COMMONWEALTH OF PUERTO RICO
COURT OF APPEALS
JUDICIAL REGION OF SAN JUAN

NATIONAL PUBLIC FINANCE GUARANTEE CORPORATION; MBIA INSURANCE CORPORATION Respondents, v. UBS FINANCIAL SERVICES, INC.; UBS SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; GOLDMAN SACHS & CO. LLC; J.P. MORGAN SECURITIES LLC; MORGAN STANLEY & CO. LLC; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; RBC CAPITAL MARKETS LLC; and SANTANDER SECURITIES LLC Petitioners.	KLCE202100827	*CERTIORARI* FROM TPI, SUPERIOR CHAMBER OF SAN JUAN CASE No.: SJ-2019-CV-07932 REGARDING: *ACTOS PROPIOS* AND UNILATERAL DECLARATION OF WILL

Panel comprised of Judge Domínguez Irizarry, Judge Vazquez Santisteban, and Judge Alvarez Esnard.

Vazquez Santisteban, Reporting Judge

OPINION

In San Juan, Puerto Rico, December 17, 2021

Appearing before us are Defendants UBS FINANCIAL SERVICES INC.; UBS SECURITIES LLC; CITIGROUP GLOBAL MARKETS INC.; GOLDMAN SACHS & CO. LLC; J.P. MORGAN SECURITIES LLC.; MORGAN STANLEY & CO. LLC; MERRILL LYNCH, PIERCE, FENNER & SMITH INC.; RBC CAPITAL MARKETS, LLC; and SANTANDER SECURITIES LLC (collectively the “Petitioners” or “Insurers”), by *Petition for certiorari* filed on July 2, 2021, requesting that we vacate the *Decision* issued on June 1, 2021 and filed on June 2, 2021, by the Court of First Instance, San Juan Chamber. That court denied the Petitioners’ motion to dismiss.

For the reasons set forth below, we **grant** certiorari and **vacate** the Trial Court's Order.

I

On August 8, 2019, National Public Finance Guarantee Corporation; and MBIA Insurance Corporation (referred to below as the "Respondents" or "Banks") filed a *Complaint* for damages for actos propios and unilateral declaration of will against the Petitioners. Therein, the Respondents sought an indemnification of $720,000,000 in damages, among other remedies. According to the *Complaint*, the Respondents comprise two financial insurance companies that insure municipal bonds and bonds of the Government of Puerto Rico and its instrumentalities. For its part, the Petitioners are comprised generally of securities brokers and investment banks that have underwritten the aforementioned municipal bonds and bonds of the Government of Puerto Rico and its instrumentalities. Having established the foregoing, we examine the allegations in the *Complaint*.

In short, the Respondents alleged:

> This lawsuit seeks to hold the investment banks accountable. By originating municipal bond issuances and marketing and selling the bonds, these banks held themselves out as gatekeepers of Puerto Rico's municipal bond market. Under laws designed to protect investors, the banks **were required to investigate the truth of key representations made in connection with the issuance of municipal bonds and to identify and disclose any materially false or incomplete disclosures by the issuers**. The Commonwealth of Puerto Rico, its people, and many others, including the plaintiff insurers, relied on the banks to carry out that duty to investigate and to identify false or incomplete representations by the issuers—especially representations relating to the ability of the issuers to repay the debt in accordance with its terms.
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> In reality, the banks **did not scrutinize these materials as they assured the market that they would**. Instead, they rushed to market one series of bonds after another with materially false or incomplete disclosures, hiding massive risks that destined the bonds to default.[1]

[1] *Complaint*, Appendix pgs. 2-3 (emphasis added)

Specifically, in the *Complaint*, the Respondents enumerated a list of 16 bond issuances underwritten by the Petitioners between the years 2011 and 2014, whose value increased to approximately $66,469,538,131. With respect to these issuances, the Respondents adduced that, between the years 2001 and 2007, the Petitioners asked it to insure the bond issuances. To that end, the Petitioners affirmed that they had investigated the issuers' statements and declared that they had complied with all legal requirements. Nonetheless, around 2015, the issuers began to breach their bond payment obligations, which activated the Respondents' obligation to make payments under their policies. According to the *Complaint*, in 2018, the results of a special investigation with respect to the Puerto Rico financial crisis came out, which revealed that the Petitioners did not reasonably investigate the veracity and sufficiency of the issuers' statements.

Accordingly, the Respondents affirmed that they had "suffered too, paying out over $720 million in claims payments as of July 1, 2019."[2] Moreover, they alleged that they interposed "this lawsuit to do justice under the well-established equitable principles of the doctrines of actos propios and unilateral declaration of will."[3]

In response, on September 16, 2020, the Petitioners filed a *Motion to Dismiss*. Relevant to the issues before us, the Petitioners argued that the Respondents could not

[2] *Id.*, pg. 5

[3] *Id.*

invoke equitable remedies, because Article 1802 of the Civil Code of Puerto Rico of 1930 and the Uniform Securities Law, Law No. 60 of June 18, 1963 (the "Securities Law") were applicable to the instance case. In the alternative, they argued that the complaint did not satisfy the requirements for the application of the doctrines of actos propios and unilateral declaration of will. Finally, as is relevant to the controversy before us, the Petitioners outlined that the claims were time-barred under state and federal securities laws. Accordingly, it sought dismissal of the *Complaint*.

After several incidents, on October 8, 2020, the Respondents filed their *Opposition to the Motion to Dismiss*. In summary, they asserted that, contrary to what the Petitioners argued, no law is applicable to the instant case because the claims are based in principles of equity. In the alternative, they argued that this determination was not appropriate at this stage of the case. Also, they asserted that the *Complaint* pled a claim that justified an equitable remedy, contrary to the Petitioners argued. Finally, they argued that the securities laws being inapplicable, the cause of action filed by the Respondents was not time-barred. Afterwards, on November 6, 2020, the Petitioners filed a *Reply to the Opposition to the Motion to Dismiss*. In response, on November 25, 2020, the Respondents filed their *Surreply*.

In light of these, on June 2, 2021, the Court of First Instance filed its *Decision*, in which it denied the Petitioners' motion to dismiss. Relevant to the issues before us, the lower court first held as follows with respect to the applicability of Article 1802:

> We believe that National's claims do not meet the requirements of a cause of action under Art. 1802. National's claims do not assert illegal or fraudulent acts, fraud, or fault-based or negligent omissions. The alleged source of the Investment Banks' liability is that, when it solicited insurance from National,

> they voluntarily represented that they would investigate the content of the Official Statements that were submitted. This alleged conduct and obligation does not arise from Art. 1802 of the Civil Code, *supra*.[4]

Moreover, with respect to the Securities Law, the lower court concluded that this was inapplicable to the instant case, because it "only regulates commercial relations between investors and entities that are dedicated to the sale of securities."[5] Finally, with respect to the timeliness of the Respondents' action, the lower court determined that the securities laws' prescriptive terms were not applicable.

Dissatisfied with the result, the Petitioners comes before this Court and outlines the following points of error:

> A. The Court of First Instance committed clear legal error by concluding that equitable claims for unilateral declaration of will and actos propios were available, despite the existence of tort and securities statutes prohibiting misrepresentations in connection with a securities offering.
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> B. The Court of First Instance committed clear legal error by failing to dismiss the Insurers' claims for unilateral declaration of will and actos propios for failure to allege unfulfilled promises to perform in the future or the defendants' clear and firm intent to be bound to the other party.
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> C. The Court of First Instance committed clear legal error by failing to apply the statutes of repose under Puerto Rico and federal securities law to alleged misrepresentations in a securities transaction, contravening Puerto Rico Supreme Court precedent and disregarding the substance of the Complaint's allegations by holding that these statutes of repose did not apply to the Insurers' allegations that the Underwriters made misrepresentations in connection with securities transactions.

Subsequently, on July 2, 2021, the Securities Industry and Financial Markets Association ("SIFMA") appeared by means of a *Motion requesting authorization to appear as amici curiae and Submission of the Securities Industry and Financial Markets Association acting as amicus curiae in support of the Defendants*.

Moreover, on July 12, 2021, the Petitioners filed a *Motion for Judicial Notice*, by which they

[4] *Decision*, Appendix pg. 2913 (footnote omitted).

[5] *Decision*, Appendix pg. 2914 (footnote omitted).

requested that this Court take judicial notice of a *Decision* related to a case with similar facts to the one before us that was issued and filed on July 9, 2021 by a different Superior Court of the Court of First Instance in Civil Case No. SJ2020CV06383. In response, on July 30, 2021, the Respondents filed an *Opposition to the Motion for Judicial Notice and Motion to Strike*. On August 2, 2021, the Petitioners filed a *Second Motion for Judicial Notice*, by which they requested that this Court take notice of another Decision issued and notified on July 30, 2021 by another Superior Court in Civil Case No. SJ2020CV01505.

On the same day, August 2, 2021, the Respondent filed its *Opposition to the Petition for Certiorari*. On August 6, 2021, the Petitioners filed an *Opposition to the Motion to Strike*. Likewise, on August 25, 2021, the Respondents filed an *Opposition to the Second Request for Judicial Notice and Motion to Strike*. On August 31, 2021 we issued a *Decision* whereby we denied the Respondents' motions to strike and took judicial notice of the facts raised by the Petitioners. Similarly, we granted SIFMA's request. Finally, on September 3, 2021, the Respondents filed an *Opposition to the Amicus Curiae Brief*. With the benefit of the appearance of all parties, we find ourselves able to rule.

II

Certiorari

A writ of certiorari is an extraordinary and discretionary remedy through which a higher court reviews the determinations of a lower court; it is governed by Civil Procedure Rule 52.1 and Rule

40 of the Rules of the Court of Appeals.[6] Under this exception, one may appeal, among others, determinations on cases of public interest, matters related to evidentiary privileges, cases of family relations, or any other situation in which waiting for the appeal would constitute an irremediable failure of justice. Our Rule 40 establishes the following criteria to guide our discretion in determining whether to issue or deny a writ of certiorari:

> A. If the remedy and the provision of the appealed decision, unlike its grounds, are contrary to law.
> B. If the factual situation raised is the most indicated for the analysis of the problem.
> C. If there has been prejudice, partiality or gross and manifest error in the assessment of the evidence by the Court of First Instance.
> D. If the issue raised requires more careful consideration in light of the original filings, which should be elevated, or more elaborate allegations.
> E. If the stage of the procedure in which the case is presented is the most conducive to its consideration.
> F. If the issuance of the writ or the order to show cause do not cause an undue splitting of the lawsuit and an undesirable delay in the final settlement of the litigation.
> G. If the issuance of the order or the order to show cause prevents a failure of justice.

Let us remember that judicial discretion is not unrestricted nor does it allow arbitrary action outside the scope of the law, but is defined as "a form of reasonableness applied to judicial discernment to reach a just conclusion."[7] In that order, the discretionary determinations of the primary forum deserve deference and this intermediate appellate forum will not intervene with them unless it is shown that there was prejudice, partiality, manifest error, or gross abuse of discretion.[8]

Likewise, we must bear in mind that discretion is the most powerful instrument reserved for judges.[9] Discretion is nourished "by a rational judgment supported by reasonableness and based on a

[6] 32 LPRA Ap. V, R. 52.1; 4 LPRA Ap. XXII-B, R. 40; *Medina Nazario v. McNeil Healthcare LLC,* 194 DPR 723, 728-729 (2016).

[7] *Negrón v. Srio. de Justicia,* 154 DPR 79, 91 (2001).

[8] *Citibank et al. v. ACBI et al.,* 200 DPR 724, 735-736 (2018).

[9] *Rodríguez v. Pérez,* 161 DPR 637, 651 (2004); *Banco Metropolitano v. Berríos,* 110 DPR 721, 725 (1981).

plain sense of justice; it is not a function of one's whim or will, without any rate or limitation whatsoever."[10] In that vein, *Pueblo v. Rivera Santiago*[11] indicates that there are certain guidelines to determine when a court abuses its discretion and expressed the following to that effect:

> [A] court of justice incurs an abuse of discretion, *inter alia*: when the judge does not take into account and ignores in the decision that it issues, without grounds for it, an important material fact that could not be ignored; when the judge, on the contrary, without justification or any basis, attaches great weight and value to an irrelevant and immaterial fact and bases his decision exclusively on it, or when, despite considering and taking into account all material and important facts and discarding the irrelevant ones, the judge weighs them and calibrates them lightly. *García v. Padró*, supra, at p. 336; *People v. Ortega Santiago*, 125 DPR 203, 211 (1990).

Dismissal for Failure to State a Claim

Our civil procedure allows the presentation of dispositive motions under certain circumstances. In other words, one or both parties may request that all or some of the matters in controversy be resolved without the need for a plenary trial. For these purposes, Civil Procedure Rule 10.2[12] provides one of the procedural vehicles for dismissal. Among its foundations, it includes: *failure to state a claim that justifies the granting of a remedy*.[13] The jurisprudence specifies that under this subsection (5), the court will accept all the complaint's well-pled facts as true, which have been asserted in a clear and conclusive manner, and that leave no room for doubt on their face.

Faced with a request to dismiss presented in accordance with Rule 10.2, *supra*, the Court must accept as true all the correctly alleged facts that arise from the lawsuit, that have been

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[10] *Pueblo v. Hernández García,* 186 DPR 656, 684 (2012); *HIETel v. PRTC,* 182 DPR 451, 459 (2011); *Santa Aponte v. Srio. def Senado,* 105 DPR 750, 770 (1977).

[11] 176 DPR 559, 580 (2009).

[12] 32 LPRA Ap. V, R. 10.2.

[13] *Id.*, paragraph 5.

clearly and conclusively asserted and, that on its face do not give margin for doubts.[14] All the complaint's allegations must be interpreted jointly, liberally, and in the light most favorable to the plaintiff.[15] When addressing a dispositive motion of this type, the Court must be extremely liberal with regard to the complaint, and should not dismiss it, unless it appears with absolute certainty from the allegations themselves that the plaintiff is not entitled to any remedy under any set of facts that can be proven in support of its claim.[16] The Court must then examine whether, even considering the claim in the light most favorable to and liberal for the plaintiff and, resolving any doubts in the plaintiff's favor, the complaint is not sufficient to establish a valid cause of action.[17] Furthermore, dismissal should not proceed if the claim is capable of being amended.[18]

Finally, when evaluating a motion to dismiss pursuant to the aforementioned Rule, the Court must examine whether the plaintiff has the right to a remedy and in order to do so, it must accept all the allegations in the complaint as true and interpret them in their favor.[19]

Remedies in Equity

The Supreme Court has stated that the courts have "the obligation to **fill the gaps** in the law, in accordance with the mandate

[14] *El Día, Inc. v. Mun. de Guaynabo,* 187 DPR 811, 821 (2013); *Asoc. Fotoperiodistas v. Rivera Schatz,* 180 DPR 920, 935 (2011); *Colón v. Lotería de Puerto Rico,* 167 DPR 625 (2006); *Roldán v. Lutrón, SM, Inc.,* 151 DPR 883, 889-891 (2000); *Harguindey Ferrer v. U.I.,* 148 DPR 13, 30 (1999); *Ramos v. Marrero,* 116 DPR 357, 369 (1985).

[15] *Rivera Sanfeliz, et al. v. Jta. Dir. First Bank,* 193 DPR 38, 49 (2015); *Ortiz Matías et al v. Mora Development,* 187 DPR 649 (2013); *Asoc. Fotoperiodistas v. Rivera Schatz,* supra; *Aut Tierras v. Moreno & Ruiz Dev. Corp.,* 174 DPR 409, 428-429 (2008).

[16] *Aut Tierras v. Moreno & Ruiz Dev. Corp.,* supra; *Dorante v. Wrangler de PR,* 145 DPR 408 (1998).

[17] *Colón Rivera v. Secretario*, *et al.*, 189 DPR 1033 (2013); *El Día, Inc. v. Mun. de Guaynabo,* supra; *Consejo de Titulares v. Gómez Estremera et al.,* 184 DPR 407 (2012).

[18] *Aut Tierras v. Moreno & Ruiz Dev. Corp.,* supra.

[19] *Romero Arroyo v. E.L.A.,* 127 DPR 724 (1991); *González Camacho v. Santos Cruz,* 124 DPR 396 (1989).

of Article 7 of the Civil Code ..."[20] Said mandate provides that "**[w]hen there is no law applicable to the case**, the court will decide according to equity, which means that natural reason will be taken into account in accordance with the general principles of law, and the accepted and established uses and customs."[21] As a corollary to the foregoing, the Supreme Court has "admitted the generating force of obligations that actos propios has and has reiterated the binding possibility of unilateral declaration of will ...", among others.[22]

Actos Propios

The doctrine of actos propios is based on "the general principle of law that requires proceeding in good faith".[23] Pursuant to it, "**[to] no one may lawfully act contrary to their own acts. Nor can they engage in conduct that is contradictory to a previous action that generated expectations in those who trusted in that act**".[24] For this doctrine to apply, the following elements must be present:

> (a) A determined behavior of a subject, (b) that has engendered a situation contrary to reality, that is, apparent and, through such appearance, capable of influencing the behavior of others, and (c) that is the basis of the trust of another party who has acted in good faith and who, therefore, has acted in a way that would cause harm to him if his trust were violated.[25]

Consequently, "[t]he center of gravity of the rule does not lie in the will of its author, but in the trust generated in third parties ...".[26]

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[20] *CMI Hospital v. Depto. Salud,* 171 DPR 313, 324 (2007) (emphasis added).

[21] 31 LPRA ant. sec. 7.

[22] *Colon v. Glamorous Nails,* 167 DPR 33, 55 esc. 23 (2006) (citations omitted) (emphasis added).

[23] *Domenech v. Integration Corp.*, 187 DPR 595, 621 (2013).

[24] *Id.* (citations omitted) (emphasis added)

[25] *Alonso Piñero v. UNDARE, Inc.,* 199 DPR 32, 55-56 (2017) (brackets and footnotes omitted).

[26] *OCS v. Universal* 187 DPR 164, 173 (2012) (citations omitted).

Unilateral Declaration of Will

Within the scope of equity, also, our Supreme Court has recognized the validity of unilateral declaration of will.

> [F]or a unilateral declaration to be binding, the following elements must be present: (1) the sole will of the person who intends to be bound; (2) that said person has sufficient legal capacity; (3) that his intention to bind is clear; (4) that the obligation has an object; (5) that there is certainty as to the form and content of the declaration; (6) that arises from a suitable legal act, and (7) that the content of the obligation is not contrary to the law, morality, or public order.[27]

By virtue of this, a party may request fulfillment of an obligation thus subscribed. It should be noted that an action of this nature is time-barred after fifteen years, in accordance with the Civil Code.[28]

Damages

It is a firmly known norm that whoever by action or omission causes harm to another, involving fault or negligence, is obligated to repair the damage caused. Art. 1802 of the Civil Code of Puerto Rico of 1930.[29] Thus, it has been held that for the existence of civil liability under said article, the concurrence of the following three requirements is necessary: (1) actual damage; (2) culpable or negligent conduct; and (3) a causal nexus between the damage and the culpable or negligent conduct.[30] For these purposes, in our legal system negligence is characterized by the concurrence of two elements.

> (a) the existence of an obligation or, at least, of a general duty, recognized by Law, which requires that the subjects adjust their acts to a certain type of conduct for the protection of others against unreasonable risks and (b) that the agent of damage has acted without conforming to such a type of conduct.[31]

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[27] *Ortiz v. PR Telephone,* 162 DPR 715, 725-726 (2004).

[28] *Id.,* pg. 733

[29] 31 LPRA Sec. 5141. Currently repealed by Act No. 55-2020, known as the Civil Code of Puerto Rico, 31 LPRA Sec. 5311. We note that as of the date of the facts giving rise to the Complaint and at the time the appealed decision was rendered, the prevailing legislation was the one contained in the prior Civil Code of 1930.

[30] *SLG Colon-Rivas v. ELA,* 196 DPR 855, 864 (2016); *Garcia v. EL.A.,* 163 DPR 800 (2005); *Pons v. Engebretson,* 160 DPR 347, 354 (2003).

[31] *SLG Colon-Rivas v. ELA,* supra.

This entails “the lack of due care, which at the same time consists in not anticipating and foreseeing the rational consequences of an act, or of the omission of an act, that a prudent person would have to foresee in the same circumstances”.[32] Thus, it means “the omission of the due diligence, whose use could have prevented the harmful outcome.” [33]

Uniform Securities Law

“The Uniform Securities Law ... does not automatically apply to all controversies in which a security is involved”.[34] Said “statute regulates a specific type of commercial relationship[,] commercial relations between investors and entities that are dedicated to the securities business ...”.[35]“ [I]n order to determine whether the Uniform Securities Law applies, it must be analyzed **whether the controversy concerns a securities transaction carried out by entities engaged in that business** ... “.[36] In case of a civil liability action,

> [the] statute limits the civil causes of action subject to its provisions to those arising from violations of Article 201(a)—that the person who sold the security is not duly registered—; to Article 301—that the security bought or sold is not duly registered—; to Article 405(b)—making illegal representations concerning registrations or exemptions—; or to Article 410(a)(2) itself—fraudulently offering or selling a security. **If the cause of action does not fall under any of these elements, it is not subject to the statute of limitations established in Article 410(e)**.[37]

Therefore, the applicability of the Securities Law depends on whether the factual situation corresponds to the circumstances described above. This extends to the two-year statute of limitations provided in the legislation. In *Olivella Zalduondo v. Triple S*, our Supreme Court had before it

[32] *López v. Porrata Doria,* 169 DPR 135, 151 (2006) (citation omitted).

[33] *Id.* (Citations omitted). *Colon, et al. v. K-Mart*, *et al.*, 154 DPR 510, 517-518 (2001).

[34] *Olivella Zalduondo v. Triple S,* 187 DPR 625, 646 (2013).

[35] *Id*.

[36] *Id*. (emphasis added)

[37] *Id.,* pg. 647 (emphasis added) (citing 10 LPRA sec. 890).

a controversy regarding the statute of limitations applicable to an action to collect money related to a security, which was not subject to the statute of limitations of the Securities Law but rather to the limit provided in the Civil Code for the same, as it did not fall under the enumerated situations.[38] It should be noted that the Securities Law provides that "[n] one person may file a civil complaint **in accordance with the provisions of this section**, after more than two (2) years have elapsed after the sale contract has been entered into."[39]

III

Having reviewed the legal framework, we proceed to decide. In accordance with the criteria that guide our discretion, we determine that our intervention at this stage of the proceedings is necessary to avoid a failure of justice. The determination of the lower court suffers from a result contrary to law and the controversy involved is presented before this Court at the most appropriate stage for its consideration. In accordance with the foregoing, we grant *certiorari* and proceed to examine the errors raised by the Petitioners.

In their first point of error, the Petitioners argue that the lower court erred in concluding that equitable causes of action were available, even though there are legal provisions that preempt them. On this point, we are forced to conclude that the Petitioners are correct. For its part, the lower court determined that, in the present case, there are no legal provisions that displace equitable remedies. Specifically, regarding the inapplicability of Art. 1802, the lower court ruled that the *Complaint* did not allege an act or omission that was either culpable or negligent. However, a brief examination of the *Complaint*'s allegations clearly reveals the classic elements of tort claim. According to their own allegations, the Respondents intended to hold the Banks responsible

[38] *Olivella Zalduondo v. Triples;* supra, pg. 648.
[39] 10 LPRA sec. 890(e).

for the damages caused by them not being diligent in complying with their obligations, particularly with respect to the investigation and verification of the bond issuers' representations. In other words, it is a paradigmatic Article 1802 negligence claim. Consequently, equitable remedies are not available in this case.

Pursuant to the foregoing, we resolve that the lower court erred by denying the motion to dismiss filed by the Petitioners. To the extent that, in this case, because a statutory remedy is applicable, equitable remedies are not available. Therefore, the causes of action filed by the Respondents under principles of equity do not state a claim upon which relief can be granted. In other words, the Respondents are not entitled to a remedy for these claims and the lawsuit is dismissed. Having established the above, the remaining points of error are academic, and so we do not consider them.

IV

For the reasons set forth above, we **grant** certiorari and **vacate** the appealed Decision. Consequently, we **order** the dismissal of the *Complaint*.

It was agreed and ordered by the Court and certified by the Secretary of the Court of Appeals.

Lilia M. Oquendo Solís, Esq.
Secretary of the Court of Appeals