether the judgment is partial, and if so, whether it is for a civil rights cause of action in cases containing such claims; (2) whether or not the debtor has acted in good or bad faith in its attempts to satisfy the judgment; (3) the length of time the judgment has gone unsatisfied; (4) the ability of the debtor to pay; and (5) the balance of interests.

We hereby remand these cases to the trial court for further consideration in keeping with this opinion.

* * * *