CHAPTER 13

Evidence

SECTIONS

§ 1301. Spouses.

Neither husband nor wife shall be compelled to testify against the other in the trial of an information, complaint, citation, or other criminal proceeding.

Source: TT Code 1966 § 341; TT Code 1970, 7 TTC 1; TT Code 1980, 7 TTC 1.

§ 1302. Official records.

Books or records of account or minutes of proceedings of any department or agency of the United States of America or of the Trust Territory, or of any predecessor thereof, shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept. Copies or transcripts (authenticated by the official having custody thereof) of any books, records, papers, or documents of any department or agency of the United States of America or of the Trust Territory, or of any predecessor thereof, shall be admitted in evidence equally with the originals thereof.

Source: TT Code 1966 § 340; TT Code 1970, 7 TTC 51; TT Code 1980, 7 TTC 51.

Cross-reference: The statutory provisions on the FSM Supreme Court and the Judiciary are found in title 4 of this code. The FSM Supreme Court website contains court decisions, rules, calendar, and other information of the court, the Constitution, the code of the Federated States of Micronesia, and other legal resource information at http://www.fsmsupremecourt.org/.

Case annotations: The following are case annotations which interpret various court evidentiary rules and are included here for reference:

Admissions

A request for admission as to the genuineness of a letter, excludable as evidence under Kosrae Evidence Rule 408 because it relates to settlement negotiations, is reasonably calculated to lead to evidence which could be admissible, and an objecting party may not obtain a protective order pursuant to Kosrae Civil Rule 26 to avoid responding to the request. *Nena v. Kosrae*, 3 FSM R. 502, 507 (Kos. S. Ct. Tr.

1988).

Although the court may allow for an enlargement or a restriction of the time in which to respond to a request for admissions, a complete failure to respond within that allotted time automatically constitutes an admission, without any need for the requesting party to move for a declaration by the court that the matters are deemed admitted. *Leeruw v. Yap*, 4 FSM R. 145, 148 (Yap 1989).

Once matters have been admitted through a failure to respond to a request for admissions, a motion by the responding party to file a late response to the request for admissions will be treated as a motion to withdraw and amend the admissions. *Leeruw v. Yap*, 4 FSM R. 145, 148 (Yap 1989).

One purpose of requests for admissions is to relieve the parties of having to prove facts which are not really in dispute. *Leeruw v. Yap*, 4 FSM R. 145, 149 (Yap 1989).

If a requesting party relies on admissions to its prejudice, it would be manifestly unjust to allow the responding party to amend its responses at a later time, but the sort of prejudice contemplated by the rule regards the difficulty the requesting party may have in proving the facts previously admitted, because of lack of time or unavailability of witnesses or evidence, not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth. *Leeruw v. Yap*, 4 FSM R. 145, 149 (Yap 1989).

FSM Civil Rule 36, regarding requests for admissions, is intended to expedite discovery and trial, to simplify issues and make litigation more efficient. *Leeruw v. Yap*, 4 FSM R. 145, 149 (Yap 1989).

When a party who has admitted matters through a failure to respond to a request for admissions later moves to withdraw and amend its response, and the requesting party has not relied on the admissions to its detriment, the imposition of penalties other than conclusive admission is a sensible approach, as it both avoids binding a party to an untrue and unintended admission and yet helps insure respect for the importance of the rules of procedure and the need for the efficient administration of justice. *Leeruw v. Yap*, 4 FSM R. 145, 149-50 (Yap 1989).

Burden of Proof

In a case of civil conspiracy, the burden of proof is a preponderance of the evidence, not a clear and convincing standard, in order to establish the conspiracy. *Opet v. Mobil Oil Micronesia, Inc.*, 3 FSM R. 159, 164 (App. 1987).

A party claiming ownership in land for which there is a determination of ownership showing another as owner, with the appeal period expired, has, at a minimum, the burden of showing facts to establish that the determination of ownership is incorrect. *Benjamin v. Kosrae*, 3 FSM R. 508, 510 (Kos. S. Ct. Tr. 1988).

The concept of Burden of Proof has two aspects. First the plaintiff in a civil case must produce sufficient evidence to establish a prima facie case in order to avoid a nonsuit. Second, the sufficiency of evidence necessary to prove a disputed fact in a civil case is proof by a

preponderance of the evidence - the facts asserted by the plaintiff are more probably true than false. *Meitou v. Uwera*, 5 FSM R. 139, 141-42 (Chk. S. Ct. Tr. 1991).

The plaintiff, whose duty it is to introduce evidence to prove her case by a preponderance of the evidence, carries the burden of proof. This "burden of going forward with the evidence," or "burden of producing evidence," lies with the party who seeks to prove an affirmative fact. *Nimeisa v. Department of Pub. Works*, 6 FSM R. 205, 212 (Chk. S. Ct. Tr. 1993).

Judicial Notice

A trial court is entitled to take judicial notice of an agreement authorizing state police officers to act on behalf of the FSM. *Doone v. FSM*, 2 FSM R. 103, 106 (App. 1985).

In a case in which the defendant proposes a standard of requiring clear and convincing evidence in civil conspiracy cases rather than a preponderance based upon conditions, customs and traditions in Micronesia, it is incumbent upon him to establish such conditions by evidence, because the court will not take judicial notice of such conditions, customs or traditions. *Opet v. Mobil Oil Micronesia, Inc.*, 3 FSM R. 159, 164 (App. 1987).

The trial court may take judicial notice at any stage of the proceedings and may do so when he gives his findings. *Este v. FSM*, 4 FSM R. 132, 135 (App. 1989).

When the trial court states that it is taking judicial notice of a fact the parties can raise the issue of the propriety thereof. *Este v. FSM*, 4 FSM R. 132, 135 (App. 1989).

It is mandatory for a court to take judicial notice of the amount of judgments in favor of creditors when a request has been made and the court has been given all necessary information. *Senda v. Mid-Pacific Constr. Co.*, 5 FSM R. 277, 280 (App. 1992).

Judicial notice may be taken on appeal. *Welson v. FSM*, 5 FSM R. 281, 284 (App. 1992).

When requested to by a party, and once it has been supplied with all the necessary information, a court must take judicial notice of an adjudicative fact, only if it is either generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Counsel's oral argument to that effect is not enough. *Stinnett v. Weno*, 6 FSM R. 312, 313 (Chk. 1994).

A court may take judicial notice at any stage of the proceedings including during a petition for rehearing on the appellate level. *Nena v. Kosrae (III)*, 6 FSM R. 564, 566 (App. 1994).

Privileges

The intention of an actor must be inferred from what he says and what he does. *FSM v. Boaz (I)*, 1 FSM R. 22, 24-25 (Pon. 1981).

The FSM Supreme Court is vested, by statute, with authority to suppress or exclude, evidence obtained by unlawful search and seizure. 12 F.S.M.C. 312. *FSM v. Tipen*, 1 FSM R. 79, 92 (Pon. 1982).

Where a purported state employment contract erroneously and consistently recites that it is between the employee and the Trust Territory of the Pacific Islands and contains other statements demonstrating that the contract words were not taken seriously and did not comport with reality, the document is unpersuasive evidence of the relationships among the employee, the state, and the nat'l government. *Manahane v. FSM*, 1 FSM R. 161, 165-67 (Pon. 1982).

As a matter of constitutional due process, a trial court presented with an alibi defense should consider evidence concerning the alibi along with all other evidence and shall not find the defendant guilty if after considering all of that evidence, the judge feels there is a reasonable doubt as to the defendant' s guilt. *Alaphonso v. FSM*, 1 FSM R. 209, 223-25 (App. 1982).

Unsubstantiated speculations raised subsequent to trial are not sufficient to raise reasonable doubt as to a person's guilt in the light of eyewitness testimony. *Alaphonso v. FSM*, 1 FSM R. 209, 225-27 (App. 1982).

The existence of plea negotiations says little to the court about defendant's actual guilt. *FSM v. Skilling*, 1 FSM R. 464, 483 (Kos. 1984).

Where there is sufficient evidence of other force in the record to support a conviction for forces sexual penetration, there is no inconsistency in finding the use of force even without ruling that a knife compelled the victim to submit. *Buekea v. FSM*, 1 FSM R. 487, 494 (App. 1984).

At the core of the task of the trier of fact is the power and obligation to determine credibility of witnesses. The court may rely upon that testimony which he finds credible and disregard testimony which does not appear credible. To do this, the trial court must be a sensitive observer of tones, hesitations, inflections, mannerisms and general demeanor of actual witnesses. *Engichy v. FSM*, 1 FSM R. 532, 556 (App. 1984).

It is not unreasonable for a trial court to conclude that a police officer, claiming to effect an arrest, who hits a person four times with a mangrove coconut husker and kills him was trying to kill him. *Loch v. FSM*, 1 FSM R. 566, 576 (App. 1984).

Death and the cause of death can be shown by circumstantial evidence. *Loch v. FSM*, 1 FSM R. 566, 577 (App. 1984).

It is generally recognized by courts that nonmedical persons may be capable of recognizing when someone is intoxicated. *Ludwig v. FSM*,

2 FSM R. 27, 33 n.3 (App. 1985).

Rule 901(a) of our Rules of Evidence provides that the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Testimony of two witnesses supporting such a claim is fully adequate to justify the action of the trial court in accepting that matter as evidence. *Joker v. FSM*, 2 FSM R. 38, 46 (App. 1985).

If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court has broad discretion to admit merely on the basis of testimony that the item is the one in question and is in substantially unchanged condition. *Joker v. FSM*, 2 FSM R. 38, 46 (App. 1985).

The FSM Rules of Evidence for identification, authentication and admissibility of evidence do not require that exhibits related to an essential element of the crime may be admitted into evidence only if identified beyond a reasonable doubt. *Joker v. FSM*, 2 FSM R. 38, 47 (App. 1985).

FSM Evidence Rule 103 contemplates timely objection and statement of reasons in support of evidentiary objections. Failure to offer reasons in timely fashion, especially when coupled with pointed avoidance by counsel of inquiry into the matters at issue, places a party in a poor position for mounting an effective challenge to an evidentiary ruling. *Joker v. FSM*, 2 FSM R. 38, 47 (App. 1985).

Information concerning the source of funds for payment of attorney's fees of a particular party normally is not privileged information. *Mailo v. Twum-Barimah*, 3 FSM R. 179, 181 (Pon. 1987).

An affidavit unsupported by factual detail is not sufficient to cast doubt on the proposition that a project manager of a joint venture, who is in charge of all activities of a corporate member of the joint venture within a state, is a managing or general agent of that corporation. *Luda v. Maeda Road Constr. Co.*, 2 FSM R. 107, 110 (Pon. 1985).

That a land commission's determination is not sufficiently supported by either reasoning or evidence furnishes "good cause" to permit the reviewing court to conduct its own evidentiary proceeding. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM R. 395, 398 (Kos. S. Ct. Tr. 1988).

Normally, it is primarily the task of the land commission, not the reviewing court, to assess the credibility of witnesses and to resolve factual disputes, since it is the commission, not the court that is present when witnesses testify and only the commission sees the manner their testimony but commission's major findings, and if no such explanation is made, the reviewing court may conduct its own evidentiary hearings or may remand the case to the commission for further proceedings. *Heirs of Mongkeya v. Heirs of Mackwelung*, 3 FSM R. 395, 401 (Kos. S. Ct. Tr. 1988).

An inference is not permitted if it cannot reasonably be drawn from the facts in evidence. *Este v. FSM*, 4 FSM R. 132, 138 (App. 1989).

In a contempt trial, the trial court may consider information in addition to evidence adduced in the contempt hearing itself when the other information came to the knowledge of the trial court in previous judicial hearings related to the matter which gave rise to the contempt charge, and when the judge identified the "outside" information and gave the defendant an opportunity to object but the defendant failed to do so. *Semes v. FSM*, 5 FSM R. 49, 52 (App. 1991).

Failure to raise objections which must be made prior to trial constitutes a waiver of objections, FSM Crim. R. 12(f). *Moses v. FSM*, 5 FSM R. 156, 159 (App. 1991).

A defendant that has failed to raise and preserve the issue has waived his right to object to the admission of evidence, but when a plain error that affects the constitutional rights of the defendant has occurred the court may notice the error. *Moses v. FSM*, 5 FSM R. 156, 161 (App. 1991).

The trier of fact determines what should be accepted as the truth and what should be rejected as untrue or false, and in doing so is free to select from conflicting evidence, and inferences that which it considers most reasonable. *Epiti v. Chuuk*, 5 FSM R. 162, 166 (Chk. S. Ct. Tr. 1991).

The excited utterance exception to the hearsay rule, FSM Evid. R. 803, does not permit admission of a statement made under stress of excitement caused by a startling event or condition, if the statement does not relate to the event or condition. *Jonah v. FSM*, 5 FSM R. 308, 313 (App. 1992).

Evidence that a customary adoption has taken place may be offered via affidavits from the natural parents of the child, consenting and attesting to the customary adoption. *In re Marquez*, 5 FSM R. 381, 384 (Pon. 1992).

Generally, a breach of duty is proven by the testimony of witnesses who describe what a reasonable person, acting in compliance with the duty of care, would have done or not done in the same situation. In rare circumstances when the facts are indisputable and when they raise such a strong inference that all reasonable people agree on the duty of care, the court can decide, as a matter of law, the person has breached his duty of care. *Nena v. Kosrae*, 5 FSM R. 417, 421 (Kos. S. Ct. Tr. 1990).

It is error for a trial court to rely on exhibits never identified, described or marked at trial. *Waguk v. Kosrae Island Credit Union*, 6 FSM R. 14, 18 (App. 1993).

Where exhibits are identified and marked at trial but never introduced, and where there is extensive testimony and cross examination of witnesses concerning the contents of these exhibits except for interest and late charges, an award for interest and late charges must be deleted because it is not supported by testimony. *Waguk v. Kosrae Island Credit Union*, 6 FSM R. 14, 18 (App. 1993).

It is not an abuse of the trial court's discretion for a trial court to admit testimony that is inconsistent with that witness's answer to an interrogatory. Admissions made in interrogatories are not binding and the answering party may introduce other evidence on the subject of

the admissions at trial. Contradictions between a party's answers to interrogatories and court testimony go to the weight and credibility of the testimony, not to its admissibility. Conflicting testimony may be admitted, and it is the responsibility of the finder of fact to weigh all the answers and resolve the conflict. *Nakamura v. Bank of Guam (II)*, 6 FSM R. 345, 350 (App. 1994).

§ 1303. Legal status of laws included in the F.S.M.C. enacted after the First Supplement.

(1) Pursuant to the authority provided in section 11 of Public Law No. 2-48 and in this Act, the laws contained in the 1997 edition of the F.S.M.C. that are printed and published under contract with the Congress of the Federated States of Micronesia and as authorized by law, shall constitute *prima facie* the laws of the Federated States of Micronesia for those laws contained therein, and as they purport to represent reproductions of statutory amendments to the F.S.M.C., as stated in accompanying notes or source cites.

(2) Future supplements or updates published pursuant to section 230 of title 1 of this code shall constitute *prima facie* the laws of the Federated States of Micronesia for those laws set forth in the latest publication in which they appear.

(3) In the event of a conflict between the text of a provision set out in the 1997 edition of the F.S.M.C. or set out in any future supplement or update thereto and the text contained in a public law as originally enacted by Congress and as approved or allowed to become law by the President of the Federated States of Micronesia pursuant to the laws and customs of the FSM, the text of the law as it became effective shall constitute the positive law and shall control.

(4) The official authenticated texts of public laws as enacted by Congress and as approved or allowed to become law by the President of the Federated States of Micronesia and the 1997 edition of the F.S.M.C. (as may be later updated or supplemented) shall constitute evidence of the law of the Federated States of Micronesia.

Source: PL 10-25 § 17, modified.

Cross-reference: The provisions of PL 2-48 are found at the beginning of this code after the Table of Contents. It is included as part of the Introduction to Original 1982 Code.

The statutory provisions on the Code of the Federated States of Micronesia are found in subchapter II of chapter 2 (Interpretation of Law and Code) of title 1 (General Provisions) of this code.

Editor's note: The reference to section 223 of title 1 in subsection (2) of this section is clearly erroneous as it has nothing to do with publication of future supplements or updates. The reference should be to section 230 of title 1.