– 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 Intrm. 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 Intrm. 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 Intrm. 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 Intrm. 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 Intrm. 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 Intrm. 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 Intrm. 145, 149-50 (Yap 1989).

FSM Civil Rule 36(b) permits a withdrawal of admissions, including admissions by omission, when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Pohnpei v. Kailis, 7 FSM Intrm. 27, 28 (Pon. 1995).

When delay in filing answers to requests for admissions was not caused by bad faith and no prejudice in maintaining the action is caused the requesting party, the late filing may be allowed, under conditions, as a withdrawal or amendment of answers obtained by omission. Pohnpei v. Kailis, 7 FSM Intrm. 27, 29 (Pon. 1995).

Admissions obtained through a failure to respond to requests for admissions may be used as the factual basis for summary judgment. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 (Chk. 1995).

A court, on motion, may permit withdrawal or amendment of an admission when the presentation of the merits will be subserved thereby and the party who obtained the admission cannot satisfy the court that it will be prejudiced by the withdrawal or amendment. In such a circumstance the court may impose other sanctions. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85-86 (Chk. 1995).

Although a motion to file a late response to the requests for admissions is considered a motion to amend or withdraw, an untimely response to a summary judgment motion cannot be deemed a motion to withdraw

or amend. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 86 (Chk. 1995).

In principle there is no difference in treating a motion to allow late filing of admissions as a Rule 36(b) motion to withdraw or amend admissions and of treating the late filing itself as a Rule 36(b) motion. Eko v. Bank of Guam, 7 FSM Intrm. 164, 165-66 (Chk. 1995).

Where the only prejudice to the defendant was the attorney's necessary expenses and in order to permit a presentation of the case on the merits, a court may allow the plaintiff's late filing of answers to requests for admissions conditioned upon his deposit with the court of a sum equal to the expenses incurred. Eko v. Bank of Guam, 7 FSM Intrm. 164, 166 (Chk. 1995).

A court may consider as evidence against pleader, in the action in which they are filed, a party's earlier admissions in its responsive pleadings even though it was later withdrawn or superseded by amended pleadings. A court may take judicial notice of them as part of the record. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 249 (Chk. 1995).

A defendant who fails to file a timely response to plaintiff's requests for admission, is deemed to have admitted the matter sought to be admitted. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 442, 445 (Pon. 1996).

Under Rule 36(a), if a party to whom requests for admission are directed fails to answer the requests within 30 days after service, the matter that is the subject of the requests is deemed admitted. It is irrelevant that if the request sought admission of so-called ultimate facts. Rule 36(a) neither expressly nor implicitly excepts such facts from its requirements. Mathebei v. Ting Hong Oceanic Enterprises, 9 FSM Intrm. 23, 25 (Yap 1999).

A party's requests to admit are deemed admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the requesting party a written answer or objection addressed to the matter. Harden v. Primo, 9 FSM Intrm. 571, 573 (Pon. 2000).

When the sanction of deeming all the facts admitted as plaintiff urges in his motion for summary judgment is a severely harsh sanction for defendant's failure to respond to plaintiff's requests to admit, the court may order defendant to submit responses to plaintiff's requests to admit within 30 days, and if defendant fails to respond to plaintiff's requests to admit, or provides an inadequate response, the court may, upon plaintiff's proper motion, deem admitted all of the requested facts and also require defendant to pay plaintiff's attorney's fees in bringing an additional motion. Harden v. Primo, 9 FSM Intrm. 571, 574 (Pon. 2000).

A court may order on its own motion that overdue responses not be deemed admissions of fact because the fashioning of remedies and sanctions for a party's failure to comply with discovery requirements is a matter within the court's discretion. Overdue responses to requests for admission are not customarily treated as having been admitted in the absence of a showing of actual prejudice to the propounding party combined with no showing of excusable neglect by the responding party. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 598 (Pon. 2000).

When a defendant has not complied with all of the discovery requests as directed in a court order, the court will consider sanctions, including Civil Rule 37(b)(2) sanctions that designated facts will be taken to be established for the purposes of the action in accordance with the plaintiff's claim, and that defendant ought to be aware that deeming certain facts established is tantamount to entering a default judgment. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 508 (Pon. 2002).

When requests for admission are irrelevant, improper, scandalous and inflammatory, they will be stricken from the record. Talley v. Talley, 10 FSM Intrm. 570, 573 (Kos. S. Ct. Tr. 2002).

In answering requests for admission, it is proper, indeed required, for the party answering to admit facts

which are already known to the requester if the answering party knows those facts to be true. That is the very purpose of requests for admission, to refine and reduce the number of disputed issues for trial. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

An answer to a request for admission that responds in a cavalier, flip manner: "If such a fact is known AHPW why should AHPW waste its time to propound this particular question?" is unacceptable, and inimical both to the letter and spirit of Rule 36. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

Rule 36 requires specificity, a detailed explanation when a truthful answer cannot be framed, good faith, and fairness. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

A response which fails to admit or deny a proper request for admission does not comply with Rule 36(a)'s requirements if the answering party has not, in fact, made reasonable inquiry, or if information readily obtainable is sufficient to enable him to admit or deny the matter. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

When a party has responded to requests for admission with evasive answers, the court may give that party one more chance and order it to answer the requests for admission in a manner that conforms with the letter and spirit of Rule 36, and order that if that party fails to comply with the order, the requests for admission will be deemed admitted. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

Rule 37(b) provides that the court may impose sanctions based upon a party's failure to comply with a court order to compel, and, pursuant to Rules 36(a) and 37(b)(2)(A), the court may deem the facts alleged in a request for admission of facts as admitted for the purposes of the action. Tolenoa v. Timothy, 11 FSM Intrm. 485, 486 (Kos. S. Ct. Tr. 2003).

– Affidavits

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 Intrm. 107, 110 (Pon. 1985).

There are varying degrees of familial relationships and Micronesian legislative bodies have consistently instructed the courts that not every family relationship requires disqualification. An affidavit, stating that an administrative decision-maker is a relative of a party, but not saying whether he is a near relative and failing to set out the degree of relationship, is insufficient to constitute a claim of statutory violation. Heirs of Mongkeya v. Heirs of Mackwelung, 3 FSM Intrm. 92, 100 (Kos. S. Ct. Tr. 1987).

An affidavit which merely sets out conclusions or beliefs of the affiant, but shows no specific factual basis therefor, is inadequate. Ittu v. Charley, 3 FSM Intrm. 188, 193 (Kos. S. Ct. Tr. 1987).

Hearsay is not admissible in a hearing or trial. Hearsay is an out-of-court statement offered as evidence to prove the truth of the matter asserted. A statement is an oral or written assertion. An affidavit is hearsay which is inadmissible unless allowed by an exception to the hearsay rule. In re Disqualification of Justice, 7 FSM Intrm. 278, 279 (Chk. S. Ct. Tr. 1995).

A court may discount inherently unreliable evidence. The more levels of hearsay or the more hearsay statements contained within an affidavit, which is hearsay itself, the more unreliable the evidence is. FSM v. Yue Yuan Yu No. 708, 7 FSM Intrm. 300, 304 (Kos. 1995).

An affidavit may be stricken when it does not satisfactorily explain how the affiant has personal knowledge of the facts set forth therein. Chuuk v. Secretary of Finance, 7 FSM Intrm. 563, 570 n.8 (Pon. 1996).

In summary judgment motion, supporting and opposing affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of his pleading, but must respond by affidavits setting forth specific facts showing that there is a genuine issue for trial. Ueda v. Stephen, 9 FSM Intrm. 195, 197 (Chk. S. Ct. Tr. 1999).

A plaintiff has not met the necessary burden of proof when the affidavit offered by plaintiff to prove her claim is highly suspect in that the plaintiff's father, whom she claims gave the property to her, did not appear in person before the Clerk of Court when he signed the document and the plaintiff presented conflicting evidence in court at which place or where the document was signed. Lukas v. Stanley, 10 FSM Intrm. 365, 366 (Chk. S. Ct. Tr. 2001).

For a summary judgment motion, supporting and opposing affidavits must be made on personal knowledge, and must set forth such facts as would be admissible in evidence. An adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth by affidavit or otherwise, specific facts showing that there is a genuine issue for trial. The facts are viewed in the light most favorable to the nonmovant. Skilling v. Kosrae, 10 FSM Intrm. 448, 450 (Kos. S. Ct. Tr. 2001).

A notary only confirms that the person appeared before him or her, was identified by the notary, and signed the affidavit (or other document) in the presence of the notary. Identity is confirmed by personal knowledge or by appropriate documentation. The identity and signature of the person signing the affidavit are verified by the notary public, and so noted on the document. In re Phillip, 11 FSM Intrm. 243, 245 (Kos. S. Ct. Tr. 2002).

When defendants' counsel supplied his own opinion that the plaintiff no longer exists based on a review of documents that were prepared by one person and translated by a second person, neither of whom supplied affidavits signifying that the statements were sworn and based on personal knowledge, defendants' counsel's affidavit clearly is not based on his personal knowledge and cannot be considered competent evidence for purposes of opposing plaintiff's summary judgment motion or to support defendants' cross-motion for summary judgment and motion to dismiss. And when the plaintiff submits affidavits of its bankruptcy trustee and its Guam representative, which are based on these individuals' personal knowledge and clearly establish that it was not liquidated, the defendants have not provided competent evidence to make the fact of the plaintiff's corporate status a material dispute, and the defendants' summary judgment motion must be denied. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 149 (Pon. 2003).

When none of the exhibits that go towards proving defendants' liability is authenticated and the only evidence of defendants' alleged negligence, purportedly a police report is not authenticated and the report also contains hearsay statements that may not be admissible, even if authenticated, there are material issues of fact precluding entry of summary judgment in the plaintiff's favor. Fredrick v. Smith, 12 FSM Intrm. 150, 152 (Pon. 2003).

The party opposing a summary judgment motion may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of material fact. Fredrick v. Smith, 12 FSM Intrm. 150, 153 (Pon. 2003).

Unauthenticated evidence is not competent, and cannot support a summary judgment motion. Fredrick v. Smith, 12 FSM Intrm. 150, 153 (Pon. 2003).

– Class Actions

The mandatory notice requirements of Civil Rule 23(c)(2) do not apply to Rule 23(b)(1) and (2) actions even though the discretionary notice provisions of 23(d)(2) are applicable. Graham v. FSM, 7 FSM Intrm. 529, 531 (Chk. 1996).

Rule 23(b)(2) certification is improper when the case is primarily one for money damages. Rule 23(b)(2) class actions do not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages, but if the predominant purpose of the suit is injunctive the fact that a claim for damages is included does not preclude certification under Rule 23(b)(2). Graham v. FSM, 7 FSM Intrm. 529, 531 (Chk. 1996).

A party invoking Rule 23 has the burden of showing that all four prerequisites – numerosity, commonality, typicality, and adequacy of representation – to utilizing the class action procedure have been satisfied. A class action can then be maintained only if the court finds that questions of law or fact that pertain to the class members predominate over those questions affecting only individual members, and class action is superior to other available methods for fair and efficient adjudication of controversy. Lavides v. Weilbacher, 7 FSM Intrm. 591, 593 (Pon. 1996).

A class action may be maintained only if the class is so numerous that joinder of all members is impracticable. Practicability of joinder depends on the size of the class, ease of identifying numbers and determining their addresses, facility of making service on members joined and their geographic dispersion. There are no arbitrary rules regarding the size of classes. Lavides v. Weilbacher, 7 FSM Intrm. 591, 593-94 (Pon. 1996).

While numbers alone are not usually determinative, a very small class may not meet the numerosity requirement for class certification because joinder of all members is practicable. Lavides v. Weilbacher, 7 FSM Intrm. 591, 594 (Pon. 1996).

Where joinder of nineteen plaintiffs was already accomplished when plaintiffs instituted suit a later request for certification as a class action will be denied although the plaintiffs later became geographically dispersed. Lavides v. Weilbacher, 7 FSM Intrm. 591, 594 (Pon. 1996).

Courts are accorded broad discretion in determining whether a suit should proceed as a class action. Lavides v. Weilbacher, 7 FSM Intrm. 591, 594 (Pon. 1996).

Parties invoking Rule 23 must show that the four prerequisites – numerosity, commonality, typicality, and adequacy of representation – for a class action have been satisfied. A class action may then be maintained only if the court finds that questions of law or fact that pertain to the class members predominate over those questions affecting only individual members and a class action is superior to other available methods for fair and efficient adjudication of the case. Saret v. Chuuk, 10 FSM Intrm. 320, 321 (Chk. 2001).

A class action may be maintained only if the class is so numerous that joinder of all members is impracticable. Practicability of joinder depends on the size of the class, ease of identifying numbers and determining their addresses, facility of making service on members joined and their geographic dispersion. Saret v. Chuuk, 10 FSM Intrm. 320, 322 (Chk. 2001).

When the plaintiff class numbers well over a hundred, some of whom reside on outer islands, it is numerous, and may be certified as a class action. Saret v. Chuuk, 10 FSM Intrm. 320, 322 (Chk. 2001).

A Rule 23(c)(2) notice may be directed, in both English and Chuukese, to the members of the class as the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort, by being distributed with the FSM paychecks to class members, read on the radio, and posted at various prominent places where class members might reasonably be expected to see them. Saret v. Chuuk, 10 FSM Intrm. 320, 322 (Chk. 2001).

An action brought by the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. People of Satawal ex rel. Ramoloilug v. Mina Maru No. 3, 10 FSM Intrm. 337, 338 (Yap 2001).

The plaintiffs bear the burden of showing that all the requirements for a class action have been met. Under Rule 23, all class actions must satisfy all four prerequisites in section (a), and any one of the three subsections in section (b). Thus parties invoking Rule 23 must show that the section (a) prerequisites – numerosity, commonality, typicality, and adequacy of representation – for a class action have been satisfied, and then a subsection (b)(3) class action can be maintained only if the court finds that the class members' common questions of law or fact predominate and that a class action is superior to other methods of adjudication. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 196 (Yap 2003).

For a class action to be certified under subsection (b)(3), there must not only be questions of law or fact common to the class, but the court must find that the question of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 197 (Yap 2003).

Both the commonality prerequisite and the predominance requirements for a class action are met when the plaintiffs seeking class certification do not allege any individual personal injuries and all of the damages sought are economic damages, and when the liability question is common and central to all claimants and the causation and damages questions are also common to the class members because all class members' damages are based on their alleged loss of their subsistence use of the natural marine resources. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 198 (Yap 2003).

To meet the predominance requirement, it is not enough that the claims arise out of a common nucleus of operative fact. Instead the common questions must be central to all claims. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 198 (Yap 2003).

A class action is superior to other available methods when no realistic alternative exists. The superiority requirement does not require that all issues be common to all parties, merely that resolution of the common questions affect all or a substantial number of the class members. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 198 (Yap 2003).

To satisfy the typicality prerequisite, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 199 (Yap 2003).

When there are no personal injuries alleged and all claimed economic damages are for subsistence use of the natural marine resources and the difference between the subsistence resources is not so great that common issues would not predominate, the named class representatives, who have subsistence economic interests in the relatively small area similar to other class members' interests, are typical of the class members' interests. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 199 (Yap 2003).

Because court decisions are mandated to be consistent with the social configuration of Micronesia, persons holding traditional leadership positions have been named representatives in class actions in the State of Yap. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 199 (Yap 2003).

To satisfy constitutional due process concerns, absent class members must be afforded adequate representation before entry of a judgment which binds them. Resolution of two questions determines legal adequacy: 1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and 2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class? The second part of this question may also be stated in the affirmative as that it must appear that the class representatives will vigorously prosecute the interests of the class through qualified counsel. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 199 (Yap 2003).

When no conflicts of interest have been brought to the court's attention and the court has already determined that the named plaintiffs are class members who share the other members' interests in an oil spill case and when any doubts the court would have had concerning counsel's qualifications and resources to

vigorously pursue the matter were dispelled by the plaintiffs' counsel's recent association with a certified proctor in admiralty and plaintiff's counsel in other oil spill cases including the well-known *Exxon Valdez* spill, the plaintiffs have satisfied the adequacy of representation prerequisite. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 199-200 (Yap 2003).

Courts are accorded broad discretion in determining whether a suit should proceed as a class action, and will not be overruled absent abuse of discretion. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003).

Each class, or subclass, must have a named class representative(s) of its own. Each class or subclass must be represented by someone who claims the same injuries as the absent class or subclass members, otherwise the typicality requirement is not met and the class or subclass cannot be certified. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003).

When all the named representatives are members of one class they cannot be named class representatives of a second class. Certification of the second class must thus be denied. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003).

When a plaintiff class has been certified, the best notice practicable under the circumstances must be given defining membership in the class, stating that it has been certified as plaintiffs in the action, identifying the action and the court it is in, and advising each member that A) the court will exclude the member from the class if the member so requests by a specified date; B) the judgment, whether favorable or not, will include all members who do not request exclusion; and C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel. People of Rull ex rel. Ruepong v. M/V Kyowa Violet, 12 FSM Intrm. 192, 200 (Yap 2003).

– Consolidation

The moving party bears the burden of persuading the court that consolidation of cases is desirable. Etscheit v. Mix, 6 FSM Intrm. 248, 250 (Pon. 1993).

Cases involving a dissolved cooperative association may be consolidated and assigned a new docket number. In re Kolonia Consumers Coop. Ass'n, 9 FSM Intrm. 297, 300 (Pon. 2000).

The relief requested in the motion to strike a claim in a complaint on the ground that it is the same as a claim in the amended complaint in different civil action is more appropriately granted through consolidation of both actions because, since the claims are the same, the actions involve a common question of law or fact. Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 115-16 (Kos. 2001).

The moving party bears the burden of persuading the court that consolidation is appropriate, and the court has broad discretion in determining whether to consolidate cases. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 295 (Pon. 2001).

A motion to consolidate two cases will be denied when little if any commonality of fact or law questions is evident from the face of the complaints in the two cases and when the motion's general allegations fail to identify a specific common question of law or fact which would make consolidation appropriate. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 295 (Pon. 2001).

Cases may be consolidated when they involve a common question of law or fact. The granting of a motion to consolidate rests with the trial court's broad judicial discretion. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 463, 464 (Pon. 2001).

When the one common thread in cases sought to be consolidated is that they share similar general principles of tort law since they all involve an alleged defective product that resulted in injuries, but when the cases involve four different accidents (although two of the suits involve kerosene stove accidents, the stoves

were not the same) that occurred at different times over the course of approximately a year, in different places, and involved different victims, the level of factual commonality needed for consolidation is of a higher order than is present. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 463, 464-65 (Pon. 2001).

Cases have been consolidated when they stemmed from a common accident. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 463, 465 (Pon. 2001).

When the fundamental underlying issue in this action and two other actions is the ownership of that land known as "Epinipis," and when in order to determine the rights of the parties (and those not yet parties) the chain of title to "Epinipis" must be determined, it makes no sense to have three separate actions all of which must rely for a determination on one issue – the ownership of the land "Epinipis," therefore the three actions will be consolidated for all purposes. Pastor v. Ngusun, 11 FSM Intrm. 281, 285 (Chk. S. Ct. Tr. 2002).

In consolidated cases that have become a quiet title action, the proper and indispensable parties to the action include without limitation all persons who the record indicates may claim any interest, wherever derived, in any portion of the land. Pastor v. Ngusun, 11 FSM Intrm. 281, 286 (Chk. S. Ct. Tr. 2002).

A major purpose for granting consolidation of judgments is to establish the payment priority for the consolidated judgments and to implement an orderly payment plan involving one, instead of multiple, orders in aid of judgments. In re Engichy, 11 FSM Intrm. 520, 527 (Chk. 2003).

When cases have been consolidated and a party to the consolidated case, files a "third party complaint" against a party consolidated into the case it cannot actually be a third party complaint, regardless of what the "third party plaintiff" calls it, because a third party complaint is a device used to bring a non-party into a case. Claims against an opposing party are counterclaims, regardless of whether counsel has labeled them correctly. Claims against a co-party are cross-claims. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 625 n.1 (App. 2003).

A partial adjudication in a consolidated case generally falls within Rule 54(b). Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 628 (App. 2003).

When the provisions of the trial court's consolidation order and later order assigning one docket number indicated that the cases were consolidated for all purposes including trial, and when the trial court dismissed the claims between certain parties but did not make the required findings under Rule 54(b), that dismissal was not a final judgment and thus the plaintiff in one of the consolidated actions remained a party to the consolidated action for purposes of later appeal. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 629 (App. 2003).

In a consolidated case, when claims between a plaintiff and the defendants in one of the original cases were dismissed, but the decision on the claims between the plaintiff and the plaintiff in the case consolidated with it remained a part of the consolidated case, the first plaintiff remained a party to the case and would thus be a party to an appeal. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 629 (App. 2003).

– Declaratory Relief

The power to issue declaratory judgments is within the judicial power vested in the FSM Supreme Court by article XI, section 1 of the Constitution and confirmed by the Judiciary Act of 1979. The FSM Supreme Court may exercise jurisdiction over an action seeking a declaratory judgment so long as there is a "case" within the meaning of article XI, section 6(b). Ponape Chamber of Commerce v. Nett, 1 FSM Intrm. 389, 400 (Pon. 1984).

When a party has been specifically warned by the attorney general that he is required to obtain a foreign investment permit under national statute which imposes criminal sanctions for failure to comply, the question of whether a permit is required is sufficiently ripe to support a suit seeking declaratory judgment. Michelsen v. FSM, 3 FSM Intrm. 416, 418 (Pon. 1988).

When a public officer is requested to perform a duty mandated by law which he feels would violate the constitution, he has standing to apply to the court for a declaratory judgment declaring the statute unconstitutional. Siba v. Sigrah, 4 FSM Intrm. 329, 334 (Kos. S. Ct. Tr. 1990).

On a claim for declaratory relief from an unconstitutional excise tax, the FSM Supreme Court trial division will not abstain, where the issue could later be certified to the FSM Supreme Court appellate division and result in delay, where the trial court has already retained the case longer than contemplated, where the issue is narrowly posed and not capable of varying resolutions, and where it appears that a greater service may be provided by deciding the issue. Gimnang v. Yap, 4 FSM Intrm. 212, 214 (Yap 1990).

A party may seek declaratory relief from the Chuuk State Supreme Court even though it may have another available remedy, but there must be an actual controversy between the parties and the matter must be within the court's jurisdiction. The court has discretion to entertain such actions if appropriate. Truk Shipping Co. v. Chuuk, 7 FSM Intrm. 337, 339, 342 (Chk. S. Ct. Tr. 1995).

A litigant may seek a declaratory judgment without first exhausting its administrative remedies where the jurisdiction of the taxing authorities is challenged on the ground that the statute is unconstitutional or that the statute by its own terms does not apply in a given case. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

When the government is attempting to enforce against the plaintiffs tax statutes which the plaintiffs believe, by the statutes' own terms, do not properly apply to them, and the plaintiffs have been warned that they are potentially subject to criminal and civil penalties if they do not comply, it is a case or dispute sufficiently ripe for the plaintiffs to seek a declaratory judgment. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

The test whether the court has jurisdiction to hear a declaratory judgment against the national government is whether there is a case or dispute within the meaning of article XI, section 6(b). Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

Declaratory relief is inappropriate when the plaintiff has already succeeded in procuring permanent injunctive relief based on the nonexistence of any genuine issue of any material fact involving deprivation of the plaintiff's constitutional rights and violation of statute and the settled principle of res judicata. In this regard, declaratory relief would be redundant. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 306 (Chk. 1998).

Because duly enacted laws are presumed constitutional in the first instance, confirmation through a suit for declaratory relief of what is already presumed is not a fruitful exercise when there is no certainty that such a declaration would alter the parties' legal interests. Kosrae v. Seventh Kosrae State Legislature, 10 FSM Intrm. 668, 671 (Kos. S. Ct. Tr. 2002).

Further declaratory relief may not be appropriate when the plaintiff has already obtained by stipulation a judgment for the taxes, interest, and penalties sought in the complaint. FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005).

– Default and Default Judgments

Courts generally disfavor default judgments and readily set them aside rather than deprive a party of the opportunity to contest a claim on the merits. Lonno v. Trust Territory (III), 1 FSM Intrm. 279, 281 (Kos. 1983).

A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default. Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

In the interest of the finality of legal proceedings, the court will not set aside a default judgment in a case in which the defendant had access to legal advice yet failed to make a timely defense of the case and

presented no meritorious defense, although the plaintiff could not be prejudiced if the default judgment were set aside. Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM Intrm. 440, 444 (Truk 1988).

Where the defendant had satisfied a default judgment and the judgment was later set aside, the court will order the amount received by the plaintiff paid into an account under the control of the court pending final disposition of the case on the merits, where it appears that the plaintiff's health and place of residence are uncertain, and where the passage of time renders the plaintiff's ability to produce the amount more uncertain, should the outcome of the case require this. Morris v. Truk, 3 FSM Intrm. 454, 458 (Truk 1988).

Under circumstances where the defendant has failed to set forth a meritorious defense and has exhibited culpable conduct, defendant will not succeed on a motion to set aside a judgment of default. Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM Intrm. 512, 514 (Truk 1988).

A motion to set aside a default judgment is addressed to the discretion of the court. In the exercise of discretion the court is guided by the principle that cases should normally be decided after trials on the merits. Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM Intrm. 512, 515 (Truk 1988).

The criteria to be met in order to justify the setting aside of a default judgment are whether the default was willful, caused by culpable conduct of the defendant, whether there is meritorious defense, and whether setting aside the default would prejudice the plaintiff. Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM Intrm. 512, 515 (Truk 1988).

The clerk's office only has authority to grant default judgments for a sum certain or for a sum which can by computation be made certain. Any award of attorney's fees must be based upon a judicial finding and thus is not for a sum certain and cannot be granted by the clerk. Bank of the FSM v. Bartolome, 4 FSM Intrm. 182, 184 (Pon. 1990).

Where a plaintiff files an amended complaint without leave of court and no motion for leave was ever filed the court may order the amended complaint stricken from the record. An entry of default based on such stricken amended complaint will be set aside. Berman v. FSM Supreme Court, 6 FSM Intrm. 109, 112-13 (Pon. 1993).

Entry of a default judgment is a two step process. There must first be an entry of default before a default judgment can be entered. A default judgment can then be entered, by the clerk if it is for a sum certain; otherwise it must be entered by the court. Poll v. Paul, 6 FSM Intrm. 324, 325 (Pon. 1994).

An improperly filed amended complaint cannot serve as the basis for a default judgment. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995).

An entry of default requires that all material allegations of the plaintiff's complaint be taken as true, so that judgment by default can be properly rendered without proof of the plaintiff's claim except as may be required to establish damages. Primo v. Refalopei, 7 FSM Intrm. 423, 427 (Pon. 1996).

An entry of default does not relieve a plaintiff of the burden of proving the damages that flowed from the liability thus established. Primo v. Refalopei, 7 FSM Intrm. 423, 428 (Pon. 1996).

There is no obstacle to the removal of a defaulted case so long as it is done within the time limit set by the General Court Order 1992-2. Porwek v. American Int'l Co. Micronesia, 8 FSM Intrm. 463, 466 (Chk. 1998).

Although removal after a default judgment is proper if done within time, it cannot be taken to supersede the default judgment which must be regarded as valid until set aside. Porwek v. American Int'l Co. Micronesia, 8 FSM Intrm. 463, 466-67 (Chk. 1998).

In the Chuuk State Supreme Court, a hearing for judgment after a default is entered that is held to allow

the plaintiff to present to the court further evidence to establish the plaintiff's right to a claim or relief, includes the court's determination of whether the action was brought within the limitation period provided by law. Sipia v. Chuuk, 8 FSM Intrm. 557, 558, 560 (Chk. S. Ct. Tr. 1998).

No judgment by default shall be entered against the State of Chuuk or an officer or agency thereof in the Chuuk State Supreme Court unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. Hartman v. Chuuk, 8 FSM Intrm. 580, 581 (Chk. S. Ct. Tr. 1998).

A plaintiff's uncontroverted testimony coupled with the defendant's failure to offer testimony or evidence of any fact, may leave a court with no alternative but to grant the plaintiff's petition for a judgment. Hartman v. Chuuk, 8 FSM Intrm. 580, 581 (Chk. S. Ct. Tr. 1998).

If, in order to enable the court to enter a default judgment, it is necessary to determine the amount of damages by evidence the court may conduct such evidentiary hearings as it deems necessary and proper. Mathebei v. Ting Hong Oceanic Enterprises, 9 FSM Intrm. 23, 25 (Yap 1999).

Where the defendant is outside the FSM, no default can be entered until the expiration of at least 30 days after service. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 373 n.3 (Kos. 2000).

A court may find service upon a foreign government sufficient when the plaintiff sent it the complaint and summons by registered mail and the foreign government had actual notice of the complaint, since it filed a motion to dismiss, but the court will deny an entry of default when the plaintiffs cannot offer a formal proof of service, such as registered mail return receipt, because they cannot confirm service on the foreign government before it filed its motion to dismiss. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 373 (Kos. 2000).

The standard for setting aside an entry of default under Rule 55(c) is the liberal and less rigorous "good cause" standard rather than the more restrictive standard of excusable neglect for setting aside a default judgment under Rule 60(b). FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 377-78 (Chk. 2000).

The "good cause" threshold for Rule 55(c) relief is lower, ergo more easily overcome, than that which obtains under Rule 60(b) and the trial court should not read "good cause" too grudgingly. This more flexible approach reflects a policy decision that a default judgment should enjoy a greater degree of finality and, therefore, should be more difficult to disturb than a mere default. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 378 (Chk. 2000).

Default judgments and stipulated or agreed judgments against the State of Chuuk are to be subjected to close scrutiny by the court. Kama v. Chuuk, 9 FSM Intrm. 496, 499 (Chk. S. Ct. Tr. 1999).

A default judgment will be set aside when one defendant was served the complaint and summons not by a policeman or some other specially appointed person in compliance with Civil Procedure Rule 4(c) but by plaintiff's counsel and the other defendant was not served at all. Simina v. Rayphand, 9 FSM Intrm. 500, 501 (Chk. S. Ct. Tr. 1999).

Failure by a plaintiff to meet deadlines set out in an order may result in dismissal under Civil Procedure Rule 41(b), while a similar failure by a defendant may be met with an entry of default under Civil Procedure Rule 55(a). Kosrae v. Worswick, 9 FSM Intrm. 536, 540 (Kos. 2000).

Although failure to make proof of service does not affect the validity of the service, it does mean that the clerk cannot enter a default because before a clerk will enter a default against a defendant, the record must show that that defendant was properly served. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

A court must be assured that it has acquired personal jurisdiction over a defendant before it enters a default against him, and a court does not have personal jurisdiction over a defendant unless or until he has

been properly served. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

Courts ordinarily favor resolving cases on their merits rather than on procedural grounds. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

Because default judgments will be vacated under proper circumstances so that cases can be decided on their merits, and because when only a default has been entered, the policy in favor of vacating the default and deciding the case on its merits is even stronger, the policy in favor of deciding a case on its merits when no default has been entered and the answer merely filed a few days late must be much stronger. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

Serving an answer three days late, and filing it four days late is not the type of prejudice that would allow a plaintiff to prevail while avoiding the case being decided on its merits because public policy favors court judgments be on the merits. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

An entry of default may be set aside for good cause shown. Rule 55 distinguishes between relief from default, which is an interlocutory matter, and relief from a judgment by default, which involves final judicial action. Thus, a more liberal standard is applied to reviewing entry of default, as opposed to default judgments. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 162 (Pon. 2001).

The court may refuse to set aside a default when the default is due to willfulness or bad faith or where the defendant offers no excuse at all for the default. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 162 (Pon. 2001).

An entry of default may be vacated when the defendant relied on the representation of another defendant's employee that it would handle his defense in the case, and that after he learned that this was not so he obtained his own counsel who then filed the motion to vacate the entry of default. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 162 (Pon. 2001).

A common statement of the criteria to set aside a default judgment is whether the default was willful, that is, caused by culpable conduct of the defendant, whether there is a meritorious defense, and whether setting aside the default judgment would prejudice the plaintiff. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 180 (Pon. 2001).

Any of the reasons sufficient to justify the vacation of a default judgment normally will justify relief from a default entry and in various situations a default entry may be set aside for reasons that would not be enough to open a default judgment. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 180 (Pon. 2001).

When there was no default entered separate from the default judgment itself and when the complaint seeks general damages requiring a hearing under Rule 55(b), a default judgment should not have been entered and will be vacated and the court will proceed on the basis that no party was in default. Amayo v. MJ Co., 10 FSM Intrm. 244, 249 n.1 (Pon. 2001).

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by the rules and that fact is made to appear by affidavit or otherwise, the clerk must enter that party's default. The term "default" simply means the defendant has failed to plead or otherwise defend within the time required by the rules. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

A motion is not required prior to entry of default. However, entry of default does not occur automatically. The entry of default must be requested and the request must be accompanied by proof of default demonstrating the defendant "has failed to plead or otherwise defend." When the fact of default is established by "affidavit or otherwise" the court clerk is required to enter it. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

Until a default is entered by the court clerk, a party still may appear in the action and the clerk must

accept for filing defendant's pleadings or motions, even if filed outside the times prescribed by the rules. Once a defendant's pleadings or motions are filed, it is too late for the entry of default, and the defendant is entitled to proceed with its defense. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

No default can be entered against a party which has either filed a response indicating its intent to defend the action or engaged in other behavior which constitutes an active defense. Customarily, a party expresses its intent to defend by filing a motion or an answer to the complaint, but it is not uncommon for an unrepresented party to respond by mailing a letter to the court, and the court's practice has long been to recognize such submissions as an expression of a party's intent to defend, thereby preventing entry of default. Whether a party's written response or other behavior satisfies the Rule 55 requirement that the party must "plead or otherwise defend" to prevent entry of default is made on a case by case basis. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

A default judgment may only be entered against a party following entry of that party's default. Where no default has been entered, no judgment by default is available. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

Courts generally disfavor default judgments and readily set them aside rather than deprive a party of the opportunity to contest a claim on the merits. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

Default proceedings protect diligent parties from delay and uncertainty caused by unresponsive parties. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261, 262 (Pon. 2001).

A default ensures that litigants who are vigorously pursuing their cases are not hindered by those who are not, in an environment of limited judicial resources. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261 (Pon. 2001).

Whether a default judgment should be entered will be considered only if any defendant is in default and it is appropriate to enter default against that defendant. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261 (Pon. 2001).

No default judgments will be entered against defendants who have timely filed their answer to the plaintiff's amended complaint or against a defendant who had actively defended his position against the earlier complaint, against whom no default had been entered by the clerk, and whose answer was filed late, but before the motion for default judgment was filed. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261 (Pon. 2001).

A default and default judgment will not be entered against a defendant who, although he did not respond to plaintiff's amended complaint, has been active in his defense and who in his answer to the original complaint asserted defenses to each factual allegation in the first amended complaint, which complaint varies only slightly from the original and in a way that is not material the to claims for relief against him. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 261-62 (Pon. 2001).

When a defendant has adequately defended against the complaint so as to prevent the entry of default, and considering the liberal standard for setting aside a default judgment, and recognizing the court's desire to permit matters to proceed on their merits, a defendant's opposition to a motion for a default judgment for failure to respond to an amended complaint will be taken as a request for leave of court to file an answer to plaintiff's first amended complaint and the defendant will be directed to file a responsive pleading. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 262 (Pon. 2001).

When none of the defendants appeared on the day set for trial on damages, the defendants were in default under Rule 55(a), and the trial could then proceed as a hearing under Rule 55(b)(2) to determine plaintiffs' damages. People of Satawal ex rel. Ramoloilug v. Mina Maru No. 3, 10 FSM Intrm. 337, 338 (Yap 2001).

Whether to grant a motion for entry of default judgment is discretionary with the court, and not a matter

of right. In making this determination, the court may consider a variety of factors including the merits of the plaintiff's substantive claim. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

If the court grants a motion for default judgment at the commencement of trial, then, when the plaintiffs are seeking general damages and not a sum certain under Rule 55(b)(1), the next step would be for plaintiffs to prove up their damages under Rule 55(b)(2). Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

In a default situation, the court may conduct such hearings as it deems necessary and proper in order to determine damages. But when the nature of plaintiffs' claims is substantial, it may be appropriate for the court to consider the merits of those claims as part of that hearing, which can be accomplished when the plaintiffs go forward with their proof on both liability and damages. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend and that fact is made to appear by affidavit or otherwise, the clerk shall enter that party's default, but when the plaintiff did not seek a default, no default is entered. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 439 (Pon. 2001).

Under proper circumstances, default judgments will be vacated so that cases can be decided on their merits and when only a default has been entered, the policy in favor of vacating the default and deciding the case on its merits is even stronger. Logically, the policy in favor of deciding a case on its merits when no default has been entered and the answer merely filed late must be much stronger. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 439 (Pon. 2001).

Having to prosecute a case when the defendants filed and served their answer only days late, is not the type of prejudice that would allow a plaintiff to prevail while avoiding the case being decided on its merits. Public policy favors court judgments be on the merits. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 439 (Pon. 2001).

When no default has already been entered against a defendant and that defendant has filed a late response clearly indicating an intention to defend against the plaintiff's claim, the court, in the interest of deciding the case on the merits, will not enter a default against that defendant. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 439 (Pon. 2001).

When a court has denied the plaintiffs' motion to strike defendants' responsive filings, and also denied the plaintiffs' motion to enter defaults, the court cannot enter a judgment by default against the defendants. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 440 (Pon. 2001).

When service of process has been made outside the territorial jurisdiction of the FSM Supreme Court (that is, outside of the FSM), no default shall be entered until the expiration of at least 30 days after service. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 121 (Chk. 2002).

If service in Guam was all that a plaintiff had to rely upon, then the entry of default and the default judgment 25 days after service was made on Guam, would have been premature, but when service of process has been made within the FSM as well, a default may be entered after twenty days have elapsed after service and the defendant has not answered or otherwise defended. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 121 (Chk. 2002).

Even when service on the defendants was proper, they may still obtain relief from a default judgment if they qualify under Rule 60. Courts generally disfavor default judgments and will, in proper Rule 60(b) cases, readily set them aside rather than deprive a party of the opportunity to contest, and the court to resolve, a claim on its merits, instead of on procedural grounds. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002).

The criteria to be met in order to justify setting aside a default judgment are whether the default was

willful, caused by the defendant's culpable conduct, whether the defendant has a meritorious defense, and whether setting aside the default would prejudice the plaintiff. Relief from judgment is addressed to the discretion of the court, which must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002).

In order to obtain relief from a default judgment, the defendant must have a meritorious defense. A defense that would constitute a complete defense to the action if proven at trial would be a meritorious defense justifying relief from judgment when some evidence to support the defense has been produced, although more evidence may be needed to prevail at trial. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 123 (Chk. 2002).

Default, under Rule 55, is typically granted when a defendant has failed to answer or respond to a complaint within the prescribed time limit. A default judgment under Rule 55 will not be granted for the plaintiff's failure to timely respond to a summary judgment motion. Sigrah v. Kosrae State Land Comm'n, 11 FSM Intrm. 169, 171 (Kos. S. Ct. Tr. 2002).

No service on a defendant of a motion for entry of a default judgment is necessary under the rules, and nothing in the rules requires that notice of hearings on default matters be given to a defaulting defendant. Konman v. Esa, 11 FSM Intrm. 291, 293-94 (Chk. S. Ct. Tr. 2002).

For good cause shown, the court may set aside an entry of default. When, even though the defendant's counsel has not sought to explain why she failed to request an enlargement of time and her failure to ask either opposing counsel or the court for an enlargement of time to answer was not excusable, the standard to be applied when determining whether to set aside an entry of default suggests that the defendants should not be penalized for the inexcusable neglect of their attorney where giving sufficient time to the defendants will provide necessary information to assist the court in a complicated case involving hundreds of thousands of dollars, and when the plaintiff has not opposed the request, the court will set aside an entry of default. Individual Assurance Co. v. Iriarte, 12 FSM Intrm. 215, 216 (Pon. 2003).

An entry of default may be sought by request. No motion is necessary for entry of default, whereas a motion is necessary for entry of a judgment by default. Hartman v. Chuuk, 12 FSM Intrm. 388, 393 n.6 (Chk. S. Ct. Tr. 2004).

When there was no entry of default, there could not have been any hearing on a request for a default judgment. Entry of a default judgment is a two step process, requiring the entry of default before a default judgment can be entered. Hartman v. Chuuk, 12 FSM Intrm. 388, 393 n.7 (Chk. S. Ct. Tr. 2004).

A default judgment must be vacated when the Chuuk State Supreme Court never had jurisdiction over the action to determine ownership of real property in the first place because, despite being framed as a declaratory relief action, the case sought a determination of ownership of land lying within a land registration area and only the Land Commission has jurisdiction to determine ownership of land within a land registration area. Hartman v. Chuuk, 12 FSM Intrm. 388, 398-99 (Chk. S. Ct. Tr. 2004).

A plaintiff has waived any claim for attorney's fees when it submitted a form of judgment for a sum certain for the clerk's signature under FSM Civil Rule 55(b)(1). Attorney's fees may only be awarded upon a judicial finding that the fees sought are reasonable. FSM Social Sec. Admin. v. Lelu Town, 13 FSM Intrm. 60, 62 (Kos. 2004).

When a party against whom judgment by default is sought has appeared in the action, that party must be served with written notice of the application for judgment at least three days prior to the hearing on such application. Lee v. Lee, 13 FSM Intrm. 68, 70 (Chk. 2004).

– Depositions

Where the court set aside a default judgment upon the payment by defendant to plaintiff of air fare to

attend the trial, no modification will be granted to require the defendant to pay the costs of the plaintiff's counsel to go to plaintiff's residence to take his deposition which is being noticed by the plaintiff, especially where there is no showing that plaintiff could not attend the trial, nor will the court decide before trial whether such deposition could be used at trial. Morris v. Truk, 3 FSM Intrm. 454, 456-57 (Truk 1988).

Where plaintiff initially appeared for deposition and thereafter missed several continued dates within a two week time span because of funerals at which he was required to officiate, the failure to appear on the rescheduled dates was substantially justified so as to make sanctions under FSM Civil Rule 37(d) inappropriate. Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 419-20 (Pon. 1994).

Ordinarily the court will not grant motions for protective orders to substitute interrogatories for depositions in view of the recognized value and effectiveness of oral over written examinations. Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 422 (Pon. 1994).

A defendant is entitled to examine a plaintiff in the jurisdiction where the plaintiff has chosen to file the lawsuit. A court may grant an exception to the rule requiring plaintiffs to submit to depositions in the jurisdiction where the suit is pending when a plaintiff makes a good faith application based on hardship. McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 488 (Pon. 1994).

Leave of court is required to depose a party within 30 days of service of summons and complaint on that party. Pacific Agri-Products, Inc. v. Kolonia Consumer Coop. Ass'n, 7 FSM Intrm. 291, 292 (Pon. 1995).

In order for a deposition to be admissible a deponent must physically appear before someone who can identify and administer the oath even if the deposition is taken telephonically. FSM v. Skico, Ltd. (III), 7 FSM Intrm. 558, 559 (Chk. 1996).

The deposition of a corporation generally must be held where its corporate offices are. FSM v. Skico, Ltd. (IV), 7 FSM Intrm. 628, 629 (Chk. 1996).

Objection to the qualification of the officer before whom the deposition is taken is waived unless made beforehand, or as soon thereafter as possible. FSM v. Skico, Ltd. (IV), 7 FSM Intrm. 628, 630 (Chk. 1996).

If objections in manner of taking deposition are not made so that they may be promptly cured, the objection is waived. FSM v. Skico, Ltd. (IV), 7 FSM Intrm. 628, 630 (Chk. 1996).

Where it would be unjust to sanction defendants whose whereabouts are unknown when what might have been discovered had their depositions gone forward was limited to information concerning insurance coverage, which could have been obtained by cheaper and simpler forms of discovery, the court will issue a protective order that the defendants need not appear for deposition, but that the document production request relating to insurance policies be honored. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 154 (Pon. 1999).

A party may in the party's notice and in a subpoena name as the deponent a governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. This procedure should be distinguished from the situation in which a party wants to take the deposition of a particular individual associated with a governmental agency. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 276 (Pon. 1999).

Once a deposition notice is served under Rule 30(b)(6), it is the duty of the governmental agency to name one or more persons who consent to testify on its behalf and these persons must testify as to matters known or reasonably available to the agency. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 276 (Pon. 1999).

It is appropriate to allow the deposition of a party's attorney either when 1) the deposition is the only

practical means of obtaining the information, 2) the information sought will not invade the attorney-client privilege or the work product doctrine, and 3) the information sought is relevant and the need for it outweighs the disadvantages inherent in deposing a party's attorney; or when it is shown that no other means exist to obtain the information, and that the information sought is crucial to the preparation of the case. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 278 (Pon. 1999).

A protective order will be granted preventing the deposition of defendants' counsel and his production of documents when there are other means by which the information can be obtained, when the information does not appear to be as relevant and necessary as suggested, and when the information involves counsel's opinions in a work he co-authored 25 years before. The plaintiff's need for the information is outweighed by the hardship on defendants, who would be forced to confront the possibility of obtaining different counsel at a late stage of the litigation. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 278 (Pon. 1999).

Deposition costs will be allowed when the transcription was done and the deposition was admitted into evidence at trial even though the documentation for the deposition charge was a check made payable to an attorney in the Philippines, and noted as such on the check stub. Amayo v. MJ Co., 10 FSM Intrm. 371, 385-86 (Pon. 2001).

Any party may serve upon any other party written interrogatories to be answered by the party served. Depositions may be taken of any person but interrogatories are limited to parties. AHPW, Inc. v. FSM, 10 FSM Intrm. 420, 426 (Pon. 2001).

The Rule 31 procedure for depositions upon written questions is that a copy of the questions is delivered to the court reporter who then takes the deposition in accordance with Rule 30(c), (e), and (f). Written cross, redirect, and recross questions are thereafter propounded within the time provided by the rule. While a deposition on written questions may be useful in certain circumstances, this procedure is inflexible, and as a result, infrequently used. All things considered, depositions upon written questions are not as effective as oral depositions in eliciting spontaneous answers. AHPW, Inc. v. FSM, 10 FSM Intrm. 420, 426 (Pon. 2001).

Generally, the designated representative of a party who is not a natural person, and parties who are natural persons, may attend depositions. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 512 (Pon. 2002).

In the case of corporations, partnerships, associations, or governmental agencies, the organization so named must designate one or more officers, directors, or managing agents, or other persons who consent to testify at depositions on its behalf. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 512-13 (Pon. 2002).

When one party has agreed to accept a personal representative for the larger question of deposing a sole proprietor party, it has also accepted him for the secondary purpose of attending other depositions as a representative where the sole proprietor would otherwise be entitled to be present. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 514 (Pon. 2002).

Depositions upon written questions under Rule 31 are an alternative to oral depositions. The Civil Procedure Rules contemplate that either an oral or written deposition will be taken, and not both. A party therefore waived its right to propound written deposition questions to another party at the same time it waived its right to take her oral deposition, but if information is sought, other discovery methods are available under the Rules. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 514 n.3 (Pon. 2002).

If parties intend to continue a deposition at a later time, the deposition transcript itself will so indicate. In the absence of such clear direction, the deposition is complete at its conclusion. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 514 (Pon. 2002).

Unless it appears that the witness's absence was procured by the party offering the deposition, a deposition of a witness, whether or not a party, may be used by any party for any purpose, if the court finds

that the witness is off of the island at which the trial or hearing is being held. AHPW, Inc. v. FSM, 12 FSM Intrm. 544, 557 (Pon. 2004).

– Discovery

Forced disclosure of arrangements for payment of attorney's fees intrudes, in some degree, upon the attorney-client relationship and can be an "annoyance" within the meaning of the FSM Civil Rule 26(c) provisions concerning protective orders. Mailo v. Twum-Barimah, 3 FSM Intrm. 179, 181 (Pon. 1987).

Unless the questioning party is able to show some basis for believing there may be a relationship between an attorney's fee and the subject matter of the pending action, objections to efforts to discover the attorney's fee arrangement may be upheld. Mailo v. Twum-Barimah, 3 FSM Intrm. 179, 181 (Pon. 1987).

Although Kosrae Evidence Rule 408 does not require the exclusion of factual evidence "otherwise discoverable" simply because it was presented during compromise negotiations, a statement made in a letter seeking to settle a dispute, which statement is clearly connected to and part of the settlement offer, is not otherwise discoverable. Nena v. Kosrae, 3 FSM Intrm. 502, 507 (Kos. S. Ct. Tr. 1988).

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 Intrm. 502, 507 (Kos. S. Ct. Tr. 1988).

An attorney who fails to make timely requests for enlargement of time to complete discovery beyond the deadline set by court order; who has someone other than the client sign answers to interrogatories; and who fails to serve the answers properly on opposing counsel while filing a proof of service with the court is sanctionable on the court's own motion. Paul v. Hedson, 6 FSM Intrm. 146, 148 (Pon. 1993).

The fashioning of remedies and sanctions for a party's failure to comply with discovery requirements is a matter within the trial court's discretion and should not be disturbed by an appellate court absent a showing that the trial court's action has unfairly resulted in substantial hardship and prejudice to a party. Nakamura v. Bank of Guam (II), 6 FSM Intrm. 345, 349 (App. 1994).

While a defendant's motion to strike portions of a complaint as immaterial or impertinent is untimely if not filed before the defendant's answer a court, in its discretion, may still consider it because the court may, on its own initiative at any time, order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. McGillivray v. Bank of the FSM (I), 6 FSM Intrm. 404, 406 (Pon. 1994).

Because methods of discovery may be used in any sequence, and courts rarely order that a deposition not be taken at all and where there has been inexcusable delay in responding to interrogatories the court will not issue a protective order barring the taking of a deposition until after less burdensome means have been tried. Instead the court will set deadlines for compliance with the outstanding discovery requests. McGillivray v. Bank of the FSM (I), 6 FSM Intrm. 404, 408 (Pon. 1994).

Official duties or employment obligations do not of themselves constitute a valid basis for a party to obtain a blanket protective order against being deposed in a lawsuit. Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 422 (Pon. 1994).

Absent a showing of any of the factors listed in FSM Civil Rule 26(c), the court will not intrude at the deposition stage at the insistence of a party to declare what is relevant information that may be sought. Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 422 (Pon. 1994).

A trial judge has considerable discretion on the question of relevancy of discovery materials and his order should not be disturbed unless there has been an abuse of discretion or unless the action taken is

improvident and affects the substantial rights of the parties. McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 489 (Pon. 1994).

Under FSM Civil Rule 26 evidence may be discovered even if it would inadmissible on relevancy grounds at trial, as long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence. However, the discovery of material to be used for impeachment purposes is generally not permissible unless the impeaching material is also relevant or material to the issues in the case. McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 490 (Pon. 1994).

Parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence, but a plan may be implemented to minimize the burden of producing a large number of documents. Chuuk v. Secretary of Finance, 7 FSM Intrm. 563, 570 (Pon. 1996).

Upon motion by a party or by the person against whom discovery is sought, and for good cause shown, a court may issue an order, which justice requires, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Under FSM Civil Rule 26, parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Any party may serve upon any other party written interrogatories to be answered by the party served. There is no requirement that two parties be directly adverse in order for one to seek discovery against another. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Generally, discovery should be permitted under Rule 26 when the information sought is relevant to the claim or defense of the party seeking discovery, or to the claim or defense of any other party. Discovery should be allowed under the "relevancy" standard set forth in Rule 26 unless it is clear that the information sought can have no possible bearing upon the subject matter of the action. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Relevant information is discoverable unless it is privileged. FSM Civil Rule 26(b)(3) protects against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party concerning the litigation. Information prepared in anticipation of litigation is discoverable only upon a showing of "good cause." Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287-88 (Pon. 1998).

The fashioning of remedies and sanctions for failure of a party to comply with discovery requirements is a matter within the trial court's discretion. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290 (Pon. 1998).

Generally, a party should move for a protective order before the date set for discovery because a party may not remain completely silent when it regards discovery as improper. If it desires not to respond it must object properly or seek a protective order. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290 (Pon. 1998).

Under Rule 37(b), if a party fails to obey an order to permit or provide discovery, a court may order, among other things, that facts be designated as admitted, that the disobedient party not be allowed to support or oppose designated claims, that pleadings or parts thereof be stricken, or that a party be held in contempt of court. In addition, or in lieu of any of these, the court shall require a disobedient party, or the party's attorney or trial counselor, or both, to pay reasonable expenses (including attorney's fees) caused by the disobedient party's failure to obey the court's order. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290-91 (Pon. 1998).

Instead of ordering that certain facts be designated as admitted as requested by a party that had previously obtained a court order requiring another party to comply with its discovery requests, a court may order that for failure to comply with that discovery order that the disobedient party pay all of the moving party's reasonable expenses in preparing, filing, and defending its motions for sanctions. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 291 (Pon. 1998).

Under the work product doctrine, even if a plaintiff demonstrates substantial need for factual information contained in the report of a consulting expert whose services a defendant sought in anticipation of litigation, he would have to show exceptional circumstances under FSM Civil Rule 26(b)(4)(B) before being entitled to discover the consulting expert's opinions. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 476 (Pon. 1998).

A question, taken literally, that calls for information on any kerosene related incident involving damage to property or injury to persons occurring anywhere in the world throughout the existence of three corporate defendants is on its face, a request so broad that it clearly exceeds the scope of permissible discovery. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 478 (Pon. 1998).

The appropriate test to determine the scope of work product protection to be afforded a document which serves the dual purpose of assisting with future litigation the outcome of which may be affected by a business decision, is that documents should be deemed prepared in anticipation of litigation if in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. Where a document is created because of the prospect of litigation, analyzing the likely outcome of that litigation, it does not lose protection under this formulation merely because it is created to assist with a business decision. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 479 (Pon. 1998).

Work product protection extends to subsequent litigation as long as the materials sought were prepared by or for a party to the subsequent litigation. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 481 (Pon. 1998).

Rule 26 does not authorize any discovery concerning experts who the other party does not intend to call as a trial witness absent a showing of exceptional circumstances. It would be "unfair" to allow a party to extract his adversaries' consulting expert's knowledge or opinion without having to bear any of the financial cost of retaining that expert and to take unwarranted advantage of the opponent's trial preparation or investigations. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 482-83 (Pon. 1998).

Absent the requisite showing of exceptional circumstances, FSM Civil Rule 26 does not permit a party to obtain any information specific to an adversary's nontestifying experts through interrogatories. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 483 (Pon. 1998).

If a person is to be used by the defendants as a testifying expert, the plaintiff would be entitled to all the discovery authorized by FSM Civil Rule 26(b)(4)(A), and all documents the expert considered in forming his opinions would be discoverable as well. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 483 (Pon. 1998).

The court may allow a supplemental discovery response to be amended to obtain a declarant's signature on the response. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 153 (Pon. 1999).

When a court's purpose in re-opening discovery on the limited subject of insurance coverage was to give the parties some perspective on whether continued prosecution of the lawsuit would be beneficial to them, the court will not give a party an unfair procedural advantage by allowing it to seek testimony from witnesses it knows to be unavailable and then to ask for sanctions on the basis of that unavailability. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 154 (Pon. 1999).

A court, on a party's motion, may limit discovery in avoidance of oppression, undue burden or expense

in order to secure the just, speedy, and inexpensive determination of every action. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 154 (Pon. 1999).

Where it would be unjust to sanction defendants whose whereabouts are unknown when what might have been discovered had their depositions gone forward was limited to information concerning insurance coverage, which could have been obtained by cheaper and simpler forms of discovery, the court will issue a protective order that the defendants need not appear for deposition, but that the document production request relating to insurance policies be honored. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 150, 154 (Pon. 1999).

A defendant's financial condition is relevant to a punitive damages claim and a proper subject of discovery, if, under the applicable law, the defendant's financial condition has a bearing on the amount of punitive damages to be awarded. Elymore v. Walter, 9 FSM Intrm. 251, 253 (Pon. 1999).

If a defendant is found liable for punitive damages, a court cannot make an award having a meaningfully deterrent effect unless the court knows the extent of the defendant's wealth. The greater or lesser the degree of defendant's wealth, the greater or lesser would be the amount of the punitive award, since a small award relative to overall wealth would not meaningfully deter, whereas a large award relative to overall wealth would be unduly onerous. Elymore v. Walter, 9 FSM Intrm. 251, 253 (Pon. 1999).

A trial judge abuses his discretion when he denies a motion to compel production of financial information in a case where punitive damages are claimed, if the plaintiff submits factual support for the claim and the defendant fails to demonstrate good cause for a protective order preventing discovery; but the defendant is usually entitled to a protective order that the information only be revealed to the discovering party's counsel or representative, that demands be limited only to information needed to determine the defendant's present net worth, and that the information be sealed or otherwise restricted to use in the current proceeding only. Elymore v. Walter, 9 FSM Intrm. 251, 254 (Pon. 1999).

A defendant facing a claim for punitive damages may be required to answer discovery concerning current net worth, but cannot be compelled to reveal his financial status for the previous five years. The court may order plaintiffs' counsel not to divulge this information to anyone until such time as the court determines punitive damages liability, at which time the court will order what is to be done with the discovered information. Elymore v. Walter, 9 FSM Intrm. 251, 254 (Pon. 1999).

A court may make such orders as justice requires to protect a party from undue burden or expense with respect to discovery sought from that party. Elymore v. Walter, 9 FSM Intrm. 251, 254 (Pon. 1999).

Parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. Generally, discovery should be permitted under Rule 26 when the information sought is relevant to the claim or defense of the party seeking discovery, or to any other party's claim or defense. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 276 (Pon. 1999).

Upon motion by a party or by the person against whom discovery is sought, a court may issue an order, which justice requires, to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 276 (Pon. 1999).

A protective order will be granted when defendants seek information related to other reef damage cases in which Pohnpei has brought suit or entered into settlement agreements that has no relevance and is not within the scope of Rule 26 because it has no bearing on facts surrounding the ship's grounding, the defendants' liability, or possible damages, it does not relate to either party's claims or defenses, and to require Pohnpei to produce such information would be oppressive and burdensome. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 277 (Pon. 1999).

A protective order will be granted preventing the deposition of defendants' counsel and his production

of documents when there are other means by which the information can be obtained, when the information does not appear to be as relevant and necessary as suggested, and when the information involves counsel's opinions in a work he co-authored 25 years before. The plaintiff's need for the information is outweighed by the hardship on defendants, who would be forced to confront the possibility of obtaining different counsel at a late stage of the litigation. Pohnpei v. KSVI No. 3, 9 FSM Intrm. 273, 278 (Pon. 1999).

There is no reason that answers could not be filed in due course during the pendency of an abstention motion, and there is also no reason that discovery could not have been ongoing during an abstention motion's pendency, since discovery was just as inevitable as the answer. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 284 (Yap 1999).

When a represented party is required to respond to discovery, the party's attorney must undertake some effort to ensure that the client makes a reasonable inquiry into the subject matters covered by the given request. An attorney's responsibility to actively participate in information gathering for discovery purposes is heightened when the client is not an individual but a legal entity such as a corporation or a governmental body. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 325 (Pon. 2000).

Where the attorney is a party's employee, who has at minimum a degree of control over the party's procedural approach to prosecuting the lawsuit, proper compliance with discovery obligations may require him to personally assist in a diligent search for information available or under the possession or control of his client. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 325 (Pon. 2000).

The choice of an appropriate sanction to be applied when a party fails to comply with a discovery obligation is committed to the court's sound discretion. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 327 (Pon. 2000).

Civil Rule 37 provides sanctions for the failure to comply with a discovery order, including making such orders in regard to the failure as are just. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 327-28 (Pon. 2000).

When Rule 37 sanctions have proven futile in resolving a discovery dispute and because they do not provide a remedy for the waste of a court's time and resources, a court may invoke its inherent power to control the orderly and expeditious disposition of cases and proper compliance with its lawful mandates. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 329 (Pon. 2000).

No party is expected to engage in discovery for the benefit of another party. Kosrae v. Worswick, 9 FSM Intrm. 437, 441 (Kos. 2000).

A court may order on its own motion that overdue responses not be deemed admissions of fact because the fashioning of remedies and sanctions for a party's failure to comply with discovery requirements is a matter within the court's discretion. Overdue responses to requests for admission are not customarily treated as having been admitted in the absence of a showing of actual prejudice to the propounding party combined with no showing of excusable neglect by the responding party. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 598 (Pon. 2000).

When confronting violations of the discovery rules (or alleged misuse of the discovery process) courts strive to apply sanctions commensurate with the degree of neglect or wrongdoing viewed in light of any harm suffered by the aggrieved party. Sanctions as harsh as those which would in effect establish a defendant's liability are generally issued only upon a finding of deliberate disregard of the rules or following a pattern of discovery abuse or related misconduct. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 598 (Pon. 2000).

FSM Civil Rule 37(b)(2) gives the court the authority to levy sanctions against a party, including dismissal, for failure to obey a discovery order, and Rule 41(b) allows the court to dismiss a plaintiff's complaint for failure to comply with a court order. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 29 (Pon. 2001).

The standard of review of a court's imposition of sanctions under its inherent powers is for abuse of discretion. This accords with the abuse of discretion standards for review of Rule 11 attorney sanctions and for review of discovery sanctions. In re Sanction of Woodruff, 10 FSM Intrm. 79, 86 (App. 2001).

When the delay was within the movants' counsel's reasonable control, when the movants' inability to propound discovery because they failed to timely request it, will not affect their rights at trial – *e.g.*, they may still cross-examine the plaintiffs' witnesses, object to proffered evidence, and subpoena witnesses and documents, and when, taking account of all relevant circumstances surrounding the movants' omission, they have failed to show the excusable neglect that would justify enlarging their time to make discovery requests, an untimely motion to enlarge time for them to propound discovery requests will be denied. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219-20 (Chk. 2001).

Because a court may order that a trade secret or other confidential commercial information should not be disclosed or should be disclosed only in a designated way, the crafting of an appropriate order to protect the disclosure of confidential information lies within the trial court's discretion. AHPW, Inc. v. FSM, 10 FSM Intrm. 277, 278 (Pon. 2001).

A court may order confidential commercial material disclosed to opposing counsel to review and to submit to the court a list of the individuals who require access to the material and for what general purposes, and to also apprise the court generally of the quantity of material involved. If the proposed further disclosure appears reasonable under all the circumstances, the court may then direct the named individuals to submit affidavits, stating that they will use the information only for the limited purpose of the litigation and that they agree not to disclose the information to or discuss it with persons other than the attorney and the persons appearing on the list submitted to the court. All persons given access to the confidential information will be subject to sanction if they violate the protective order. AHPW, Inc. v. FSM, 10 FSM Intrm. 277, 278-79 (Pon. 2001).

A party may not derive benefit post trial from tendering evidence that which he was under a discovery obligation to produce pre-trial, and did not. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

Matter is discoverable if it is relevant and not privileged. Information is discoverable if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

When each paragraph of a discovery request begins by using the phrase "relating to" in a general sense, and each paragraph goes on to describe specific categories of information, the request is not overbroad. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

If a party has any of the documents asked for in a discovery request, it should produce them; if it does not, it should so indicate. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

Rule 37(a)(4) requires an opportunity for hearing before attorney's fees are awarded to a party who has prevailed on a motion to compel discovery. Courts may comply with this requirement either by holding an oral hearing on adequate notice, or by considering written submission from the affected parties. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

Generally discovery orders are interlocutory in character and review may be obtained only through means of the contempt process or through appeal of the final judgment in the underlying action. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 469 (Pon. 2001).

Even though a discovery order may compel a party to perform certain actions, such an order is not injunctive in nature because it does not grant or withhold substantive relief. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001).

The appropriate means by which someone may challenge a discovery order is to subject themselves

to a contempt proceeding. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001).

A discovery order is not appealable. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001).

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, and it is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 471 (Pon. 2001).

Information which leads to admissible evidence is, by definition, relevant within the meaning of that word as used in Rule 26. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 471 (Pon. 2001).

Relevancy is very broadly defined, including both directly relevant material and material likely to lead to the discovery of admissible evidence. If requested materials lead to discovery of admissible evidence, the discovery request is relevant. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 471 (Pon. 2001).

What is relevant in discovery is different from what is relevant at trial, in that the concept at the discovery state is much broader. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 471 (Pon. 2001).

Discovery should ordinarily be allowed under the concept of relevance unless it is clear the information sought can have no possible bearing upon the subject matter of the action. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 471 (Pon. 2001).

A defendant cannot limit the scope of the plaintiffs' legitimate discovery by either denying the complaint's allegations, or by the way in which it characterizes those allegations. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 472 (Pon. 2001).

When a party has contended that plainly relevant information is not relevant, and has done so in the face of clear law that is contrary to its position, the question becomes whether the party's relevancy argument is so wide of the mark as to be frivolous. This is a prima facie case of a Rule 11 violation. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

When a party fails to comply with an order compelling discovery under Rule 37(a), the court may order that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

When a defendant has not complied with all of the discovery requests as directed in a court order, the court will consider sanctions, including Civil Rule 37(b)(2) sanctions that designated facts will be taken to be established for the purposes of the action in accordance with the plaintiff's claim, and that defendant ought to be aware that deeming certain facts established is tantamount to entering a default judgment. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 508 (Pon. 2002).

When a party has yet to comply with the court's discovery order and discovery has been outstanding for an extended period, then that is one fact that the court will consider when contemplating sanctions if compliance is not forthcoming. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 508 (Pon. 2002).

When only one of a defendant's offices has produced any discovery documents and when it is unlikely that other affected offices would have no documents related to the litigation, it raises the issue of the thoroughness of the searches done by the offices involved. The court will therefore order that defendant's counsel to designate an appropriate individual in each of the offices to conduct a search of relevant records to determine if any such documents exist and who will prepare an affidavit indicating what was done to locate relevant documents, and the result of that search. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 509 (Pon. 2002).

The FSM Development Bank is an agency of the FSM government for purposes of discovery when the request for production plainly comprehends documents within the possession of the Bank, which is specifically named. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 509 (Pon. 2002).

Pohnpei may be held liable for discovery sanctions of motion related expenses such as attorney's fees, but the FSM is exempt from such sanctions under Rule 37(f). AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 509 (Pon. 2002).

When a defendant has unprofessionally refused to comply with the plaintiffs' discovery requests without any justification for doing so, in the limited context of discovery proceedings, its hands are unclean and it is in no position to make a case under rescission or other equitable principle. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 510, 513 (Pon. 2002).

When a party's response to a request for documents is evasive and non-responsive, he will be ordered to answer the request, either by providing copies of the requested documents, or by making the requested documents available for review and copying. Talley v. Talley, 10 FSM Intrm. 570, 572 (Kos. S. Ct. Tr. 2002).

If a defendant has already produced the documents requested by subpoena, then nothing remains to be done by the defendant other than to advise the plaintiffs of that fact because the law does not take notice of trifling matters. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 611, 613 (Pon. 2002).

A duty to supplement discovery responses may be imposed at any time prior to trial through new requests for supplementation of prior responses. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 611, 613 (Pon. 2002).

Subpoenas under Rule 45 may be issued to parties or non-parties, although Rule 34 is used for production of documents, etc., from parties. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 611, 613 n.1 (Pon. 2002).

When, if the court quashed the plaintiffs' subpoena and directed them to reform the request made by subpoena through a supplementary request for production under Rule 26(e)(3), the end result would be the same as if the subpoena were left in place, and when the balance of the discovery equities weigh against the defendant, the subpoena will not be quashed. But that should not be construed to the effect that a subpoena is generally a substitute for a supplementation request because this denial is based on the equitable considerations generated by the defendant's conduct. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 611, 614 & n.3 (Pon. 2002).

Discovery is not a game to be played for anyone's amusement. It is a serious undertaking requiring serious, considered responses. AHPW, Inc. v. FSM, 10 FSM Intrm. 615, 617 (Pon. 2002).

Any party may serve on any other party a request to permit entry upon designated land or other property in the requested party's possession or control for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b), and if the requested party fails to permit inspection as requested, the party seeking discovery may move for an order compelling inspection in accordance with the request, and if granted, the court may, after opportunity for hearing, require the party whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees. Ambros & Co. v. Board of Trustees, 10 FSM Intrm. 645, 647 (Pon. 2002).

When the plaintiffs failed to respond to a defendant's request for inspection of the property as required by Rule 34(b), their opposition to defendant's motion to compel inspection that the real intent of the request was to ask for plaintiffs to pay a portion of the survey's cost was inappropriate when made for the first time in the opposition, and, when even if timely made, it was not persuasive because the question of the property's ownership is central to the litigation and determining the respective properties' boundaries would be important evidence. The motion to compel the prpoertty inspection will therefore be granted. Ambros & Co. v. Board

of Trustees, 10 FSM Intrm. 645, 647 (Pon. 2002).

A bank's internal confidentiality policy is not dispositive as to whether its records are subject to discovery. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 131 (Pon. 2002).

Discovery restrictions may be broadened when a nonparty is the target. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 131 (Pon. 2002).

Records which are confidential, but not asserted to be privileged, are discoverable because parties may obtain discovery regarding any matter, not privileged, which is relevant to the pending action's subject matter. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 132 (Pon. 2002).

The party resisting discovery has the burden of clarifying and explaining its objections and to provide support therefor. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 132 (Pon. 2002).

The mere fact that discovery is burdensome is not a sufficient objection to that discovery provided the information sought is relevant or may lead to discovery of admissible evidence. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 132 (Pon. 2002).

A party, assuming that it is being truthful, may refuse discovery on the basis that it does not have the documents requested because it cannot produce documents that it does not have, but it must produce documents regardless of whether they are named by the document's actual title or not because it may not evade discovery through semantic equivocation. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 132 (Pon. 2002).

When a party has stated it has already produced the documents, it need not produce those documents again, but it must specifically identify the documents previously produced that are responsive to the requests. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 130, 132 (Pon. 2002).

There is a real, substantial dichotomy between a privilege and a privacy interest, because if matter is privileged, it is not discoverable under Civil Procedure Rule 26(b)(1), which expressly provides that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 227 (Pon. 2002).

There is no banker-client (i.e., customer) privilege, and no analytical reason to raise an understandably confidential commercial situation of principal-agent or customer-banker to a privilege. A privacy or confidentiality interest must be balanced against a litigant's interest in obtaining relevant and probative information even if the privacy interest implicated is that of non-parties. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 227 (Pon. 2002).

A party may not refuse to produce relevant discovery materials in order to prevent information damaging to it from coming to light. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

Personal conflicts between counsel do not excuse the failure to produce a document. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 230 (Pon. 2002).

When a party's record of discovery obduracy speaks for itself, the court may award attorney's fees and expenses as reasonable under all the facts and circumstances. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 447 (Pon. 2003).

When, given the scope and depth of the discovery disputes generated by a party's conduct, the court, in awarding fees to opposing counsel, will not find several billing entries showing work by both attorneys working together to be inordinate. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

In order to achieve the end of discouraging obstructionist discovery conduct, the "expenses," that are

imposed as a sanction for failure to comply with discovery is to be given a more expansive meaning than the "costs" that are awarded as part of a civil rights judgment. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

When a party's actions necessitated discovery sanction attorney fee awards, that party cannot complain about being held to account for them under Rule 37(a)(4). Such awards are not limited to the 15% generally awarded in collection cases. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

If a motion to compel discovery is granted, the court shall, after opportunity for hearing, require payment of the moving party's reasonable expenses incurred in obtaining the order, including attorney or trial counselor fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Actouka Executive Ins. Underwriters v. Walter, 11 FSM Intrm. 508, 509 (Pon. 2003).

When a defendant has not paid a court-ordered sanction for costs related to the plaintiff's motion to compel discovery, the court may order that, if the sanction is not paid immediately, the defendant's answer be stricken. Actouka Executive Ins. Underwriters v. Walter, 11 FSM Intrm. 508, 510 (Pon. 2003).

If a motion to compel answers to discovery is granted, the court must, after opportunity for hearing, require the party (or the party's attorney, or both) whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Primo v. Semes, 11 FSM Intrm. 603, 606 (Pon. 2003).

When a party has received a copy of an instrument evidencing the property transfer that she now claims was concealed from her, notwithstanding this omission, and regardless of the fact that the opponent answered the interrogatory "no," when the only correct answer was "yes," it remains that the discovery responses that were served on her attorney of record and are a part of the court file contain a copy of the document conveying the half interest. Thus, she cannot now say this transaction was not disclosed to her. At most, the inconsistency between the request for production and the interrogatory created an issue for resolution by further discovery. In light of the property transfer document, even the patently incorrect interrogatory answer does not entitle her to any relief under the fraud on the court provision. Ramp v. Ramp, 11 FSM Intrm. 630, 638-39 (Pon. 2003).

When a party is precluded from contesting its liability on an oral agreement as a result of its willful, bad faith discovery misconduct and when the plaintiffs' damages are also fully awardable under the plaintiffs' third-party beneficiary claim quite apart from any liability under the agreement, the party's contention that it is not liable under the agreement is wholly lacking in merit. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 234, 241 (Pon. 2003).

When certain requested documents did not exist and therefore could not be provided and the plaintiffs had provided those responsive documents which were in existence at the time of issuance of the subpoena duces tecum, there is no basis for the defendants' motion to compel and accordingly it will be denied. Allen v. Kosrae, 13 FSM Intrm. 55, 58 (Kos. S. Ct. Tr. 2004).

– Dismissal

Where there are significant issues of fact in a civil action, a motion to dismiss must be denied. Lonno v. Trust Territory (III), 1 FSM Intrm. 279, 281 (Kos. 1983).

Where the plaintiff has been given reasonable notice of his trial and he and his attorney failed to appear to adduce evidence and prosecute the claim, his inactivity amounts to abandonment of his claim and it is subject to dismissal under FSM Civil Rule 41(b). Etpison v. Perman, 1 FSM Intrm. 405, 414 (Pon. 1984).

A motion under FSM Civil Rule 12(b) to dismiss for failure to state a claim upon which relief may be

granted maybe upheld only if it appears to a certainty that no relief could be granted under any state of facts which could be proved in support of the claim. Mailo v. Twum-Barimah, 2 FSM Intrm. 265, 267 (Pon. 1986).

Civil proceedings typically can be concluded by the parties without court action or approval of any kind pursuant to Rule 41 of the FSM Supreme Court's Rules of Civil Procedure. FSM v. Ocean Pearl, 3 FSM Intrm. 87, 91 (Pon. 1987).

Dismissal of a claim for failure of the plaintiff to prosecute normally operates as an adjudication on the merits. Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

Where there is dismissal of an action, even though the dismissal is voluntary and without prejudice, the defendant is the prevailing party within the meaning of Rule 54(d) which provides for awards of costs to the prevailing party. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 413 (Pon. 1988).

When a party incurs considerable expense in preparation for trial and the other party seeks for dismissal, the court may specify the conditions under which dismissal will be allowed, but dismissal need not be accepted by a party who finds the conditions too onerous. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 414 (Pon. 1988).

Where a plaintiff seeks dismissal of her own complaint without prejudice under Rule 41(a)(2), it is generally thought that the court should at least require the plaintiff to pay the defendant's costs of the litigation as a condition to such dismissal and these costs may include travel expenses of plaintiff's attorney. Mailo v. Twum-Barimah, 3 FSM Intrm. 411, 415 (Pon. 1988).

A motion to dismiss for failure to state a claim for which relief can be granted brought under FSM Civil Rule 12(b)(6) will be granted only if it appears to a certainty that no relief can be granted under any state of facts which could be proven in support of the claim. In making its determination the court is to assume the allegations in the complaint to be true and give the plaintiff the benefit of all reasonable inferences. Jano v. King, 5 FSM Intrm. 388, 390 (Pon. 1992).

A motion under FSM Civil Rule 12(b) to dismiss for failure to state a claim may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support. Faw v. FSM, 6 FSM Intrm. 33, 37 (Yap 1993).

Dismissal of actions for attorney misconduct is generally disfavored in light of the judicial preference for adjudication on the merits whenever possible so as to allow parties a reasonable opportunity to present their claims and defenses. Paul v. Hedson, 6 FSM Intrm. 146, 147 (Pon. 1993).

A motion to dismiss, unlike a pleading, must state with particularity the grounds for dismissal, be made before pleading, and be argued with clarity and relevance. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 152 (Pon. 1993).

A motion to dismiss is not to be granted unless it appears to a certainty that the non-moving party is entitled to no relief under any state of facts which could be proved in support of the claim, and if on the motion to dismiss matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. Etscheit v. Adams, 6 FSM Intrm. 365, 386 (Pon. 1994).

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Where a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed, but will be dismissed without prejudice. Berman v. Santos, 6 FSM Intrm. 532, 534 (Pon. 1994).

Dismissal with prejudice is a drastic sanction to be applied only in extreme situations. McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23 (Pon. 1995).

Where just, the court has discretion to enter a judgment of default based on a party's failure to obey an order or permit discovery, FSM Civ. R. 37(b)(2)(C), or based on a plaintiff's failure to prosecute his case, FSM Civ. R. 41(b). McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23 (Pon. 1995).

The purpose of the rule allowing dismissal for failure to prosecute is to guard against delay in litigation and harassment of the defendant, as well as preventing undue delays in disposition of pending cases and avoiding congestion in trial court calendars. McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23 (Pon. 1995).

The sanction of dismissal with prejudice should be allowed only in the face of a clear record of delay or contumacious conduct by the plaintiff, or upon a serious showing of willful default. McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23 (Pon. 1995).

Where the plaintiff has failed to obey the court's discovery orders, and has repeatedly refused to submit to a deposition although the court has tried to accommodate plaintiff's claim of financial hardship, and failed to make a good faith effort to respond to interrogatories, the plaintiff has demonstrated an express lack of a good faith effort to move the litigation forward, leaving the court no choice but to dismiss the case with prejudice. McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23-26 (Pon. 1995).

Plaintiffs are permitted to dismiss an action without the order of the court provided they file a stipulation signed by all parties who have appeared in the action. Therefore where plaintiffs file a stipulation of dismissal including all but one defendant and later file another stipulation of dismissal with that one defendant a court may recognize that the plaintiffs have reached agreements with all defendants and enter the stipulated judgment and dismissal. Labra v. Makaya, 7 FSM Intrm. 75, 76 (Pon. 1995).

Motions to dismiss for failure to state a claim upon which relief can be granted filed after an answer has been filed are considered motions for judgment on the pleadings. In ruling on a motion for judgment on the pleadings a court must presume the non-moving party's factual allegations to be true and view the inferences drawn therefrom in the light most favorable to the non-moving party. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 113 (Chk. 1995).

Punitive damages are a derivative, not an independent cause of action, and must rest upon some other, underlying cause of action because it is merely an element of damages in that cause of action. Thus, if all other causes of action are dismissed then punitive damages must necessarily also be dismissed. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 113 (Chk. 1995).

A complaint should not be dismissed and a party precluded from relief because a plaintiff's lawyer has misconceived the proper legal theory of the claim. If the complaint shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 114 (Chk. 1995).

A motion to dismiss that contains matters outside the pleadings shall be treated as a motion for summary judgment. Wainit v. Weno, 7 FSM Intrm. 121, 122 (Chk. S. Ct. Tr. 1995).

When it appears that the court lacks subject matter jurisdiction the case will be dismissed. Trance v. Penta Ocean Constr. Co., 7 FSM Intrm. 147, 148 (Chk. 1995).

A court evaluates a Rule 12(b)(6) motion to dismiss only on whether a plaintiff's claim has been adequately stated in the complaint, and does not resolve the facts or merits of the case. A court's review is limited to the complaint's contents and the court must assume the facts alleged therein are true and view them in the light most favorable to the plaintiff. Dismissal can only be granted if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. Latte Motors, Inc. v. Hainrick, 7 FSM Intrm. 190, 192 (Pon. 1995).

Averment of a foreign judgment states a claim upon which relief could be granted. Allegations that the foreign judgment was obtained without notice are outside the complaint and cannot be considered in

evaluating a Rule 12(b)(6) motion to dismiss. Latte Motors, Inc. v. Hainrick, 7 FSM Intrm. 190, 192 (Pon. 1995).

When a party in support of or in opposition to a Rule 12(b)(6) motion to dismiss submits matters outside of the pleadings a court has complete discretion to exclude those matters from consideration or to accept those matters and treat the motion as one for summary judgment. Latte Motors, Inc. v. Hainrick, 7 FSM Intrm. 190, 192 (Pon. 1995).

A motion to dismiss for failure to state a claim will be granted only if it appears to a certainty that no relief can be granted under any state of facts that could be proven in support of the claim, and a court must assume that the facts alleged in the complaint are true, and the facts and inferences drawn from the complaint must be viewed by the court in the light most favorable to party opposing the motion to dismiss the complaint. Union Indus. Co. v. Santos, 7 FSM Intrm. 242, 244 (Pon. 1995).

Dismissal with prejudice of a plaintiff's prior action constitutes a judgment on the merits, which has a res judicata effect, barring the relitigation of all issues that were or could have been raised in that action. Union Indus. Co. v. Santos, 7 FSM Intrm. 242, 244 (Pon. 1995).

Dismissal may be ordered when plaintiffs have not complied with a lesser sanction designed to relieve prejudice to a defendant caused by plaintiffs' fault. Damarlane v. United States, 7 FSM Intrm. 350, 354-55 (Pon. 1995).

In ruling on a Rule 12(b) motion to dismiss, a court assumes the allegations in the complaint are true and gives the plaintiff the benefit of all reasonable inferences. A motion to dismiss for failure to state a claim may thus be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support of that claim. Chuuk v. Secretary of Finance, 7 FSM Intrm. 563, 569-70 (Pon. 1996).

When reviewing the grant of a motion to dismiss the appellate court must take as true the facts alleged and view them and their reasonable inferences in the light most favorable to the party opposing the dismissal. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996).

A motion to dismiss should not be granted unless it appears to a certainty that no relief could be granted under any state of facts that can be proved in support of the claim. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996).

It is not an abuse of discretion for a trial court to order payment of a sanction instead of dismissal when the plaintiffs failed to comply with a court order to prepare a proper pretrial statement and then dismiss the case when the sanction was not paid. Damarlane v. United States, 8 FSM Intrm. 45, 58-59 (App. 1997).

A court evaluates a motion to dismiss for failure to state a claim only on whether a plaintiff's case has been adequately stated in the complaint, and does not resolve the facts or merits of the case. A court deciding such a motion must assume that the facts alleged in the complaint are true and view them in a light most favorable to the plaintiff, and then dismiss the complaint only if it appears certain that no relief could be granted under any facts which could be proven in support of the complaint. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 114 (Chk. 1997).

Because dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, courts will often quash service instead of dismissing the action. That way only the service need be repeated. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

A motion to dismiss for failure to state a claim may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support. Damarlane v. FSM, 8 FSM Intrm. 119, 121 (Pon. 1997).

Claims for damages for violation of the FSM Environmental Protection Act and for damage based on an alleged property interest in the reef and lagoon adjoining plaintiffs' land will be dismissed for failure to state a claim for which relief may be granted. Damarlane v. FSM, 8 FSM Intrm. 119, 121 (Pon. 1997).

Under Rule 4(j) a complaint that has not been served within 120 days of being filed can only be dismissed upon motion or the court's own initiative. Service made after 120 days but before a motion or court initiative to dismiss is good service and dismissal will not be granted on a later motion. Alik v. Moses, 8 FSM Intrm. 148, 151 (Pon. 1997).

In evaluating a motion to dismiss, a court must accept as true the allegations in the complaint. Relief should be granted only if it appears certain that no relief could be granted under any facts which could be proven in support of the complaint. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 291 (Pon. 1998).

A complaint's allegations that officials' knowing interference prevented two ships from refloating their ship after it had grounded on a reef, that the ship's crew were arrested by the officials without cause, and that this actively and unreasonably prevented rescue the vessel's by other boats, and that that interference was the direct cause of the boat's damage, set forth a claim in negligence and are sufficient to survive a motion to dismiss. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 294 (Pon. 1998).

A civil rights claim against a municipal government will be dismissed when it fails to allege that the officials were acting pursuant to governmental policy or custom when the allegedly unconstitutional actions occurred or when it fails to allege that the violations were caused by the officials who were responsible for final policy making, and when those officials made a deliberate choice to follow a course of action chosen from various alternatives. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 296 (Pon. 1998).

When a plaintiff has not shown good cause for his failure to serve the summons and complaint on a foreign defendant within 120 days as required by FSM Civil Rule 4(j) or pursuant to one of the alternative methods for service in a foreign country allowed by FSM Civil Rule 4(i) the court will dismiss the complaint against without prejudice. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 477 (Pon. 1998).

When a plaintiff has not shown good cause for his failure to timely serve a defendant, a motion to dismiss without prejudice will be granted. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 484 (Pon. 1998).

In reviewing a motion to dismiss for failure to state a claim, a court must assume that the facts alleged in the complaint are true and view them in the light most favorable to the plaintiff. Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998).

Cases may be dismissed for the plaintiff's failure to prosecute or to comply with the rules or any order of court. Sally v. Andon, 9 FSM Intrm. 55, 56 (Chk. S. Ct. Tr. 1999).

Where grounds exist, an action is subject to dismissal, as a general rule, on the court's own motion and the trial court has power to dismiss an action, sua sponte, for want of prosecution. Sally v. Andon, 9 FSM Intrm. 55, 56 (Chk. S. Ct. Tr. 1999).

Courts in the exercise of their inherent powers may dismiss an action in which a plaintiff refuses to comply with an order of the court or the setting of a case for trial. In dismissing an action the court may consider the importance of a judge maintaining control of his calendar and that a trial, once set, should be continued only for the most compelling reasons . Sally v. Andon, 9 FSM Intrm. 55, 56 (Chk. S. Ct. Tr. 1999).

When all parties have been duly served notice of a scheduled hearing and none appear, the case may be dismissed with prejudice because the plaintiff failed to appear and prosecute his case and is deemed to have abandoned his claim. Sally v. Andon, 9 FSM Intrm. 55, 56 (Chk. S. Ct. Tr. 1999).

Because failure to make proof of service does not affect the validity of the service, a motion to dismiss

for a defect in a return of service will be denied. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 125 (Pon. 1999).

A motion to dismiss because the forum selection clause in the agreement selects a different court to hear the dispute is properly seen as a motion to dismiss for improper forum. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 125 (Pon. 1999).

For purposes of the motion to dismiss, the plaintiff has the burden of showing a prima facie case of personal jurisdiction, and the allegations in the complaint are taken as true except where controverted by affidavit, in which case any conflicts are construed in the non-moving party's favor. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 127 (Pon. 1999).

A judgment entered upon a dismissal for lack of jurisdiction should recite that fact, so as to make clear that the dismissal is without prejudice to a different suit in a court that does have jurisdiction. Similar reasoning applies to the granting of a motion to dismiss for improper forum. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 147, 148 (Pon. 1999).

Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Thus subject matter jurisdiction may never be waived, and may be raised at any time, even after judgment. Island Dev. Co. v. Yap, 9 FSM Intrm. 220, 222 (Yap 1999).

Rule 41(b) requires prosecution of a civil lawsuit with reasonable diligence to avoid dismissal. The burden of prosecuting a civil lawsuit lies with any party seeking affirmative relief. O'Sullivan v. Panuelo, 9 FSM Intrm. 229, 231 (Pon. 1999).

When the stakeholder can demonstrate that it is disinterested, it is appropriate for the court to dismiss the stakeholder from the action following the deposit of the funds at issue or the posting of a bond. Bank of Hawaii v. Helgenberger, 9 FSM Intrm. 260, 263 (Pon. 1999).

When contracts between the parties provide that any legal proceedings instituted by either party must be filed and heard in the FSM Supreme Court with no other court having jurisdiction and that should the FSM Supreme Court not accept jurisdiction must the parties' dispute be resolved by arbitration, the FSM Supreme Court, not having declined jurisdiction, will not dismiss or stay the case pending arbitration because arbitration is mandated in a dispute arising from the agreements only when the FSM Supreme Court has declined jurisdiction. Mobil Oil Micronesia, Inc. v. Helgenberger, 9 FSM Intrm. 295, 296 (Pon. 1999).

In ruling on a motion to dismiss, the court must assume the truth of the allegations in the complaint, with the benefit of all reasonable inferences to be given to the plaintiff. AHPW, Inc. v. FSM, 9 FSM Intrm. 301, 303 (Pon. 2000).

Whether Pohnpei's power to regulate trochus means that any action which has an arguably regulatory effect on trochus cannot constitute an anticompetitive practice is an issue for trial, and a motion to dismiss in this respect must be denied. AHPW, Inc. v. FSM, 9 FSM Intrm. 301, 304 (Pon. 2000).

When a defendant draws its own legal conclusions from the complaint's alleged facts, its comments are not a sufficient basis on which to dismiss a complaint, and the facts as alleged present issues for trial because the court must take the complaint's allegations as true. AHPW, Inc. v. FSM, 9 FSM Intrm. 301, 305-06 (Pon. 2000).

A motion to dismiss based on an allegation that the plaintiff's trial testimony was untruthful and intentionally misrepresented material facts concerning the ownership of the land beneath his hotel and restaurant will be denied when the plaintiff had ownership rights to some of the land and a land use agreement for the rest and neither defendant asked whether there were other owners of the land and the plaintiff did not volunteer this information. This omission does not make the plaintiff's testimony an intentional misrepresentation. Jonah v. Kosrae, 9 FSM Intrm. 332, 333-34 (Kos. S. Ct. Tr. 2000).

When a plaintiff at trial failed to introduce evidence that would show one defendant's liability, that defendant may be dismissed and excused from the remainder of the trial, and when the other defendant fails to object to that defendant's withdrawal the court may accept that as the other defendant's abandonment of its cross claims against that defendant. Jonah v. Kosrae, 9 FSM Intrm. 335, 344-45 (Kos. S. Ct. Tr. 2000).

When a vessel has not been seized and is not in the FSM, the court has not obtained jurisdiction over it and the complaint as to the vessel must be dismissed. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 370 (Kos. 2000).

There has been a clear record of delay justifying dismissal for failure to prosecute when substantial delay has resulted from plaintiff's failure to act during the period from December, 1994 until September, 1999, and from plaintiff's subsequent failure to act with the due dispatch required by the court's November 25, 1999 order. Kosrae v. Worswick, 9 FSM Intrm. 437, 441-42 (Kos. 2000).

Delay in a case that is attributed to the time taken to designate a justice and for the clerk's preparation of the record, is not the type of delay that can be properly attributed to the appellant and be a ground for dismissal. In re Lot No. 014-A-21, 9 FSM Intrm. 484, 491 (Chk. S. Ct. Tr. 1999).

The court lacks jurisdiction over the subject matter or the complaint does not state a claim or cause of action upon which relief can be granted when it asks the court to hold the removal of the Speaker and Vice-Speaker null and void. Christlib v. House of Representatives, 9 FSM Intrm. 503, 506-07 (Chk. S. Ct. Tr. 2000).

A third-party due process claim against the Land Commission will be dismissed when, although the Land Commission was named as a third-party defendant in the caption, it was never served with a Third-Party Complaint and Summons in accordance with the Kosrae Civil Procedure Rules. Jonas v. Paulino, 9 FSM Intrm. 519, 521-22 (Kos. S. Ct. Tr. 2000).

When a court order required the plaintiff-appellee to file within 30 days a written request for trial on his trespass claim if he wished to prosecute the claim, and he did not, the trespass claim is dismissed. Jonas v. Paulino, 9 FSM Intrm. 519, 522 (Kos. S. Ct. Tr. 2000).

A suit over an incident involving a foreign vessel, will not be dismissed when the vessel was engaged in commercial activity, and not in sovereign acts. Kosrae v. Kingdom of Tonga, 9 FSM Intrm. 522, 523 (Kos. 2000).

A motion to vacate an order of dismissal under Rule 60(b) that is not brought under any of the six enumerated bases set out in Rule 60(b), and reurges the same points made in the response to the original motion to dismiss is plainly not a Rule 60(b) motion, but is considered as a motion for reconsideration. Kosrae v. Worswick, 9 FSM Intrm. 536, 538 (Kos. 2000).

When the court dismissed the case in material part on the basis of the plaintiff's failure to proceed with "all due dispatch," as required by the court's order and when, with the benefit of hindsight, "all due dispatch" was an inadequate choice of directives because it did not set out precisely what was expected of counsel and when, and when although the plaintiff did nothing to prosecute the case for nearly five years, the court did not intervene to get the case back on track before the notice of trial setting was issued, reconsidering all the circumstances, the better course is to vacate the dismissal. Kosrae v. Worswick, 9 FSM Intrm. 536, 538 (Kos. 2000).

A party is precluded from moving to dismiss on the basis of a stale summons and amended complaint, since by not filing a Rule 12(b) motion on the point, nor asserting it in his answer to the amended complaint, he has waived any defect in this regard. Kosrae v. Worswick, 9 FSM Intrm. 536, 539 (Kos. 2000).

Failure by a plaintiff to meet deadlines set out in an order may result in dismissal under Civil Procedure Rule 41(b), while a similar failure by a defendant may be met with an entry of default under Civil Procedure

Rule 55(a). Kosrae v. Worswick, 9 FSM Intrm. 536, 540 (Kos. 2000).

In considering a motion to dismiss, a court must assume the allegations in the complaint to be true and give the plaintiff the benefit of all reasonable inferences. A motion to dismiss for failure to state a claim for which relief can be granted will be granted only if it appears to a certainty that no relief can be granted under any set of facts which could be proven in support of the claim. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 9 FSM Intrm. 551, 556 (Pon. 2000).

A motion to dismiss for lack of subject matter jurisdiction is properly considered under Civil Procedure Rule 12(h)(3) and may be raised at any time. The motion is treated as a suggestion that the court lacks subject matter jurisdiction. Udot Municipality v. FSM, 9 FSM Intrm. 560, 562 (Chk. 2000).

When the court's jurisdiction is placed at issue, it is the plaintiff's burden to show that the Supreme Court does have jurisdiction, and that a colorable claim exists. Udot Municipality v. FSM, 9 FSM Intrm. 560, 562 (Chk. 2000).

A court will not dismiss a case for failure to exhaust administrative remedies when to do so would require the plaintiff to pursue relief through an unconstitutional procedure. Udot Municipality v. FSM, 9 FSM Intrm. 560, 563 (Chk. 2000).

A motion to dismiss for failure to join necessary parties may be denied without prejudice when it is at too early a stage of the proceedings to determine whether complete relief among the parties cannot be obtained without the joinder of others. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

A Rule 12(b)(7) motion to dismiss for failure to join an indispensable party under Rule 19 is a defense that is, by rule, specifically preserved and may be raised as late in the proceedings as at the trial on the merits. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

A motion, styled a motion to strike (under Rule 12(f)), that may more accurately be characterized as one to dismiss for failure to state a claim upon which relief can be granted (under Rule 12(b)(6)), shall, when matter outside the pleading is presented to and not excluded by the court, be treated as one for summary judgment and disposed of as provided in Rule 56. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 50 (Chk. 2001).

When the complaint states that it is an admiralty and maritime action and that the plaintiffs are invoking the court's *in rem* and *in personam* jurisdiction, plaintiffs' failure to style their action against a vessel as *in rem* in the caption is merely a formal error and not a fatal defect, and the caption can always be amended to correct technical defects. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 51 (Chk. 2001).

When a vessel was never seized and brought under the court's jurisdiction and is no longer present in the jurisdiction, a court cannot exercise *in rem* jurisdiction over it and all such claims against the vessel will be dismissed without prejudice. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001).

Dismissal of an *in rem* suit against a vessel does not act to dismiss the suit against its captain and crew as that is an action *in personam*, not *in rem*. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001).

A motion to dismiss for failure to state a claim may be granted only if it appears to a certainty that no relief could be granted under any state of facts which could be proven in support of the claim. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001).

When no national or state statute or contractual provision authorizes a third party's suit against or joinder of an insurer, an injured party's causes of action against and joinder of an insurer will be dismissed. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52-53 (Chk. 2001).

Dismissal is only appropriate if it appears to a certainty that no relief could be granted under any facts

which could be proven in support of the complaint. Pohnpei v. KSVI No. 3, 10 FSM Intrm. 53, 67 (Pon. 2001).

When a party moving to dismiss for failure to state a claim states that an agreement is referred to in the complaint, and that by attaching a copy to its motion, it does not intend to present matter outside the pleadings, regardless of intent, the agreement is "matter outside the pleadings" under Rule 12(b)(6), and the court will therefore treat the motion to dismiss as one for summary judgment under Rule 56, as is expressly provided for by Rule 12(b). Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 114 (Kos. 2001).

Because the FSM Supreme Court generally (with some exceptions) lacks jurisdiction over a moot cause of action, it must be dismissed. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 119 (Pon. 2001).

When a complaint's first cause of action is dismissed for lack of jurisdiction, and its only other cause of action is dismissed for failure to state a claim upon which relief may be granted, the complaint is thereby dismissed. Damarlane v. Pohnpei Supreme Court Appellate Division, 10 FSM Intrm. 116, 122 (Pon. 2001).

Unless the court otherwise specifies, an involuntary dismissal pursuant to Rule 41(b) acts as an adjudication upon the merits, and is generally reviewed for abuse of discretion. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 137 (App. 2001).

The abuse of discretion standard is usually applied in reviewing a Rule 41(b) dismissal when there is no substantial dispute over the facts underlying the trial court's determination that the plaintiff had failed to prosecute the action. In such instances the analysis turns instead on whether the circumstances surrounding the delay justify dismissal. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001).

When reviewing a trial court's Rule 41(b) dismissal order on sufficiency of the evidence, the appropriate standard of review is whether the findings of fact are clearly erroneous. A finding is clearly erroneous when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001).

When an appellant takes issue with both the trial court's findings of fact and its subsequent dismissal order, it requires a two tier analysis. The appellate court first reviews the trial court's findings of fact for clear error. Thereafter, it applies the facts found that are not clearly erroneous, together with those shown by the record as undisputed, and reviews the Rule 41(b) dismissal order under an abuse of discretion standard. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001).

Dismissal under Rule 41(b), like Rule 37, should be allowed only in the face of a clear record of delay or contumacious conduct by the plaintiff, or upon a serious showing of willful default. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 140 (App. 2001).

A plaintiff in a civil lawsuit seeking affirmative relief has the burden of pursuing that relief with reasonable diligence. Initially, the burden of showing some excuse for any delay in prosecution ought to be borne by the plaintiff. If the excuse is anything but frivolous, the burden shifts to the defendant to show prejudice from the delay. If prejudice is demonstrated, the burden shifts back to the plaintiff to show that the force of its excuse outweighs any prejudice to the defendant. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 140 (App. 2001).

Although ultimately the granting or denial of involuntary dismissal rests in the sound discretion of the court, the record must still support a finding of delay attributable to plaintiff's conduct. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 140 (App. 2001).

When plaintiff's counsel did not receive formal notice of the Kosrae trial date until six days before trial and he acted reasonably in attempting to travel to Kosrae, and given the effort counsel previously made to try these cases, counsel's inability to make the flight did not justify the trial court's dismissal order because

counsel had not acted willfully or out of disdain for the trial court's authority. Considering the minimal three day continuance requested by counsel and the absence of prejudice to the defendants, the trial court abused its discretion in ordering the cases' dismissal. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 140 (App. 2001).

When six months have elapsed since the plaintiffs first asked for time to find new counsel and a court order explicitly stated what the consequences would be if new counsel did not file a notice of appearance by March 30, 2001, the plaintiffs' remaining punitive damages claim, absent a showing of good cause and excusable neglect, will be dismissed, and, given the purpose of punitive damages, a final judgment entered. Elymore v. Walter, 10 FSM Intrm. 166, 168-69 (Pon. 2001).

While the court is reluctant to hold a party responsible for the party's attorney's failure to act in time but when it was plaintiffs themselves who were acting to find new counsel, in the absence of a showing of excusable neglect for their failure to do so, the court will hold the plaintiffs responsible for their own actions and dismiss the punitive damages claim so that judgment may be entered. Elymore v. Walter, 10 FSM Intrm. 166, 168-69 (Pon. 2001).

When there was no evidence presented at trial that two defendants had made any promise to the plaintiff and they were not a parties to any agreement or promise with the plaintiff, the plaintiff has not carried his burden of proof with respect to claims made against them and justice requires that the complaint against them be dismissed. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 197 (Kos. S. Ct. Tr. 2001).

There are two types of voluntary dismissal under Rule 41(a): dismissals under 41(a)(1) do not require a court order; dismissals under 41(a)(2) do. Subsection (a)(1) permits dismissal by notice of dismissal when the notice is filed before the filing of an answer or a summary judgment motion, whichever occurs first, or by the stipulation of all parties who have appeared in the action. Subsection (a)(2) governs all other circumstances when a plaintiff seeks to dismiss a lawsuit and applies when a defendant opposes dismissal. Under Rule 41(a)(2) an action will not be dismissed at the plaintiff's instance save upon court order and upon such terms and conditions as the court deems proper. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 208 (Kos. 2001).

A defendant may not move for a voluntary dismissal of the plaintiff's action. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 208 (Kos. 2001).

The decision to grant or deny a voluntary dismissal under Rule 41(a)(2) is addressed to the sound discretion of the court and unless otherwise specified in the order, a dismissal under this paragraph is without prejudice. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 208 (Kos. 2001).

Under the terms of a dismissal with prejudice, a defendant secures the same relief as it would have had the case gone to trial and it had prevailed. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 209 (Kos. 2001).

Consideration of the terms and conditions appropriate for dismissal under Rule 41(a)(2) centers on the interests of parties before the court, not on a party's procuring a strategic advantage in future litigation with a different plaintiff or plaintiffs. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 209 (Kos. 2001).

When the plaintiff and other defendant and the third-party defendant seek dismissal with prejudice and a defendant/third-party plaintiff opposes and when the third-party claim is solely for indemnification, the defendant/third party plaintiff would have no liability on which to base an indemnification claim if the case were dismissed with prejudice. Dismissal of the entire action is then appropriate. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 209 (Kos. 2001).

While Rule 42(a)(2) expressly provides protection against the dismissal of counterclaims, no such protection is provided for cross-claims, or for third-party claims. The pendency of the third-party claim for indemnification is thus not a bar to dismissal. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 209

(Kos. 2001).

A breach of contract and warranty claim that all defendants had warranted that the construction project would be a reasonably safe workplace will be dismissed when the contract does not contain such a warranty, and no other evidence supports the allegation that such an express warranty was made. Amayo v. MJ Co., 10 FSM Intrm. 244, 249 (Pon. 2001).

A stipulated dismissal signed by the counsel who represented all the parties who had appeared in the case until then operates as a voluntary dismissal of the case without the need for further action. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275 (Chk. 2001).

Entry of a stipulated dismissal under Rule 41(a)(1)(ii) is effective automatically and does not require judicial approval. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275 (Chk. 2001).

When a defendant is granted summary judgment on the complaint against him, that defendant's cross-claim for contribution and indemnification from another defendant in the event that he is found liable on the complaint will be dismissed since he has no basis to seek indemnification or contribution because the summary judgment order dismissed the complaint against him. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001).

When the plaintiffs have never qualified for the public office for which they seek compensation, their case will be dismissed. Songeni v. Fanapanges Municipality, 10 FSM Intrm. 308, 309 (Chk. S. Ct. Tr. 2001).

A case that appears to rest on the assertion that the Land Commission gave title to the land in question to a clan will be dismissed when the Determination of Ownership names a person as the sole owner of the land. Enengeitaw Clan v. Shirai, 10 FSM Intrm. 309, 311 (Chk. S. Ct. Tr. 2001).

A motion to dismiss will be denied when the parties' later stipulation to entry of partial judgment made moot any contention that the defendants' subsequent payments entitled them to a dismissal of the bank's claim to foreclose and sell the vessels, and when the pleadings and the mortgage terms on their face entitle the bank to such a remedy if its factual allegations are taken as true, as they must be on a motion to dismiss or for judgment on the pleadings. Bank of the FSM v. Pacific Foods & Servs., Inc., 10 FSM Intrm. 327, 331 (Pon. 2001).

When on the day set for trial the defendants were not present to proceed on their counterclaim, the counterclaim is dismissed. People of Satawal ex rel. Ramoloilug v. Mina Maru No. 3, 10 FSM Intrm. 337, 338 (Yap 2001).

In *in personam* actions, there is no authority to proceed against unknown persons in the absence of a statute or rule, and the FSM has no rule or statute permitting the use of fictitious names to designate defendants. Accordingly, John Doe defendants will be dismissed. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412 n.1 (Pon. 2001).

Dismissal of John Doe defendants does not prohibit the plaintiff from seeking to amend its complaint if it does ascertain other parties should be named defendants. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412 n.1 (Pon. 2001).

When a court has both subject matter and personal jurisdiction over a case, a motion to dismiss on jurisdictional grounds will be denied. First Hawaiian Bank v. Engichy, 10 FSM Intrm. 536, 538 (Chk. S. Ct. Tr. 2002).

Settlement negotiations are not adequate grounds for dismissal of a matter. Generally when parties do settle a matter, they jointly request the court for dismissal. Talley v. Talley, 10 FSM Intrm. 570, 573 (Kos. S. Ct. Tr. 2002).

A defense of failure to state a claim upon which relief can be granted to be made in a pleading, or in a motion for judgment on the pleadings, or at the trial on the merits. There is no requirement that such a defense only be raised, if at all, in a motion to dismiss filed prior to filing a responsive pleading. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 17, 23 (Pon. 2002).

A court evaluates a Rule 12(b)(6) motion to dismiss only on whether a plaintiff's claim has been adequately stated in the complaint, and does not resolve the facts or merits of the case. A court's review is limited to the complaint's contents and the court must assume the facts alleged therein are true and view them in the light most favorable to the plaintiff. Dismissal can only be granted if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 17, 24 (Pon. 2002).

When state law clearly provides that no action shall be brought against the state for any actions or omissions of the Chuuk Coconut Authority and that the Authority's debts or obligations shall not be debts or obligations of the Legislature or state government, and neither will be responsible for the same, the state and the governor will be dismissed as defendants from a suit against the Authority because as a matter of law no action lies against the state and no liability attaches. Konman v. Adobad, 11 FSM Intrm. 34, 35 (Chk. S. Ct. Tr. 2002).

A Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted must be made before the defendant files its answer to the complaint and when a defendant did not file such a motion until almost seven months after it filed its answer, the motion must be denied on that ground. William v. Director of Public Works, 11 FSM Intrm. 45, 46-47 (Chk. S. Ct. Tr. 2002).

When it appears that triable issues of fact would still exist that would compel denial of the motion even if the court were to convert the motion from one to dismiss for failure to state a claim to one for summary judgment because matter outside the pleadings was included, the court will instead exercise its discretion to set the case for trial at the earliest opportunity. William v. Director of Public Works, 11 FSM Intrm. 45, 47 (Chk. S. Ct. Tr. 2002).

The separation of powers doctrine precludes the Chuuk State Supreme Court from exercising jurisdiction over the claims that the plaintiff should be speaker of a municipal legislature and will dismiss the action. Anopad v. Eko, 11 FSM Intrm. 287, 290 (Chk. S. Ct. Tr. 2002).

After a default judgment has been entered, a motion to dismiss cannot be granted unless the motion to set aside the default is successful. Konman v. Esa, 11 FSM Intrm. 291, 294 n.2 (Chk. S. Ct. Tr. 2002).

By not granting a defendant's motion to dismiss on the grounds that plaintiffs lacked standing, the court does not somehow imply that it, at that stage of the proceedings, has made any findings of ownership or right to possession of the property in question. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

A plaintiffs' attorney's failure to properly plead their claims is not a sufficient justification to prevent the plaintiffs from being able to bring their claims at all because a complaint should not be dismissed and a party precluded from relief when a plaintiff's lawyer has misconceived the proper legal theory of the claim. If the complaint shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

When the plaintiff failed to file any papers to advise the court of the defendant's failure to complete his performance as ordered and when the plaintiff also failed to request a delay of the dismissal, to accommodate the additional time needed to obtain permits, the court properly assumed that the land filling had been completed as agreed to by the parties and as ordered by the court, and the court's dismissal of the case was proper and in accordance with its earlier order. James v. Lelu Town, 11 FSM Intrm. 337, 339 (Kos. S. Ct. Tr. 2003).

A statute of limitations defense is not one of the enumerated defenses that may be brought by motion under Rule 12(b), but rather is one of the specific defenses named in Rule 8(c) where a party must set forth affirmatively in the answer, the statute of limitations and any other matter constituting an avoidance or affirmative defense. Segal v. National Fisheries Corp., 11 FSM Intrm. 340, 342 (Kos. 2003).

Once a party's death has been suggested on the record under Civil Procedure Rule 25(a)(1), the ninety-day deadline for making a motion for substitution of that deceased party starts running, and when the ninety days has passed and no motion for substitution or for enlargement of time has been filed, that party will be dismissed. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

When a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed and can be dismissed without prejudice, but because a dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, courts will often quash service instead of dismissing the action. That way only the service need be repeated. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

When a defendant has received sufficient notice of all causes of action and had a fair and adequate opportunity to defend, and when the plaintiff later properly served defendant with a copy of the summons and complaint, the court will not dismiss the case under Rule 12(b)(5). Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

On a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, the court must accept plaintiff's allegations to be true. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

A complaint will not be dismissed for failure to state a claim upon which relief may be granted when, if the plaintiff is able to prove his allegations that his termination was wrongful and violated the FSM Constitution since he had no opportunity for a hearing and was not provided sufficient notice of his rights at the time of the termination, the plaintiff would be able to establish a violation of his rights secured under the FSM Constitution. Reg v. Falan, 11 FSM Intrm. 393, 400 (Yap 2003).

If an indispensable party cannot be made a party, the court must determine whether in equity and good conscience the action should proceed among the parties before it or whether it must be dismissed. The factors the court must consider include: 1) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; 2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; 3) whether a judgment rendered in the person's absence will be adequate; and 4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 403, 404-05 (Chk. 2003).

A trespass case will be dismissed for failure to join the land's co-owners as indispensable parties plaintiff because any judgment in a rendered in the co-owners' absence will be prejudicial to the defendant since any of the other co-owners could sue for the same trespass, thus subjecting the defendant to multiple judgments for the same acts; because even a judgment in the defendant's favor would not prevent another co-owner from suing for the same acts; because there are no protective provisions that could be included in a judgment that would lessen the prejudice; and because the plaintiff has an adequate remedy since the dismissal is without prejudice – he may refile the case with the co-owners included. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 403, 405 (Chk. 2003).

A cross-claim that sets out a legal conclusion and that does not provide a short and plain statement of the facts on which the legal conclusion rests, lacks sufficient factual allegations and a motion to dismiss it will be granted. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 449 (Pon. 2003).

Each of the familiar elements of a cause of action for negligence – duty, breach of duty, proximate cause, and damages – should be alleged, and a negligence counterclaim that does not is deficient and a motion to dismiss it will be granted. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 449 (Pon.

2003).

When the plaintiff does not have standing to pursue an action for a preliminary injunction, the court lacks subject matter jurisdiction over the action and the case will be dismissed. Eighth Kosrae Legislature v. FSM Dev. Bank, 11 FSM Intrm. 491, 501 (Kos. 2003).

When a judgment was entered in a plaintiff's favor and against a defendant prior to the defendant's death, dismissal of the matter is not appropriate as the claim has not been extinguished. The unsatisfied portion of the judgment still exists. Bank of the FSM v. Rodriguez, 11 FSM Intrm. 542, 544 (Pon. 2003).

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), the court must presume the non-moving party's allegations to be true, and view inferences drawn from the allegations in a light most favorable to the non-moving party. Dismissal may only be granted if it appears to a certainty that no relief could be granted under any facts which could be proven in support of the complaint. Rubin v. Fefan Election Comm'n, 11 FSM Intrm. 573, 577-78 (Chk. S. Ct. Tr. 2003).

If it appears that the court lacks jurisdiction over the complaint's subject matter, it shall dismiss the action. Rubin v. Fefan Election Comm'n, 11 FSM Intrm. 573, 578 (Chk. S. Ct. Tr. 2003).

A motion to dismiss for lack of subject matter jurisdiction is properly brought pursuant to Rule 12(b)(1), or as a motion to dismiss pursuant to Rule 12(h)(3), which can be raised at any time. Rubin v. Fefan Election Comm'n, 11 FSM Intrm. 573, 578 n.3 (Chk. S. Ct. Tr. 2003).

A motion to dismiss for lack of jurisdiction will be denied when the plaintiffs' complaint alleges claims that arise under national law and the national constitution because the FSM Supreme Court exercises jurisdiction over such cases, and, although state courts may also exercise jurisdiction over such cases, the plaintiffs have a constitutional right to bring such cases in the FSM Supreme Court if they so desire. Naoro v. Walter, 11 FSM Intrm. 619, 621 (Chk. 2003).

A motion to dismiss for failure to state a claim will be denied when it is more in the nature of an affirmative defense that requires that certain facts be proven and certain rulings of law made before it can be effective. A motion to dismiss for failure to state a claim must be based solely on the plaintiffs' allegations in their complaint. Naoro v. Walter, 11 FSM Intrm. 619, 621 (Chk. 2003).

A Rule 41(a)(1) dismissal signed by all parties who appeared in the original action is ineffective when as a result of a consolidation order, other parties had appeared in the action. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 628 (App. 2003).

A dismissal with prejudice constitutes a judgment on the merits. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 628 (App. 2003).

Absent an order dismissing it, a defendant is still a party despite its deletion from the case caption. Jackson v. Pacific Pattern, Inc., 12 FSM Intrm. 18, 19 (Pon. 2003).

A case against one defendant will not be dismissed because that defendant will be a witness in the case since a party to a civil action is expected to be a witness in his own case. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 27 (Chk. 2003).

An action against a promissory note's cosigner is one for which a court can grant relief. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

That a promissory note's co-signer did not receive the loan proceeds, but the other signers did and they spent it, is not a defense to an action on the note or a ground for dismissal of the case against the co-signer. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

Defendant co-signer's allegation that he did not sign the promissory note is not a ground for dismissal but a disputed fact which must be proven at trial. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

When a defendant's motion to dismiss has been denied, he has 10 days within which to file his answer to the amended complaint. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

If a plaintiff fraudulently conceals allegedly defective construction methods, the six-year limitations period does not begin to run until the date on which the defendant discovered or had a reasonable opportunity to discover the alleged defect. It is not appropriate for the court, at the juncture of a motion to dismiss, to rule on an essentially factual matter. The trial's purpose will be to determine whether the construction methods that are alleged were, in fact, utilized; whether those methods were improper; and if they were, at what point the defendant knew or should have known of them. Youngstrom v. NIH Corp., 12 FSM Intrm. 75, 77-78 (Pon. 2003).

A denial of a motion to dismiss for lack of jurisdiction is without prejudice to Social Security's right to raise the statute of limitations defense by motion pursuant to FSM Civil Rule 12(c). Andrew v. FSM Social Sec. Admin., 12 FSM Intrm. 78, 81 (Kos. 2003).

When reviewing arguments that a plaintiff has failed to state a claim upon which relief can be granted, the standard is onerous: a claim will not be dismissed on this ground unless it can be said, to a certainty, that no relief can be granted under any facts that could be proven by the plaintiff in support of its claims. Furthermore, the court must assume that the facts alleged in the complaint are true, and it must view the facts and inferences drawn from the complaint in the light most favorable to the party opposing the motion to dismiss. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 91 & n.2 (Pon. 2003).

When in an equal protection claim, the record contains a document in which the defendant agency expressly referred to the claimants' race, the defendants have not met their burden under the applicable standard of review for dismissal for failure to state a claim because the question is not whether the plaintiff has proven its claim, but whether under any set of facts it could do so. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 91 (Pon. 2003).

When the plaintiff received notice of the hearing and had an opportunity to present its arguments to the agency, when, although the agency would have done well to explain its reasons for rejecting plaintiff's arguments, it was not legally required to do so, and when the record shows that a hearing was held, a rehearing was held, the parties were allowed to have their attorneys present, the parties were given the opportunity to file written briefs and did so, and the agency thereafter issued a 13-page written decision, the plaintiff's claim that its due process rights were violated will be dismissed for failure to state a claim, as will a civil rights claim inextricably tied to the due process claim. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 91-92 (Pon. 2003).

When there is a factual dispute on the plaintiff's unjust enrichment claim, and when it cannot be said with certainty that no relief can be granted if the facts alleged by the plaintiff are proven, the claim cannot be dismissed. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 92 (Pon. 2003).

When the plaintiff alleges facts regarding a defendant having familial ties that gave him either inside information or favorable treatment in the proceeding below that dissolved the plaintiff's public land assignment, under the relevant standard of review, the tortious interference with contract claim cannot be dismissed at this point. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 92 (Pon. 2003).

When the plaintiff's complaint seems to plead fraud, and a defendant moves to dismiss for failure to state a claim but the argument is that this claim should be dismissed because it was not plead with particularity, the court may treat that as a request for a more definite statement, grant the request, and require the plaintiff to amend its complaint to state with greater clarity which facts it believes constitute fraud. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 92 (Pon. 2003).

Causes of action are dismissed when no relief could be granted on the allegations pled even if those allegations were proven. AHPW, Inc. v. FSM, 12 FSM Intrm. 164, 168 (Pon. 2003).

Rule 12(h)(3) provides that whenever it appears by the parties' suggestion or otherwise that the court lacks jurisdiction of the subject matter, the court must dismiss the action. Hartman v. Chuuk, 12 FSM Intrm. 388, 399 (Chk. S. Ct. Tr. 2004).

A dismissal must be with prejudice when a plaintiff cannot under any theory state a claim for which relief can be granted. Hartman v. Chuuk, 12 FSM Intrm. 388, 399 (Chk. S. Ct. Tr. 2004).

Whenever it appears by the parties' suggestion or otherwise that the court lacks subject matter jurisdiction, the court must dismiss the action. Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 414 (Chk. 2004).

When all parties to an action are foreign citizens, diversity jurisdiction is not present, and if no other basis for FSM Supreme Court jurisdiction is apparent, the case will be dismissed without prejudice. Geoffrey Hughes (Export) Pty, Ltd. v. America Ducksan Co., 12 FSM Intrm. 413, 415 (Chk. 2004).

Even if the court permitted the inclusion of Doe defendants, in order to replace a Doe defendant with a named party, the plaintiffs would still have to move, under Civil Procedure Rule 15, to amend the pleadings to replace the Doe defendant with a named defendant, and that to do so, all the Rule 15's specifications must be met, and since even in the absence of John Doe defendants, the plaintiffs can still move to amend their pleadings should the plaintiffs identify through discovery other persons who may be liable on the plaintiffs' claims in a case, the court will dismiss without prejudice the Doe defendants when no reference was made to them in the complaint's body. People of Weloy ex rel. Pong v. M/V Micronesian Heritage, 12 FSM Intrm. 506, 508 (Yap 2004).

The "statute of limitations" is an affirmative defense which must be raised in either the answer or in a motion to dismiss. A plaintiff's failure to timely oppose a defendant's motion to dismiss is deemed a consent to the motion. However, even without opposition, the court still needs good grounds before it can grant the motion. Skilling v. Kosrae State Land Comm'n, 13 FSM Intrm. 16, 19 (Kos. S. Ct. Tr. 2004).

When a determination of ownership by the Land Commission is subject to appeal to the Court within 120 days from the date of receipt of notice of the determination and when it is alleged that the plaintiff never received notice of the determination of ownership, accepting the alleged facts as true, then the appeal time limit of 120 days never began to run. Skilling v. Kosrae State Land Comm'n, 13 FSM Intrm. 16, 19 (Kos. S. Ct. Tr. 2004).

Claims against the Land Commission for violation of statute and violation of due process are subject to a limitations period of six years. When claims against the Land Commission based upon Land Commission actions which took place in 1984 and before occurred more than six years ago, they are barred by the statute of limitations and should be dismissed. Skilling v. Kosrae State Land Comm'n, 13 FSM Intrm. 16, 19 (Kos. S. Ct. Tr. 2004).

The statute of limitations is an affirmative defense which must be raised in either the answer or in a motion to dismiss. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 80 (Kos. S. Ct. Tr. 2004).

When the plaintiff did not file any timely opposition to the defendant's motion to dismiss, the plaintiff's failure to file a memorandum in opposition to the motion to dismiss is deemed a consent to the motion. However, even without opposition, the court still needs good grounds before it can grant the motion. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 80 (Kos. S. Ct. Tr. 2004).

When the allegations made in the complaint are for causes of action that accrued more than seven years ago, and when claims against the Kosrae State Land Commission for violation of statute and violation of due process are subject to a limitations period of six years, the claims based upon Land Commission actions

which took place in 1997 are therefore barred by the statute of limitations and defendants Kosrae State Land Commission and Kosrae state government will be dismissed from the action. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 81 (Kos. S. Ct. Tr. 2004).

The doctrine of claim preclusion (a form of res judicata) does not bar a later action when the court order denying the plaintiff's intervention (in part) in an earlier action shows that intervention was denied because the intervenor had no interest in the subject matter of the litigation, and a motion to dismiss on that ground or on the grounds that that the court lacks subject matter jurisdiction because the earlier court already had the case, or that the plaintiff is barred by his alleged "unclean hands" because he omitted mention of the earlier action allegedly to circumvent the other court's jurisdiction are therefore without merit. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 126 (Chk. 2005).

A plaintiff's tort claim will not be dismissed as duplicative of his civil rights claim without the benefit of trial because it would be premature to dismiss either claim since the plaintiff has yet to prove the necessary elements of one or both of his two distinct claims and because at this juncture the contention that the tort and civil rights claims are duplicative is without merit. Warren v. Pohnpei State Dep't of Public Safety, 13 FSM Intrm. 154, 156 (Pon. 2005).

A plaintiff's state law claims will not be dismissed because he is seeking a large amount of damages. The amount of damages sought does not determine whether a claim is to be dismissed. Warren v. Pohnpei State Dep't of Public Safety, 13 FSM Intrm. 154, 156 (Pon. 2005).

– Filings

Telecommunication facsimiles are an unacceptable means of filing with the FSM Supreme Court. In re Marquez, 5 FSM Intrm. 381, 383 n.1 (Pon. 1992).

Fax transmissions cannot be received for filing. Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

Trial courts have considerable discretion in ruling on motions for extension of filing deadlines. A court which has already extended a filing deadline does not abuse its discretion by refusing to grant successive extensions. McGillivray v. Bank of the FSM (II), 6 FSM Intrm. 486, 488 (Pon. 1994).

Permission for parties to file documents by fax transmission may be given for special cause and shall only apply to the case until otherwise ordered. O'Sullivan v. Panuelo, 9 FSM Intrm. 229, 232 (Pon. 1999).

When, although a copy has been faxed to the court, a motion has never been filed and when no application for filing by facsimile pursuant to Civil Procedure Rule 5(e) has been made, the motion is not before the court. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 606 (Chk. 2000).

Filing and service of pre-trial briefs by the court ordered deadline are mandatory and not optional. Violation of court orders with respect to the filing of pre-trial briefs, or any other required action, may result in sanctions against that party. All requests for an enlargement of time to file pre-trial briefs must be made in writing. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 193 (Kos. S. Ct. Tr. 2001).

The phrase "et al." or such other similar indication is not permitted in the caption of a complaint although it may be used on later filings. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

Until a default is entered by the court clerk, a party still may appear in the action and the clerk must accept for filing defendant's pleadings or motions, even if filed outside the times prescribed by the rules. Once a defendant's pleadings or motions are filed, it is too late for the entry of default, and the defendant is entitled to proceed with its defense. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 260 (Pon. 2001).

Filing by fax is permitted only by order of a justice for special cause given. The rule allowing fax filing

for special cause is not an excuse to wait for the filing deadline and then fax the papers to the court. Waiting to the last minute because it can then be faxed does not constitute "special cause." In re Engichy, 11 FSM Intrm. 450, 451 (Chk. 2003).

The court may, without notice upon a party's request for cause shown, order an enlargement of time to file if the request is made before the expiration of the period previously ordered by the court. The higher standard of "special cause given" is required for fax filing. In re Engichy, 11 FSM Intrm. 450, 451 (Chk. 2003).

When an act is required or allowed to be done at or within a specific time, the court for cause shown may at any time in its discretion upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect. The court will find excusable neglect and deny a motion to strike papers filed out of time when the filer did not seek a further enlargement, but had a motion for enlargement pending, as far as he knew, until January 3, 2003, and he promptly filed his papers as soon as he was able on January 6, 2003, and when two enlargements of time had been requested because of catastrophic damage done to the filer's office by a super-typhoon and the court would have granted another limited enlargement had it been requested. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 143-44 (Pon. 2003).

When a deadline is approaching, motions may customarily be accompanied by a motion to file by fax. Ramp v. Ramp, 12 FSM Intrm. 228, 230 (Pon. 2003).

When citing to sources not available in FSM libraries, counsel are expected to provide copies to the court and opposing counsel. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 468 n.1 (Pon. 2004).

General Court Order 1990-1 does not apply to filing by facsimile transmission in civil cases because the (later promulgated) applicable portion of Civil Procedure Rule 5(e) has superseded it. It may retain some vitality in criminal cases since the criminal rules do not contain a provision concerning fax filing. However, Civil Rule 5(e)'s pertinent part is identical to section 2 of General Court Order 1990-1. Goya v. Ramp, 13 FSM Intrm. 100, 105 & n.3 (App. 2005).

In absence of an order of a justice, given for special cause, the clerk of court will not accept for filing any document transmitted to the clerk through a telecommunication facsimile. Goya v. Ramp, 13 FSM Intrm. 100, 105 (App. 2005).

Neither General Court Order 1990-1 nor Civil Rule 5(e) delineates the method(s) whereby an order to file by fax can be obtained or by which a request to file by fax is to be made. Neither expressly prohibit a request to file by fax from being made by fax. Goya v. Ramp, 13 FSM Intrm. 100, 105 (App. 2005).

A faxed "motion" to file by fax remains an unfiled request for an order to file by fax unless and until a justice grants the request and orders the "motion" and accompanying papers filed. Goya v. Ramp, 13 FSM Intrm. 100, 106 (App. 2005).

Since "special cause" is a higher standard than mere "cause shown," but a different standard than "good cause shown," the implication is that "special cause" will usually arise from either short, or very short, court-ordered deadlines, or as the result of an unforeseen, unexpected, or unanticipated event or circumstance. Applying by fax for an order to file by fax would seem the only sensible method when the "special cause" shown is an unforeseen, unexpected, or unanticipated circumstance or event. Goya v. Ramp, 13 FSM Intrm. 100, 106 (App. 2005).

– Frivolous Actions

Although it is ultimately proved that plaintiff has no solid claim or theory against a defendant, plaintiff's action against that defendant is not vexatious or frivolous where 1) plaintiff reasonably believed at the outset of litigation that defendant might be liable, 2) a considerable amount of discovery was required to establish that defendant was not liable, 3) plaintiff did not stubbornly insist on defendant's liability in the face of defendant's motion for summary judgment, and 4) other defendants would presumably have named defendant

in the case in any event, so that defendant would have incurred substantial attorney's fees regardless of plaintiff's actions. Semens v. Continental Air Lines, Inc. (II), 2 FSM Intrm. 200, 209 (Pon. 1986).

The court strongly disapproves of as frivolous and a waste of the court's resources the same plaintiff, represented by the same counsel, in an action involving the same land, repeatedly asserting previously denied theories. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 180 (Pon. 1995).

A litigant pleading non-frivolous along with frivolous claims cannot expect to avoid all sanctions under Rule 11 merely because the pleading or motion under scrutiny was not entirely frivolous. In re Sanction of Berman, 7 FSM Intrm. 654, 657 (App. 1996).

– Injunctions

FSM Civil Rule 65 providing for issuance of temporary restraining orders and preliminary injunctions pending final decisions by the court, is drawn from rule 65 of the United States Federal Rules of Civil Procedure, so decisions of the United States courts under that rule are a legitimate source of guidance as to the meaning of FSM Civil Rule 65. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 275 (Pon. 1986).

A prerequisite for the granting of injunctive relief is that the party seeking protection must be faced with the threat of irreparable harm before conclusion of the litigation unless the injunction is granted, and if money damages or other relief upon conclusion of the litigation will fully compensate for the threatened interim action, then the preliminary injunction should be denied. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 276 (Pon. 1986).

In considering motions for temporary restraining order or for preliminary injunction, courts weigh the possibility of irreparable injury to the plaintiff, the balance of possible injuries between the parties, the movant's possibility of success on the merits, and the impact of any requested action upon the public interest. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 276-77 (Pon. 1986).

The fact that the party moving for preliminary injunction relief does not appear more likely than not to succeed on the merits is a factor weighing against granting of such relief but it is only one of four factors and is not necessarily determinative when the other factors point toward such relief. Ponape Transfer & Storage v. Pohnpei State Public Lands Auth., 2 FSM Intrm. 272, 278 (Pon. 1986).

The trial court is required to exercise broad discretion and weigh carefully the interests of both sides in order to arrive at a fair and equitable result. Ponape Transfer & Storage v. Federated Shipping Co., 3 FSM Intrm. 174, 177 (Pon. 1987).

Courts generally consider the likelihood of success on the merits of the party seeking injunctive relief, the possibility of irreparable injury as well as the balance of possible injuries or inconvenience to the parties which would flow from granting or denying the relief, and any impact upon the public interest. Ponape Transfer & Storage v. Federated Shipping Co., 3 FSM Intrm. 174, 177 (Pon. 1987).

It is not appropriate to abstain from deciding a claim for injunctive relief where it is undisputed that the court has jurisdiction and where the interests of time can be of pressing importance. Gimnang v. Yap, 4 FSM Intrm. 212, 214 (Yap 1990).

Earthmoving regulations themselves represent a governmental determination as to the public interest, and the clear violation of such regulations may therefore be enjoined without a separate court assessment of the public interest and balancing of hardships between the parties. Damarlane v. Pohnpei Transp. Auth., 4 FSM Intrm. 347, 349 (Pon. 1990).

The right to appeal an interlocutory order which affects an injunction is an exception to the general rule that permits appeals only from final decisions. The exception reflects the importance of prompt action when

injunctions are involved since the threat of irreparable harm is a prerequisite to injunctive relief. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 332, 334 (App. 1992).

To obtain a temporary restraining order there must be a clear showing that immediate and irreparable injury or loss or damage would occur otherwise. An injury is not irreparable if there is an adequate alternative remedy. Kony v. Mori, 6 FSM Intrm. 28, 29 (Chk. 1993).

A court may modify an injunction to preserve the status quo during the pendency of an appeal. Ponape Enterprises Co. v. Luzama, 6 FSM Intrm. 274, 276-77 (Pon. 1993).

In exercising its broad discretion in considering whether to grant a preliminary injunction the court looks to four factors: 1) the likelihood of success on the merits of the party seeking injunctive relief, 2) the possibility of irreparable injury to the moving party, 3) the balance of possible injuries or inconvenience to the parties which would flow from granting or denying the relief, and 4) any impact on the public interest. The object of a preliminary injunction is to preserve the status quo pending the litigation on the merits. Ponape Enterprises Co. v. Bergen, 6 FSM Intrm. 286, 288 (Pon. 1993).

A court may grant a preliminary injunction even if the moving party is not more likely than not to prevail, as long as the movant's position appears sufficiently sound to raise serious, nonfrivolous issues. Ponape Enterprises Co. v. Bergen, 6 FSM Intrm. 286, 289 (Pon. 1993).

An injunction allowing defendants in a trespass action to remain on the land, harvest their crops, but preventing them from destroying any trees or expanding their cultivations or further entrenching their positions will prevent irreparable harm to the plaintiffs, balance the interests of the parties, and serve the public interest by preserving the status quo while the litigation is pending. Ponape Enterprises Co. v. Bergen, 6 FSM Intrm. 286, 289-90 (Pon. 1993).

Where there is little likelihood that of success on the merits, where economic loss does not represent irreparable harm, where the balance of interests weighs against the plaintiff, and where the public interest favors regulation of alcohol sales, no preliminary injunctive relief will be granted the plaintiff ordering the defendant state grant it an alcoholic beverage license which would not preserve the status quo pending the litigation. Simon v. Pohnpei, 6 FSM Intrm. 314, 316-18 (Pon. 1994).

Where a stipulated preliminary injunction is void because of the judge's disqualification and because of the stipulated dismissal of the court case in which it was issued, factual questions must be resolved before deciding whether it is enforceable as an independent contract. Etscheit v. Adams, 6 FSM Intrm. 365, 391-92 (Pon. 1994).

Whether the lower court erred by issuing a preliminary injunction that did not require the return of funds obtained in violation of a TRO involves a trial court's exercise of discretion and is reviewed using an abuse of discretion standard. Onopwi v. Aizawa, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

Injunctive relief is an equitable remedy for which a court must use a balance-of-hardship test with a flexible interplay among four factors – the likelihood of irreparable harm to the plaintiff without an injunction; likelihood of harm to the defendant with an injunction; plaintiff's likelihood of success on the merits; and the public interest. Striking a fair balance between the two more important factors, the likelihood of harm to the competing sides, is largely a matter of the facts of each situation and is thus a matter peculiarly for the discretion of the trial judge. Onopwi v. Aizawa, 6 FSM Intrm. 537, 539 (Chk. S. Ct. App. 1994).

In requesting a Temporary Restraining Order a plaintiff has to show that his damage will be irreparable, that is, that it cannot be remedied in any way except by the rather drastic measure of a restraining order. Wiliander v. Siales, 7 FSM Intrm. 77, 80 (Chk. 1995).

Where the election law provides for remedies that have not yet been used a candidate cannot show irreparable harm necessary for the issuance of a temporary restraining order. Wiliander v. Siales, 7 FSM

Intrm. 77, 80 (Chk. 1995).

A court must weigh three factors other than irreparable harm when considering injunctive relief. Those are: the relative harm to the plaintiff and to the defendant, the public interest, and the likelihood of success by the plaintiff in the underlying case. Where none of those factors weigh so strongly in the plaintiff's favor to overcome the lack of irreparable harm injunctive relief will not be granted. Wiliander v. Siales, 7 FSM Intrm. 77, 80 (Chk. 1995).

Preliminary injunctions are granted or denied based on a court's consideration of four factors: a) the possibility of irreparable harm to the plaintiff, b) the balance of possible injuries to the parties, c) the movant's possibility of success on the merits, and d) the impact of any requested action upon the public interest. In arriving at a fair and equitable result a court exercises broad discretion and weighs carefully the interests of both sides. Wakuk v. Kosrae Island Credit Union, 7 FSM Intrm. 195, 196-97 (Kos. S. Ct. Tr. 1995).

Where plaintiff's poverty is disputed thus not showing irreparable injury to him for failure to redeem his shares, where the balance of harms favors the credit union, where the plaintiff's likelihood of prevailing on the merits is likely but uncertain without knowing the contents of the credit union's by-laws, and where the public interest favors a sound credit union there will be no injunctive relief ordering the credit union to redeem plaintiff's shares. Wakuk v. Kosrae Island Credit Union, 7 FSM Intrm. 195, 197-98 (Kos. S. Ct. Tr. 1995).

When a final judgment has been entered on the merits, a preliminary injunction comes to an end and is superseded by the final order. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997).

Chuuk State Supreme Court Rule of Civil Procedure 65(c) requires security for the issuance of a temporary restraining order. Island Cable TV-Chuuk v. Aizawa, 8 FSM Intrm. 104, 105 (Chk. 1997).

A temporary restraining order may only be granted without notice if there is a showing that notice should not be required and of any attempts to give notice to the opponent. Island Cable TV-Chuuk v. Aizawa, 8 FSM Intrm. 104, 107 (Chk. 1997).

When there is an Appellate Rule 4(a)(1)(B) appeal from the grant of an injunction the trial court loses its power to vacate the order when the notices of appeal are filed. However, as with Rule 59(e) and 60(b) motions, the trial court may consider and deny the motion, or, if it were inclined to grant the motion, so indicate on the record so as to allow the movant an opportunity to request a remand from the appellate division so that it could proceed to grant the motion. Stinnett v. Weno, 8 FSM Intrm. 142, 145 & n.2 (Chk. 1997).

Pursuant to FSM Appellate Rule 4(a)(1)(B) the FSM Supreme Court appellate division has jurisdiction to hear an appeal from an interlocutory order granting a permanent injunction. Stinnett v. Weno, 8 FSM Intrm. 142, 145 n.2 (Chk. 1997).

Rule 62(c) giving the trial court the authority to "suspend, modify, restore, or grant an injunction during the pendency of the appeal" does not give any authority to vacate an order granting an injunction that has been appealed. It only allows a trial court in its discretion to issue such orders as are necessary to preserve the status quo while the appeal is pending. Jurisdiction has otherwise passed to the appellate court. Stinnett v. Weno, 8 FSM Intrm. 142, 145 (Chk. 1997).

In considering whether to grant a motion for preliminary injunction, a court looks to four factors: 1) the possibility of irreparable injury to the plaintiff; 2) the balance of possible injuries between the parties; 3) the movant's likelihood of success on the merits; and 4) the impact of any requested action upon the public interest. Carlos Etscheit Soap Co. v. Epina, 8 FSM Intrm. 155, 161 (Pon. 1997).

In order for injunctive relief to be granted, the party seeking protection must be faced with the threat of irreparable harm before the conclusion of the litigation unless the injunction is granted. If money damages or other relief will fully compensate for any threatened interim harm, the preliminary injunction should be denied. Carlos Etscheit Soap Co. v. Epina, 8 FSM Intrm. 155, 161 (Pon. 1997).

A threat of irreparable injury exists when threats of physical violence and assertion of control over land deprives plaintiffs of access to their land in a way that money damages or other relief cannot completely compensate for. Carlos Etscheit Soap Co. v. Epina, 8 FSM Intrm. 155, 162 (Pon. 1997).

In evaluating the balance of possible injuries factor, a court compares the threatened harm to each party if the requested injunctive relief is granted or if it is denied. Carlos Etscheit Soap Co. v. Epina, 8 FSM Intrm. 155, 162 (Pon. 1997).

Injunctive relief will be granted when three of the four factors to be considered favor granting the preliminary injunction, particularly when the plaintiffs have demonstrated a substantial likelihood of success at trial. Carlos Etscheit Soap Co. v. Epina, 8 FSM Intrm. 155, 164 (Pon. 1997).

In order for the appellate division to hear an appeal in the absence of a final judgment there must be some other source of jurisdiction, such as FSM Appellate Rule 4(a)(1)(B) which allows appeals from FSM Supreme Court trial division interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions. Iriarte v. Etscheit, 8 FSM Intrm. 231, 235 (App. 1998).

As a general rule in an interlocutory appeal of an injunction an appellate court concerns itself only with the order from which the appeal is taken, and reviews other issues only if they are inextricably bound up with the injunction. Thus an appellate court has jurisdiction to review a summary judgment on the merits when the appellants are subject to a permanent injunction which is inextricably bound up with the underlying summary judgment. Iriarte v. Etscheit, 8 FSM Intrm. 231, 235 (App. 1998).

A non-party is entitled to permanent injunctive relief against the issuance of a writ of execution when its due process rights are violated because no adequate remedy at law exists when the non-party has no right to appeal, cannot move for the judge's disqualification, or a stay of the writ pending appeal, and a motion to intervene as a party was never acted upon, and because the injury is irreparable in that if the writ is enforced, there is no assurance that the financial loss could be recovered. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 305-06 (Chk. 1998).

The mere fact that a statute is alleged to be invalid will not entitle a party to have its enforcement enjoined. Further circumstances must appear which bring the case under some recognized head of equity jurisdiction and present some actual or threatened and irreparable injury to complainant's rights for which there is no adequate legal remedy. Esechu v. Mariano, 8 FSM Intrm. 555, 556 (Chk. S. Ct. Tr. 1998).

When issues of fact must be decided in the proper forum before the validity of a municipal ordinance can be determined and other cases are pending that will decide those issues, plaintiffs have an adequate remedy at law. Therefore, when it does not clearly appear from specific facts alleged that immediate and irreparable injury will result to plaintiffs before the defendants can be heard in opposition, a request for a temporary restraining order will be denied and the defendants must be served with a copy of the complaint forthwith so that a hearing on the plaintiffs' preliminary injunction request can be held. Esechu v. Mariano, 8 FSM Intrm. 555, 556-57 (Chk. S. Ct. Tr. 1998).

A court may not grant a plaintiff's request for injunctive or other equitable relief when there has been no showing of irreparable harm or that there is no adequate remedy at law and when the court has taken judicial knowledge of the use to which the government has put the land and the public detriment that would result from an injunction prohibiting such use. Hartman v. Chuuk, 8 FSM Intrm. 580, 581 (Chk. S. Ct. Tr. 1998).

In order for the court to issue a temporary restraining order, the party seeking the order must show that he will suffer irreparable injury, and that the only remedy is the somewhat drastic one of a restraining order. Irreparable injury is that for which there is no adequate alternative remedy. Palik v. Henry, 9 FSM Intrm. 267, 269 (Kos. S. Ct. Tr. 1999).

An injury which tends to destroy an estate, such as the construction of a concrete house on disputed

land, will be treated as an irreparable injury justifying the issuance of a temporary restraining order. Palik v. Henry, 9 FSM Intrm. 267, 269 (Kos. S. Ct. Tr. 1999).

Rule 65(b) of the Kosrae Rules of Civil Procedure contemplates that a verified complaint will be filed along with a motion for temporary restraining order and preliminary injunction. In the usual situation, the filing of a complaint along with the motion puts the party against whom injunctive relief is sought on notice as to the nature of the moving party's claim against him, but when injunctive relief is sought in a case with a long prior litigation history, it would not seem strictly necessary that a formal claim be filed in the action in order to put the other party on notice as to the nature of the claim. Palik v. Henry, 9 FSM Intrm. 267, 269 (Kos. S. Ct. Tr. 1999).

All violations of the FSM Regulations under which the FSM Registrar of Corporations may appoint trustees in dissolution for winding up an association's affairs are enjoinable. In re Kolonia Consumers Coop. Ass'n, 9 FSM Intrm. 297, 300 (Pon. 2000).

A court considers four criteria in determining whether to grant a preliminary injunction: 1) the likelihood of success on the merits of the party seeking injunctive relief; 2) the possibility of irreparable injury; 3) the balance of possible injuries or inconvenience to the parties which would result from granting or denying relief; and 4) any impact on the public interest. Preserving the status quo pending litigation on the merits is the purpose of a preliminary injunction. Palik v. Henry, 9 FSM Intrm. 309, 312 (Kos. S. Ct. Tr. 2000).

As to the likelihood of success on the merits, a court may grant a preliminary injunction so long as the movant's position raises serious, nonfrivolous issues. Palik v. Henry, 9 FSM Intrm. 309, 312 (Kos. S. Ct. Tr. 2000).

When a $7,000 loan had been taken out to build a house on now disputed land, the construction is complete except for the roof, and the repayment of the loan plus interest is underway, the balance of injury criterion weighs determinatively in the home builder's favor and the temporary restraining order enjoining further construction will be dissolved. Palik v. Henry, 9 FSM Intrm. 309, 312 (Kos. S. Ct. Tr. 2000).

Under Yap law, proceedings for judicial review of an agency decision may be instituted by filing a petition in a court of competent jurisdiction within thirty days after the issuance of the decision to be reviewed. The agency may grant, or the court may order, a stay of the administrative agency's final decision on appropriate terms. International Bridge Corp. v. Yap, 9 FSM Intrm. 362, 365 (Yap 2000).

When the court has scheduled oral argument for judicial review of an agency decision, when the state is facing time constraints, and when the aggrieved party, although it has presented a fair question for determination on the record, has not demonstrated to the court's satisfaction that it is so likely to prevail, the court will exercise its discretion not to enter a stay or a TRO. International Bridge Corp. v. Yap, 9 FSM Intrm. 362, 366 (Yap 2000).

Four factors are considered to determine if an injunction is proper: the relative harm to the defendant and to the plaintiff, the likelihood of success on the merits, the public interest and (often stated first) the threat of irreparable harm to the plaintiff. Udot Municipality v. FSM, 9 FSM Intrm. 418, 420 (Chk. 2000).

A preliminary injunction will issue when it is difficult to say that the defendants are harmed by requiring them to withhold action on the unconstitutional application of a public law, when it appears likely that the plaintiff will succeed on the merits at trial, when the public has a great interest that the national government adhere to divisions of political power set forth in the Constitution, and when the plaintiff has shown irreparable harm. Udot Municipality v. FSM, 9 FSM Intrm. 418, 420 (Chk. 2000).

Irreparable harm for the purpose of issuing an injunction may be found when, although there is no immediate or certain loss to the plaintiff if a preliminary injunction is denied, if an injunction is not issued all the remaining funds may be obligated without any limitation. So the irreparable harm is that the plaintiff does not have the opportunity of possibly obtaining any of the unobligated funds. Thus, when the other three factors

clearly tend towards the issuance of the injunction and to deny the preliminary injunction would be to tell the plaintiff that it must apply and get any appropriations that it can by following unconstitutional steps, the preliminary injunction will issue. Udot Municipality v. FSM, 9 FSM Intrm. 418, 420 (Chk. 2000).

A municipality and its election commissioner will be restrained from enforcing added qualifications for municipal office when a short time remains to file as a candidate and the harm is irreparable to those potential candidates who are denied nominating petitions because they do not meet the unlawful added qualifications, when there is no harm to the municipality or the election commissioner if they are required to allow the candidacies, and when the public interest is served if eligible citizens are able to present themselves for election. Chipen v. Election Comm'r of Losap, 10 FSM Intrm. 15, 18 (Chk. 2001).

When the court stated in its order granting a preliminary injunction that it would consider at the time of trial all of the admissible evidence which was presented at the preliminary injunction hearing, the court thereby made that evidence part of the record. It is thus also appropriate to consider this uncontroverted evidence to decide summary judgment motions. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183 n.3 (Pon. 2001).

Until such time as the plaintiff demonstrates the allegedly defamatory nature of the publications at issue, either by way of trial or proper motion accompanied by admissible supporting evidence, a permanent injunction cannot lawfully issue against the publication of speech that the defendants contend is true and which involves matters of public concern. O'Sullivan v. Panuelo, 10 FSM Intrm. 257, 262 (Pon. 2001).

A modification of a permanent injunction pending appeal may be conditioned upon the posting of an appeal bond. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 296, 298 (Pon. 2001).

Specific powers are given to each branch of the government and a public law that abridges the executive's power to execute and implement national laws may be enjoined. Udot Municipality v. FSM, 10 FSM Intrm. 354, 357 (Chk. 2001).

National government sovereign immunity is waived for claims for injunction arising out of alleged improper administration of FSM statutory laws, or any regulations issued pursuant to such statutory laws. Udot Municipality v. FSM, 10 FSM Intrm. 354, 359 (Chk. 2001).

Because Congress has the statutory authority to name allottees other than the President or his designee, the court will deny a request for an order prohibiting defendants from ever again being allottees of FSM money. Udot Municipality v. FSM, 10 FSM Intrm. 354, 359 (Chk. 2001).

Courts rarely grant mandatory injunctions because courts are ill-equipped to involve themselves in day-to-day administration and because of the difficulty of enforcing such injunctions. Courts generally enter prohibitory injunctions – an injunction forbidding some act. Udot Municipality v. FSM, 10 FSM Intrm. 354, 360 (Chk. 2001).

When a party has standing, a court may order an accounting of public funds because the financial management act requires that public funds be properly accounted. Udot Municipality v. FSM, 10 FSM Intrm. 354, 361 (Chk. 2001).

In reviewing a motion for preliminary injunction, the court weighs four factors: 1) the possibility of irreparable injury to the plaintiff; 2) the balance of possible injuries between the parties; 3) the movant's likelihood of success on the merits; and 4) the impact of any requested action upon the public interest. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 416 (Pon. 2001).

The loss of goodwill, loss of customers and potential customers, lost sales, and similar harms, are not readily compensable by money damages, and thus are precisely the type of harm a preliminary injunction is intended to prevent because economic damages based on such harms are extremely difficult to calculate. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 417 (Pon. 2001).

When it is not clear whether the plaintiff can demonstrate the type of illegal "combination" contemplated by 32 F.S.M.C. 302, and there is no relevant case law found in the FSM which interprets the anti-competitive practices law and when the court does not have before it any evidence of the parties' relative market shares, it is difficult to evaluate the likelihood of success of plaintiff's claims under 32 F.S.M.C. 301 *et seq*. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 417 (Pon. 2001).

Where the issue is whether the defendant's actions were a good faith effort to protect a legally cognizable interest under FSM law, when it had no standing to enforce this particular law, and where the defendant not only does not have a legally cognizable interest under FSM law, but also its actions were not in good faith, the plaintiff's likelihood of success in this case weighs in favor of granting the preliminary injunction. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 418-19 (Pon. 2001).

When the defendant has no valid counterclaim for unfair competition under a common law theory, and the plaintiff is likely to prevail in at least some of its claims, the balance of harms favors the plaintiff. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 419 (Pon. 2001).

The public interest weighs in favor of granting a preliminary injunction when the harm to the public that the defendant alleges remains fully protectable by consumers who may be confused, or by the Attorney General and when the public interest is best served by maintaining competition in the corned beef market pending the litigation's outcome. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 419 (Pon. 2001).

Even though a discovery order may compel a party to perform certain actions, such an order is not injunctive in nature because it does not grant or withhold substantive relief. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001).

Every temporary restraining order expires by its terms within such time after entry, not to exceed 14 days, as the court fixes, unless within the time fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. Alafanso v. Suda, 10 FSM Intrm. 553, 556 (Chk. S. Ct. Tr. 2002).

When a TRO was issued June 29, 2001 and was apparently extended by stipulation only until a hearing to be held on July 23, 2001, even if the TRO had been extended for a like period of the original 14 days, it could not have been in effect after July 27, 2001. Alafanso v. Suda, 10 FSM Intrm. 553, 556 (Chk. S. Ct. Tr. 2002).

A motion for a preliminary injunction may be denied without prejudice when it fails to contain the movant's certification that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming. Ambros & Co. v. Board of Trustees, 10 FSM Intrm. 639, 645 (Pon. 2001).

The object of a preliminary injunction is to preserve the status quo pending the litigation on the merits. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113 (Kos. S. Ct. Tr. 2002).

The long established standard for issuance of a preliminary injunction is that the court must consider four criteria in determining whether to grant a preliminary injunction: 1) the likelihood of success on the merits of the party seeking injunctive relief; 2) the possibility of irreparable injury; 3) the balance of possible injuries or inconveniences to the parties which would result from granting or denying relief; and 4) impact on the public interest. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113 (Kos. S. Ct. Tr. 2002).

The issuance of a preliminary injunction is largely a matter of the facts of each situation and thus a matter for the trial judge's discretion. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113 (Kos. S. Ct. Tr. 2002).

Injunctive relief will be granted when three of the four, or four of the four, factors to be considered favor

the granting of the preliminary injunction. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113, 115 (Kos. S. Ct. Tr. 2002).

As to the likelihood of success on the merits, a court may grant a preliminary injunction so long as the movant's position raises serious, nonfrivolous issues. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113 (Kos. S. Ct. Tr. 2002).

For the court to issue a preliminary injunction, the party seeking protection must be faced with the threat of irreparable harm before the conclusion of the litigation unless it is granted. There must be a clear showing that immediate and irreparable injury or loss or damages would otherwise occur, and there must be no adequate alternative remedy. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 113-14 (Kos. S. Ct. Tr. 2002).

When the Legislative Counsels' continued services to the Legislature will not interfere with the executive's duties to faithfully execute the laws, and no fiscal issues are involved because their salaries are already appropriated, the balance of possible injuries favors issuance of the preliminary injunction, as does the strong public interest in the continued functioning of the Legislative branch with legal counsel, particularly during their session. Seventh Kosrae State Legislature v. Sigrah, 11 FSM Intrm. 110, 114-15 (Kos. S. Ct. Tr. 2002).

A party may apply for a preliminary injunction, but no preliminary injunction will issue except upon the giving of security by the applicant, in such sum, if any, as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262g (Pon. 2002).

In determining whether to issue a preliminary injunction, a reviewing court considers: 1) the possibility of irreparable injury to the moving party; 2) the balance of possible injuries between the parties; 3) the movant's likelihood of success on the merits; and 4) any impact on the public interest. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262g-62h (Pon. 2002).

Constant and excessive noise caused by refrigerator fans operating on and off for 24 hours a day, although extremely difficult to quantify, can constitute irreparable injury. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262h (Pon. 2002).

Although a party has shown that he is suffering a continuing irreparable injury due to the operation of refrigeration machines, the court must consider the harm that the issuance of an injunction would cause to the other party before it can issue an injunction. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262h (Pon. 2002).

When the party seeking an injunction has made out a prima facie case for nuisance against the other, the likelihood of success on the merits factor weighs in favor of the issuance of an injunction. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262i (Pon. 2002).

When, upon weighing all of the factors, a court finds that it would be appropriate to issue an injunction, but during testimony, a party suggested what might be an acceptable solution, the court, before issuing an injunction, may give the parties an opportunity to work together to find a solution acceptable to both. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262i (Pon. 2002).

In reviewing a motion for preliminary injunction, the court weighs four factors: 1) the possibility of irreparable injury to the plaintiff; 2) the balance of possible injuries between the parties; 3) the movant's likelihood of success on the merits; and 4) the impact of any requested action upon the public interest. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 613 (Pon. 2003).

A court may issue a preliminary injunction when certain portions of commercial speech are misleading to consumers and merchants. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 615 (Pon. 2003).

Irreparable injury may include the loss of goodwill, loss of customers and potential customers, lost sales, and similar harms because they are not readily compensable by money damages, and thus are precisely the type of harm a preliminary injunction is intended to prevent since economic damages based on such harms are extremely difficult to calculate. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 616 (Pon. 2003).

An entity is not irreparably injured by an injunction which prohibits it from accusing another of unsubstantiated illegal conduct, and threatening unspecified legal action against those who purchase goods from the other. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 617 (Pon. 2003).

When the court has before it no evidence that the plaintiff acted unlawfully or that the defendants' actions were justified, the likelihood-of-success factor weighs in favor of granting a preliminary injunction. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 618 (Pon. 2003).

The public interest weighs in favor of issuing a preliminary injunction when the injunction is limited in scope to protect the public from defendants' statements which are more likely to mislead than to inform the public. Yang v. Western Sales Trading Co., 11 FSM Intrm. 607, 618 (Pon. 2003).

When the trial court ordered an injunction to prevent further dissipation of existing appropriated funds because it found that 1) the broad language in the appropriations contained little guidance as to what specific projects were to be funded; 2) there were no fair and transparent procedures to apply for such funds; 3) an unlawful implementation procedure was being used; and 4) that there was a lack of oversight and compliance with the Financial Management Act and related regulations, the trial court acted entirely within its discretion. There was no abuse of discretion in issuing the injunction enjoining the allottees from obligating funds and the FSM from disbursing funds until such time as new procedures were put in place. FSM v. Udot Municipality, 12 FSM Intrm. 29, 52-53 (App. 2003).

The elements for a court to consider in determining a request for injunctive relief include: 1) the possibility of irreparable injury to the moving party; 2) the balance of possible injuries between the parties; 3) the movant's likelihood of success on the merits; and 4) any impact on the public interest. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 124, 127 (Pon. 2003).

A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if 1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and 2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 124, 127 (Pon. 2003).

The first requirement for the issuance of a temporary restraining order is that it clearly appear from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition. This requirement has not been met when it is not clear that immediate and irreparable injury will result to the applicant by virtue of the agency's hearing proceeding as scheduled because even if the agency ruled against him at the hearing, he has a number of options at his disposal in regards to any agency decision. The possibility that the agency might issue an adverse decision does not constitute the immediate and irreparable injury to the applicant required for the issuance of a restraining order. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 124, 127 (Pon. 2003).

Another requirement for a temporary restraining order's issuance is that the applicant's attorney certify to the court the efforts, if any, which have been made to give notice or the reasons supporting the claim that notice should not be required. Thus, when, in reviewing the applicant's attorney's affidavit, the court does not see that any efforts were made to notify the other parties to the lawsuit about the filing of the restraining order motion or any reasons why notice should not be required, the temporary restraining order motion will be denied since the Rule 65(b) requirements were not met. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 124, 127-28 (Pon. 2003).

The Kosrae Director of Education will be temporarily restrained from administering an FSM National Standard Test for Teachers for profiling purposes because there is no legal requirement for a teacher to take the test (although it is desirable to get as many teachers as possible to take it), when the Kosrae teachers will be irreparably harmed because of the teachers' mistaken belief and understanding that the test's completion is now required by law or regulation that successful completion of the test will result in that teacher's certification and because of the potential discipline to, and potential loss of salary by, any teacher who fails to take the exam. Mackwelung v. Robert, 12 FSM Intrm. 161, 162-63 (Kos. S. Ct. Tr. 2003).

When a person has entered the plaintiff's parcel on at least two occasions and harvested crops in violation of the court's decision that the plaintiff is the fee simple owner of the parcel, an injunction will issue against that person and the defendants which prohibits further trespass and taking of crops from the parcel, and the defendants will be given a reasonable time to remove a local hut that they have constructed on parcel. Edwin v. Heirs of Mongkeya, 12 FSM Intrm. 220, 222 (Kos. S. Ct. Tr. 2003).

Failure to comply with an order in aid of judgment and an injunction can be grounds for a contempt proceeding. Edwin v. Heirs of Mongkeya, 12 FSM Intrm. 220, 222 (Kos. S. Ct. Tr. 2003).

In exercising its broad discretion in considering a motion for a preliminary injunction, the court looks to four factors: 1) the possibility of the irreparable injury to the movant; 2) the balance of the possible injury as between the parties; 3) the movant's possibility of ultimate success on the merits; and 4) the impact upon the public interest. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 246 (Chk. 2003).

Significant irreparable injury and loss to the movant may be found when its tower would be tampered with or removed and the cellular telephone system shut down and when the plaintiffs do not appear to have the financial resources to adequately compensate it if the tower were removed and if such removal were later determined to be improper or unlawful. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 247 (Chk. 2003).

The balance of injuries weigh in the movant's favor when it stands to lose its significant investments in the cellular telecommunications tower's construction and the start-up of its cellular telephone system in Chuuk should the tower be tampered with or removed, and when the plaintiffs, should they prevail on the merits, are in a position to recover the land and have it restored to the condition it was in before the tower was built there and they were not making any particular use of the land before the tower was put there. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 247 (Chk. 2003).

With regard to the movant's possibility of success on the merits, its actions to construct a cellular telecommunications tower only after undertaking a survey and a search of land commission records on the property where the tower is now located, and after obtaining an easement, demonstrates that it acted prudently before proceeding with the tower's construction. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 247 (Chk. 2003).

The potential for significant impact on the public interest exists when the cellular telephone system is already in use in Chuuk and is providing service to persons who previously had none and in places where telephone service was previously not possible and when the telephone services' expansion through the cellular system affects the Chuuk public's health, safety and welfare and economy in a positive manner. Having the system discontinued or severely restricted is not in the public interest. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 247 (Chk. 2003).

A preliminary injunction will issue when all of the four factors to be considered in a motion for a preliminary injunction favor its issuance, and the plaintiffs and any other person or entity acting on their behalf, will be prohibited from interfering in or attempting to interfere with the operation of the Sapuk cellular telecommunications tower constructed on a disputed lot. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 247 (Chk. 2003).

A plaintiff, who failed to prove monetary damages, is still entitled to a permanent injunction, against the

Governor, the Director of Personnel, the Director of Budget, and any designee acting on their behalf or in their stead, permanently enjoining them from interfering in any way or manner with plaintiff's lawful exercise of all of the duties, obligations and responsibilities of his office. Tomy v. Walter, 12 FSM Intrm. 266, 273 (Chk. S. Ct. Tr. 2003).

The Kosrae State Court must consider four criteria in determining whether to grant injunctive relief: 1) the likelihood of success on the merits of the party seeking injunctive relief; 2) the possibility of irreparable injury to the plaintiff; 3) the balance of possible injuries or inconvenience to the parties which would result from granting or denying injunctive relief; and 4) the impact upon the public interest. Sigrah v. Kosrae, 12 FSM Intrm. 513, 518 (Kos. S. Ct. Tr. 2004).

Preserving the status quo pending litigation on the merits is the purpose of injunctive relief. In arriving at a fair and equitable result this Court carefully weighs the interests of both sides and exercises broad discretion. Sigrah v. Kosrae, 12 FSM Intrm. 513, 518 (Kos. S. Ct. Tr. 2004).

As to the likelihood of success on the merits, a court may grant injunctive relief so long as the movant's position raises serious, non-frivolous issues. A court may grant injunctive relief even if the moving party is not more likely than not to prevail, so long as the plaintiffs' position appears sufficiently sound to raise serious non-frivolous issues. Sigrah v. Kosrae, 12 FSM Intrm. 513, 518 (Kos. S. Ct. Tr. 2004).

Since the state's statutory authority to acquire interests in land through court action has never been utilized to forcibly purchase an interest in private land for a public purpose, the court cannot conclude that the state is likely to prevail on the merits of its claim due to a complete absence of court decisions applying or interpreting this authority. Sigrah v. Kosrae, 12 FSM Intrm. 513, 519 (Kos. S. Ct. Tr. 2004).

An injury which tends to destroy an estate will be treated as an irreparable injury justifying the issuance of a temporary retraining order. Clearing, bulldozing and grading land, damage and destruction of crops are injuries which tend to destroy an estate, and are accepted as irreparable injuries. Sigrah v. Kosrae, 12 FSM Intrm. 513, 520 (Kos. S. Ct. Tr. 2004).

When the plaintiffs claim serious and irreparable damage to their land and crops from the state due to its trespass, clearing, grading and quarrying related activities on the site and the state has failed to demonstrate why a delay of a few more weeks in producing gravel would result in irreparable harm to the state, the balance weighs in favor of granting relief for the plaintiffs. Sigrah v. Kosrae, 12 FSM Intrm. 513, 520 (Kos. S. Ct. Tr. 2004).

When, because of the special importance that land has in Kosraean society, the state has substantial interests in assuring that land issues are settled fairly, it is the public interest that the state deal fairly with issues involving land and to respect rights of owners of private land and comply with state laws in acquiring an interest in private land, and it is not in the public interest for the state to commit torts such as trespass, negligence, property or crop damage, or to engage in acts that will subject the state to liability; and when it is also in the public interest to assure that materials such as gravel are available for road maintenance and construction projects as this assists continued employment in the construction trade and provides benefits the people of Kosrae, the public interest weighs in favor of the state protecting rights of owners of private land, assuring compliance with state laws and avoiding liability through its actions and thus the public interest weighs in favor of granting relief for the plaintiffs. Sigrah v. Kosrae, 12 FSM Intrm. 513, 520-21 (Kos. S. Ct. Tr. 2004).

Rule 65(b) requires that the plaintiff show by affidavit or verified complaint that immediate and irreparable injury, loss or damage will result. When the plaintiffs' complaint is signed by both plaintiffs, but is not notarized, the complaint is not verified and does not meet Rule 65(b)'s requirements; when the plaintiffs' affidavit does not allege the details of immediate and irreparable injury, loss, or damage; and when the plaintiffs' application is defective as it does not contain any memorandum of points and authorities, the plaintiffs have not provided legal authority for granting of injunctive relief. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 74 (Kos. S. Ct. Tr. 2004).

A court must consider four criteria in determining whether to grant a preliminary injunction: 1) likelihood of success on the merits of the party seeking injunctive relief; 2) the possibility of irreparable injury; 3) the balance of possible injuries or inconvenience to the parties which would result from granting or denying relief; and 4) any impact upon the public interest. Injunctive relief will be granted when three of the four, or four of the four factors favor granting of the preliminary injunction. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 75 (Kos. S. Ct. Tr. 2004).

As to the likelihood of success on the merits, a court may grant a preliminary injunction so long as the movant's position raises serious, nonfrivolous issues. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 75 (Kos. S. Ct. Tr. 2004).

When the plaintiffs' predecessor in interest no longer held title to the parcel in April 2002, when he wrote his will, he could not transfer any interest in the parcel, by will or otherwise, to the plaintiffs or to anyone else and therefore the plaintiffs do not have likelihood of success on the merits. This factor weighs strongly in the defendants' favor. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 75-76 (Kos. S. Ct. Tr. 2004).

The granting of injunctive relief requires the possibility of irreparable injury. Permanent damage to property is irreparable injury. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 76 (Kos. S. Ct. Tr. 2004).

When the plaintiffs do not allege a specific irreparable injury and when they seek injunctive relief to stop the defendant's interference and potential disconnection of electricity from the subject parcel, but they fail to show how these actions will result in irreparable injury, the disconnection of electricity, without more, does not constitute irreparable injury and the possibility of irreparable injury weighs in the defendant's favor. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 76 (Kos. S. Ct. Tr. 2004).

When it would be inconvenient to plaintiffs to live without electricity or to be required to move from the parcel, as demanded by the defendant and when it would also be inconvenient to defendant, who holds prima facie title to the parcel, to be prohibited from acting as the true owner of the property, this factor is weighted equally between the plaintiffs and the defendant. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 76 (Kos. S. Ct. Tr. 2004).

Since the public interest supports the acceptance of prima facie evidence of property ownership through the certificate of title, to which the court must attach a presumption of correctness, and supports the validity and integrity of the Kosrae land registration process and registration of title documents and documents that transfer an interest in land, the public interest weighs in the titleholder's favor. Benjamin v. Youngstrom, 13 FSM Intrm. 72, 76 (Kos. S. Ct. Tr. 2004).

– Interpleader

One purpose of the rule regarding interpleader is to protect stakeholders from being forced to determine the validity of competing claims against a fund. When a stakeholder has no interest in the fund, the purpose of the interpleader rule is to force competing claimants to contest a controversy between them without involving the stakeholder in litigation and subjecting the stakeholder to multiple liability. Bank of Hawaii v. Helgenberger, 9 FSM Intrm. 260, 263 (Pon. 1999).

When the stakeholder can demonstrate that it is disinterested, it is appropriate for the court to dismiss the stakeholder from the action following the deposit of the funds at issue or the posting of a bond. Bank of Hawaii v. Helgenberger, 9 FSM Intrm. 260, 263 (Pon. 1999).

The purpose of the interpleader rule is to force competing claimants to contest a dispute between them without involving the stakeholder in litigation and subjecting the stakeholder to potential multiple liability. Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 164 (Chk. 2005).

Interpleader is a two-step process. During the first stage, the court must make a determination whether the party invoking the remedy of interpleader has met its burden to establish its right to interplead the

defendants. If it has, the court will order the sums deposited in the court's registry and, upon deposit, will then discharge the plaintiff. The action then proceeds to its second stage. This usually consists of enjoining the parties from prosecuting any other proceeding related to the same subject matter, and then proceeding to determine the remaining parties' respective rights to the money. Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 164-65 (Chk. 2005).

When all parties acknowledge in their pleadings that the plaintiff bank is subject to competing claims for the rental payments for the land because both of two different defendants claim to own the land on which the bank sits and thus to be the rightful recipient for any rental payments for the land's use, the plaintiff has established that it legitimately fears that it will be subject to competing claims for the same rental payments and is potentially subject to double or conflicting liabilities. It has thus established its right to the interpleader remedy. Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 165 (Chk. 2005).

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 165 (Chk. 2005).

When it is undisputed that only one defendant paid for the improvements to the property, and it is also undisputed that only she pays for the property's maintenance and upkeep and for insurance on it; and when it is undisputed that the other defendant made no improvements to the land, the plaintiff's motion for interpleader remedy will be granted with the condition that only the portion of the rent attributable to the land, and not the portion attributable to her improvements, should be deposited in the court's registry. Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 165 (Chk. 2005).

– Interrogatories

Any party may serve upon any other party written interrogatories to be answered by the party served. There is no requirement that two parties be directly adverse in order for one to seek discovery against another. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. Many legal conclusions require the application of law to fact and are appropriate under Rule 33. The only type of interrogatory that is objectionable, without more, as a legal conclusion, is one that extends to legal issues unrelated to the facts of the case. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 288 (Pon. 1998).

A question, taken literally, that calls for information on any kerosene related incident involving damage to property or injury to persons occurring anywhere in the world throughout the existence of three corporate defendants is on its face, a request so broad that it clearly exceeds the scope of permissible discovery. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 478 (Pon. 1998).

It is incumbent upon a party propounding interrogatories not to pose questions calling for information outside the scope of permissible discovery. An attorney's responsibility in this regard is controlled by FSM Civil Rule 26(g). Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 478 (Pon. 1998).

Absent the requisite showing of exceptional circumstances, FSM Civil Rule 26 does not permit a party to obtain any information specific to an adversary's nontestifying experts through interrogatories. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 483 (Pon. 1998).

Subject to limitations found elsewhere in the rules, Rule 33 defines the scope of information a party is required to provide when answering interrogatories as such information as is available to the party. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 324-25 (Pon. 2000).

Rule 33 provides an answering party with the alternative option of making records available if the burden of gathering the information would be substantially the same for either party. Pohnpei v. M/V Miyo Maru No.

11, 9 FSM Intrm. 316, 325 (Pon. 2000).

If a party satisfies its duty to make a reasonable search and diligent inquiry for discoverable information contained in an interrogatory and comes up empty, it is entirely satisfactory to respond by stating that the information is unknown. When this is done, however, the responding party should further indicate whether the information is believed to exist but has not yet been located or that the information cannot be provided because the responding party does not believe it to exist. If the latter response is provided, the responding party should further indicate whether the information was ever believed to exist and if so, where, when and in what form. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 326 (Pon. 2000).

It is also appropriate for a party answering "unknown" to an interrogatory to specify that discovery and investigation continues, and that the party will provide updated answers as soon as the information is located or in compliance with Rule 26(e)(2). Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 326 (Pon. 2000).

Whether a party is directed by a court order to answer an interrogatory or not, it is never acceptable not to provide a response unless a motion for protective order is timely filed under Rule 26. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 326 (Pon. 2000).

Any party may serve upon any other party written interrogatories to be answered by the party served. Depositions may be taken of any person but interrogatories are limited to parties. AHPW, Inc. v. FSM, 10 FSM Intrm. 420, 426 (Pon. 2001).

Each interrogatory is to be answered separately and fully in writing under oath, and when they are not answered under oath, they may be stricken and ordered filed and served in compliance with the rules. Talley v. Talley, 10 FSM Intrm. 570, 572 (Kos. S. Ct. Tr. 2002).

A party may be ordered to answer an interrogatory he failed to answer. Talley v. Talley, 10 FSM Intrm. 570, 572 (Kos. S. Ct. Tr. 2002).

When none of the arguments put forward in opposition to a motion to compel discovery establish that there was any legitimate justification for the opposition to the plaintiffs' motion to compel or the failure to timely respond to the interrogatories, the defendant should pay the plaintiffs the reasonable expenses incurred in obtaining the order compelling interrogatory responses. Primo v. Semes, 11 FSM Intrm. 603, 606 (Pon. 2003).

– Intervention

Rules 19(a) and 24(a) of the FSM Rules of Civil Procedure refer to similar "interests." Decisions under Rule 19(a) provide additional understanding of the meaning of "interest" in Rule 24(a). Wainit v. Truk (I), 2 FSM Intrm. 81, 84 (Truk 1985).

The interest of the speaker of a state legislature in upholding validity of laws enacted by that legislature, and in obtaining funds for the legislature pursuant to the tax legislation challenged in litigation, is not the kind of interest which will support a right to intervene in the litigation pursuant to FSM Civil Rule 24(a) in order to enforce the legislation through cross-claims and counterclaims. Wainit v. Truk (I), 2 FSM Intrm. 81, 85 (Truk 1985).

Under FSM Civil Rule 24(b), the interest needed for permissive intervention is not as great as that needed under FSM Civil Rule 24(a). Wainit v. Truk (I), 2 FSM Intrm. 81, 85 (Truk 1985).

Where the speaker of a legislature seeks to intervene in order to deny the plaintiff's claim that legislation enacted by the legislature is invalid, his proposed denial, with the complaint, presents a single or common question of law within the meaning of FSM Civil Rule 24(b), and the intervention may be permitted so long it will not cause undue delay, or prejudice adjudication of the rights of the original parties. Wainit v. Truk (I), 2 FSM Intrm. 81, 85 (Truk 1985).

Where one seeking to intervene under FSM Civil Rule 24(b) would not raise new and difficult issues through a proposed answer but would do so through proposed cross-claims and counterclaims, the court may properly limit the participation of the intervenor to defense against the plaintiff's claims. Wainit v. Truk (I), 2 FSM Intrm. 81, 86 (Truk 1985).

Where a party on appeal challenges the intervention in the appeal of another party, and the issue on the merits is decided in favor of the challenging party, no harm is visited on the challenging party by allowing the intervention, and the court is not required to rule on the propriety of that intervention. Innocenti v. Wainit, 2 FSM Intrm. 173, 180 (App. 1986).

An intervenor must make a three part showing to qualify for intervention as a matter of right: an interest, impairment of that interest, and inadequacy of representation by existing parties. A tax lien holder and a judgment creditor with an unsatisfied writ of execution may intervene as a matter of right where an assignee is compromising a debtor's accounts receivable. California Pac. Assocs. v. Alexander, 7 FSM Intrm. 198, 200 (Pon. 1995).

The purposes of intervention are to protect the interests of those who may be affected by the judgment and to avoid delay, circuitry of action, and similar, repetitive lawsuits. Langu v. Kosrae, 8 FSM Intrm. 455, 457 (Kos. S. Ct. Tr. 1998).

The procedure for intervention is usually specified by statute or by court rules. In the Kosrae State Court, a motion to intervene must be served upon the parties and the grounds for the motion stated. When no such motion has been made, the procedural requirements for intervention are not satisfied, and intervention should not be permitted. Langu v. Kosrae, 8 FSM Intrm. 455, 458 (Kos. S. Ct. Tr. 1998).

Both intervention of right and permissive intervention must be upon timely application. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 88 (App. 1999).

Timeliness must be determined from all the circumstances of the case. There are four factors to consider when determining whether a motion to intervene is timely: 1) how long the applicant knew or should have known of his interest before making the motion; 2) the prejudice to existing parties resulting from any delay; 3) the prejudice to the applicant if the motion is denied; and 4) any unusual circumstances militating for or against a finding of timeliness. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 88 (App. 1999).

An application to intervene is untimely when the would-be intervenors knew or should have known of their interest against the potential defendant, the prejudice to the potential defendant was that it could be liable for a large sum for a claim for which it would not otherwise be liable because the statute of limitations had run, the prejudice to the would-be intervenors was that they would receive no more compensation than the $105,311.27 they had already received in a settlement, and the unusual circumstances militating against a finding of timeliness was that the would-be intervenors were the original plaintiffs in the lawsuit and had filed their case and had notice of the potential defendant well before the statute of limitations had run. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 88 (App. 1999).

An intervenor must make a three part showing to qualify for intervention as a matter of right under Rule 24(a): an interest, an impairment of that interest, and the inadequacy of representation by existing parties. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

Both intervention of right and permissive intervention must be upon timely application. An application when the litigation is still in its initial stages and no prejudice to the existing parties is apparent is timely. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

When the state claims an ownership interest in some or all of the marine space claimed by the two plaintiffs that filed the initial complaint and neither the existing plaintiffs, nor any defendant, can adequately represent the state's claimed interest, which would impair or impede the state's ability to protect its interest, and when the application is timely, the state is entitled to in intervene as a plaintiff in the case. Moses v.

Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

Generally, when a party is permitted to intervene in a pending case he joins the litigation as it stands and subject to the proceedings that have already occurred. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

Timeliness is not the sole prerequisite for intervention of right. There must be an existing litigation into which to intervene, because intervention may not be utilized to revive a moribund lawsuit. Intervention contemplates an existing lawsuit and cannot be permitted to breathe life into a non-existent suit. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275 (Chk. 2001).

Because stipulations of dismissal are effective when filed, once they are filed there is no action left in which to intervene and later motions to intervene are moot. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275-76 (Chk. 2001).

Even if the motion to intervene had been filed before the parties' stipulated dismissal was filed, the parties' stipulated dismissal would be effective without the movant's consent in the absence of a court-ordered stay. Moses v. Oyang Corp., 10 FSM Intrm. 273, 276 (Chk. 2001).

The mere filing of a motion to intervene will not give a person party status because persons seeking to intervene in a case cannot be considered parties until their motion to intervene has been granted. Motions to intervene are not granted automatically, nor does their filing constitute an automatic stay. Moses v. Oyang Corp., 10 FSM Intrm. 273, 276 (Chk. 2001).

Would-be intervenors, whose motions to intervene have not yet been granted, are not parties who have appeared in the action, and because stipulated dismissals are effective when filed, their motions to intervene will then be denied as moot. Moses v. Oyang Corp., 10 FSM Intrm. 273, 276 (Chk. 2001).

Although there are those rare cases where it may be proper to allow intervention even after judgment has been entered, a case that was voluntarily dismissed before any judgment was entered is not such a case because the parties stipulated to a dismissal, not to a judgment and no judgment was, or will be, entered. Moses v. Oyang Corp., 10 FSM Intrm. 273, 276 (Chk. 2001).

Both intervention of right and permissive intervention must be upon timely application. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 364 (Chk. 2003).

A motion to intervene must be accompanied by a pleading setting forth the claim. The motion can be denied solely on procedural grounds for failure to comply with the rule and supply a proposed pleading. Such a denial would be without prejudice. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 364 (Chk. 2003).

An intervenor must make a three part showing to qualify for intervention as a matter of right under Rule 24(a): a substantial interest, impairment of that interest, and inadequacy of representation by existing parties. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 364-65 (Chk. 2003).

When a bank's chattel mortgage purchase money liens are not enforceable against third parties who have had no notice of them and are therefore not enforceable against and do not have priority over an execution lien, even if the bank were permitted to intervene, it could not prevail. Since that is so, the bank does not have an interest in the litigation that would be impaired if it were not allowed to intervene and therefore does not satisfy the elements required to intervene of right. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 365-66 (Chk. 2003).

Permissive intervention may be granted when the applicant's claim or defense and the main action have a question of law or fact in common and if the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 366 (Chk. 2003).

Permissive intervention will be denied when the intervenor's claim has no questions of law or fact in common with the main action and its sole claim is that it disputes whether the judgment can be enforced against certain of the defendants' assets and when the court has already determined that the claim must fail. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 361, 366 (Chk. 2003).

There are rare cases when it may be proper to allow intervention even after judgment has been entered. Courts are reluctant to allow intervention after entry of judgment and require a strong showing by the applicant. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

The rule is that intervention may be allowed after a final judgment or decree if it is necessary to preserve some right which cannot otherwise be protected, but such intervention will not be permitted unless a strong showing is made. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

Both intervention of right and permissive intervention must be upon timely application, but a permissive intervention motion under Rule 24(b) filed after all rights to appeal have expired is never timely. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

In addition to timeliness, an intervenor must make a three part showing to qualify for intervention as a matter of right under Rule 24(a): an interest, an impairment of that interest, and the inadequacy of representation by existing parties. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

Generally, absent extraordinary and unusual circumstances, intervention by a party who did not participate in the litigation giving rise to the judgment should not be permitted. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

An attempt to intervene after final judgment is ordinarily looked upon with a jaundiced eye. The rationale underlying this general principle is the assumption that allowing intervention after judgment will either prejudice the rights of the existing parties to the litigation or substantially interfere with the court's orderly processes. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

Intervention after judgment has been entered carries with it inherent procedural disruption, and a high risk of prejudice to the original parties by undercutting litigation strategies planned without reference to the intervenor. It is well in such cases to deny intervention to an applicant who does not act promptly to protect his interest in the case, once he learns of it. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 518 (Chk. 2003).

When a would-be intervenor has no interest in the litigation's subject matter, but only claims an interest in the funds that were generated to pay the judgment, he has other remedies to recover the funds already paid. To allow him to intervene would substantially interfere with the court's orderly process by inserting new causes of action in to post-judgment consolidated cases, which include parties with no interest in any of his claims, and who would be prejudiced by having their collection efforts unnecessarily involved with a landowning dispute. This would create procedural disruption. The would-be intervenor's remedy is to assert whatever causes of action and claims, he deems appropriate, against such defendant(s), as he is advised, in a new action. His application to intervene must therefore be denied. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 519 (Chk. 2003).

It seems proper to permit an applicant's intervention for the limited purpose of protecting whatever interest he and his lineage may have in the undistributed funds on deposit with the court. As long as the funds remain on deposit, the present parties are not prejudiced. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 519 (Chk. 2003).

An applicant's motion to intervene will be denied with the exception of his and his lineage's claim to funds on deposit with the court. Intervention will be permitted for the limiting purpose of protecting his and his lineage's claim to those funds if he files and serves a pleading asserting only his claim to the funds deposited

with the court. Aggregate Sys., Inc. v. FSM Dev. Bank, 11 FSM Intrm. 514, 519 (Chk. 2003).

A motion to intervene must state the grounds therefor and be accompanied by a pleading setting forth the claim or defense for which intervention is sought. In re Engichy, 11 FSM Intrm. 555, 557 (Chk. 2003).

A denial of a motion to intervene can be solely on the ground that no proposed pleading accompanies the intervention motion, but such a denial would be without prejudice. The motion could be refiled with a proposed pleading attached. In re Engichy, 11 FSM Intrm. 555, 557 (Chk. 2003).

Although the formal requirements of Rule 24(c) state that a proposed pleading should accompany the attempt to intervene, when the papers filed give adequate notice to the parties of the claim and clearly state the ground for it, they have fulfilled the substance of Rule 24's requirements. Noncompliance with Rule 24(c)'s strict requirements does not bar consideration of the motion's merits. In re Engichy, 11 FSM Intrm. 555, 557 (Chk. 2003).

There are rare cases where it is proper to allow intervention even after judgment has been entered. Courts are reluctant to allow intervention after judgment and require a strong showing by the applicant. In re Engichy, 11 FSM Intrm. 555, 557 (Chk. 2003).

Intervention may be allowed after a final judgment or decree when it is necessary to preserve some right which cannot otherwise be protected. In re Engichy, 11 FSM Intrm. 555, 557 (Chk. 2003).

While the court has previously allowed intervention for the sole purpose of asserting a claim to funds on deposit with the court, when the court is not currently in possession of any funds and does not expect to be and when the entity from which the funds are claimed is no longer a party to the case, a motion to intervene to claim such funds will be denied. In re Engichy, 11 FSM Intrm. 555, 558 (Chk. 2003).

If a party is permitted to intervene in a pending case it joins the litigation as it stands and subject to the proceedings that have already occurred. In re Engichy, 11 FSM Intrm. 555, 558 (Chk. 2003).

When the court is not in possession of any funds to which a would-be intervenor might assert its claim and the would-be intervenor has no interest in the subject matter of the case, its remedy, if it wishes to resort to judicial proceedings, is to file a separate action against either whoever it believes may be liable to it on its claim. In re Engichy, 11 FSM Intrm. 555, 558 (Chk. 2003).

Although there is authority that it was the moving party's burden to insure compliance with the Rule 24(c) requirement that the attorney general be notified of challenges to a statute's constitutionality, the language of the rule provides that the court "shall notify" the attorney general, and the better course would have been for the court to insure that the FSM attorney general's office had received notice. However, the failure to notify the attorney general does not deprive the court of jurisdiction. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 8 (Chk. 2003).

When writs of garnishment that formally designated the FSM as a "garnishee/defendant" were entered before the notices of appeal, the FSM was already a party and its motion to intervene is therefore moot. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 8 (Chk. 2003).

The court cannot grant a motion to intervene after a notice of appeal has been filed, since it would have no jurisdiction to permit intervention once a notice of appeal has been filed. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 8 n.2 (Chk. 2003).

Certification by the court to the attorney general that the constitutionality of a statute has been drawn into question and subsequent intervention may occur at any stage of a proceeding. Thus, the FSM could intervene as a matter of right in any appeal of the matter. Estate of Mori v. Chuuk, 12 FSM Intrm. 3, 8-9 (Chk. 2003).

A motion to intervene must be accompanied by a pleading setting forth the claim or defense for which

intervention is sought. Absent such a pleading, the motion is improper, and must be denied. Hartman v. Chuuk, 12 FSM Intrm. 388, 402 (Chk. S. Ct. Tr. 2004).

Not only must proper procedures be followed in seeking intervention, any motion to intervene must also be timely. Timeliness must be decided on the facts presented, and depends on four factors: 1) how long the applicant knew or should have known of his interest before making the motion; 2) the prejudice to other parties should the motion be granted; 3) prejudice to the applicant if the motion is denied; and 4) any other factors militating for or against timeliness. Hartman v. Chuuk, 12 FSM Intrm. 388, 402 (Chk. S. Ct. Tr. 2004).

Intervention may be denied when the existing parties will suffer prejudice if intervention is permitted since the court's decision has disposed of all issues raised by all current parties to the litigation and having new issues presented six years after the first case was filed, would not serve the ends of justice and would interfere with the parties' rights to a final resolution of their dispute and when the would-be intervenors will not prejudiced at all since they may pursue their claims before the Land Commission. Hartman v. Chuuk, 12 FSM Intrm. 388, 402 (Chk. S. Ct. Tr. 2004).

– Joinder, Misjoinder, and Severance

An FSM Civil Procedure Rule 21 motion for misjoinder should not be granted where the claims against the joined parties arose out of the same occurrence and there are common questions of law and fact. Manahane v. FSM, 1 FSM Intrm. 161, 164 (Pon. 1982).

When more than two years had elapsed in pending litigation before filing of a motion for leave to file third party complaint under FSM Civil Rule 14(a), when a pre-trial order closing discovery had been filed and the existing parties had declared themselves ready for trial, when filing of the complaint would introduce new issues, when no reason for delay in filing the motion has been given, and when the opposing party reasonably objects on grounds that the delay will prejudice that party's rights, the motion to file a third party complaint should be denied. Salik v. U Corp. (II), 3 FSM Intrm. 408, 410 (Pon. 1988).

A motion for joinder under FSM Civil Rule 19 will be denied where it appears that complete relief between the existing parties could be granted without the joinder and where there is no showing that the party sought to be joined claims an interest relating to the subject of the action. Salik v. U Corp. (II), 3 FSM Intrm. 408, 410 (Pon. 1988).

A motion to add counterclaims and join new defendants will be denied where the new defendants and counterclaims are virtually identical to those in a separate pending action before the court and the moving party has failed to show that the relief sought by the opposing party is the same as that sought in an earlier decided case between the same parties. Nahnken of Nett v. United States (II), 6 FSM Intrm. 417, 421-22 (Pon. 1994).

In some cases failure to join an indispensable party may subject a judgment to collateral attack, but failure to join a necessary party will not. A necessary party is one who has an identifiable interest in the action and should normally be made a party to the lawsuit, but whose interests are separable from the rest of the parties or whose presence cannot be obtained; whereas an indispensable party is one to whom any judgment, if effective, would necessarily affect his interest, or would, if his interest is eliminated, constitute unreasonable, inequitable, or impractical relief. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 517 (Pon. 1994).

The burden of joining absent parties rests with the party asserting their indispensability. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 518 (Pon. 1994).

Any party may move to strike a third-party claim, or for its severance or separate trial. The decision whether to sever a third-party complaint is left to the sound discretion of the trial court. In determining whether to sever a third-party complaint, a court considers whether continued joinder of claims will unduly complicate or delay the primary action. International Trading Corp. v. Ikosia, 7 FSM Intrm. 17, 18 (Pon. 1995).

Where resolution of issues in a third-party complaint is unnecessary to the resolution of the primary claim and will result in a delay in he resolution of the primary claim, and the answer to the third-party complaint has added more complex issues, unrelated to the primary action, a motion to sever may be granted. International Trading Corp. v. Ikosia, 7 FSM Intrm. 17, 19 (Pon. 1995).

The real party in interest in a civil action is the party who possesses the substantive right to be enforced. The mere fact that a shareholder may substantially benefit from a monetary recovery by a corporation does not make the shareholder a real party in interest entitled to seek monetary recovery in a civil action. A claim of such a shareholder will be dismissed. Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 96-97 (Pon. 1995).

Although joinder may be permitted at any stage of the proceedings on such terms as are just, a person will not be joined as a plaintiff after trial when the plaintiffs were aware of that person's circumstance for four years of the litigation, that person had been a party defendant for a time, and there was no showing that that person's ability to protect his interest was impaired or impeded. Damarlane v. United States, 7 FSM Intrm. 350, 353 (Pon. 1995).

No one is rendered an indispensable party who must be joined merely because if he is not his claim is time-barred. Damarlane v. United States, 7 FSM Intrm. 350, 355 (Pon. 1995).

Compulsory joinder will be denied when the moving party has failed to explain exactly why it is that complete relief cannot be accorded among those already parties without the joinder, why the non-parties' interests would be impaired without joinder, or why failure to join would expose those who are already parties to inconsistent obligations. Lavides v. Weilbacher, 7 FSM Intrm. 400, 403-04 (Pon. 1996).

Rule 21 motions to sever are often more properly brought as motions for separate trials under Rule 42(b). Severance of claims under Rule 21 converts them into independent actions, and is limited to cases in which the claims are separable enough to make appropriate a separate final judgment with its usual consequences. Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 527-28 (Pon. 1996).

Separate trials should not be ordered unless such a disposition is clearly necessary. Thus it will not serve judicial convenience or economy to order separate trials when both plaintiffs must prove the same liability and where trial together would yield an equitable result. Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 528 (Pon. 1996).

Joinder is the act of uniting as parties to an action all persons who have the same rights or against whom rights are claimed as either co-plaintiffs or co-defendants. Lavides v. Weilbacher, 7 FSM Intrm. 591, 594 n.2 (Pon. 1996).

An exceedingly high threshold must be met for joinder to be proper after judgment has been rendered, especially when there was ample opportunity to argue in favor of joinder before trial and when the parties who are now seeking joinder have repeatedly changed their position on the matter throughout the proceedings. Damarlane v. United States, 8 FSM Intrm. 45, 56 (App. 1997).

When complete relief has already been accorded among the parties to the litigation, it is proper to deny joinder to another because he is not an indispensable party. Damarlane v. United States, 8 FSM Intrm. 45, 56-57 (App. 1997).

While Rule 70 provides that the court may "appoint" a third party to undertake specified actions on the behalf of defendants, when a non-party has indicated its desire to participate in the litigation in more than the administerial way contemplated by Rule 70, the better course may be to add the non-party formally as a party defendant pursuant to Rule 21, which provides for the addition of parties "at any stage of the action and on such terms as are just." Louis v. Kutta, 8 FSM Intrm. 228, 230 (Chk. 1998).

A branch campus of the College of Micronesia-FSM does not have the capacity to sue or be sued on its own and will be dismissed from an action where the College of Micronesia-FSM, a public corporation, is

a party. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 441 (Chk. 1998).

An agent and principal may be sued in the same action for the same cause of action even when the principal's liability is predicated solely on the agency. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 442 (Chk. 1998).

Someone who has bought at least part of disputed land is a person who must be joined as a party in the land dispute because complete relief cannot be accorded among those already parties in the person's absence or because the person sought to be joined claims an interest relating to the subject of the action and that person's absence may impair or impede the person's ability to protect that interest or leave any of the parties subject to a substantial risk of inconsistent obligations. Palik v. Henry, 9 FSM Intrm. 267, 270 (Kos. S. Ct. Tr. 1999).

A counterclaim may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 290 n.1 (Yap 1999).

Civil Procedure Rule 13(h) provides that persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 19 and 20. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 290 (Yap 1999).

A defendant is not required to obtain leave of court before naming additional defendants on its counterclaim, when the counterclaim is brought in the original answer, but although not required by Rule 13(h), the general practice is to obtain a court order to join an additional party. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 291 (Yap 1999).

When a defendant counterclaims against the original plaintiff and new additional parties, as to claims between the original parties the original plaintiff is designated plaintiff/counterdefendant while the original defendant is designated defendant/counterplaintiff, and as to new parties on the counterclaim, the original defendant is designated counterclaim plaintiff, while the new parties are designated counterclaim defendants. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 291 (Yap 1999).

In the case of misjoinder, parties may be dropped or added by order of the court of its own initiative at any stage of the action. A party joined by the court in the mistaken belief that he was making a claim to land parcels involved in an action before the court will be dropped as a party when it is apparent his claim is to parcels distinct from those in the court action. Palik v. Henry, 9 FSM Intrm. 309, 311 (Kos. S. Ct. Tr. 2000).

Third-party practice under Rule 14 is the procedure by which a defendant can bring in as a third-party defendant one alleged to be liable to him for all or part of plaintiff's claim against him. Rule 14 is intended to provide a mechanism for disposing of multiple claims arising from a single set of facts in one action expeditiously and economically. On the other hand, Rule 19(a) is directed to factually complex, multi-party litigation where the joinder issue involves an analysis of greater subtlety. Kosrae v. Worswick, 9 FSM Intrm. 536, 539 (Kos. 2000).

A motion to dismiss for failure to join necessary parties may be denied without prejudice when it is at too early a stage of the proceedings to determine whether complete relief among the parties cannot be obtained without the joinder of others. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

A Rule 12(b)(7) motion to dismiss for failure to join an indispensable party under Rule 19 is a defense that is, by rule, specifically preserved and may be raised as late in the proceedings as at the trial on the merits. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

In the absence of a contractual or statutory provision authorizing a direct action against or the joinder of a liability insurer, an injured person, for lack of privity between himself and the insurer, has no right of action at law against the insurer and cannot join the insured and the liability insurer as parties defendant. Moses v.

M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001).

An insurance company that has no contractual obligation to persons other than its insured until a court determines its insured's liability, cannot be joined as a party to a lawsuit to determine that liability. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 52 (Chk. 2001).

Parties may be added by order of the court on motion of any party or on its own initiative at any stage of the action and on such terms as are just. A court usually has the discretion to refuse to join a new party at a late stage of the litigation. Phillip v. Moses, 10 FSM Intrm. 540, 545 (Chk. S. Ct. App. 2002).

Although refusal to add a party defendant to an action is a matter of discretion for the trial court and absent a showing of abuse of discretion will not be disturbed, Rule 19(a) does require a court to join as a party someone who in his absence complete relief cannot be accorded among those already parties or someone who claims an interest in the subject of the action and whose absence may impair his ability to protect that interest or would leave those already parties subject to substantial risk of multiple or inconsistent obligations. Phillip v. Moses, 10 FSM Intrm. 540, 545 (Chk. S. Ct. App. 2002).

If a clan claimed to own the tideland in dispute and had moved to intervene in the action, the trial court should then have joined the clan as a party. But when they did not move to intervene, and it appears that the clan may not even claim to own the tideland, the appellate court is not inclined to remand the case for a new trial with the clan, or its members, unwillingly joined as a party. Phillip v. Moses, 10 FSM Intrm. 540, 546 (Chk. S. Ct. App. 2002).

When a judgment can be shaped to cure any prejudice to a party absent below, dismissal at the appellate stage is not required. An appellate court may also properly require suitable modification as a condition of affirmance. Phillip v. Moses, 10 FSM Intrm. 540, 546 (Chk. S. Ct. App. 2002).

In a claim for damages to land, such as trespass, all the co-owners of the affected land are indispensable parties to the action and must be joined if they are not already parties; otherwise the defendant faces a substantial risk that it may be subject to multiple or inconsistent judgments if any of the other persons who claim to be co-owners decide to sue. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 203-04 (Chk. 2002).

In Chuuk, it has been common practice for one joint owner to sue as a representative of himself and other joint owners, or for the lineage as a whole to sue as one party, but when neither is what was done in the case and the plaintiff's complaint asserted that he was the sole owner of the land allegedly trespassed upon, a defendant's motion to add the land's co-owners as parties-plaintiff must be granted. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

Rule 14 allows a defendant to bring in third parties by causing a summons and complaint to be served upon persons not a party to the action who are or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, but if those persons are added as parties plaintiff in the action, then they are parties, not third parties, and no third party complaint could possibly be brought against them. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

If persons the defendant seeks to add as third parties become plaintiffs, then the "claims" the defendant seeks to bring against them can properly be raised as defenses to the plaintiffs' action, and a motion for leave to file a third party complaint against them must be denied. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

A defendant is also allowed, at the court's discretion, to add as a permissive counterclaim any claim it has against the plaintiff that is unrelated to the plaintiff's claims. While the court may not be inclined to grant leave to add a counterclaim, not in the original answer, if adding it would cause further delay in the proceeding, but when it appears that the counterclaim is straight forward and will not delay matters and when it does not appear that much preparation for this claim will be needed so as to delay the scheduled trial, the motion to

add a permissive counterclaim will be granted. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204-05 (Chk. 2002).

If an indispensable party cannot be made a party, the court must determine whether in equity and good conscience the action should proceed among the parties before it or whether it must be dismissed. The factors the court must consider include: 1) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; 2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; 3) whether a judgment rendered in the person's absence will be adequate; and 4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 403, 404-05 (Chk. 2003).

A trespass case will be dismissed for failure to join the land's co-owners as indispensable parties plaintiff because any judgment in a rendered in the co-owners' absence will be prejudicial to the defendant since any of the other co-owners could sue for the same trespass, thus subjecting the defendant to multiple judgments for the same acts; because even a judgment in the defendant's favor would not prevent another co-owner from suing for the same acts; because there are no protective provisions that could be included in a judgment that would lessen the prejudice; and because the plaintiff has an adequate remedy since the dismissal is without prejudice – he may refile the case with the co-owners included. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 403, 405 (Chk. 2003).

Since, if the court determines that the Chuuk State Election Commission is constitutionally required to conduct all elections in Chuuk, including all municipal elections, the Chuuk State Election Commission will be required to bear substantial additional burdens and obligations, the Chuuk State Election Commission is thus a necessary party to the litigation as provided in Chuuk Civil Rule 19(a). Rubin v. Fefan Election Comm'n, 11 FSM Intrm. 573, 581 (Chk. S. Ct. Tr. 2003).

Co-owners of land are generally considered indispensable parties to any litigation involving that land. This should be especially true when full title to the land is at stake, and even more important when the land will be registered and a certificate of title issued for it because a certificate of title, once issued, is conclusive upon a person who had notice of the proceedings and a person claiming under him and is prima facie evidence of ownership. This is because a cotenant cannot be divested of his interest by a proceeding against all the co-owners of the common property unless he is made a party to the proceeding and served with legal process. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 278-79 (App. 2003).

A party who seeks to quiet title to a piece of land must join all known persons who are claiming title in order to settle the property's ownership without additional litigation. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 279 (App. 2003).

An appeal from an administrative agency must be perfected as well as started within the established statutory time period and part of perfecting an appeal is the joinder of indispensable parties. Failure to join indispensable parties prior to the expiration of the statutory time for appeal is a fatal defect which deprives the court of jurisdiction to entertain the action. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 279 (App. 2003).

All co-tenants are indispensable parties to the litigation when someone else claims complete ownership of the land. Otherwise, the co-tenants would either be deprived of their property interest without due process of law or they would be forced to share their property with a hostile co-owner who believes he should be the sole owner. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 279 (App. 2003).

All co-tenants would not be indispensable parties if a litigant were claiming only one co-tenant's share and not the other shares. Then only that co-tenant need be joined. Anton v. Heirs of Shrew, 12 FSM Intrm. 274, 279 (App. 2003).

A debtor is not an indispensable party under Rule 19 in an action to enforce a guaranty of payment. A lender holding a guaranty of payment can sue a guarantor directly, without naming the borrower. FSM Dev.

Bank v. Arthur, 13 FSM Intrm. 1, 11 (Pon. 2004).

When a suit is being brought by three of the representative committee members within the clan and is not a suit being brought by the clan as a whole and thus did not require authorization by the clan; when the interest of the plaintiffs who represent part of the clan may be adverse to the interests of the other clan committee members, who may not be proper plaintiffs based on the causes of actions alleged in the suit; and when complete relief can be accorded among those already parties without the joinder of the other committee members, a motion to join those other committee members as indispensable parties will be denied. Edgar v. Truk Trading Corp., 13 FSM Intrm. 112, 115 (Chk. 2005).

– Judgment on the Pleadings

Normally a Rule 12(c) motion for judgment on the pleadings is granted or denied upon the entire complaint, and the rule does not provide for partial judgment as in Rule 56(d) summary judgment, but where the briefing was exhaustive, full argument made, and such a judgment promotes an expeditious disposition of matters placed before the court, partial judgment may be granted. Damarlane v. United States, 6 FSM Intrm. 357, 359 (Pon. 1994).

The standard for evaluating a motion for judgment on the pleadings is almost identical to that for evaluating a motion for summary judgment. A motion for judgment on the pleadings shall be granted only when the movant has demonstrated that there are no issues of material fact, and that the movant is entitled to judgment as a matter of law. The moving party must carry its burden by reference solely to the pleadings, and the court must evaluate all facts and inferences in the light most favorable to the non-moving party. Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 96 (Pon. 1995).

A Rule 12(c) motion for judgment on the pleadings, unlike a Rule 56(d) summary judgment motion, is normally granted or denied upon the entire complaint, but where a partial judgment would promote an expeditious disposition of matters placed before the court, it may be granted. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 114 (Chk. 1995).

For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the opposing party's pleadings are taken as true and all allegations of the moving party which have been denied are taken as false. Judgment is granted only if the moving party is clearly entitled to judgment on the facts as so admitted. In re Kuang Hsing 182, 7 FSM Intrm. 465, 467 (Yap 1996).

Judgment on the pleadings cannot be granted when nonmovant's factual allegations are taken as true or on movant's affirmative defenses because affirmative defenses are deemed denied by operation of Civil Rule 8(d). In re Kuang Hsing 182, 7 FSM Intrm. 465, 468 (Yap 1996).

Partial judgment on a motion for judgment on the pleadings may be granted when the full argument allows the court to understand the parties' position and such a judgment promotes an expeditious disposition of matters before the court. Oster v. Cholymay, 7 FSM Intrm. 598, 599 (Chk. S. Ct. Tr. 1996).

A court grants judgment on the pleadings if, based on contents of the pleadings alone, it is apparent that either an affirmative defense completely bars plaintiff's claim, or that the sole defense relied upon by defendant is insufficient as a matter of law. An appellate court reviews motions for judgments on the pleadings de novo, as it does all rulings of law. Damarlane v. United States, 8 FSM Intrm. 45, 52 (App. 1997).

A motion to dismiss will be denied when the parties' later stipulation to entry of partial judgment made moot any contention that the defendants' subsequent payments entitled them to a dismissal of the bank's claim to foreclose and sell the vessels, and when the pleadings and the mortgage terms on their face entitle the bank to such a remedy if its factual allegations are taken as true, as they must be on a motion to dismiss or for judgment on the pleadings. Bank of the FSM v. Pacific Foods & Servs., Inc., 10 FSM Intrm. 327, 331 (Pon. 2001).

A motion for judgment on the pleadings will be granted only if the movant has demonstrated that there are no issues of material fact, and that the movant is entitled to judgment as a matter of law. The moving party must carry its burden by reference solely to the pleadings, and the court must evaluate all facts and inferences in the light most favorable to the non-moving party. Marcus v. Truk Trading Corp., 10 FSM Intrm. 346, 347-48 (Chk. 2001).

Judgment on the pleadings cannot be granted for the defendant on the grounds of a valid lease agreement, or for laches, or for the statute of limitations, when the plaintiff's pleading alleges facts, which if true and they must be taken as true for the propose of the motion, would bring the signed lease's validity into question, would justifiably account for the delay in bringing the suit, and which would make it an action for a continuing trespass, for which the contract statute of limitations would not apply. Marcus v. Truk Trading Corp., 10 FSM Intrm. 346, 348 (Chk. 2001).

A motion to dismiss for failure to state a claim may be brought after an answer has been filed by a motion for judgment on the pleadings or at the trial on the merits. But when the movant presents matter outside the pleadings as part of his motion to dismiss, then under Rule 12(c), the motion will be treated as one for summary judgment and disposed of as provided in Rule 56. Richmond Wholesale Meat Co. v. George, 11 FSM Intrm. 86, 88 (Kos. 2002).

– Motions

Failure to file a memorandum in opposition to a motion is deemed a consent to the motion. Actouka v. Etpison, 1 FSM Intrm. 275, 276 (Pon. 1983).

Failure to file a memorandum of points and authorities with a motion constitutes a waiver of the motion. Actouka v. Etpison, 1 FSM Intrm. 275, 277 (Pon. 1983).

The failure of the nonmoving party's memorandum to set forth points and authorities constitutes a consent to the granting of the motion. FSM Civ. R. 6(d). Enlet v. Truk, 3 FSM Intrm. 459, 461 (Truk 1988).

A memorandum of points and authorities filed by a party opposing a motion must set forth the law upon which the party relies and his theory as to the application of that law to the facts of the case. Enlet v. Truk, 3 FSM Intrm. 459, 462 (Truk 1988).

Where a defendant has not filed a response to a motion for summary judgment within the ten days provided by FSM Civil Rule 6(d), the defendant is deemed to have consented to the granting of the motion and the court may decline to hear oral argument. Actouka v. Kolonia Town, 5 FSM Intrm. 121, 123 (Pon. 1991).

Although failure to oppose a motion operates as a consent by the opposing party to the granting of the motion, the court is not bound to grant motion simply because it is unopposed. For a motion to be granted, even if unopposed, it must be well grounded in law and fact, and not interposed for delay. In re Parcel No. 046-A-01, 6 FSM Intrm. 149, 153 (Pon. 1993).

Under the Rules of Civil Procedure a party opposing a motion has ten days to file a response. Six days may be added if service was by mail. The time period does not commence running from date of notice for hearing on the motion, but from the date of the motion itself. Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

Where there is no timely opposition filed after the service of a motion, the opposing party is considered to have consented to the motion. Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM Intrm. 238, 240 (Pon. 1993).

While it is true that failure to file a timely opposition is deemed a consent to the granting of the motion, FSM Civ. R. 6(d), proper grounds for the granting of the motion must still exist before a court may grant it.

Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994).

Motions may be served on other parties prior to being filed. Setik v. FSM, 6 FSM Intrm. 446, 448 (Chk. 1994).

A movant's inaction is insufficient to notify the court (or other parties) that a motion has been dropped. Only a notice of withdrawal of motion will do that. Otherwise a motion may be decided without hearing and without further request. Setik v. FSM, 6 FSM Intrm. 446, 448 (Chk. 1994).

A filed stipulation to extend time to respond to a motion will be treated as a motion for an enlargement of time, but will be denied when filed after the time respond has expired and no excusable neglect has been shown. Elwise v. Bonneville Constr. Co., 6 FSM Intrm. 570, 572 (Pon. 1994).

A motion filed in a related criminal case for the release of a vessel, which is only a defendant in a civil forfeiture action, will be denied as not properly before the court. FSM v. Wu Ya Si, 6 FSM Intrm. 573, 574 (Pon. 1994).

A court may grant a motion nunc pro tunc to supply a record of an action previously done but omitted from the record through inadvertence or mistake, to have effect as of the former date. A motion nunc pro tunc cannot be used to supply an action omitted by the court. Western Sales Trading Co. v. Ponape Federation of Coop. Ass'ns, 6 FSM Intrm. 592, 593-94 (Pon. 1994).

Although failure to timely file an opposition to a motion is deemed a consent to the motion, proper grounds for the granting of the motion must still exist before the court may grant it. Bank of Guam v. Nukuto, 6 FSM Intrm. 615, 616 (Chk. 1994).

A party opposing a motion has ten days after service of the motion to file and serve responsive papers. Six days are added to this period when the service was done by mail. The court may at its discretion enlarge the time for filing for cause shown. Where no reason is given for late filing and an enlargement of time is not sought, responsive papers will be stricken from the record as untimely. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 84 (Chk. 1995).

A court may not grant a motion unless proper grounds to do so exist even though the nonmoving party has failed to timely oppose the motion and is deemed to have consented to it. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 (Chk. 1995).

The FSM Civil Procedure Rules do not provide for the filing of replies to oppositions to motions, but they do not prohibit them either. It has been the general practice of the trial division to accept such filings although in a particular case the court may direct otherwise. Damarlane v. FSM, 7 FSM Intrm. 383, 385 (Pon. 1996).

Requests for postponements are properly made by a motion for an enlargement of time. Such a motion may be made even after the time specified for action has passed when the failure to act was due to excusable neglect. FSM Telecomm. Corp. v. Worswick, 7 FSM Intrm. 420, 422 (Yap 1996).

While failure to file a timely opposition is deemed a consent to the granting of the motion there still must be proper grounds for granting of motion before a court may do so. Bank of the FSM v. O'Sonis, 8 FSM Intrm. 67, 68 (Chk. 1997).

Because failure to file an opposition to a motion is deemed a consent to it a party failing to file an opposition will not be allowed to argue it orally. Bank of the FSM v. O'Sonis, 8 FSM Intrm. 67, 68 (Chk. 1997).

A showing of excusable neglect is required to grant a request for enlargement of time made after the time allowed had elapsed. Counsel's failure to make a note to remind him of the answer's due date and his attention to other matters, both personal and professional, does not establish excusable neglect. Bank of Guam v. Ismael, 8 FSM Intrm. 197, 198 (Pon. 1997).

A defendant's motion to enlarge time to file an answer may be granted, even though excusable neglect has not been shown, when it would be conducive to a speedy and inexpensive determination of the action, the delay has not been long, and no prejudice to the plaintiff is apparent. Bank of Guam v. Ismael, 8 FSM Intrm. 197, 198 (Pon. 1997).

When defendants do not oppose a motion, they are deemed to have consented to it, but before a motion can be granted, proper grounds must exist. Bank of Guam v. O'Sonis, 8 FSM Intrm. 301, 304 (Chk. 1998).

An opposition to a removal petition, regardless of how it is styled, is actually a motion to remand the case to state court on the ground that it was improvidently removed. Porwek v. American Int'l Co. Micronesia, 8 FSM Intrm. 436, 438 (Chk. 1998).

An enlargement of time to oppose a motion may be granted when the mail service has been delayed and erratic. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 441 (Chk. 1998).

In the Kosrae State Court, motions for relief from judgment or to alter or amend a judgment are non-hearing motions. Langu v. Kosrae, 8 FSM Intrm. 455, 457 (Kos. S. Ct. Tr. 1998).

Failure to oppose a portion of a motion may be considered a consent to that portion of the motion, but a court still needs proper grounds to grant the motion. Pau v. Kansou, 8 FSM Intrm. 524, 526 (Chk. 1998).

Failure of the opposing party to file responsive papers shall be considered by the court as consent to the granting of the motion. Welle v. Walter, 8 FSM Intrm. 572, 573 (Chk. S. Ct. Tr. 1998).

Even though failure to timely oppose a motion is deemed a consent to that motion, a court still needs proper grounds before it can grant the motion. Bank of Guam v. O'Sonis, 9 FSM Intrm. 197, 198 (Chk. 1999).

All motions must contain the movant's certification that a reasonable effort has been made to obtain the opposing party's agreement or acquiescence and that no such agreement has been forthcoming. Motions without such certification may be denied without prejudice on that basis alone. Calvary Baptist Church v. Pohnpei Bd. of Land Trustees, 9 FSM Intrm. 238, 239 (Pon. 1999).

Compliance with the rule requiring motions to contain a movant's certification that a reasonable effort has been made to obtain the opposing party's agreement initiates a dialogue between the parties and decreases the cost of litigation by minimizing paperwork and eliminating unnecessary court appearances when compromises are reached, and in turn reduces the court's workload thereby increasing its ability to attend to other matters and minimize delays. Calvary Baptist Church v. Pohnpei Bd. of Land Trustees, 9 FSM Intrm. 238, 239 (Pon. 1999).

Failure to respond to a motion generally operates as consent to the granting of the motion; at the same time, the motion will not automatically be granted, and must be well grounded in law and fact. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999).

A memorandum of points and authorities filed in opposition to a motion should set forth the law upon which the party relies and his theory as to how that law should be applied to the facts of the case. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999).

A written motion shall be served with a memorandum of points and authorities, and the moving party's failure to file the memorandum of points and authorities shall be deemed a waiver by the moving party of the motion. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999).

The moving party has the same standard as the responding party with respect to the content of the memorandum of points and authorities – it must set forth the applicable law and apply that law to the facts of the case. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999).

No bright-line test is appropriate for determining what is a sufficient memorandum of points and authorities under Civil Procedure Rule 6(d) and a court necessarily assesses a memorandum's sufficiency on the facts and law of a given motion. Island Cable TV v. Gilmete, 9 FSM Intrm. 264, 266 (Pon. 1999).

A motion, although obviously filed as a result of an opponent's objection to an earlier motion for enlargement, but which requests affirmative relief different from the motion for enlargement, may stand as an independent motion, and may be seen as the withdrawal of the earlier motion to enlarge. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 282 (Yap 1999).

While the FSM Rules of Civil Procedure do not provide for replies to responses to motions, they do not prohibit them either, and it has been the general practice of FSM Supreme Court's trial division to consider them in the absence of an order directing differently. A court may consider replies to the extent that they address the response, and not to the extent that the reply may raise issues extraneous to the original motion or the response. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 282 (Yap 1999).

Every defense, in law or fact, to a claim for relief in any pleading must be asserted in the responsive pleading thereto except for the defenses list in Rule 12(b), which may be raised by motion made before pleading. If a Rule 12(b) motion is denied the responsive pleading must be made within 10 days after notice of the court's action. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 283 (Yap 1999).

A motion to stay most closely analogizes to a motion to abstain, and such a motion is not a pre-answer motion, but a pre-trial motion. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 284 (Yap 1999).

Although the Civil Procedure Rules do not specifically provide for the filing of replies to oppositions to motions, the Rules do not prohibit the practice, and the usual practice has been to accept them. AHPW, Inc. v. FSM, 9 FSM Intrm. 301, 303 (Pon. 2000).

Failure to timely oppose a motion is deemed a consent to that motion, but a court still needs proper grounds before it can grant an unopposed motion. Marar v. Chuuk, 9 FSM Intrm. 313, 314 (Chk. 2000).

A motion to vacate an order of dismissal under Rule 60(b) that is not brought under any of the six enumerated bases set out in Rule 60(b), and reurges the same points made in the response to the original motion to dismiss is plainly not a Rule 60(b) motion, but is considered as a motion for reconsideration. Kosrae v. Worswick, 9 FSM Intrm. 536, 538 (Kos. 2000).

When no response to a summary judgment motion appears in the record and the opposing party does not appear at the noticed hearing the motion is due to be granted for that reason alone. Udot Municipality v. Chuuk, 9 FSM Intrm. 586, 587 (Chk. S. Ct. Tr. 2000).

The FSM Civil Procedure Rules 5, 6 and 7 set forth the requirements governing service, filing and the form of motions. In accordance with Rule 5, all motions filed with the court must also be served on each party to the action. Similarly, each paper filed must be accompanied by certification of service of copies upon all other parties. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 592 (Pon. 2000).

A motion is deficient in multiple respects when it does not appear that it was served on any party to the action including the very party it was directed toward, when it was not accompanied by certification of service upon all other parties, when it was supported by an affidavit which was filed one day after the motion was filed and the affidavit was not accompanied by certification of service upon all other parties as required by Rule 5(d), nor was it served with the motion as required by Rule 6(d), and when the motion did not contain a certification that a reasonable effort had been made to obtain the agreement or acquiescence of the opposing party and that no such agreement had been forthcoming. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 595 (Pon. 2000).

Notice that the court has been requested to issue an order affecting a litigant's rights and an opportunity for that party to be heard are constitutionally mandated by the due process clause. O'Sullivan v. Panuelo, 9

FSM Intrm. 589, 595 (Pon. 2000).

The requirement that reasonable efforts be made by a moving party to obtain the opposing party's agreement before filing a motion is a particularly important one. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 595 (Pon. 2000).

Compliance with the rule requiring motions to contain a movant's certification that a reasonable effort has been made to obtain the opposing party's agreement initiates a dialogue between the parties and decreases litigation costs by minimizing paperwork and eliminating unnecessary court appearances when compromises are reached, and in turn reduces the court's workload thereby increasing its ability to attend to other matters and minimize delays. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 595-96 (Pon. 2000).

A plaintiff's summary judgment motion that fails to comply with the certification requirements of Civil Procedure Rule 6(d) may, for this reason alone, be denied without prejudice and may be renewed subject to plaintiff making reasonable attempts to reach agreements on its disposition with the defendants affected by any order requested. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 597 (Pon. 2000).

Motions failing to comply with requirements of Rule 6(d) should be denied without prejudice. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 599 (Pon. 2000).

In determining what must be done to satisfy the Rule 6(d) requirement that a reasonable effort has been made to obtain the opposing party's agreement, it is appropriate to consider the circumstances of a given case, and a reasonable effort to obtain agreement may include an explanation clarifying the issue involved and explaining the likely outcome of the motion from both a procedural and substantive perspective. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 600 (Pon. 2000).

When the parties are not in disagreement on every issue addressed by a motion, compliance with FSM Civil Rule 6(d) would have served its intended purpose of generating a compromise without court intervention. Damarlane v. Pohnpei Supreme Court Appellate Division, 9 FSM Intrm. 601, 603 (Pon. 2000).

Compliance with the rule requiring motions to contain a movant's certification that a reasonable effort has been made to obtain the opposing party's agreement initiates a dialogue between the parties and decreases litigation costs by minimizing paperwork and eliminating unnecessary court appearances when compromises are reached, and in turn reduces the court's workload thereby increasing its ability to attend to other matters and minimize delays. Damarlane v. Pohnpei Supreme Court Appellate Division, 9 FSM Intrm. 601, 603-04 (Pon. 2000).

When, although a copy has been faxed to the court, a motion has never been filed and when no application for filing by facsimile pursuant to Civil Procedure Rule 5(e) has been made, the motion is not before the court. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 606 (Chk. 2000).

Even though failure to timely oppose a motion is deemed a consent to that motion, a court still needs proper grounds before it may grant the motion. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

Motions to strike under Rule 12(f) are viewed with disfavor and are infrequently granted. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

Pleadings are defined as the complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, and third-party answer. No other pleadings are allowed, except that the court may order a reply to an answer or a third-party complaint. No other paper will be considered a pleading and a motion in any form cannot stand as a pleading. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001).

A motion to strike a memorandum supporting a motion and a response to an opposition is not a motion

to strike matter from pleadings subject to Rule 12(f), but rather, falls under the general motion practice of Rule 7(b) which provides that an application to the court for an order shall be by motion and shall set forth the relief or order sought. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001).

Because the Rules must be construed to secure the just, speedy, and inexpensive determination of every action the court may deny striking a memorandum filed 18 days after the motion it supported when the memorandum provides the court with additional relevant information. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001).

The court may consider and will not strike a response by a party other than the one against whom a motion is directed since any party may oppose another party's motion. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001).

Even though failure to timely oppose a motion is deemed a consent to that motion, a court still needs proper grounds before it can grant the motion. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 172 (Chk. 2001).

It is not the court's practice generally to hear oral argument on pre-trial motions. Livaie v. Kosrae Sea Ventures, Inc., 10 FSM Intrm. 206, 208 (Kos. 2001).

When motions to enlarge time are made before the expiration of the period prescribed by a court order to do some thing, they may be granted just for cause shown. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 218 (Chk. 2001).

When a motion to enlarge time is filed after the time set by an order has expired, the court must determine whether the movants' failure to timely act was the result of excusable neglect. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001).

The determination of what sorts of neglect that can be considered "excusable" is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission. These include the danger of prejudice to the nonmovant, the length of delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was in the reasonable control of the movant, and whether the movant acted in good faith. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001).

To establish excusable neglect a movant must show good faith and a reasonable basis for noncompliance. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001).

The burden is on the movant to establish that the failure to act timely was the result of excusable neglect. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001).

Merely being a busy lawyer does not constitute excusable neglect justifying an enlargement of time. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219 (Chk. 2001).

When the delay was within the movants' counsel's reasonable control, when the movants' inability to propound discovery because they failed to timely request it, will not affect their rights at trial – *e.g.*, they may still cross-examine the plaintiffs' witnesses, object to proffered evidence, and subpoena witnesses and documents, and when, taking account of all relevant circumstances surrounding the movants' omission, they have failed to show the excusable neglect that would justify enlarging their time to make discovery requests, an untimely motion to enlarge time for them to propound discovery requests will be denied. Medabalmi v. Island Imports Co., 10 FSM Intrm. 217, 219-20 (Chk. 2001).

Even though failure to timely oppose a motion is deemed a consent to that motion, the court still needs proper grounds before it may grant the motion. Moses v. Oyang Corp., 10 FSM Intrm. 273, 275 (Chk. 2001).

Failure to timely oppose a motion is deemed a consent to that motion. Even so, a court still needs

proper grounds before it can grant that motion. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345 (Chk. 2001).

Failure to timely oppose a motion is deemed a consent to that motion, but good grounds are still needed before the motion may be granted. Marcus v. Truk Trading Corp., 10 FSM Intrm. 387, 389-90 (Chk. 2001).

The ten day time limit for a motion to alter or amend a judgment does not apply to an order which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties because that order does not terminate the action as to any of the claims or parties, and is subject to revision at any time before the entry of judgment. The appropriate means by which to raise concerns about such an order is not by a Rule 59 motion to alter or amend judgment, but by a Rule 54 motion for reconsideration. A motion for reconsideration can be brought any time before entry of judgement, and is not subject to the 10 day limit. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 470 (Pon. 2001).

The phrase "the endless stream of discovery drivel emanating from plaintiffs' quarter" in a written response has no place in the civil colloquy (especially in the course of written discourse which permits the authoring party time to reflect) within the bounds of which professional, zealous advocacy takes place. Such comments are no substitute for convincing arguments that follow from the careful marshaling of facts, and the application to those facts of carefully researched principles of law. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 473-74 (Pon. 2001).

Counsel, who also signed another party's motion even though it did not involve a live dispute with respect to his client, should be prepared to address why at least nominal sanctions should not be imposed against him in the event that a Rule 11 violation occurred. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

Failure to file a memorandum in opposition to a motion is deemed a consent to the motion, but the motion must have proper grounds before it can be granted. Shrew v. Kosrae, 10 FSM Intrm. 533, 534 (Kos. S. Ct. Tr. 2002).

Failure to oppose a motion is deemed a consent to the motion. Talley v. Talley, 10 FSM Intrm. 570, 571, 572 (Kos. S. Ct. Tr. 2002).

When a court makes a motion sua sponte, it generally gives the parties notice and an opportunity to respond before it decides; just as when a party makes a motion the other party is generally given an opportunity to respond before the court rules. Notice and an opportunity to be heard is the essence of due process. Wainit v. Weno, 10 FSM Intrm. 601, 606 (Chk. S. Ct. App. 2002).

Failure to respond to a motion may be deemed a consent to granting the motion, but even when a party fails to respond, the motion may be granted only if it is grounded both in law and fact. Bank of the FSM v. Mori, 11 FSM Intrm. 13, 14 (Chk. 2002).

A pending motion to dismiss that involves only matters of law can be decided without hearing. Konman v. Adobad, 11 FSM Intrm. 34, 35 (Chk. S. Ct. Tr. 2002).

The court may decide motions based on the written filings. Stephen v. Chuuk, 11 FSM Intrm. 36, 39 (Chk. S. Ct. Tr. 2002).

When there is no judgment in the case but only an interlocutory order confirming a settlement agreement between fewer than all the parties to the action, a motion for relief from judgment will properly be characterized, not as one for relief from judgment under Rule 60(b), but as one to reconsider an interlocutory order. A party cannot seek relief from a judgment that does not exist. Stephen v. Chuuk, 11 FSM Intrm. 36, 43 (Chk. S. Ct. Tr. 2002).

Under Kosrae Civil Procedure Rule 12, a motion to dismiss is directed to a pleading, not a motion. Rule

6(d) uses the term "responsive papers" to designate how a motion is responded to. A reply, though not provided for under Rule 6(d), has been employed by those wishing to address new matter raised in a response. Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 59-60 (Kos. S. Ct. Tr. 2002).

In the absence of the Rule 60(b) finality requirement, the court will deem a putative Rule 60(b) motion as one for reconsideration of the court's order. Richmond Wholesale Meat Co. v. George, 11 FSM Intrm. 86, 88 (Kos. 2002).

Failure to file a timely opposition is deemed a consent to the granting of the motion, but proper grounds to grant the motion must still exist before a court can grant it. Kelly v. Lee, 11 FSM Intrm. 116, 117 (Chk. 2002).

Failure to oppose a motion is generally deemed a consent to the motion, but even if there is no opposition, the court still needs good grounds before it can grant the motion. Farata v. Punzalan, 11 FSM Intrm. 175, 177 (Chk. 2002).

A written motion, other than one which may be served ex parte and notice of the hearing thereof shall be served, with a memorandum of points and authorities, not later than 14 days before the time specified for the hearing, unless a different period is fixed by these rules or by court order. Such an order may for cause shown be made on ex parte application. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

Civil Rule 6(d) addresses when a written motion must be filed. It does not address notice or service, which is addressed by Rule 5. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

Every written motion and similar paper must be served upon each of the parties. No service need to be made on the parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

Except in extraordinary circumstances, due process requires that parties receive notice of motions because all parties must be served with all papers unless the party is in default, and the default is for a failure to ever appear at any stage of the proceeding. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

When the plaintiff has failed to establish that the relief requested in its motion may be had on an ex parte basis, the court will order the plaintiff to serve its motion on the defendant. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

When no opposition has been filed to a motion, it is deemed a consent to the motion. But even without any opposition, the court still needs good grounds before it can grant the motion. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 353 (Chk. 2003).

Failure to file responsive papers is considered as consent to granting a motion. Heirs of Henry v. Palik, 11 FSM Intrm. 419, 420 (Kos. S. Ct. Tr. 2003).

A motion to relieve a person of the effect of a court order will be denied as moot when a later order directed another to undertake the task. Davis v. Kutta, 11 FSM Intrm. 545, 548 (Chk. 2003).

Rule 6(b) requires that when requesting an enlargement to perform an act when the period has expired, the moving party must show excusable neglect. Primo v. Semes, 11 FSM Intrm. 603, 606 (Pon. 2003).

Failure to oppose a motion to enlarge time is generally deemed a consent to the motion. Naoro v. Walter, 11 FSM Intrm. 619, 621 (Chk. 2003).

If the court were to consider an untimely filed response to a motion as a failure to file an opposition, such failure to oppose is generally deemed a consent to the motion, but even when there is no opposition, the court still needs good grounds before it can grant a motion. For a motion to be granted, even if unopposed, it must be well grounded in law and fact, and not interposed for delay. Enlet v. Bruton, 12 FSM Intrm. 187, 190 (Chk. 2003).

A new claim that constitutionally only the state election commission can conduct municipal elections in Chuuk will not be considered unless the municipal defendants are represented separately from the state when past practice in Chuuk has been that municipal officials have run municipal elections, when this new claim is only hypothetical as the state election commission, a non-party, has not asserted that it intends to and will conduct or that it has the sole authority to conduct municipal elections in the future, and when the defendant Governor and the municipal defendants are represented by the same counsel, a state employee, but may likely have differing views on the point. Even then, the court would desire a separate appearance by the state election commission before considering the issue. Buruta v. Walter, 12 FSM Intrm. 289, 295 (Chk. 2004).

Failure to respond to a motion may be deemed consent to the granting of the motion, but there still must be a basis in law and fact justifying the relief requested in order for the court to grant the motion in the absence of a response. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 348, 350 (Pon. 2004).

The Rule 6(d) requirement that motions "contain certification by the movant that a reasonable effort has been made to obtain the agreement or acquiescence of the opposing party and that no such agreement has been forthcoming" does not apply to Rule 6(b)(1) requests to enlarge time (requests made before time has expired) since such requests may be made, and granted, without notice. Such certification is necessary for Rule 6(b)(2) requests to enlarge time once the deadline has passed since such requests must be made on motion with notice. Church of the Latter Day Saints v. Esiron, 12 FSM Intrm. 473, 474 (Chk. 2004).

Failure to oppose a motion is generally deemed a consent to the motion, but even when there is no opposition, the court still needs good grounds before it can grant the motion. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 495 (Chk. 2004).

Since court decisions are constitutionally required to be consistent with the geographical configuration of Micronesia, which includes the relative isolation of various outer island communities, a fifteen-day delay caused by the inability of a mayor from an outer island with no air service to Chuuk Lagoon to travel to the Lagoon to sign legal papers will be considered excusable neglect. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 495-96 (Chk. 2004).

Rule 6(d) requires that motions be accompanied by a memorandum of points and authorities and that the moving party's failure to file the memorandum of points and authorities shall be deemed the moving party's waiver of the motion. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

Although Rule 6(d) requires that motions must contain both a memorandum of points and authorities and a certification that a reasonable effort has been made to obtain the opposing party's "agreement or acquiescence" and whether it has been obtained, only the failure to include points and authorities results in a mandatory denial of the motion. Whether the court denies a motion because it lacks a certification concerning the opposing party's "agreement or acquiescence," is a matter left to the court's discretion. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

When there are other grounds to deny a motion, the absence of a certification that a reasonable effort has been made to obtain the opposing party's "agreement or acquiescence" will be used as a secondary ground of denial. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

When the motion is sought *ex parte* or is one that may be sought *ex parte* or without notice, no certification that a reasonable effort has been made to obtain the opposing party's "agreement or acquiescence" is needed. Otherwise, when the certification is absent, the court will generally not rule either way on the motion until the time (generally ten days, or if served by mail, sixteen) allowed for responses has

expired, unless the opposing party has filed a response before then. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

A movant who fails to include a certification concerning the opposing party's agreement or acquiescence, takes the risk that, because of the certification's absence, the motion may be denied and that, as a result of the passage of time, the possibility of taking alternative action or of renewing the motion may be gone or its possible scope or effectiveness may be narrowed. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

Often, seeking the opposing party's consent is simply good practice because, although agreement by counsel does not mean that the court will, or must, grant the agreed motion, it does increase the likelihood it will be granted. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 (Chk. 2004).

In the case of certain motions, such as a Rule 11 motions for sanctions, the court, in its discretion, has, and will, overlook the lack of a certification when it is apparent from the motion's nature that no agreement would ever be considered by, or forthcoming from, the opposing party and that any attempt to seek such an agreement would be futile. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 496 & n.3 (Chk. 2004).

Failure to file a timely opposition to a motion (not later than ten days after service of the motion) is deemed a consent to the motion and the court, may in its discretion, refuse to hear oral argument in opposition to the motion. Skilling v. Kosrae State Land Comm'n, 13 FSM Intrm. 16, 18 (Kos. S. Ct. Tr. 2004).

The "statute of limitations" is an affirmative defense which must be raised in either the answer or in a motion to dismiss. A plaintiff's failure to timely oppose a defendant's motion to dismiss is deemed a consent to the motion. However, even without opposition, the court still needs good grounds before it can grant the motion. Skilling v. Kosrae State Land Comm'n, 13 FSM Intrm. 16, 19 (Kos. S. Ct. Tr. 2004).

Nonresponse may be deemed consent to the motion, but there still must be a basis in law and fact for granting the motion. Clarence v. FSM Social Sec. Admin., 13 FSM Intrm. 34, 35 (Kos. 2004).

When a party files a motion for enlargement of time under Rule 6(b) after the time for doing the act has expired, he must show excusable neglect. Merely being a busy lawyer does not establish excusable neglect and a motion to enlarge brought on that basis will be denied. Clarence v. FSM Social Sec. Admin., 13 FSM Intrm. 34, 35 (Kos. 2004).

Since there is no authority that a litigant may "reserve" an unspecified objection by stating that it is reserving its right to comment and object to an attorney's fees submission until such time that the appellate division has finally determined the appealed case including the propriety of the award of attorney's fees and costs, such a notice of reservation is deemed a waiver of any objection to counsel's amended attorney's fee statement. AHPW, Inc. v. FSM, 13 FSM Intrm. 36, 40 (Pon. 2004).

Failure to oppose a motion is generally deemed a consent to the motion, but even if there is no opposition, the court still needs good grounds before it can grant the motion. For a motion to be granted, even if unopposed, it must be well grounded in law and fact. Lee v. Lee, 13 FSM Intrm. 68, 70 (Chk. 2004).

When the plaintiff did not file any timely opposition to the defendant's motion to dismiss, the plaintiff's failure to file a memorandum in opposition to the motion to dismiss is deemed a consent to the motion. However, even without opposition, the court still needs good grounds before it can grant the motion. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 80 (Kos. S. Ct. Tr. 2004).

Failure to file responsive papers to a motion is deemed a consent to the motion, and a party failing to file responsive papers to a motion will not be allowed to argue it orally. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 123-24 (Chk. 2005).

When no opposition has been filed to a motion, it is generally deemed a consent to that motion. Bank

of the FSM v. Aisek, 13 FSM Intrm. 162, 165 (Chk. 2005).

– New Trial

A motion for a new trial may be filed before the entry of judgment. Walter v. Meippen, 7 FSM Intrm. 515, 517 (Chk. 1996).

A new trial may be granted to all or any of the parties and on all or part of the issues for manifest error of law or fact, or for newly discovered evidence. Conrad v. Kolonia Town, 8 FSM Intrm. 215, 216 (Pon. 1997).

It is not a manifest error of fact requiring a new trial that certain evidence that parties felt was compelling was not recited in the court's decision or given the weight they thought proper, when the parties were afforded a full hearing and the court considered all evidence on the record in reaching its decision. Conrad v. Kolonia Town, 8 FSM Intrm. 215, 217 (Pon. 1997).

It is not a manifest error of law or fact requiring a new trial that the court held police officers liable for battery without determining exactly which officer's action caused plaintiff's injury when the court found that each of the defendants had participated in plaintiff's arrest, the court discussed the issues of justifiable force and privilege throughout its decision, and found that defendants had acted with intent to bring about a harmful or offensive contact with plaintiff, which was not justified under the circumstances. Conrad v. Kolonia Town, 8 FSM Intrm. 215, 217-18 (Pon. 1997).

A motion for a new trial will be denied when the movant has not demonstrated that a manifest error of law or fact existed. Conrad v. Kolonia Town, 8 FSM Intrm. 215, 218 (Pon. 1997).

A motion for a new trial will be denied when medical expenses were properly awarded as an element of damages against a negligent tortfeasor and when no legal error resulted from the court's reliance on another case because the court's finding that the plaintiff was working for the movant, and being supervised by his foreman when the accident occurred was similar to facts of the other case. Amayo v. MJ Co., 10 FSM Intrm. 371, 377 (Pon. 2001).

Rule 59 provides a means for relief in cases in which a party has been unfairly made the victim of surprise, but relief will be denied if the party failed to seek a continuance. Surprise, along with excusable neglect, is also addressed by Rule 60(b)(1). Thus, if a party is surprised at trial he is amply protected by Rules 59(a) and 60(b). Amayo v. MJ Co., 10 FSM Intrm. 371, 383 (Pon. 2001).

A Rule 59 motion must be brought within ten days of entry of judgment and can either be for a new trial or to alter or amend the judgment. Farata v. Punzalan, 11 FSM Intrm. 175, 177 (Chk. 2002).

A new trial is granted only for manifest error of law or fact, or for newly discovered evidence, and will be denied when the movant has not identified any manifest error of law or fact or any newly discovered evidence. Farata v. Punzalan, 11 FSM Intrm. 175, 177 (Chk. 2002).

A motion for new trial may be filed before the entry of judgment. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 182 (Kos. S. Ct. Tr. 2002).

A motion for new trial will be denied when the movant has not demonstrated that a manifest error of law or fact existed. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 182 (Kos. S. Ct. Tr. 2002).

The trial court may deny a motion for new trial when the motion's basis is the judge's failure to recuse himself and the party making the motion was, since the beginning of the case, aware of the information upon which the motion is based. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 184 (Kos. S. Ct. Tr. 2002).

When a justice was not required to recuse himself from a matter, his failure to recuse himself does not constitute manifest error of law and a motion for a new trial on that basis will be denied. Tolenoa v. Kosrae,

11 FSM Intrm. 179, 185 (Kos. S. Ct. Tr. 2002).

– Notice

Constructive notice is a concept through which actual notice is imputed to a party regardless of whether that party has actual knowledge of the imputed facts. A party has constructive notice when from all the facts and circumstances known to him at the relevant time, he has such information as would prompt a person exercising a reasonable care to acquire knowledge of the fact in question or to infer its existence. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 177 n.11 (Pon. 1995).

Substantial, open and notorious occupation of land is constructive notice of occupant's claim and puts all persons on inquiry as to the nature of occupant's claim, and whoever willfully avoids learning of such trespass will be charged with constructive notice. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 177-78 (Pon. 1995).

A plaintiff cannot contend that he had no notice of his causes of action until a certain date when before that date he had filed a prior suit involving the same claims and land. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 181-82 (Pon. 1995).

An attorney, who stated that he was appearing temporarily for a party and only for the purposes of that one brief, in chambers, off-the-record status conference and who did not file a notice of appearance either then or subsequently, did not appear of record. And when that attorney did nothing officially of record in the case until he came to court with the party for the trial's afternoon session, he was not the party's counsel of record as of the date the notice of trial was served, and it is immaterial whether he received the notice of trial. Amayo v. MJ Co., 10 FSM Intrm. 371, 378-79 (Pon. 2001).

No hard and fast rule for determining what notice of trial is adequate can be made, as any such rule would be arbitrary. While the law requires that adequate notice be given, it does not require that any particular type or kind of notice be given, so that a written notice is not required; a party's actual knowledge of the trial date is sufficient. Amayo v. MJ Co., 10 FSM Intrm. 371, 379 (Pon. 2001).

Personal service on a party of a trial subpoena that gave clear, unambiguous notice to that party of the time and place of trial more than seven weeks before trial, constituted adequate timely notice of trial. Amayo v. MJ Co., 10 FSM Intrm. 371, 379 (Pon. 2001).

There was no defect in service when a person who had been subpoenaed for trial as a witness, was also a party to the litigation, who was representing himself. As such, he is to be credited with knowing that "trial" means exactly that, a final determination of the merits of the case. Amayo v. MJ Co., 10 FSM Intrm. 371, 380 (Pon. 2001).

No service on a defendant of a motion for entry of a default judgment is necessary under the rules, and nothing in the rules requires that notice of hearings on default matters be given to a defaulting defendant. Konman v. Esa, 11 FSM Intrm. 291, 293-94 (Chk. S. Ct. Tr. 2002).

Even when a litigant was provided with a subpoena by opposing counsel, which accurately stated the trial date, it is essential that the trial court insure that its own notice procedures satisfy the requirements of due process, especially where *pro se* litigants are involved. When unrepresented parties are deluged with legal documents drafted by attorneys on the opposing side, it is conceivable that confusion will result. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Except as otherwise provided in the rules or by court order, every written notice must be served upon each of the parties. It is mandatory for the court to serve notices on parties, unless they are in default. The court must insure that its own notices and orders are properly served on *pro se* litigants – *pro se* litigants should not be compelled to rely upon opposing counsel to inform them of a trial date. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

When the trial court easily could have concluded a trial on the full merits of the case by extending or delaying the proceedings for a few extra hours, but chose instead to base its determination of liability upon evidence that a litigant did not have an opportunity to oppose because of lack of court-issued notice of trial, and when the law favors the disposition of cases on their merits, the trial court's error in failing to insure that it provided the litigant with notice of the trial date and time brings into question the fairness, integrity, and public reputation of judicial proceedings. Panuelo v. Amayo, 12 FSM Intrm. 365, 375 (App. 2004).

A corporation has received notice when its officers promptly received a default notice in which all the information was correct except the P.O. box number and the names in the greeting and when, even if those flaws were not in strict compliance with the written notice requirement, the accuracy of the rest of the document constitutes constructive notice. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

A party has constructive notice when from all the facts and circumstances known to him at the relevant time, he has such information as would prompt a person exercising a reasonable care to acquire knowledge of the fact in question or to infer its existence. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

When a guaranty itself does not require a notice of the principal's default to the guarantors and when the relationship between the debtor and the guarantors is such that the guarantors may be charged with notice of the debtor's situation without a formal notice of default, separate notice to the guarantors is not required. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 10 (Pon. 2004).

– Parties

Either the husband or the wife may prosecute or defend a civil action in which one or both are parties, provided that he or she has informed his or her spouse of the representation. O'Sonis v. Truk, 3 FSM Intrm. 516, 518 (Truk S. Ct. Tr. 1988).

The substitution of a party upon the death of a party plaintiff requires an affirmative showing that the cause of action survived the death. Damarlane v. FSM, 8 FSM Intrm. 10, 12 (Pon. 1997).

When a party has died, a statement suggesting the party's death may be placed upon the record and served in compliance with the rules for service of motions, and if a motion for substitution is not made within 90 days afterward then the action shall be dismissed as to the deceased party. Damarlane v. FSM, 8 FSM Intrm. 10, 12 (Pon. 1997).

Rule 25(a) clearly contemplates appointment of legal representatives, such as an executor or an administrator for substitution for a deceased party. Relatives of the deceased who are not legal representatives cannot be substituted as parties. The identity of an administrator is not presumed from an intestacy statute. There must be some designation by a court. The proper party for substitution is either the executor or the administrator of the deceased's estate ("representative"), or, if the estate has been distributed by the time the motion to substitute is made, the distributee ("successor"). Damarlane v. FSM, 8 FSM Intrm. 10, 12 (Pon. 1997).

A branch campus of the College of Micronesia-FSM does not have the capacity to sue or be sued on its own and will be dismissed from an action where the College of Micronesia-FSM, a public corporation, is a party. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 441 (Chk. 1998).

Natural persons generally have the capacity to sue or be sued. Kaminanga v. FSM College of Micronesia, 8 FSM Intrm. 438, 442 (Chk. 1998).

Actions are prosecuted in the name of the real party in interest. An assignment passes title to the assignee so that he is the owner of any claim arising from the chose and should be treated as the real party in interest. When all rights to a claim have been assigned, courts generally have held that the assignor no longer may sue. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 86 n.1 (App. 1999).

When a defendant counterclaims against the original plaintiff and new additional parties, as to claims between the original parties the original plaintiff is designated plaintiff/counterdefendant while the original defendant is designated defendant/counterplaintiff, and as to new parties on the counterclaim, the original defendant is designated counterclaim plaintiff, while the new parties are designated counterclaim defendants. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 291 (Yap 1999).

Because the use of John Doe plaintiffs is limited to those rare cases where for privacy concerns of a highly personal and sensitive nature the plaintiff's identity is kept secret, when no such privacy considerations are present and the defendants ask the court to add fictitious plaintiffs that are unknown and quite probably nonexistent, joinder of John Does as party plaintiffs will be denied. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

The only way a vessel can be a defendant in a civil action is if the proceeding against it is *in rem*. The FSM Supreme Court may exercise *in rem* jurisdiction over a vessel for damage done by that vessel. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 51 (Chk. 2001).

A judgment may not be rendered in favor of or against a person who was not made party to the action. A party to an action is a person whose name is designated on the record as a plaintiff or defendant. A person may not be made a party to a proceeding simply by including his name in the judgment. Hartman v. Bank of Guam, 10 FSM Intrm. 89, 97 (App. 2001).

All parties must be named in the complaint. The only exception the rules allow to this requirement that parties be named, rather than just described, is that a public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name. Moses v. Oyang Corp., 10 FSM Intrm. 210, 213 (Chk. 2001).

Replacing an unnamed or "John Doe" party with a named party in effect constitutes a change in the party sued and can only be accomplished when the specifications of Rule 15(c) are met. Thus the presence, or addition, of described, but unnamed defendants would serve no purpose. Moses v. Oyang Corp., 10 FSM Intrm. 210, 213 (Chk. 2001).

No statute or rule specifically countenances the naming of fictitious, or "John Doe," defendants. The better practice is to move under Rule 15 of the FSM Rules of Civil Procedure for leave of court to add parties as their identities become known. Amayo v. MJ Co., 10 FSM Intrm. 244, 254 (Pon. 2001).

The mere filing of a motion to intervene will not give a person party status because persons seeking to intervene in a case cannot be considered parties until their motion to intervene has been granted. Motions to intervene are not granted automatically, nor does their filing constitute an automatic stay. Moses v. Oyang Corp., 10 FSM Intrm. 273, 276 (Chk. 2001).

An action's title should include the names of all the parties but the caption is not determinative as to parties to action. If the body of the complaint correctly identifies the parties, courts will generally allow amendment to correct technical defects in the caption. Small v. Roosevelt, Innocenti, Bruce & Crisostomo, 10 FSM Intrm. 367, 369 n.1 (Chk. 2001).

All plaintiffs should be named in the complaint's caption, and certainly in the complaint's body as well. The defendants have a right to know the identity of those suing them. Small v. Roosevelt, Innocenti, Bruce & Crisostomo, 10 FSM Intrm. 367, 369 n.1 (Chk. 2001).

In *in personam* actions, there is no authority to proceed against unknown persons in the absence of a statute or rule, and the FSM has no rule or statute permitting the use of fictitious names to designate defendants. Accordingly, John Doe defendants will be dismissed. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412 n.1 (Pon. 2001).

Since any judgment *in personam* against an unknown defendant would be void, the court will dismiss

John Doe defendants. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412-13 n.1 (Pon. 2001).

When the plaintiffs' prayer for injunctive relief that sought to bar the defendants from interfering with the plaintiffs' claimed ownership interests in tideland and when it was the defendants' destruction of a *mechen* sign that caused the plaintiffs to resort to court action and seek injunctive relief, the defendants, who as *afokur* may have themselves claimed some property use rights in the tideland, were thus proper parties to the suit even once they declined to claim ownership for themselves. Phillip v. Moses, 10 FSM Intrm. 540, 545 (Chk. S. Ct. App. 2002).

A person may act as a clan representative and be a party-plaintiff in his representative capacity when he was an acknowledged lineage representative prior to and during the negotiations over the lineage land and was named as a lineage representative on the land's certificate of title. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 158-59 (Chk. 2002).

In Chuuk, it has been common practice for one joint owner to sue as a representative of himself and other joint owners, or for the lineage as a whole to sue as one party, but when neither is what was done in the case and the plaintiff's complaint asserted that he was the sole owner of the land allegedly trespassed upon, a defendant's motion to add the land's co-owners as parties-plaintiff must be granted. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

A judgment may be vacated for nonjoinder of a necessary or indispensable party or where it affects persons who were never made parties to the suit. Pastor v. Ngusun, 11 FSM Intrm. 281, 285 (Chk. S. Ct. Tr. 2002).

In consolidated cases that have become a quiet title action, the proper and indispensable parties to the action include without limitation all persons who the record indicates may claim any interest, wherever derived, in any portion of the land. Pastor v. Ngusun, 11 FSM Intrm. 281, 286 (Chk. S. Ct. Tr. 2002).

Rule 60(a) allows the correction of clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission. It may be inapplicable when plaintiff's counsel, who, through oversight, was unaware of the exact identity of his own client, seeks to substitute the real party in interest for the originally-named plaintiffs. While Rule 60(a) may be utilized to correct mistakes by the parties as well as those committed by the clerk or by the court, including the misnomer of a party (usually a defendant), it does not appear that the rule may be used to substitute a party plaintiff for the other entities mistakenly named as plaintiffs. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 353 (Chk. 2003).

An assignee is generally the real party in interest. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 353 (Chk. 2003).

Every action must be prosecuted in the name of the real party in interest. But no action will be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution will have the same effect as if the action had been commenced in the name of the real party in interest. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 353 (Chk. 2003).

The purpose of Rule 17(a) is to allow an assignee to sue in its own name, and it has, more importantly, come to also protect the defendant against later action by the party actually entitled to recover and thus insures that a judgment will have its proper final (res judicata) effect. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

Rule 17(a) controls the substituion of the real party in interest when the interest was transferred before the suit was filed, while Rule 25(c) applies if the transfer occurred after the start of the suit. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

When the plaintiffs' motion asks that another entity be substituted in as plaintiff because it is the real party in interest and the motion does not seek to change any claim or the cause of action, the motion will be granted. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

Substitution of plaintiffs is allowed under Rule 15 when the substitution does not change the claim or cause of action. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

Once a party's death has been suggested on the record under Civil Procedure Rule 25(a)(1), the ninety-day deadline for making a motion for substitution of that deceased party starts running, and when the ninety days has passed and no motion for substitution or for enlargement of time has been filed, that party will be dismissed. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties, and unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death, the action shall be dismissed as to the deceased party. Bank of the FSM v. Rodriguez, 11 FSM Intrm. 542, 544 (Pon. 2003).

Absent an order dismissing it, a defendant is still a party despite its deletion from the case caption. Jackson v. Pacific Pattern, Inc., 12 FSM Intrm. 18, 19 (Pon. 2003).

A d/b/a is not a party. Jackson v. Pacific Pattern, Inc., 12 FSM Intrm. 18, 20 (Pon. 2003).

A party who was originally a defendant but who is not named as a defendant in the plaintiffs' first amended complaint will remain a party to the action by virtue of his counterclaims against a plaintiff. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 124, 126 n.1 (Pon. 2003).

When a plaintiff files a lawsuit against a Pohnpei state employee or public officer arising out of an act or omission within the scope of his or her public duties or employment either in his or her official capacity or as an individual, and that lawsuit alleges any tort, tax or contract claims, claims for injuries or damages, or actions which seek injunctive relief or writ of mandamus, the state itself must also be named as a defendant, but in an appeal from an administrative agency decision, the plaintiff is permitted, but not required, to name the state as a party to the action. Cuipan v. Pohnpei Foreign Inv. Bd., 12 FSM Intrm. 184, 185 (Pon. 2003).

When the deceased's brother failed to provide the court with evidence of his representation of the deceased's heirs in the matter, his appearance is accepted as a pro se representation of himself and his claimed interests, but when the brother is not an heir, he does not have standing to file a motion for reconsideration on his own behalf because he is not a party to the matter, and on this basis his motion will be denied. Edwin v. Heirs of Mongkeya, 12 FSM Intrm. 220, 222 (Kos. S. Ct. Tr. 2003).

When determinations of ownership for adjoining land show that title to those lands is held not only by the named parties but by their brothers and sisters as well, these persons should be named in a boundary dispute and trespass case's pleadings and at least once in the caption, because as co-owners, they may be indispensable parties. In re FSM Telcomm. Corp. Cellular Tower, 12 FSM Intrm. 243, 248 (Chk. 2003).

When an entity is in possession of a plot of land because its tower sits on it, and the plaintiffs seek relief against it, and since it has an interest in maintaining its possession of the plot, it is, or should be, a party-defendant. Kiniol v. Kansou, 12 FSM Intrm. 335, 336 (Chk. 2004).

Proceeding against unknown defendants has not been authorized by the FSM Rules of Civil Procedure. People of Weloy ex rel. Pong v. M/V Micronesian Heritage, 12 FSM Intrm. 506, 507 (Yap 2004).

When a verified complaint makes no allegations against persons known or thought to exist but whose identities are unknown and the Doe defendants are only mentioned in the caption, it does not appear any purpose would be served by leaving them in the caption. People of Weloy ex rel. Pong v. M/V Micronesian Heritage, 12 FSM Intrm. 506, 508 (Yap 2004).

Even if the court permitted the inclusion of Doe defendants, in order to replace a Doe defendant with a named party, the plaintiffs would still have to move, under Civil Procedure Rule 15, to amend the pleadings to replace the Doe defendant with a named defendant, and that to do so, all the Rule 15's specifications must be met, and since even in the absence of John Doe defendants, the plaintiffs can still move to amend their pleadings should the plaintiffs identify through discovery other persons who may be liable on the plaintiffs' claims in a case, the court will dismiss without prejudice the Doe defendants when no reference was made to them in the complaint's body. People of Weloy ex rel. Pong v. M/V Micronesian Heritage, 12 FSM Intrm. 506, 508 (Yap 2004).

A motion to dismiss John Doe defendants will be granted. Naming John Doe defendants is not a pleading practice recognized in the FSM. The John Doe defendants will be deleted from the caption and the caption on the parties' future filings will be consistent with the order. Warren v. Pohnpei State Dep't of Public Safety, 13 FSM Intrm. 154, 155 (Pon. 2005).

– Pleadings

When issues which were not raised in the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Edwin v. Kosrae, 4 FSM Intrm. 292, 301 (Kos. S. Ct. Tr. 1990).

The pleading requirements of FSM Civil Rule 8(a) are to be interpreted liberally, and a complaint which states the grounds of jurisdiction and alleges facts sufficient to put the defendant on notice as to the nature and basis of the claim being made sufficiently complies with the rule. Faw v. FSM, 6 FSM Intrm. 33, 36-37 (Yap 1993).

Where a plaintiff files an amended complaint without leave of court and no motion for leave was ever filed the court may order the amended complaint stricken from the record. An entry of default based on such stricken amended complaint will be set aside. Berman v. FSM Supreme Court, 6 FSM Intrm. 109, 112-13 (Pon. 1993).

A party may not amend its pleadings after trial to include another issue unless it was tried by the express or implied consent of the parties. Ponape Constr. Co. v. Pohnpei, 6 FSM Intrm. 114, 120 (Pon. 1993).

When an issue not raised in the pleadings is raised at trial without objection by either party and evidence is admitted on the matter, the issue is to be considered tried by implied consent per FSM Civil Rule 15(b). Wito Clan v. United Church of Christ, 6 FSM Intrm. 129, 133 (App. 1993).

Where a wife is not a party to an action the court may strike from the complaint references to harm to her because she is not a party to the litigation and therefore damages for harm to her cannot be obtained as part of the action. It would be unfair to allow the plaintiff to seek damages for harm to his wife while maintaining that she is a non-party who is not subject to the pleading, discovery, and evidentiary rules that a party is bound by. McGillivray v. Bank of the FSM (I), 6 FSM Intrm. 404, 407 (Pon. 1994).

Rule 9(b) requires that in allegations of fraud that the circumstances constituting the fraud shall be stated with particularity. The extent of the particularity is guided by FSM Civil Rule 8(a) which requires a short and plain statement of the claim. Pohnpei v. Kailis, 6 FSM Intrm. 460, 462 (Pon. 1994).

The rules allow for notice pleading and require a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled. The pleadings must give the opposing party fair notice of the nature and grounds for the claim, and a general indication of the type of litigation involved. Apweteko v. Paneria, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

Pleadings may be amended as a matter of right anytime before a responsive pleading is served, with written consent of the adverse party, or by order of court, which should be liberally granted. Once the pleading

is complete and all amendments have been filed the matters raised by the pleadings normally form the issues to be determined at trial. Apweteko v. Paneria, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and any party may make a motion to amended the pleadings to conform to the evidence and issues tried by such consent. Apweteko v. Paneria, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

If an unpled theory of recovery is fully tried by consent of the parties, the trial court may base its decision on that theory and may deem the pleadings amended accordingly, even though the theory was not set forth in the pleading or the pretrial order. Apweteko v. Paneria, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

If no understanding by the parties appears in the record that evidence admitted at trial was aimed at an unpled issue, it is an abuse of discretion for a court to base its decision on issues not pled. An adverse party must have sufficient notice to properly prepare to oppose the claim. Apweteko v. Paneria, 6 FSM Intrm. 554, 557 (Chk. S. Ct. App. 1994).

A court commits reversible error by basing its decision on a theory of recovery that was not raised by the pleadings nor tried by consent or understanding of the parties. Apweteko v. Paneria, 6 FSM Intrm. 554, 558 (Chk. S. Ct. App. 1994).

A court has discretion to determine whether it is just to allow a party to serve additional, supplemental pleadings upon an opposing party based on happenings since the date of the pleading sought to be supplemented. Damarlane v. Pohnpei State Court, 6 FSM Intrm. 561, 563 (Pon. 1994).

Where a party has obtained all the relief he originally requested it is not just for a court to allow that party to supplement his pleadings to seek additional relief because he is dissatisfied with the relief he received. Damarlane v. Pohnpei State Court, 6 FSM Intrm. 561, 563 (Pon. 1994).

When a court has granted leave to file an amended complaint attached to movant's motion to amend, and the movant later files a different amended complaint, no leave has been granted for that complaint and its filing is improper. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 15 (App. 1995).

An amended pleading, which is complete in itself and which does not refer to or adopt a former pleading as a part of it, supersedes the former pleading. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 15 (App. 1995).

The rules require only notice pleading, and are flexible and informal rather than technical. The complaint need only be a short and plain statement of the claim and give the defendant fair notice of the factual wrong on the basis of the facts asserted. The legal theory advanced, if one is advanced, need not be correct. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 113-14 (Chk. 1995).

A complaint should not be dismissed and a party precluded from relief because a plaintiff's lawyer has misconceived the proper legal theory of the claim. If the complaint shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient. Semwen v. Seaward Holdings, Micronesia, 7 FSM Intrm. 111, 114 (Chk. 1995).

Where a plaintiff in response to interrogatories does not list "funding" as one of the defendant's acts constituting a violation and plaintiffs' amended pretrial statement does not state that "funding" is a ground for liability, plaintiffs' allegation in their complaint that "funding" gave rise to liability will be deemed abandoned. Damarlane v. United States, 7 FSM Intrm. 167, 169 (Pon. 1995).

A court has inherent power to strike those portions of a pretrial statement that do not comport with its order for pretrial statements. Damarlane v. United States, 7 FSM Intrm. 167, 170 (Pon. 1995).

A court may consider as evidence against pleader, in the action in which they are filed, a party's earlier admissions in its responsive pleadings even though it was later withdrawn or superseded by amended pleadings. A court may take judicial notice of them as part of the record. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 249 (Chk. 1995).

A court has discretion to allow an amendment to the pleadings. In the case of a post-trial motion to amend, the court must find that the unpled theory or issue has been tried by the express or implied consent of the parties. If it has not, then it is reversible error for the court to base its judgment on the unpled theory. Alafonso v. Sarep, 7 FSM Intrm. 288, 290 (Chk. S. Ct. Tr. 1995).

When pleading fraud the pleader must state the time, place, and content of the false misrepresentation, the fact misrepresented and what was obtained as a consequence of the fraud. Pacific Agri-Products, Inc. v. Kolonia Consumer Coop. Ass'n, 7 FSM Intrm. 291, 293 (Pon. 1995).

The extent of the particularity required when pleading fraud is guided by FSM Civil Rule 8(a), which requires a "short and plain statement of the claim." Chen Ho Fu v. Salvador, 7 FSM Intrm. 306, 309 (Pon. 1995).

When a pleading is alleged to be too vague and ambiguous for the adverse party to respond the appropriate motion is one for a more definite statement, not one to strike. Chen Ho Fu v. Salvador, 7 FSM Intrm. 306, 309-10 (Pon. 1995).

A complaint cannot be amended to include allegations already ruled against on summary judgment. Damarlane v. United States, 7 FSM Intrm. 350, 353 (Pon. 1995).

A complaint cannot be amended after trial when the movants make no showing at all what it was that was tried by express or implied consent of the parties that would justify the amendment. Damarlane v. United States, 7 FSM Intrm. 350, 356 (Pon. 1995).

In view of the liberal discovery rules and procedures available, motions for more definite statement are generally disfavored, and are granted, not if a better affirmative pleading would enable the movant to provide a more enlightening or accurate response, but only if the pleadings addressed are so vague that they cannot be responded to. Whether such a motion should be granted is generally a matter within the court's discretion. FSM Dev. Bank v. Nait, 7 FSM Intrm. 397, 399 (Pon. 1996).

Pure conjecture is not the appropriate standard for the assertion of an affirmative defense. An affirmative defense may be pled only when to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the defense is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. Lavides v. Weilbacher, 7 FSM Intrm. 400, 405 (Pon. 1996).

Plaintiff's waiver of a portion of its monetary claim cannot summarily disprove an affirmative defense of usury. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (III), 7 FSM Intrm. 453, 455 (Pon. 1996).

Issues not specifically raised in pleading may be tried by parties' implied consent. Davis v. Kutta, 7 FSM Intrm. 536, 543 (Chk. 1996).

Although not listed in Civil Rule 8(c), failure to exhaust administrative remedies is an affirmative defense. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 618 (App. 1996).

Issues not raised in the pleadings may be tried by consent of the parties. Implied consent may be demonstrated by a party's failure to object to evidence directly pertaining to the issue or by the party against whom the issue is asserted being the first to raise the issue and submit evidence on it. Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 619 (App. 1996).

Counsel does not risk waiver of affirmative defenses if she does not list them immediately because additional time may obtained in which to respond to a complaint, or after an answer is filed the answer may be amended within twenty days without leave of court. If pretrial investigation and discovery uncovers an unanticipated defense, a defendant can move to amend the pleading, for which leave will be freely given when justice so requires. Finally, the pleadings do not necessarily bind the parties because issues not raised in the pleadings may be tried by the paries' express or implied consent. In re Sanction of Berman, 7 FSM Intrm. 654, 657 (App. 1996).

Generally, affirmative defenses that are not pled are waived. Consequently, a pleader normally will not be penalized for exercising caution when he sets up affirmative matter that technically may not be an affirmative defense but nonetheless might fall within the residuary clause of Rule 8(c) of the Rules of Civil Procedure. Senda v. Semes, 8 FSM Intrm. 484, 493 (Pon. 1998).

When an affirmative defense has not been pled but is raised after trial has begun, it is not waived when opposing counsel consents to its being raised. Senda v. Semes, 8 FSM Intrm. 484, 493 (Pon. 1998).

Affirmative defenses that in each instance are tied to specific factual allegations do not present an instance of blanket pleading of frivolous affirmative defenses without regard to the facts of the case. Senda v. Semes, 8 FSM Intrm. 484, 493-94 (Pon. 1998).

Issues raised in pleadings are not waived by a party's failure to discuss them in briefs. Senda v. Semes, 8 FSM Intrm. 484, 494 n.6 (Pon. 1998).

Pleadings are designed to develop and present the precise points in dispute between parties and should narrow and focus issues for trial, not provide a vehicle for scattering legal theories to the wind in the hope that the trial process will eventually winnow some few grains from the cloud of chaff. With respect to affirmative matter under Rule 8(c), counsel should come to trial knowing what affirmative defenses or "any other matter constituting an avoidance" the facts support, and present evidence accordingly. Senda v. Semes, 8 FSM Intrm. 484, 494 (Pon. 1998).

Upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or immaterial matter. Rule 12(f) is a useful vehicle for disposing of both legally and factually deficient defenses. The former defenses are those which would not under the facts alleged, constitute a valid defense to the action, while the latter are irrelevant defenses appropriately disposed of under that portion of Rule 12(f) dealing with immaterial matter. Senda v. Semes, 8 FSM Intrm. 484, 494-95 (Pon. 1998).

Normally a defense that is not pled is waived, but an affirmative defense is not waived when it is raised after trial has begun, and opposing counsel consents to its being raised. Senda v. Semes, 8 FSM Intrm. 484, 499-500 (Pon. 1998).

Affirmative defenses that the court has ruled against earlier and affirmative defenses for which no evidence was presented at trial must fail. Senda v. Semes, 8 FSM Intrm. 484, 501-02 (Pon. 1998).

When a party has mistakenly designated a counterclaim as a defense, the court, on such terms as justice requires, shall treat the pleading as if there had been a proper designation. Senda v. Semes, 8 FSM Intrm. 484, 503 (Pon. 1998).

When a party requests leave of the court to amend pleadings, leave shall be freely given. In addition, such amendment of the pleadings as may be necessary to cause them to conform to the evidence may be made upon motion of any party at any time. Sellem v. Maras, 9 FSM Intrm. 36, 38 (Chk. S. Ct. App. 1999).

Although a court should exercise its discretion liberally to allow amended pleadings, a motion to amend a complaint may be denied if it is futile. One reason a motion to amend would be futile is if the claims sought to be added are barred by the relevant statute of limitations. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82,

87 (App. 1999).

An amended pleading in a personal injury suit filed after the two year statute of limitations ran out would be futile unless it can be related back to an earlier date. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 87 (App. 1999).

A mistake of identity as used in Rule 15(c) applies to misnomers, incorrect names, and mistakes concerning which official body is the proper defendant, but a mistake of legal judgment concerning who is responsible for the tort, where the plaintiff was fully aware of the identities of the defendant and potential defendants, is not the type of mistake of identity which can be corrected under Rule 15(c), with the amended pleading to relate back. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 87 (App. 1999).

When the plaintiffs were fully aware of the identity of the third-party defendant at least since the third-party complaint was filed, but do not seek to amend their complaint to proceed against that party until after the statute of limitations has run, they made no mistake of identity correctable under Rule 15(c) and the motion to amend is properly denied because the amendment is futile. Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 87 (App. 1999).

Every defense, in law or fact, to a claim for relief in any pleading must be asserted in the responsive pleading thereto except for the defenses list in Rule 12(b), which may be raised by motion made before pleading. If a Rule 12(b) motion is denied the responsive pleading must be made within 10 days after notice of the court's action. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 283 (Yap 1999).

A defense is that which is offered and alleged by the party proceeded against in an action or suit, as a reason in law or fact why plaintiff should not recover or establish what he seeks. A motion for abstention has little common ground with the concept of a defense because abstention by no means precludes a plaintiff from obtaining the requested relief but rather goes to the question of the appropriate forum in which to pursue that relief. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 283 (Yap 1999).

Abstention is not a defense to a lawsuit in the sense used in Rule 12(b). In abstention practice, the movant is asking the court to exercise its discretion to abstain from hearing the action for the express purpose that another court may hear the lawsuit. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 283 (Yap 1999).

A motion to stay most closely analogizes to a motion to abstain, and such a motion is not a pre-answer motion, but a pre-trial motion. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 284 (Yap 1999).

There is no reason that answers could not be filed in due course during the pendency of an abstention motion, and there is also no reason that discovery could not have been ongoing during an abstention motion's pendency, since discovery was just as inevitable as the answer. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 284 (Yap 1999).

An abstention motion before the FSM Supreme Court should proceed as a post-answer motion, and not a motion in lieu of answer under Rule 12(b) of the FSM Civil Procedure Rules. Island Dev. Co. v. Yap, 9 FSM Intrm. 279, 284 (Yap 1999).

A counterclaim may not be directed solely against persons who are not already parties to the original action, but must involve at least one existing party. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 290 n.1 (Yap 1999).

Civil Procedure Rule 13(h) provides that persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 19 and 20. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 290 (Yap 1999).

A defendant is not required to obtain leave of court before naming additional defendants on its counterclaim, when the counterclaim is brought in the original answer, but although not required by Rule 13(h),

the general practice is to obtain a court order to join an additional party. Island Dev. Co. v. Yap, 9 FSM Intrm. 288, 291 (Yap 1999).

General denials are disfavored, but when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations of honesty in pleading set forth in Rule 11. Marar v. Chuuk, 9 FSM Intrm. 313, 314 n.1 (Chk. 2000).

A plaintiff may amend a complaint once without leave of court anytime before a responsive pleading is filed and a Rule 12 motion to dismiss is not a responsive pleading. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 410 (App. 2000).

Generally, leave to amend a complaint ought to be freely given. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

In the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment's allowance, or futility of amendment, leave to amend should, as the rules require, be "freely given." Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

It is an abuse of discretion for a trial court to deny leave to amend pleadings without stating its reasons on the record because outright refusal to grant leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

It is not an abuse of discretion to deny a motion to amend when the amendment would not cure a complaint's defects, and when the reasons are readily apparent that the amendment will obviously not cure a defective complaint, a trial court does not abuse its discretion by denying the amendment without declared reasons. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

Although when the reasons are readily apparent it is not a per se abuse of discretion to omit them, the better practice is for the trial court to state on the record its reasons for denying a motion to amend. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

Although a court should exercise its discretion liberally to allow amended pleadings, when a proposed amendment to a complaint would be futile because it still would not state a claim upon which the FSM Supreme Court could grant relief, the court may deny the motion to amend. Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000).

Because leave to amend a pleading shall be freely given when justice so requires, a plaintiff may be granted leave to amend its complaint to present its argument that the statute of limitations may have been tolled based upon its request that the parties submit their dispute to arbitration when the defendant has not presented any arguments that would show any injustice if the plaintiff amended its complaint. E.M. Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 9 FSM Intrm. 551, 559 (Pon. 2000).

The term "at issue" has been defined as, whenever the parties come to a point in the pleadings which is affirmed on one side and denied on the other, they are said to be at an issue. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 1, 4 (Chk. 2001).

A caption may be changed to reflect the defendants' name corrections in the plaintiff's motion to amend complaint, and to reflect the plaintiff's request in the opening statement at trial, that the caption be altered to conform to the pleadings. Estate of Mori v. Chuuk, 10 FSM Intrm. 6, 9 (Chk. 2001).

If a defendant has never been properly served with a complaint and summons, that defendant cannot

possibly file a late or untimely answer because the twenty-day time to answer allowed in Civil Procedure Rule 12(a), or the thirty-day time to answer allowed in 4 F.S.M.C. 204(3), does not start running until valid service of the complaint and summons has been made. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

Motions to strike under Rule 12(f) are viewed with disfavor and are infrequently granted. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

Because default judgments will be vacated under proper circumstances so that cases can be decided on their merits, and because when only a default has been entered, the policy in favor of vacating the default and deciding the case on its merits is even stronger, the policy in favor of deciding a case on its merits when no default has been entered and the answer merely filed a few days late must be much stronger. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

In all averments of fraud the circumstances constituting fraud must be stated with particularity. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

In the complaint the title of the action shall include the names of all the parties. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 49 (Chk. 2001).

Motions to strike redundant matter under Rule 12(f) are viewed with disfavor and are infrequently granted because the mere presence of redundant matter is not usually a sufficient ground and because a motion to strike for redundancy ought not to be granted in the absence of a clear showing of prejudice to the movant. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 50 (Chk. 2001).

When the complaint states that it is an admiralty and maritime action and that the plaintiffs are invoking the court's *in rem* and *in personam* jurisdiction, plaintiffs' failure to style their action against a vessel as *in rem* in the caption is merely a formal error and not a fatal defect, and the caption can always be amended to correct technical defects. Moses v. M.V. Sea Chase, 10 FSM Intrm. 45, 51 (Chk. 2001).

Errors in a case's caption can always be amended to correct technical defects. Sangechik v. Cheipot, 10 FSM Intrm. 105, 106 (Chk. 2001).

When the pleadings clearly name a person as the *de facto* keeper of the detention facility where the petitioner is currently incarcerated and the petitioner seeks a writ of habeas corpus directed to that person in that capacity, that person is properly named as the respondent to the petition. Sangechik v. Cheipot, 10 FSM Intrm. 105, 106 (Chk. 2001).

A court may order stricken from any pleading any redundant matter. Generally, courts will strike a claim as redundant when it essentially repeats another claim in the same complaint. Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 115 (Kos. 2001).

Rule 12(f) motions to strike are directed toward a complaint's internal redundancy, not toward non-internal redundancy where the claim is redundant to one in a different action. Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 115 (Kos. 2001).

The relief requested in the motion to strike a claim in a complaint on the ground that it is the same as a claim in the amended complaint in different civil action is more appropriately granted through consolidation of both actions because, since the claims are the same, the actions involve a common question of law or fact. Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 115-16 (Kos. 2001).

Pleadings are defined as the complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, and third-party answer. No other pleadings are allowed, except that the court may order a reply to an answer or a third-party complaint. No other paper will be considered a pleading and a motion in any form cannot stand as a pleading. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon.

2001).

A motion to strike a memorandum supporting a motion and a response to an opposition is not a motion to strike matter from pleadings subject to Rule 12(f), but rather, falls under the general motion practice of Rule 7(b) which provides that an application to the court for an order shall be by motion and shall set forth the relief or order sought. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 159, 161 (Pon. 2001).

The FSM Supreme Court's practice has been to consider any written response from an unrepresented defendant as an answer or a pleading. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 172 (Chk. 2001).

The phrase "et al." or such other similar indication is not permitted in the caption of a complaint although it may be used on later filings. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

Because technical defects in a caption can always be amended, the failure to name a party as a defendant in the caption does not mean the action cannot be maintained against him if the complaint makes a number of explicit references to him and he was served. Moses v. Oyang Corp., 10 FSM Intrm. 210, 212 (Chk. 2001).

All parties must be named in the complaint. The only exception the rules allow to this requirement that parties be named, rather than just described, is that a public officer who sues or is sued in an official capacity may be described as a party by the officer's official title rather than by name. Moses v. Oyang Corp., 10 FSM Intrm. 210, 213 (Chk. 2001).

Replacing an unnamed or "John Doe" party with a named party in effect constitutes a change in the party sued and can only be accomplished when the specifications of Rule 15(c) are met. Thus the presence, or addition, of described, but unnamed defendants would serve no purpose. Moses v. Oyang Corp., 10 FSM Intrm. 210, 213 (Chk. 2001).

Defenses cannot be raised for the first time in a written closing argument when they were not raised in the answer and were not tried by express or implied consent of the parties. Defenses not raised in a responsive pleading are waived. Amayo v. MJ Co., 10 FSM Intrm. 244, 250 (Pon. 2001).

Any proposed amended complaint seeking to add a civil fraud charge against a defendant must state the circumstances constituting fraud with particularity. Bank of the FSM v. Pacific Foods & Servs., Inc., 10 FSM Intrm. 327, 333 (Pon. 2001).

When non-pleading issues are tried by the parties' consent, those issues shall be treated as raised in the pleadings. Amayo v. MJ Co., 10 FSM Intrm. 371, 377 (Pon. 2001).

Dismissal of John Doe defendants does not prohibit the plaintiff from seeking to amend its complaint if it does ascertain other parties should be named defendants. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412 n.1 (Pon. 2001).

Late filed responsive pleadings will not be stricken when the plaintiffs have failed to show any prejudice from defendants' failure to respond within 20 days of service of the plaintiffs' complaint and when the policy of deciding cases on the merits outweighs the prejudice to plaintiffs, but the defendants will be required to amend their responsive pleadings and file responses to plaintiffs' complaint that comply with Rule 8(b). Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 439-40 (Pon. 2001).

The court will grant defendants leave to amend their responsive pleadings when one defendant has not stated in short and plain terms her defenses to each claim asserted and has not admitted nor denied the plaintiffs' averments rely and the other defendant had not obtained leave to amend his answer, so the court could not permit him to avail himself of the affirmative defenses filed later. Carlos Etscheit Soap Co. v. Gilmete, 10 FSM Intrm. 436, 440 (Pon. 2001).

When the plaintiff's complaint claimed he performed "over 714 hours of overtime work," the defendant was given notice of the plaintiff's overtime claims. The defendant thus cannot exclude evidence that the plaintiff worked 1184.5 overtime hours, and the plaintiff does not need to amend his complaint, because 1184.5 hours is more than 714 hours. Palsis v. Kosrae, 10 FSM Intrm. 551, 552 (Kos. S. Ct. Tr. 2002).

A defendant who has failed to raise any affirmative defenses in his answer, or to amend his answer to add any, or to assert at trial any counterclaims or crossclaims, or third party claims, has waived and lost his right to assert at trial affirmative defenses and to assert any counterclaims or crossclaims, or third party claims. Shrew v. Killin, 10 FSM Intrm. 672, 674 (Kos. S. Ct. Tr. 2002).

A pleading must state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. Youngstrom v. NIH Corp., 11 FSM Intrm. 60, 61 (Pon. 2002).

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim and a pleading may be amended with leave of court to include a counterclaim when the counterclaim either matured or was acquired by the pleader after serving his pleading or when a pleader failed to set it up through oversight, inadvertence, or excusable neglect, or when justice requires. Youngstrom v. NIH Corp., 11 FSM Intrm. 60, 62 (Pon. 2002).

When a defendant seeks to amend its answer to include a permissive counterclaim and the plaintiff opposes on the basis that the statute of limitations has run on the proposed counterclaim, and when considerations of judicial economy weigh in favor of granting defendant's motion for leave to amend, the court will not address the issue of statute of limitations on the proposed counterclaim because this is a defense that could be the basis for a motion to dismiss the counterclaim, rather than a basis to oppose defendant's motion to amend. Youngstrom v. NIH Corp., 11 FSM Intrm. 60, 62 (Pon. 2002).

A party may seek leave of court to amend a pleading to include an omitted counterclaim, and leave will be freely given when justice so requires. Youngstrom v. NIH Corp., 11 FSM Intrm. 60, 62 (Pon. 2002).

The statute of limitations is an affirmative defense which must be raised in the defendant's answer, and when it has not been, the defendant has waived its statute of limitations defense. Tolenoa v. Kosrae, 11 FSM Intrm. 179, 185 (Kos. S. Ct. Tr. 2002).

Rule 14 allows a defendant to bring in third parties by causing a summons and complaint to be served upon persons not a party to the action who are or may be liable to the defendant for all or part of the plaintiff's claim against the defendant, but if those persons are added as parties plaintiff in the action, then they are parties, not third parties, and no third party complaint could possibly be brought against them. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

If persons the defendant seeks to add as third parties become plaintiffs, then the "claims" the defendant seeks to bring against them can properly be raised as defenses to the plaintiffs' action, and a motion for leave to file a third party complaint against them must be denied. Ifenuk v. FSM Telecomm. Corp., 11 FSM Intrm. 201, 204 (Chk. 2002).

Rule 8(a) provides that a pleading shall assert a short and plain statement of the claim showing that the pleader is entitled to relief. Under this rule, the claimant need not set forth any legal theory justifying the relief sought on the facts alleged, but the rule does require sufficient factual averments to show that the claimant may be entitled to some relief. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 230 (Pon. 2002).

The plaintiffs' factual averments and the claims resting on them are dispositive, not the legal theories assigned to the claims. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 230 (Pon. 2002).

After a pleading has been responded to, leave shall be freely given to amend a pleading when justice so requires. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 230-31 (Pon. 2002).

When at a late stage in the litigation, the plaintiffs can only allege on no more concrete basis than mere information and belief that an unseen contract may make non-parties liable for unpaid-for building materials, it is insufficient at this point to state an unjust enrichment or third-party beneficiary claim, and the motion to add these non-parties and claims will be denied. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 232 (Pon. 2002).

A motion to amend a complaint to add an unjust enrichment claim will be denied when it is based upon a defendant's failure to abide by the alleged agreements' terms because these are express agreements, and unjust enrichment is a theory applicable to implied contracts. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 232 (Pon. 2002).

When the loan agreement was produced in discovery seven months before the motion to amend was filed, but the motion was brought within the time permitted for filing pretrial motions; when the opponent bank was also responsible for considerable delays through its own resistance to discovery; and when the bank cannot claim surprise, since the loan agreement is its own document, a motion to amend the complaint to add a third-party beneficiary claim against the bank based on the loan agreement will be granted. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 232 (Pon. 2002).

When the applicable statute of limitations is six years and the construction agreement between the Permans and Felix is dated January 10, 1997 and other operative events occurred in September and October 1997, a July 23, 2002 motion to amend the complaint to add Felix and claims against him is not time barred. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 233 (Pon. 2002).

A strong presumption exists under FSM law for deferring land matters to local land authorities, along with federalism principles and concerns for judicial harmony. The FSM Supreme Court can certify such questions of state law to the state courts. But when, if the equitable or mechanic's lien claims had been presented in the original complaint, the court could then have certified the questions to the state court to determine whether such liens exist under state law and when the original complaint's factual allegations support such claims, there was no reason why that claim could not have been made then with discovery on-going while the state court considered the question. But when, considering the circumstances, it has become too late to bring this claim, a motion to amend the complaint to add a declaratory judgment claim that the plaintiffs have such a lien will be denied. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 233 (Pon. 2002).

A defendant's "cross-claim" against a plaintiff should properly be titled as a "counterclaim" and not a "cross-claim." Primo v. Semes, 11 FSM Intrm. 324, 325 n.1 (Pon. 2003).

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. But if a responsive pleading has been served, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

Rule 15 mandates that leave to amend a party's pleading shall be freely given by the court. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

A plaintiffs' attorney's failure to properly plead their claims is not a sufficient justification to prevent the plaintiffs from being able to bring their claims at all because a complaint should not be dismissed and a party precluded from relief when a plaintiff's lawyer has misconceived the proper legal theory of the claim. If the complaint shows that the plaintiff is entitled to any relief which the court can grant, regardless of whether it asks for the proper relief, the complaint is sufficient. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

When deciding whether justice requires that a plaintiff be permitted to amend its complaint, a trial court must navigate the conflicting principals that litigation must be brought to an end and that justice should be done. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

Although a defendant's motion to dismiss certain of plaintiffs' claims was granted because plaintiffs' counsel pled claims upon which relief could not be granted, this does not necessarily imply that plaintiffs have no claims against the defendant upon which relief might be granted. Thus, justice is better served by allowing the plaintiffs to amend their complaint than to preclude them from so doing. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 336 (Pon. 2003).

A proposed copy of plaintiffs' first amended complaint, attached as an exhibit to the plaintiffs' motion to amend complaint, will not be considered by the court to be the plaintiffs' operative pleading. When a motion to amend is granted, the plaintiffs must file and serve a separate pleading. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 333, 337 & n.3 (Pon. 2003).

A statute of limitations defense is not one of the enumerated defenses that may be brought by motion under Rule 12(b), but rather is one of the specific defenses named in Rule 8(c) where a party must set forth affirmatively in the answer, the statute of limitations and any other matter constituting an avoidance or affirmative defense. Segal v. National Fisheries Corp., 11 FSM Intrm. 340, 342 (Kos. 2003).

When a case has been properly removed from a municipal court where no complaint was filed, the FSM Supreme Court will require the plaintiff to file a complaint and allow the case to proceed therefrom. Damarlane v. Sato Repair Shop, 11 FSM Intrm. 343, 344 (Pon. 2003).

Our rules of pleading are informal and flexible, and a pleading need only set forth a short and plain statement of the wrong alleged based on the facts asserted. Even if a legal theory is advanced, it does not have to be the correct one and a claimant does not have to set out in detail the facts on which the claim for relief is based, but must provide a statement sufficient to put the opposing party on notice of the claim. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 449 (Pon. 2003).

A cross-claim that sets out a legal conclusion and that does not provide a short and plain statement of the facts on which the legal conclusion rests, lacks sufficient factual allegations and a motion to dismiss it will be granted. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 449 (Pon. 2003).

A defense perfunctorily raised in an answer but never explained, documented, or developed through argument and citation to the law, ultimately carries little or no weight. LPP Mortgage, Ltd. v. Ladore, 11 FSM Intrm. 601, 603 (Pon. 2003).

When cases have been consolidated and a party to the consolidated case, files a "third party complaint" against a party consolidated into the case it cannot actually be a third party complaint, regardless of what the "third party plaintiff" calls it, because a third party complaint is a device used to bring a non-party into a case. Claims against an opposing party are counterclaims, regardless of whether counsel has labeled them correctly. Claims against a co-party are cross-claims. Kitti Mun. Gov't v. Pohnpei, 11 FSM Intrm. 622, 625 n.1 (App. 2003).

A party may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise a party may amend the its pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Truk Trading Co. (Pohnpei) v. Department of Treasury, 12 FSM Intrm. 1, 2 (Pon. 2003).

A party must plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders. Truk Trading Co. (Pohnpei) v. Department of Treasury, 12 FSM Intrm. 1, 2 (Pon. 2003).

A motion to amend a complaint to add the FSM as a party will be granted when the original complaint was an appeal of a Pohnpei state administrative decision and when a related FSM administrative decision involving the plaintiff's related tax matters was recently issued since, as the plaintiff asserts that Pohnpei and the FSM are inconsistently interpreting tax laws, it seeks to add the FSM as a defendant so that both Pohnpei

and the FSM will be required to tax it uniformly, without potentially subjecting it to double tax liability. Judicial economy weighs in favor of permitting plaintiff to file its amended complaint and consolidate the appeals of inconsistent Pohnpei and FSM administrative decisions. Truk Trading Co. (Pohnpei) v. Department of Treasury, 12 FSM Intrm. 1, 2-3 (Pon. 2003).

When a defendant's motion to dismiss has been denied, he has 10 days within which to file his answer to the amended complaint. LPP Mortgage Ltd. v. Maras, 12 FSM Intrm. 27, 28 (Chk. 2003).

When the plaintiff's complaint seems to plead fraud, and a defendant moves to dismiss for failure to state a claim but the argument is that this claim should be dismissed because it was not plead with particularity, the court may treat that as a request for a more definite statement, grant the request, and require the plaintiff to amend its complaint to state with greater clarity which facts it believes constitute fraud. Asumen Venture, Inc. v. Board of Trustees, 12 FSM Intrm. 84, 92 (Pon. 2003).

When the defendants' answer imprecisely attempts to incorporate by reference in its response to the complaint's paragraphs 15-18 that incorporate all of the complaint's preceding paragraphs by reference, given the answer's denials of those preceding paragraphs, the facts alleged in the complaint's paragraphs 15-18 will be deemed denied. Fredrick v. Smith, 12 FSM Intrm. 150, 152 (Pon. 2003).

By its terms, Rule 15(b) applies after evidence has been introduced, either at an evidentiary hearing held in connection with a pretrial motion, in the course of trial, after the close of testimony, after the return of the verdict or entry of judgment, and on rehearing or on remand following an appeal. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7 (Pon. 2004).

A motion to amend the pleadings brought, and granted, before the trial or any evidentiary hearing was held falls under Rule 15(a). FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7 (Pon. 2004).

Under Rule 15(a), a court should generally exercise its discretion liberally to allow amended pleadings when justice so requires. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7 (Pon. 2004).

In the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the amendment's allowance, or futility of amendment, leave to amend should, as the rules require, be freely given. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7 (Pon. 2004).

Rule 15's purpose is to provide maximum opportunity for each claim to be decided on the merits rather than on procedural technicalities. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 7-8 (Pon. 2004).

When the defendants have never specified the defenses they believe that a non-party may have other than a reference in earlier filings to a defense that the court has rejected on other occasions and, more importantly, when the defendants, under the terms of the guaranty, waive any right to the non-party borrower's defenses, no undue prejudice to the defendants appears that would preclude the court from allowing the pleadings to be amended. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 8 (Pon. 2004).

Even if a motion were brought under Rule 15(b) and had been made after trial, the court could still permit the amendment of the pleadings despite the defendants' objection because if evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 8 (Pon. 2004).

A motion to strike amended pleadings and evidence concerning it will be denied when the court has determined that justice required amendment of the pleadings and that the presentation of the action's merits

would be subserved thereby. FSM Dev. Bank v. Arthur, 13 FSM Intrm. 1, 8 (Pon. 2004).

The statute of limitations is an affirmative defense which must be raised in either the answer or in a motion to dismiss. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 80 (Kos. S. Ct. Tr. 2004).

Counsel are put on notice that ghostwriting will be considered a violation of ethical and procedural rules of the Kosrae State Court. Counsel may assist pro se litigants in drafting and filing an answer to a summons and complaint, to avoid the entry of default. In cases where counsel assist pro se litigants with drafting and filing an answer, the answer shall reflect the counsel's limited assistance in preparing the answer, and shall sign the answer in that capacity, along with the signature of the pro se litigant. Kinere v. Kosrae Land Comm'n, 13 FSM Intrm. 78, 82 (Kos. S. Ct. Tr. 2004).

– Res Judicata and Collateral Estoppel

Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in the that action. Ittu v. Charley, 3 FSM Intrm. 188, 190 (Kos. S. Ct. Tr. 1987).

Under common law res judicata principles, an order of dismissal with prejudice bars reassertion of the dismissed claim at a later date. Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

A judgment of a court having jurisdiction of the parties and of the subject matter operates as res judicata, in the absence of fraud or collusion, even if obtained upon a default. Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

The need for finality of judgment, which is the inspiration of the res judicata doctrine, exists within the FSM. Ittu v. Charley, 3 FSM Intrm. 188, 191 (Kos. S. Ct. Tr. 1987).

A FSM Supreme Court decision applying state law in a case before it is final and res judicata; but if in a subsequent case a state court decides the same issue differently, the state decision in that subsequent case is controlling precedent and the national courts should apply the state court rule in future cases. Edwards v. Pohnpei, 3 FSM Intrm. 350, 360 n.22 (Pon. 1988).

Judgment entered pursuant to compromise and settlement is treated as a judgment on the merits barring any other action for the same cause. Truk v. Robi, 3 FSM Intrm. 556, 564 (Truk S. Ct. App. 1988).

A fundamental principle of the common law, traditionally referred to in common law jurisdictions as res judicata, is that once judgment has been issued and the appeal period has expired or the decision is affirmed on appeal, the parties are precluded from challenging that judgment or from litigating any issues that were or could have been raised in that action. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 106 (App. 1989).

The FSM Supreme Court normally will refuse to review the correctness of an earlier Trust Territory High Court judgment, which has become final through affirmance on appeal or through lack of a timely appeal, and claims that the earlier judgment is ill-reasoned, unfair or even beyond the jurisdiction of the High Court typically will not be sufficient to escape the doctrine of res judicata. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 107 (App. 1989).

The determination of jurisdiction itself normally qualifies for protection under the common law principle of res judicata, requiring a second court to presume that the court which issued the judgment did properly exercise its own jurisdiction, but plain usurpation of power by a court which wrongfully extends its jurisdiction beyond the scope of its authority, is outside of the doctrine and does not qualify for res judicata protection. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 107-08 (App. 1989).

In light of the Trust Territory High Court's insistence on maintaining control over cases within the Federated States of Micronesia in disregard of Secretarial Order 3039 and to the exclusion of the new

constitutional courts, its characterizations of Joint Rule No. 1 as "simply a memorandum" and of the words "active trial" in Secretarial Order 3039 as merely "administrative guidance," its acceptance of appeals after it was precluded from doing so by Secretarial Order 3039, its decision of appeals after Secretarial Order 3039 was terminated and its continued remand of cases to the High Court trial division for further action even after November 3, 1986, there can be no doubt that for purposes of res judicata analysis, the High Court was a court lacking capacity to make an adequately informed determination of a question concerning its own jurisdiction. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 118 (App. 1989).

Although final judgment in a case has been entered by the Trust Territory High Court, because any effort by a party to have the High Court consider its own jurisdiction would have been futile, it is procedurally fair to later afford the party an opportunity to question that jurisdiction. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 118-19 (App. 1989).

Where the Trust Territory High Court's exercise of jurisdiction was a manifest abuse of authority, allowing the judgment of the High Court to stand would undermine the decision-making guidelines and policies reflected in the judicial guidance clauses of the national and state constitutions and would thwart the efforts of the framers of the Constitution to reallocate court jurisdiction within the Federated States of Micronesia by giving local decision-makers control over disputes concerning ownership of land. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 119 (App. 1989).

Decisions regarding res judicata and the transitional activities of the Trust Territory High Court typically should be made on the basis of larger policy considerations rather than the equities lying with or against a particular party. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 120 (App. 1989).

Actions of the Trust Territory High Court taken after the establishment of functioning constitutional courts in the Federated States of Micronesia, and without a good faith determination after a full and fair hearing as to whether the "active trial" exception permitted retention of the cases, were null and void, even though the parties failed to object, because the High Court was without jurisdiction to act and its conduct constituted usurpation of power. United Church of Christ v. Hamo, 4 FSM Intrm. 95, 122 (App. 1989).

A party is precluded from rearguing, under another theory of liability, a claim it has already pursued to a final adjudication. Berman v. FSM Supreme Court, 6 FSM Intrm. 109, 112 (Pon. 1993).

The doctrine of merger holds that a plaintiff cannot maintain an action on a claim or part of a claim for which he has already recovered a valid final judgment since the original claim becomes merged in the judgment and thereafter plaintiff's rights are upon the judgment, not the original claim. Mid-Pacific Constr. Co. v. Semes (II), 6 FSM Intrm. 180, 184 & n.2 (Pon. 1993).

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim under the doctrine of collateral estoppel or issue preclusion, but in a judgment entered by confession, consent, or default none of the issues is actually litigated. Mid-Pacific Constr. Co. v. Semes (II), 6 FSM Intrm. 180, 185 & n.3 (Pon. 1993).

Res judicata does not apply when different land is involved than the previous case and only one of the parties is the same. Dobich v. Kapriel, 6 FSM Intrm. 199, 201 (Chk. S. Ct. Tr. 1993).

The doctrine of res judicata is recognized in the FSM. The primary reason for its value is repose. The general rule is that a final decision on the "merits" of a claim bars a subsequent action on that same claim or any part thereof, including issues which were not but could have been raised as part of the claim. A plaintiff must raise his entire "claim" in one proceeding. "Claim" is defined to cover all the claimant's rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM Intrm. 238, 241 (Pon. 1993).

A claim for damages not proven at trial is not renewable at some later point in a different proceeding since res judicata clearly applies to the failed claim. Wito Clan v. United Church of Christ, 6 FSM Intrm. 291, 292 (App. 1993).

A plaintiff who has previously litigated and lost his claim to a legal interest in a certain property is collaterally estopped from claiming damages as a result of loss of ownership or possession of the land because under the principle of collateral estoppel, a cause of action which could have been litigated in the course of the original case between the same parties is treated as litigated and decided with the former cause of action. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 516 (Pon. 1994).

In some cases failure to join an indispensable party may subject a judgment to collateral attack, but failure to join a necessary party will not. A necessary party is one who has an identifiable interest in the action and should normally be made a party to the lawsuit, but whose interests are separable from the rest of the parties or whose presence cannot be obtained; whereas an indispensable party is one to whom any judgment, if effective, would necessarily affect his interest, or would, if his interest is eliminated, constitute unreasonable, inequitable, or impractical relief. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 517 (Pon. 1994).

Where land is not public land and where the Land Commission and TT High Court had jurisdiction to adjudicate land claims even over public lands because the authorized adjudicatory body for public lands had not yet been created the TT High Court's land adjudication will have res judicata effect. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 518 (Pon. 1994).

Only truly exceptional cases warrant an exception to the normal presumption of res judicata, and such exceptions are to be confined within narrow limits. Where there is no evidence a TT High Court judgment was obtained unfairly or worked a serious injustice an FSM court cannot grant relief from it. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 519 (Pon. 1994).

FSM courts are not bound to follow the precedents or reasoning of the TT High Court in deciding cases, but must respect the resolution or outcome of a case as between the parties and subject matter of the particular action adjudicated absent constitutional defect or obvious injustice such as a plain usurpation of power. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 519-20 (Pon. 1994).

Where a party had imputed and actual notice of the dimensions of the land in dispute in a previous litigation the same party cannot later attack the judgment for either vagueness of description or lack of notice. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 520 (Pon. 1994).

A party who has litigated an action in his personal capacity cannot escape the application of collateral estoppel and relitigate the action simply by claiming to act in a different capacity. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 520 (Pon. 1994).

Courts stand ready to assist litigants with claims that are well-grounded in law and diligently brought. At the same time the courts must strive to ensure that the final judgments fairly rendered are upheld, so that all interested parties may know when an issue has been justly concluded. Parties are entitled to rely on the conclusiveness of prior decisions. Nahnken of Nett v. United States (III), 6 FSM Intrm. 508, 529 (Pon. 1994).

For a matter to be considered adjudged so that the doctrine of res judicata is applicable, there must be an existing, final judgment that has been decided on the merits without fraud or collusion by a court or tribunal of competent jurisdiction. The doctrine bars any further litigation of the same issues between the same parties or anyone claiming under those parties. Ungeni v. Fredrick, 6 FSM Intrm. 529, 531 (Chk. S. Ct. App. 1994).

The decisions of the Land Commission are not final judgments for purposes of res judicata until after the time for appeal from a determination of ownership has expired without an appeal or after a properly taken appeal has been determined. Once the trial court granted a trial de novo on the question of ownership the Land Commission's determination of ownership ceased to exist for purposes of res judicata. Ungeni v. Fredrick, 6 FSM Intrm. 529, 531 (Chk. S. Ct. App. 1994).

The doctrine of collateral estoppel provides that a right, question, or fact which is distinctly put in issue and directly determined as a ground of recovery by a court of competent jurisdiction cannot be disputed in a subsequent action between the same parties, even if the subsequent action is on a different cause of action. The prior judgment is not, however, conclusive as to matters which might have been, but were not, litigated and determined in the prior action. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995).

Under the doctrine of res judicata a judgment entered in a cause of action conclusively settles that cause of action as to all matters that were or might have been litigated and adjudged therein. The doctrine exists to ensure efficient litigation and use of judicial resources, and to promote the reliability and certainty of judgments. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995).

While the doctrine of res judicata formally addresses situations involving prior and subsequent lawsuits, its reasoning and purpose apply with equal force where a litigant attempts to revisit an earlier phase of a lawsuit that has already been adjudged. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995).

While, as a general rule, res judicata applies only to parties, and their privies, to an earlier proceeding, a Torrens system land registration Certificate of Title is, by statute, prima facie evidence of ownership stated therein as against the world, and conclusive upon all persons who had notice and those claiming under them. As a general rule a Certificate of Title can be set aside only on the grounds of fraudulent registration. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 50-51 (App. 1995).

Parties are precluded from raising any issues that were or could have been raised in a previous proceeding. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 51 (App. 1995).

When dismissal of a related criminal case is without prejudice, there is no judgment on the merits. Therefore the doctrines of res judicata and collateral estoppel, which rely on an underlying final judgment, cannot be applied to the same matters in a civil case. FSM v. Yue Yuan Yu No. 346, 7 FSM Intrm. 162, 164 (Chk. 1995).

Dismissal with prejudice of a plaintiff's prior action constitutes a judgment on the merits, which has a res judicata effect, barring the relitigation of all issues that were or could have been raised in that action. Union Indus. Co. v. Santos, 7 FSM Intrm. 242, 244 (Pon. 1995).

When defendants have been granted judgment after trial, a codefendant severed for trial may be granted judgment on the same grounds through the doctrine of issue preclusion (collateral estoppel) or the doctrine of law of the case. Damarlane v. United States, 7 FSM Intrm. 350, 354 (Pon. 1995).

Although the FSM Supreme Court is not bound to accept the findings of the Trust Territory courts, it may consider their rationale and elect to adopt their reasoning. Rulings of the FSM Supreme Court appellate division are not binding specifically upon a nonparty under the doctrine of *res judicata*, they are binding on the court under the doctrine of *stare decisis*. Etscheit v. Nahnken of Nett, 7 FSM Intrm. 390, 396 (Pon. 1996).

A municipal court judgment will not be given res judicata effect when the judgment was suspended by the state court. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 485, 492 (App. 1996).

Once a judgment has been issued and the time to appeal has expired, or the decision was affirmed on appeal, the parties are precluded from challenging that judgment or litigating any issue that was or could have been raised in that action. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996).

FSM courts will apply the doctrine of res judicata to uphold and enforce Trust Territory High Court decisions. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996).

Even when an individual brings suit in a different capacity res judicata still bars the suit where the right sought to be enforced was necessarily litigated in an earlier proceeding so that entertaining the latter contention would in substance be a relitigation of the matter. Nahnken of Nett v. United States, 7 FSM Intrm.

581, 586-87 (App. 1996).

Even if a party is not collaterally estopped from relitigating a different issue between parties to a prior judgment, res judicata will still bar relitigation of those claims that might have been raised and adjudged in the first action. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 587 (App. 1996).

The FSM Supreme Court does not sit in review of Trust Territory High Court decisions and res judicata bars relitigation of its judgments. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 588 (App. 1996).

The doctrine of collateral estoppel or issue preclusion holds that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. It therefore does not apply to a criminal contempt proceeding for acts after earlier civil contempt proceedings and because the burden of proof is different in a criminal proceeding and because it is not a subsequent action between the same parties. FSM v. Cheida, 7 FSM Intrm. 633, 637-38 (Chk. 1996).

The doctrine of res judicata bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits, which has been affirmed on appeal or for which time for appeal has expired. Damarlane v. FSM, 8 FSM Intrm. 119, 120 (Pon. 1997).

The doctrine of res judicata bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits, which has been affirmed on appeal or for which time for appeal has expired. Iriarte v. Etscheit, 8 FSM Intrm. 231, 236-37 (App. 1998).

Res judicata bars any further litigation of the same issues between the same parties or anyone claiming under those parties. Senda v. Semes, 8 FSM Intrm. 484, 504 (Pon. 1998).

Both res judicata and laches are affirmative defenses and must be asserted in responsive pleading. If affirmative defenses are not raised in the answer or other responsive pleading, the defenses are waived. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 94 (Kos. S. Ct. Tr. 1999).

A judgment that applied only to the lower, oceanside parcels of land is not res judicata to upper inland parcels. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 94 (Kos. S. Ct. Tr. 1999).

As a general rule, a judgment for a defendant based on lack of jurisdiction does not bar the plaintiff from bringing another action on the same cause in another court having jurisdiction. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 147, 148 (Pon. 1999).

Res judicata prevents parties to an action from relitigating an issue which has been already been fully litigated. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

Once a judgment has been issued and the appeal period has expired or the decision is affirmed on appeal, the parties are precluded from challenging that judgment or from litigating any issues that were or could have been raised in that action. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

The doctrine of res judicata generally does not operate to affect strangers to a judgment, that is, to affect the rights of those who are neither parties nor in privity with a party therein. Res judicata only applies to those who were parties to a prior litigation. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

A party to a prior litigation cannot use the doctrine of res judicata as a shield to prevent a party to a subsequent litigation (who was not a party to the prior action) from litigating an issue which was not litigated in the prior action. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 285 (Pon. 2001).

When a divorced couple is jointly responsible on a promissory note, no agreement they could make between them could possibly prevent the creditor from pursuing its claims against either or both of them, and since the issue of whether one of the defendants could have relieved himself or herself from responsibility to the creditor could not have been litigated in the divorce proceeding, the creditor cannot be precluded from litigating that issue. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 286 (Pon. 2001).

Final judgments, as a rule, generally bind only the parties to the case and all those in privity with them. If a judgment is final, then the doctrine of res judicata applies, and that doctrine bars any further litigation of the same issues between the same parties or anyone claiming under those parties. Phillip v. Moses, 10 FSM Intrm. 540, 546 (Chk. S. Ct. App. 2002).

When an earlier Trust Territory High Court judgment clearly stated that someone owned only half of a land parcel and the plaintiff's only claim to the land is through his purchase of that person's rights, he cannot own any more of the land than the half that the seller owned, and when that judgment was res judicata and binding on the parties to that case and all claiming under them, there was no genuine issue of fact as to whether the plaintiff owned half or all of the land. He owned only half, and the defendants were therefore entitled, as a matter of law, to a summary judgment to that effect. Bualuay v. Rano, 11 FSM Intrm. 139, 150 (App. 2002).

If diversity of citizenship among the parties were not present and there were no other basis of jurisdiction, the FSM Supreme Court would be without subject matter jurisdiction, and any judgment it might render would be void and without any res judicata effect because all proceedings that had taken place would have been for naught, and the plaintiffs would have to start all over again in state court if they still wished to pursue the matter. Marcus v. Truk Trading Corp., 11 FSM Intrm. 152, 155 n.1 (Chk. 2002).

A Kosrae district Trust Territory High Court judgment in a trespass action will not be set aside as invalid because it was in a designated land registration area when the registration area designation was not filed in the Kosrae district High Court and the prevailing defendants did not ask that title be issued to them, but only that the complaint be dismissed. Sigrah v. Kosrae State Land Comm'n, 11 FSM Intrm. 169, 172-73 (Kos. S. Ct. Tr. 2002).

The Kosrae State Court has always accepted and enforced Trust Territory High Court decisions as valid and binding, consistent with the Kosrae constitutional provisions on transition of government. Sigrah v. Kosrae State Land Comm'n, 11 FSM Intrm. 169, 173 (Kos. S. Ct. Tr. 2002).

The purpose of Rule 17(a) is to allow an assignee to sue in its own name, and it has, more importantly, come to also protect the defendant against later action by the party actually entitled to recover and thus insures that a judgment will have its proper final (res judicata) effect. Beal Bank S.S.B. v. Maras, 11 FSM Intrm. 351, 354 (Chk. 2003).

The doctrine of claim preclusion (a form of res judicata) does not bar a later action when the court order denying the plaintiff's intervention (in part) in an earlier action shows that intervention was denied because the intervenor had no interest in the subject matter of the litigation, and a motion to dismiss on that ground or on the grounds that that the court lacks subject matter jurisdiction because the earlier court already had the case, or that the plaintiff is barred by his alleged "unclean hands" because he omitted mention of the earlier action allegedly to circumvent the other court's jurisdiction are therefore without merit. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 126 (Chk. 2005).

– Sanctions

It is inappropriate to deny a defendant the right to assert a statute of limitations defense by way of punishment for tardiness in filing its answer. Lonno v. Trust Territory (III), 1 FSM Intrm. 279, 280 (Kos. 1983).

Where the information desired from another party's lawyer as a witness was material and necessary and unobtainable elsewhere and the party desiring it had not acted in bad faith in the late service of a subpoena,

a motion for sanctions may be denied at the court's discretion. In re Island Hardware, Inc., 5 FSM Intrm. 170, 174-75 (App. 1991).

An attorney shall be sanctioned under FSM Civil Rule 11 when it is apparent to the court that counsel had no arguable basis in fact or law in bringing a motion or pleading. Berman v. Kolonia Town, 6 FSM Intrm. 242, 245-46 (Pon. 1993).

A motion will be regarded as frivolous (and sanctionable) if at the time of filing it offered no reasonable possibility of relief. Berman v. Kolonia Town, 6 FSM Intrm. 242, 246 (Pon. 1993).

Although the language of FSM Civil Rule 11 directs that the court shall impose sanctions on an attorney when a violation of the rule has been shown, the nature and amount of penalty is left to the court's discretion. Berman v. Kolonia Town, 6 FSM Intrm. 242, 247 (Pon. 1993).

Rule 11 mandates a reasonable inquiry by the attorney as to whether the pleading or motion is well grounded in fact and warranted either by current law, or, alternatively, by a good faith argument that that is what the law ought to be. A bad faith argument, although still sanctionable, is thus not the only action sanctionable under this provision. A purely frivolous, good faith argument is also sanctionable. Berman v. Kolonia Town, 6 FSM Intrm. 433, 435 (App. 1994).

The purpose of Rule 11 is to deter baseless filings. Berman v. Kolonia Town, 6 FSM Intrm. 433, 436 (App. 1994).

Appeals of Rule 11 sanctions are reviewed under an abuse of discretion standard. Berman v. Kolonia Town, 6 FSM Intrm. 433, 436 (App. 1994).

It is an abuse of discretion to deem a motion frivolous and sanctionable when it was a case of first impression in this jurisdiction, no contrary authority can be cited from another jurisdiction, and no authority was cited by the trial court, and where the appellant made a good faith argument for the extension of existing law. Berman v. Kolonia Town, 6 FSM Intrm. 433, 436-37 (App. 1994).

An argument, although plainly incorrect, may be insufficiently frivolous as to warrant sanctions under FSM Civil Rule 11. Berman v. Santos, 7 FSM Intrm. 231, 241 (Pon. 1995).

An attorney may be sanctioned under Rule 11 when, although citing the correct rule, she makes no attempt to demonstrate how the circumstances meet the provisions of that rule, her position is contrary to her earlier position, and she repeatedly misstates the court's conclusions; when a motion for reconsideration raises matters already decided and offers no new arguments; and when everything a posttrial motion to amend the complaint seeks to add are matters already adjudicated against the plaintiffs. Damarlane v. United States, 7 FSM Intrm. 350, 356-57 (Pon. 1995).

Rule 11 sanctions can be granted only for violating one of the three elements of Rule 11 – is the document 1) signed, or 2) is to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it well grounded in fact and warranted by law, or 3) is it interposed for any improper purpose such as delay or harassment. Damarlane v. FSM, 7 FSM Intrm. 383, 384 (Pon. 1996).

Sanctions will not be imposed for a motion not well-researched and supported only by the language of what most likely is the wrong rule of civil procedure when it was not a deliberate attempt to harass and increase the cost of litigation. Lavides v. Weilbacher, 7 FSM Intrm. 400, 404 (Pon. 1996).

Sanctions will be imposed for the assertion of a long list of inapplicable affirmative defenses for which no reasonable inquiry was conducted. Sanctions may be both monetary and non-monetary. Lavides v. Weilbacher, 7 FSM Intrm. 400, 406 (Pon. 1996).

An attorney who argues that his motion need not be served on an opposing party or an attempt be made

to obtain that party's consent to the motion because the opposing party has defaulted when no default judgment has been entered may be sanctioned. Bank of the FSM v. Bergen, 7 FSM Intrm. 595, 597 (Pon. 1996).

A sanction against an attorney who is not a party to the underlying case is immediately appealable if the sanctioned attorney proceeds under her own name and as the real party in interest. In re Sanction of Berman, 7 FSM Intrm. 654, 656 (App. 1996).

Rule 11 sanction orders are reviewed under an objective abuse of discretion standard. In re Sanction of Berman, 7 FSM Intrm. 654, 656 (App. 1996).

Rule 11 requires that an attorney undertake a reasonable inquiry before signing to determine whether a pleading, motion, or other paper is well-grounded in fact and warranted either by current law, or a good faith argument of what the law ought to be. A purely frivolous, though good faith, argument is sanctionable. A reasonable inquiry means an inquiry reasonable under all the circumstances of the case. An attorney whose answer copied the list of affirmative defenses directly from Civil Rule 8(c), giving no thought to the applicability of any one defense to the particular facts or issues of the case, has not made a reasonable inquiry. In re Sanction of Berman, 7 FSM Intrm. 654, 656-57 (App. 1996).

A litigant pleading non-frivolous along with frivolous claims cannot expect to avoid all sanctions under Rule 11 merely because the pleading or motion under scrutiny was not entirely frivolous. In re Sanction of Berman, 7 FSM Intrm. 654, 657 (App. 1996).

An objection to the amount of a monetary sanction cannot be raised for the first time on appeal. In re Sanction of Berman, 7 FSM Intrm. 654, 658 (App. 1996).

A sanction of $135 is not an abuse of discretion because it is presumptively within the ability of an attorney in private practice to pay. In re Sanction of Berman, 7 FSM Intrm. 654, 658 (App. 1996).

Merely because a motion is legally deficient in some respect does not make it a frivolous motion subject to sanctions. Damarlane v. FSM, 8 FSM Intrm. 10, 13 (Pon. 1997).

An attorney, before signing a document, must undertake a reasonable inquiry to determine whether the document is well-grounded in fact and warranted either by current law, or a good faith argument of what the law ought to be. A purely frivolous argument, even if made in good faith, may be sanctionable. Damarlane v. United States, 8 FSM Intrm. 45, 57-58 (App. 1997).

Rule 11 sanction orders are reviewed under an abuse of discretion standard, using an objective standard, rather than assessing an attorney's subjective intent. Damarlane v. United States, 8 FSM Intrm. 45, 58 (App. 1997).

A Rule 11 attorney sanction order is immediately appealable, but only if the sanctioned attorney proceeds under his own name, and as the real party in interest. In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997).

Rule 11 sanction orders are reviewed under an abuse of discretion standard. In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997).

Rule 11 sanctions are usually sought by a party, but a court may impose sanctions on its own initiative. In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997).

The manner in which Rule 11 sanctions are imposed must comport with due process requirements. At a minimum, notice and an opportunity to be heard are required. In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997).

A court's failure to provide adequate notice and the opportunity to be heard when imposing sanctions *sua sponte* in itself provides the ground for reversal of an order imposing sanctions. In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997).

A trial judge abuses his discretion when, without due process of law, he *sua sponte* imposes a Rule 11 sanction on an attorney. In re Sanction of Michelsen, 8 FSM Intrm. 108, 111 (App. 1997).

When a trial court has determined a party's liability for an attorney's fees sanction but has not determined the amount of that liability, it is not a final order because the trial court could not execute on the order when the amount of attorney fees had not been fixed. Only once the fees have been fixed will the order become final and appealable. Santos v. Bank of Hawaii, 9 FSM Intrm. 285, 287 (App. 1999).

When Rule 37 sanctions have proven futile in resolving a discovery dispute and because they do not provide a remedy for the waste of a court's time and resources, a court may invoke its inherent power to control the orderly and expeditious disposition of cases and proper compliance with its lawful mandates. Pohnpei v. M/V Miyo Maru No. 11, 9 FSM Intrm. 316, 329 (Pon. 2000).

Arguing the facts is different from representing the facts as being what they are not. That is simple prevarication sanctionable under Civil Procedure Rule 11. Kosrae v. Worswick, 9 FSM Intrm. 536, 539 (Kos. 2000).

FSM Civil Rule 37(b)(2) gives the court the authority to levy sanctions against a party, including dismissal, for failure to obey a discovery order, and Rule 41(b) allows the court to dismiss a plaintiff's complaint for failure to comply with a court order. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 29 (Pon. 2001).

An attorney is entitled to appropriate notice and an opportunity to be heard before any sanction is imposed on him, whether that sanction is imposed on him under the civil procedure rules, the criminal contempt statute, or some other court power. In re Sanction of Woodruff, 10 FSM Intrm. 79, 84 (App. 2001).

In addition to its statutory contempt power, the FSM Supreme Court does retain inherent powers to sanction attorneys. In re Sanction of Woodruff, 10 FSM Intrm. 79, 85 (App. 2001).

A court must exercise its inherent powers with caution, restraint, and discretion and must comply with the mandates of due process. In re Sanction of Woodruff, 10 FSM Intrm. 79, 85 (App. 2001).

A finding of bad-faith conduct is necessary before a court can use its inherent powers to sanction. In re Sanction of Woodruff, 10 FSM Intrm. 79, 85-86 (App. 2001).

The standard of review of a court's imposition of sanctions under its inherent powers is for abuse of discretion. This accords with the abuse of discretion standards for review of Rule 11 attorney sanctions and for review of discovery sanctions. In re Sanction of Woodruff, 10 FSM Intrm. 79, 86 (App. 2001).

Sanctions imposed personally on an attorney must be based on that attorney's personal actions or omissions, not on the court's frustration, no matter how justified, with previous counsel's actions or omissions, or with a recalcitrant client's actions or omissions that are beyond an attorney's control or influence. In re Sanction of Woodruff, 10 FSM Intrm. 79, 87 (App. 2001).

No proper personal sanction against an attorney should include any consideration of the amount of time and work the court spent on earlier motions when the attorney was not responsible for or personally involved with the case at the time the court's work was done. In re Sanction of Woodruff, 10 FSM Intrm. 79, 87 (App. 2001).

The proper standard of proof for inherent power sanctions is clear and convincing evidence standard rather than the lower standard of preponderance of the evidence standard. This heightened standard of proof

is particularly appropriate because most inherent power sanctions are fundamentally punitive and because an inherent power sanction requires a finding of bad faith, and a bad faith finding requires heightened certainty. In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001).

For those inherent power sanctions that are fundamentally penal – and default judgments, as well as contempt orders, awards of attorneys' fees and the imposition of fines – the trial court must find clear and convincing evidence of the predicate misconduct. In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001).

The clear and convincing evidence standard of an inherent powers sanction is also consistent with the standard of proof needed to discipline an attorney. It would be inequitable if a court could avoid the heightened standard of a disciplinary proceeding by instead resorting to its inherent powers to sanction an attorney. In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001).

The trial court abused its discretion by its failure to make a specific finding of bad faith, its apparent use of an improper standard of proof, and because the short time span for which the attorney was personally responsible for the case therefore, as a matter of law, he could not be personally sanctioned using the court's inherent powers. In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001).

The standard for the imposition of sanctions using the court's inherent powers is extremely high. The court must find that the very temple of justice has been defiled by the sanctioned party's conduct. In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001).

Rule 37(a)(4) requires an opportunity for hearing before attorney's fees are awarded to a party who has prevailed on a motion to compel discovery. Courts may comply with this requirement either by holding an oral hearing on adequate notice, or by considering written submission from the affected parties. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 430, 432 (Pon. 2001).

An attorney's signature constitutes the signer's certificate that the signer has read the pleading, motion, or other paper and that to the best of the signer's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

When a party has contended that plainly relevant information is not relevant, and has done so in the face of clear law that is contrary to its position, the question becomes whether the party's relevancy argument is so wide of the mark as to be frivolous. This is a prima facie case of a Rule 11 violation. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

Counsel, who also signed another party's motion even though it did not involve a live dispute with respect to his client, should be prepared to address why at least nominal sanctions should not be imposed against him in the event that a Rule 11 violation occurred. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

When a party fails to comply with an order compelling discovery under Rule 37(a), the court may order that the matters regarding which the order was made or any other designated facts will be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order. Adams v. Island Homes Constr., Inc., 10 FSM Intrm. 466, 474 (Pon. 2001).

When a defendant has not complied with all of the discovery requests as directed in a court order, the court will consider sanctions, including Civil Rule 37(b)(2) sanctions that designated facts will be taken to be established for the purposes of the action in accordance with the plaintiff's claim, and that defendant ought to be aware that deeming certain facts established is tantamount to entering a default judgment. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 508 (Pon. 2002).

When a party has yet to comply with the court's discovery order and discovery has been outstanding for an extended period, then that is one fact that the court will consider when contemplating sanctions if compliance is not forthcoming. AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 508 (Pon. 2002).

Pohnpei may be held liable for discovery sanctions of motion related expenses such as attorney's fees, but the FSM is exempt from such sanctions under Rule 37(f). AHPW, Inc. v. FSM, 10 FSM Intrm. 507, 509 (Pon. 2002).

Sanctions under Kosrae Rule 11 are applicable only to legal counsel, not pro se litigants. Talley v. Talley, 10 FSM Intrm. 570, 573 (Kos. S. Ct. Tr. 2002).

Any party may serve on any other party a request to permit entry upon designated land or other property in the requested party's possession or control for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b), and if the requested party fails to permit inspection as requested, the party seeking discovery may move for an order compelling inspection in accordance with the request, and if granted, the court may, after opportunity for hearing, require the party whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees. Ambros & Co. v. Board of Trustees, 10 FSM Intrm. 645, 647 (Pon. 2002).

A court retains jurisdiction over a Rule 11 motion for sanctions even though the action has been dismissed. Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 58 (Kos. S. Ct. Tr. 2002).

The Kosrae Rule 11 provides that an offending attorney may be subject to appropriate disciplinary action for a wilful violation of the rule. FSM Rule 11 on the other hand contains no wilfulness requirement and provides that the court must impose an appropriate sanction. Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 58 (Kos. S. Ct. Tr. 2002).

A party seeking sanctions under the Kosrae Rule 11 must show that the filer of the offending pleading knew that the pleading violated the rule and intended, or meant, to violate the rule by filing it. Kosrae Rule 11 is reserved for instances where the filer deliberately presses an unfounded claim or defense. The filer's knowledge of the pleading's defects and his intent to violate the rule, along with the other elements of a Rule 11 violation, must be shown by clear and convincing evidence. Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 58-59 (Kos. S. Ct. Tr. 2002).

Because Kosrae Admission Rule 4(2) provides that the Chief Justice may, after notice and hearing, discipline an attorney for violation of the Admission Rules, a Rule 11 motion for sanctions may be denied without prejudice to the initiation of the appropriate disciplinary proceedings under Rule 4(2). Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 59 (Kos. S. Ct. Tr. 2002).

To the extent that the hearing requirement of Practice Rule 4(2) has any application to a motion under Kosrae Civil Procedure Rule 11, it means that the court may comply with this requirement either by holding an oral hearing on adequate notice, or by considering written submissions from the affected parties. Kosrae v. Seventh Kosrae State Legislature, 11 FSM Intrm. 56, 59 (Kos. S. Ct. Tr. 2002).

When a motion to compel discovery is either granted or denied, the court must, after opportunity for hearing, award to the prevailing party its reasonable expenses incurred, including attorney or trial counselor fees, unless the court finds that the non-prevailing party's position was substantially justified or that other circumstances make an award of expenses unjust. The opportunity for hearing is complied with by considering written submissions from the affected parties. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 228 (Pon. 2002).

In addition to the sanction of fees and expenses provided for in Rule 37(a)(4), Rule 37(b)(2)(A) provides that the court may enter an order refusing to allow the disobedient party to oppose designated claims or defenses. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

The court may order as a sanction that the matters regarding which an order compelling discovery was made or any other designated facts will be taken to be established for purposes of the action in accordance with the claim of the party obtaining the order. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

When a party's refusal to produce a document in discovery was sufficiently egregious that the facts necessary to establish the party's liability to the plaintiffs are deemed established, the only issue remaining for trial will be that of damages. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

When a court has imposed Rule 37 discovery sanctions and finds that Rule 11 has also been violated, it may make the sanctions imposed under Rule 37 also stand as those imposed under Rule 11. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

The court may impose no further sanctions when a party is in contempt for its failure to abide by a court order because it knew of the order, had the ability to comply with the order, and decided not to comply, but Rule 37 sanctions have already been imposed. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 218, 229 (Pon. 2002).

When a party's record of discovery obduracy speaks for itself, the court may award attorney's fees and expenses as reasonable under all the facts and circumstances. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 447 (Pon. 2003).

When, given the scope and depth of the discovery disputes generated by a party's conduct, the court, in awarding fees to opposing counsel, will not find several billing entries showing work by both attorneys working together to be inordinate. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

In order to achieve the end of discouraging obstructionist discovery conduct, the "expenses," that are imposed as a sanction for failure to comply with discovery is to be given a more expansive meaning than the "costs" that are awarded as part of a civil rights judgment. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

When a party's actions necessitated discovery sanction attorney fee awards, that party cannot complain about being held to account for them under Rule 37(a)(4). Such awards are not limited to the 15% generally awarded in collection cases. Adams v. Island Homes Constr., Inc., 11 FSM Intrm. 445, 448 (Pon. 2003).

Rule 37(b) provides that the court may impose sanctions based upon a party's failure to comply with a court order to compel, and, pursuant to Rules 36(a) and 37(b)(2)(A), the court may deem the facts alleged in a request for admission of facts as admitted for the purposes of the action. Tolenoa v. Timothy, 11 FSM Intrm. 485, 486 (Kos. S. Ct. Tr. 2003).

If a motion to compel discovery is granted, the court shall, after opportunity for hearing, require payment of the moving party's reasonable expenses incurred in obtaining the order, including attorney or trial counselor fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Actouka Executive Ins. Underwriters v. Walter, 11 FSM Intrm. 508, 509 (Pon. 2003).

When a defendant has not paid a court-ordered sanction for costs related to the plaintiff's motion to compel discovery, the court may order that, if the sanction is not paid immediately, the defendant's answer be stricken. Actouka Executive Ins. Underwriters v. Walter, 11 FSM Intrm. 508, 510 (Pon. 2003).

If a motion to compel answers to discovery is granted, the court must, after opportunity for hearing, require the party (or the party's attorney, or both) whose conduct necessitated the motion to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust. Primo v. Semes, 11 FSM Intrm. 603, 606 (Pon. 2003).

When none of the arguments put forward in opposition to a motion to compel discovery establish that there was any legitimate justification for the opposition to the plaintiffs' motion to compel or the failure to timely respond to the interrogatories, the defendant should pay the plaintiffs the reasonable expenses incurred in obtaining the order compelling interrogatory responses. Primo v. Semes, 11 FSM Intrm. 603, 606 (Pon. 2003).

When efforts to settle the case, or set a schedule for discovery, motions and trial, or proceed with a hearing on the sanctions motion, were rendered impossible by the unexplained absence of parties, the court, under FSM Civil Rule 37(d), has the authority to strike the parties' answer to third-party complaint or enter a default against them. Damerlane v. Sato Repair Shop, 12 FSM Intrm. 231, 232 (Pon. 2003).

Failure to attend depositions, court hearings and conferences, and failure to answer discovery requests, are impermissible acts that subject the non-complying party to sanctions, ultimately including punishment that is as severe as imprisonment for acts that are deemed in contempt of court. Damerlane v. Sato Repair Shop, 12 FSM Intrm. 231, 232 (Pon. 2003).

Since for every hour in-house counsel spent on the plaintiff's successful motion to compel his employer lost an hour of legal services that could have been spent on other matters, it is therefore appropriate to award the employer reasonable attorney's fees under Rule 37. FSM Dev. Bank v. Kaminanga, 12 FSM Intrm. 454, 455 (Chk. 2004).

To award a party its attorney fees based upon its in-house counsel's salary prorated for the time spent on a successful motion to compel would be to confer a benefit on the non-prevailing party because the prevailing party choose to use in-house, rather than outside, counsel to do the work. There is no reason in law or equity that the non-prevailing party, or in the case of sanctions, the wrongdoer, should benefit from this choice. FSM Dev. Bank v. Kaminanga, 12 FSM Intrm. 454, 455 (Chk. 2004).

The entitlement to reasonable attorneys' fees is that of the client, not of his attorney. The amount the client actually pays his attorney is irrelevant, since the determination of what is a "reasonable" fee is to be made without reference to any prior agreement between the client and its attorney. The appropriate lodestar rate is thus the community market rate charged by attorneys of equivalent skill and experience for work of similar complexity. FSM Dev. Bank v. Kaminanga, 12 FSM Intrm. 454, 455-56 (Chk. 2004).

An attorney's fees award for in-house counsel will be no different than if the party had retained outside counsel for the work. FSM Dev. Bank v. Kaminanga, 12 FSM Intrm. 454, 456 (Chk. 2004).

When there are no monetary Rule 11 sanctions against party's counsel and he is not appealing in his own name as the real party in interest and the Rule 11 sanctions run to the party and are identical to the Rule 37 sanctions (which can only be appealed after entry of a final judgment) imposed on the party, the Rule 11 sanctions are not properly before the court in an interlocutory appeal. FSM Dev. Bank v. Adams, 12 FSM Intrm. 456, 461 (App. 2004).

If a motion for discovery sanctions is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 497 (Chk. 2004).

As a general rule, the parties bear their own attorney's fees unless a contract between them provides otherwise, or they are awardable under a statute or court rule. In addition, attorney's fees may be assessed against a litigant for vexatious and oppressive litigation practices. Civil Procedure Rule 37 provides a specific mechanism for sanctioning vexatious discovery conduct. Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 541, 543 (Pon. 2004).

When, pursuant to Rule 37, the court has already assessed attorney's fees, as well as liability on the underlying cause of action as a sanction for a party's willful, bad faith discovery conduct, the court will award no further fees based on a claim of that party's generally vexatious conduct in the trial court. Adams v. Island

Homes Constr., Inc., 12 FSM Intrm. 541, 543 (Pon. 2004).

– Service

Determination of whether an individual is a managing or general agent for purposes of FSM Civil Rule 4(d)(3) is made on the basis of whether person served can fairly be expected to know what to do with the papers so that the organization will have notice of the filing of the action. A person of authority and responsibility in an organization's operation is a managing or general agent for purposes of the rule. Luda v. Maeda Road Constr. Co., 2 FSM Intrm. 107, 109 (Pon. 1985).

The acts of hand-delivering a subpoena to a deponent, reading its relevant portions in English and translating it into Pohnpeian, informing the deponent of the date time and location of his appearance, and stating that the order was signed by the court satisfy the requirement of Rule 45(c) of the FSM Rules of Civil Procedure that reasonable attempts be made to explain the subpoena to the person to be served. Alfons v. FSM, 5 FSM Intrm. 402, 405 (App. 1992).

Motions may be served on other parties prior to being filed. Setik v. FSM, 6 FSM Intrm. 446, 448 (Chk. 1994).

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Where a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed, but will be dismissed without prejudice. Berman v. Santos, 6 FSM Intrm. 532, 534 (Pon. 1994).

Where a state official was sued in his individual capacity and service of the complaint and summons was made on the governor's office and the state attorney general, it is not good service because service upon an individual is made by delivery to the individual personally or by leaving copies at the individual's dwelling house or usual place of abode or of business or by delivery to an agent authorized to receive service of process. Berman v. Santos, 6 FSM Intrm. 532, 534 (Pon. 1994).

Although the civil rules do not provide for a specific method of service upon a state officer in his official capacity, service upon a state officer in his official capacity requires that he receive notice of the suit. Berman v. Santos, 6 FSM Intrm. 532, 534-35 & nn.3, 4 (Pon. 1994).

Proof of service of process should be made to the court promptly and in any event within the time during which the person served must respond. Berman v. Santos, 6 FSM Intrm. 532, 535 (Pon. 1994).

Certificates of service should state whether service was effected personally or by mail. Chen Ho Fu v. Salvador, 7 FSM Intrm. 306, 308 n.4 (Pon. 1995).

All parties must be served with pleadings and papers unless the party is in default, and the default is for a failure to ever appear at any stage of the proceeding. Bank of the FSM v. Bergen, 7 FSM Intrm. 595, 596 (Pon. 1996).

Service of a suggestion of death and a motion to substitute a party for a deceased party, if made by a party's attorney, must be made on the other parties (may be done through their attorneys) and personally (not upon their or the decedent's attorney) upon the nonparties who are to be substituted. The suggestion and motion can also be made by an attorney for the estate's representative, naming the estate's representative or decedent's successors, and served on all the parties' attorneys. An attorney for a decedent cannot file a suggestion of death or motion to substitute unless she has the status as a legal representative of the deceased party's estate. Damarlane v. FSM, 8 FSM Intrm. 10, 13 & n.2 (Pon. 1997).

For personal service of a complaint and summons to be effective when the defendant refuses to accept the papers the complaint and summons must be left where they might reasonably be found and the process

server must make an attempt to describe generally the meaning of the papers in a language the defendant can understand. Rodale's Scuba Diving Magazine v. Billimon, 8 FSM Intrm. 18, 19 (Chk. 1997).

The duties of an agent for the service of process are not the same as those of an attorney. Practically anyone may serve in the capacity as an agent. It may entail little more than receiving legal papers and promptly forwarding them on to the principal. Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 93, 94 (Chk. 1997).

When a law firm has been designated as an agent for service of process by a foreign corporation required to appoint one in the FSM, the law firm may remain the corporation's agent for service even if the corporation has left the FSM and the firm is no longer its attorney. Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 93, 94-95 (Chk. 1997).

Failure to effect service of the summons and complaint on the FSM Attorney General, as required by FSM Civil Rule 4(d)(4) and (5), as well as the national government agency and officer that are the defendants makes the case subject to dismissal under Rule 12(b)(5). Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

Because dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, courts will often quash service instead of dismissing the action. That way only the service need be repeated. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997).

Because a person may have more than one place of residence and a person's legal residence is his place of domicile or permanent abode, as distinguished from temporary residence, an FSM citizen temporarily working abroad is the legal resident of some state in the Federated States of Micronesia, and thus may be served process in any manner permitted by the FSM rules, such as by certified mail. Alik v. Moses, 8 FSM Intrm. 148, 150 (Pon. 1997).

The service requirements of the long-arm statute are more stringent than those of the rules of civil procedure. Service of process may be by personal service, and the service of summons must be made in like manner as service within the Federated States of Micronesia and must be made by an officer or person authorized to make service of summons in the state or jurisdiction where the defendant is served. Alik v. Moses, 8 FSM Intrm. 148, 150 (Pon. 1997).

Under Rule 4(j) a complaint that has not been served within 120 days of being filed can only be dismissed upon motion or the court's own initiative. Service made after 120 days but before a motion or court initiative to dismiss is good service and dismissal will not be granted on a later motion. Alik v. Moses, 8 FSM Intrm. 148, 151 (Pon. 1997).

Under Rule 37(b), if a party fails to obey an order to permit or provide discovery, a court may order, among other things, that facts be designated as admitted, that the disobedient party not be allowed to support or oppose designated claims, that pleadings or parts thereof be stricken, or that a party be held in contempt of court. In addition, or in lieu of any of these, the court shall require a disobedient party, or the party's attorney or trial counselor, or both, to pay reasonable expenses (including attorney's fees) caused by the disobedient party's failure to obey the court's order. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290-91 (Pon. 1998).

Instead of ordering that certain facts be designated as admitted as requested by a party that had previously obtained a court order requiring another party to comply with its discovery requests, a court may order that for failure to comply with that discovery order that the disobedient party pay all of the moving party's reasonable expenses in preparing, filing, and defending its motions for sanctions. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 291 (Pon. 1998).

The rules require a certification of service upon all other parties. Porwek v. American Int'l Co. Micronesia, 8 FSM Intrm. 436, 438 (Chk. 1998).

When a plaintiff has not shown good cause for his failure to serve the summons and complaint on a foreign defendant within 120 days as required by FSM Civil Rule 4(j) or pursuant to one of the alternative methods for service in a foreign country allowed by FSM Civil Rule 4(i) the court will dismiss the complaint against without prejudice. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 477 (Pon. 1998).

The 120 day time limit to effect service does not apply to service in a foreign country pursuant to Rule 4(i). This exception was clearly intended to cover situations where the difficulties in accomplishing service make it impracticable to complete the task in that time. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 483 (Pon. 1998).

When a plaintiff has not shown good cause for his failure to timely serve a defendant, a motion to dismiss without prejudice will be granted. Lebehn v. Mobil Oil Micronesia, Inc., 8 FSM Intrm. 471, 484 (Pon. 1998).

In addition to the personal service provided in 4 F.S.M.C. 204(2), service may be accomplished for the purpose of the long arm statute by any of the means provided for in Rule 4 of the FSM Rules of Civil Procedure. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 124 (Pon. 1999).

Service of the summons and complaint may be made on a foreign corporation not an inhabitant of or found within the state by registered or certified mail, return receipt requested. If service was by mail, the person serving process shall show in the proof of service the date and place of mailing. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 124 (Pon. 1999).

Because failure to make proof of service does not affect the validity of the service, a motion to dismiss for a defect in a return of service will be denied. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 125 (Pon. 1999).

Service upon a party of all papers and pleadings subsequent to the original complaint shall be made by delivering a copy to that person or by mailing it to that person's last known address. Under Rule 5 service by mail is complete upon mailing and a party's nonacceptance of the papers generally does not affect its validity. Service by registered mail is not required – ordinary mail suffices. People of Satawal ex rel. Ramoloilug v. Mina Maru No. 3, 9 FSM Intrm. 241, 242 (Yap 1999).

Under 4 F.S.M.C. 204, service of process may be made upon any person subject to the Supreme Court's jurisdiction by personally serving the summons upon the defendant outside the Federated States of Micronesia and service of summons under 4 F.S.M.C. 204 must be made in like manner as service within the Federated States of Micronesia by any officer or person authorized to make service of summons in the state or jurisdiction where the defendant is served. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 370-71 (Kos. 2000).

Since a summons and complaint must be served together, "process" in 4 F.S.M.C. 204(2) necessarily means both the complaint and the summons. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 371 (Kos. 2000).

If a plaintiff opts for personal service on a defendant outside the FSM, it must be accomplished by a person authorized to do so under 4 F.S.M.C. 204. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 371 (Kos. 2000).

Nothing contained in 4 F.S.M.C. 204 limits or affects the right to serve any process in any other manner now or hereafter provided by law, such as by registered mail with a signed receipt as provided for in FSM Civil Procedure Rule 4(I). Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 371 (Kos. 2000).

The FSM Civil Procedures Rules do not specifically address the question of service upon a foreign government or its agents. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 371-72 (Kos. 2000).

The question of proper service is different from the question of the validity of an immunity defense. The issue of sovereign immunity does not involve a jurisdictional defect in the same sense as does improper service of process. Rather, the sovereign immunity defense technically comes into consideration only after jurisdiction is acquired and simply provides a ground for relinquishing jurisdiction previously acquired. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 372 n.2 (Kos. 2000).

Because the Supreme Court has the power to make rules and orders, and do all acts, not inconsistent with law or with the rules of procedure as may be necessary for the due administration of justice, it may, in a case, prescribe the manner in which service may be had on the foreign government of Tonga and its agents. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 372 (Kos. 2000).

Fax service is not a method recognized by FSM Civil Procedure Rule 4. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 372 (Kos. 2000).

A court may find service upon a foreign government sufficient when the plaintiff sent it the complaint and summons by registered mail and the foreign government had actual notice of the complaint, since it filed a motion to dismiss, but the court will deny an entry of default when the plaintiffs cannot offer a formal proof of service, such as registered mail return receipt, because they cannot confirm service on the foreign government before it filed its motion to dismiss. Kosrae v. M/V Voea Lomipeau, 9 FSM Intrm. 366, 373 (Kos. 2000).

A default judgment will be set aside when one defendant was served the complaint and summons not by a policeman or some other specially appointed person in compliance with Civil Procedure Rule 4(c) but by plaintiff's counsel and the other defendant was not served at all. Simina v. Rayphand, 9 FSM Intrm. 500, 501 (Chk. S. Ct. Tr. 1999).

The failure of any person to perform service of process when that duty is imposed by the court or by law is subject to severe sanctions. Nameta v. Cheipot, 9 FSM Intrm. 510, 511 (Chk. S. Ct. Tr. 2000).

The FSM Civil Procedure Rules 5, 6 and 7 set forth the requirements governing service, filing and the form of motions. In accordance with Rule 5, all motions filed with the court must also be served on each party to the action. Similarly, each paper filed must be accompanied by certification of service of copies upon all other parties. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 592 (Pon. 2000).

A motion is deficient in multiple respects when it does not appear that it was served on any party to the action including the very party it was directed toward, when it was not accompanied by certification of service upon all other parties, when it was supported by an affidavit which was filed one day after the motion was filed and the affidavit was not accompanied by certification of service upon all other parties as required by Rule 5(d), nor was it served with the motion as required by Rule 6(d), and when the motion did not contain a certification that a reasonable effort had been made to obtain the agreement or acquiescence of the opposing party and that no such agreement had been forthcoming. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 595 (Pon. 2000).

Although failure to make proof of service does not affect the validity of the service, it does mean that the clerk cannot enter a default because before a clerk will enter a default against a defendant, the record must show that that defendant was properly served. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

If a defendant has never been properly served with a complaint and summons, that defendant cannot possibly file a late or untimely answer because the twenty-day time to answer allowed in Civil Procedure Rule 12(a), or the thirty-day time to answer allowed in 4 F.S.M.C. 204(3), does not start running until valid service of the complaint and summons has been made. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 34 (Chk. 2001).

Serving an answer three days late, and filing it four days late is not the type of prejudice that would allow

a plaintiff to prevail while avoiding the case being decided on its merits because public policy favors court judgments be on the merits. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001).

Service upon legal counsel may be made by leaving a copy of the document at his office with his clerk or other person in charge thereof. It is proper to serve a person who has an office at or is employed at the Kosrae State Legislature by leaving a copy of the document with the Administrative Secretary at the Legislature. It is the legal counsel's professional responsibility and duty to follow up with the Administrative Secretary regarding any documents that may have been served upon him at the Legislature during his absence from the Legislature. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 193 (Kos. S. Ct. Tr. 2001).

Counsel must act with reasonable diligence and promptness in representing a client. Reasonable diligence requires follow up by legal counsel to determine whether any documents have been served upon him at his office. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 193 (Kos. S. Ct. Tr. 2001).

When counsel personally accepted the court's order and signed the return of service he had received actual and personal hand delivery of the order. Under these circumstances, the argument that he was not properly served with this document is without merit. Kilafwakun v. Kilafwakun, 10 FSM Intrm. 189, 193 (Kos. S. Ct. Tr. 2001).

The venue provision of 32 F.S.M.C. 306(2) must be read in conjunction with the service provisions of the FSM "long-arm statute," 4 F.S.M.C. 204, and with the FSM Code's venue provisions. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 (Pon. 2001).

A venue provision that permits a civil action against a defendant who does not live in the FSM to be brought in a court within whose jurisdiction the defendant can be served or his property can be attached does not limit the FSM Supreme Court's subject matter jurisdiction, and does not render the long-arm statute superfluous. Such provisions do not preclude actions which are made procedurally possible by the long-arm statute, which gives litigants the means to effect service on entities not found within the FSM. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 (Pon. 2001).

The long-arm statute provides how service may be effected, outside of the FSM Supreme Court's territorial jurisdiction, against those who have done certain acts which subject them to the personal jurisdiction of the FSM Supreme Court, and such service has the same force and effect as though it had been personally made within the FSM. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 (Pon. 2001).

A foreign corporation served pursuant to 4 F.S.M.C. 204 may be sued within the FSM for violations of 32 F.S.M.C. 302 or 303, regardless of where the service occurs, so long as that foreign corporation has done specific acts within the FSM to bring it within the jurisdiction of the FSM Supreme Court. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204-05 (Pon. 2001).

Personal service on a party of a trial subpoena that gave clear, unambiguous notice to that party of the time and place of trial more than seven weeks before trial, constituted adequate timely notice of trial. Amayo v. MJ Co., 10 FSM Intrm. 371, 379 (Pon. 2001).

When serving a subpoena, reasonable attempts shall be made to explain the meaning of the subpoena and what the person is required to do. Amayo v. MJ Co., 10 FSM Intrm. 371, 380 (Pon. 2001).

There was no defect in service when a person who had been subpoenaed for trial as a witness, was also a party to the litigation, who was representing himself. As such, he is to be credited with knowing that "trial" means exactly that, a final determination of the merits of the case. Amayo v. MJ Co., 10 FSM Intrm. 371, 380 (Pon. 2001).

Serving the defendant himself and failure to serve defendant's counsel with documents was not improper conduct entitling the defendant to Rule 60(b)(3) relief from judgment when that defendant had no counsel of record and was appearing pro se. Amayo v. MJ Co., 10 FSM Intrm. 371, 380 (Pon. 2001).

FSM Rule 45 does not require notice of a trial subpoena to be served on the opposing party. Amayo v. MJ Co., 10 FSM Intrm. 371, 380 (Pon. 2001).

Service of a motion upon an opposing party is expressly required under Civil Procedure Rule 6(d). Such is not the case with a trial subpoena. Therefore, in the absence of any pre-trial order requiring it, failure to serve trial subpoenas on an opposing party does not constitute improper conduct justifying relief from judgment under Rule 60(b)(3). Amayo v. MJ Co., 10 FSM Intrm. 371, 381 (Pon. 2001).

When, service was done by servers employed at various times by plaintiffs' counsel, but who were duly appointed process servers and charged separate fees for the service, they were acting as private process servers. Fees charged by private process servers may be recoverable as costs. Amayo v. MJ Co., 10 FSM Intrm. 371, 385 (Pon. 2001).

Service costs are always allowable to the prevailing party. Udot Municipality v. FSM, 10 FSM Intrm. 498, 501 (Chk. 2002).

When the actual defendants are natural persons, service may be accomplished by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode or of business with some person of suitable age and discretion then residing or employed therein. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 121 (Chk. 2002).

Ordinarily a person's usual place of abode is the place where the party is actually living, except for temporary absences, at the time service is made, but it is possible for a person to have two or more dwelling houses or usual places of abode for the purpose of Rule 4(d)(1) service. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 121 (Chk. 2002).

If defendants wish to maintain that they reside at a certain address for "Department of Motor Vehicles purposes" but actually dwell elsewhere, it would seem that they cannot then contend that they should not be served process there. Certainly if they had been served traffic citations at that address, it is unlikely that their argument would prevail. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 121 (Chk. 2002).

Service may be made at a defendant's usual place of business by leaving a copy with a person of suitable age and discretion employed at the place of business even though it is disputed whether the person who received the papers was employed in a managerial capacity. UNK Wholesale, Inc. v. Robinson, 11 FSM Intrm. 118, 122 (Chk. 2002).

No service on a defendant of a motion for entry of a default judgment is necessary under the rules, and nothing in the rules requires that notice of hearings on default matters be given to a defaulting defendant. Konman v. Esa, 11 FSM Intrm. 291, 293-94 (Chk. S. Ct. Tr. 2002).

Civil Rule 6(d) addresses when a written motion must be filed. It does not address notice or service, which is addressed by Rule 5. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

Every written motion and similar paper must be served upon each of the parties. No service need to be made on the parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served in the manner provided for service of summons in Rule 4. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

When the plaintiff has failed to establish that the relief requested in its motion may be had on an ex parte basis, the court will order the plaintiff to serve its motion on the defendant. FSM Social Sec. Admin. v. David, 11 FSM Intrm. 262j, 262L (Pon. 2002).

Service of a summons and complaint shall be made by any person who is not a party and is not less than 18 years of age. Service shall be made upon an individual by delivering a copy of the summons and complaint to the individual or by leaving copies thereof at the individual's usual place of business with some

person employed therein of suitable age and discretion then employed therein. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

The purpose of the rules addressing process and service of process in civil cases is to assure that a defendant receives sufficient notice of all causes of action that are filed against him and thus has a fair and adequate opportunity to defend. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

When a plaintiff fails to properly serve a defendant, the court does not have jurisdiction over that defendant, and the case may not proceed and can be dismissed without prejudice, but because a dismissal under Rule 12(b)(5), unlike most Rule 12(b) dismissals, is without prejudice and with leave to renew, courts will often quash service instead of dismissing the action. That way only the service need be repeated. Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

When a defendant has received sufficient notice of all causes of action and had a fair and adequate opportunity to defend, and when the plaintiff later properly served defendant with a copy of the summons and complaint, the court will not dismiss the case under Rule 12(b)(5). Reg v. Falan, 11 FSM Intrm. 393, 399 (Yap 2003).

If a plaintiff must use a disfavored form of service, such as service by publication, it should, at a minimum, be held to strict compliance with the statute authorizing that form of service. Northern Marianas Housing Corp. v. Finik, 12 FSM Intrm. 441, 445 (Chk. 2004).

Although a court must rely on a certificate of service attached to a filing and presume that it is correct, such a presumption may be rebutted by admissible evidence. Fan Kay Man v. Fananu Mun. Gov't, 12 FSM Intrm. 492, 495 (Chk. 2004).

– Summary Judgment

A motion for summary judgment under Rule 56 may be granted only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Manahane v. FSM, 1 FSM Intrm. 161, 164 (Pon. 1982).

A party moving for summary judgment has the burden of clearly establishing the lack of any triable issue of fact. FSM v. Ponape Builders Constr. Inc., 2 FSM Intrm. 48, 52 (Pon. 1985).

Under Rule 56 of the FSM Rules of Civil Procedure, a summary judgment shall be rendered only if the pleadings, depositions, answers, interrogatories, and admissions on files together with the affidavits, if any, show that there is no genuine issue as to the material facts and that the moving party is entitled to a judgment as a matter of law. FSM v. Ponape Builders Constr. Inc., 2 FSM Intrm. 48, 52 (Pon. 1985).

Rule 56 of the FSM Rules of Civil Procedure is drawn from United States federal court rules. The court therefore may look to the interpretations of Rule 56 of the Federal Rules of United States Civil Procedure for guidance in seeking the proper interpretations of the FSM rule. FSM v. Ponape Builders Constr. Inc., 2 FSM Intrm. 48, 52 (Pon. 1985).

In considering a motion for summary judgment under Rule 56, the facts and inferences to be drawn therefrom, must be viewed by the court in the light most favorable to the party opposing the motion for summary judgment. FSM v. Ponape Builders Constr. Inc., 2 FSM Intrm. 48, 52 (Pon. 1985).

Where there is no genuine issue of any material fact and the plaintiffs are entitled to judgment as a matter of law, summary judgment may be granted. Wainit v. Truk (II), 2 FSM Intrm. 86, 87 (Truk 1985).

Where the nonmoving party admits allegations contained in the motion for summary judgment and there is nothing in the nonmoving party's answer or its response to the motion that suggests any factual issue in dispute, the moving party is entitled to summary judgment on those uncontested allegations. FSM Dev. Bank

v. Rodriguez Corp., 2 FSM Intrm. 128, 130 (Pon. 1985).

When a party to a civil action seeks summary judgment on the question of liability, it must initiate the inquiry even as to affirmative defenses. The moving party has the burden of clearly establishing the lack of any triable issue of fact and this burden extends to affirmative defenses as well as to the moving party's own positive allegations. FSM Dev. Bank v. Rodriguez Corp., 2 FSM Intrm. 128, 130 (Pon. 1985).

When a party moves for summary judgment on an affirmative defense, putting forward arguments and evidence indicating that there is no material fact at issue and that the defense is insufficient as a matter of law, the opposing party must produce some evidence to rebut the moving party's evidence or the moving party is entitled to partial summary judgment. FSM Dev. Bank v. Rodriguez Corp., 2 FSM Intrm. 128, 130 (Pon. 1985).

Where the party moving for partial summary judgment has done nothing to show that a factual basis for the opposing party's affirmative defenses is lacking or that the defenses are insufficient as a matter of law, the defenses remain at issue and the moving party is not entitled to partial summary judgment. FSM Dev. Bank v. Rodriguez Corp., 2 FSM Intrm. 128, 131 (Pon. 1985).

Facts and inferences are to be viewed in the light most favorable to the party against whom summary judgment is sought and the motion may then be granted only if it is clear that there is no genuine issue of material fact and the moving party must prevail as a matter of law. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 284 (Pon. 1986).

A summary judgment may be granted for a state named as defendant in an action asserting that the state is liable for negligent preparation of a survey when it is clear from the pleadings and record that the state did not exist when the survey was prepared, and plaintiff offers no theory under which the state could be liable and the pleadings, depositions, answers, interrogations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Salik v. U Corp. (I), 3 FSM Intrm. 404, 407 (Pon. 1988).

Conflicting affidavits show that the circumstances surrounding the execution of a document allegedly reflecting plaintiff's acceptance of a settlement and her release of defendant and others from liability for the death of her late husband are not sufficiently clear to permit summary judgment either as to the efficacy of that document or as to the application to the plaintiff's claims of the statute of limitations found at 6 F.S.M.C. 503(2). Sarapio v. Maeda Road Constr. Co., 3 FSM Intrm. 463, 464 (Pon. 1988).

Where the party moving for summary judgment makes out a prima facie case which, if uncontroverted at trial, would entitle it to a directed verdict on the issue, then the burden shifts to the nonmoving party to offer some competent evidence that could be admitted at trial showing that there is a genuine issue of material fact. Federated Shipping Co. v. Ponape Transfer & Storage Co., 4 FSM Intrm. 3, 11 (Pon. 1989).

In considering a motion for summary judgment, the court is required to view facts and draw inferences in a light as favorable to the party against whom the judgment is sought as may reasonably be done, and the motion may then only be granted if it is clear that there is no genuine issue of material fact and that the moving party must prevail as a matter of law. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 1, 3 (Pon. 1991).

Where the national government, in previous appearances and filings, stated that no valid earthmoving permit was in effect, the burden is on the national government at a motion for summary judgment to establish that there was a valid delegation of permit granting authority by the national government to the state officials. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 1, 7 (Pon. 1991).

Where a defendant has not filed a response to a motion for summary judgment within the ten days provided by FSM Civil Rule 6(d), the defendant is deemed to have consented to the granting of the motion and the court may decline to hear oral argument. Actouka v. Kolonia Town, 5 FSM Intrm. 121, 123 (Pon. 1991).

In a motion for summary judgment the moving party has the initial burden of showing that there are no triable issues of fact. Once the moving party has done this, the burden then shifts to the nonmoving party to show that there is a triable issue. The nonmoving party must show that there is enough evidence supporting his position to justify a decision upholding his claim by a reasonable trier of fact. Alik v. Kosrae Hotel Corp., 5 FSM Intrm. 294, 295 (Kos. 1992).

A motion for summary judgment must be denied unless the court finds there is no genuine dispute as to material facts, viewing the facts in the light most favorable to the nonmoving party, and that the moving party is entitled to judgment as a matter of law. Tosie v. Healy-Tibbets Builders, Inc., 5 FSM Intrm. 358, 360 (Kos. 1992).

Without supporting affidavits the non-moving party cannot rely on inferences culled from the record to raise inferences as to the existence of genuine issues of material fact unless the non-movant has shown affidavits are unavailable. Maruwa Shokai (Guam), Inc. v. Pyung Hwa 31, 6 FSM Intrm. 1, 4 (Pon. 1993).

Where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment must be granted. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 52 (Pon. 1993).

The burden of showing a lack of triable issues of fact belongs to the moving party. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 52 (Pon. 1993).

In determining whether triable issues exist, the court must view the facts presented and inferences made in the light most favorable to the party against whom summary judgment is sought. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 52 (Pon. 1993).

In a summary judgment motion plaintiff's burden of establishing the lack of any triable issue of fact extends to affirmative defenses as well as to plaintiff's own positive allegations. Kihara Real Estate, Inc. v. Estate of Nanpei (I), 6 FSM Intrm. 48, 53 (Pon. 1993).

When a party's motion for summary judgment has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994).

A motion for summary judgment may be granted only if it is clear that there is no genuine issue of material fact, viewing the facts, and any inferences therefrom, in the light most favorable to the party against whom summary judgment is sought, and that the moving party must prevail as a matter of law. When the only issues to be decided in a case are issues of law, summary judgment is appropriate. Etscheit v. Adams, 6 FSM Intrm. 365, 373 (Pon. 1994).

The issue of whether the rule of primogeniture that appeared on German standard form deeds applied to land not held under one of those deeds is a question of law that may be decided by the court at the summary judgment stage even if the question is seen as a determination of foreign law. Etscheit v. Adams, 6 FSM Intrm. 365, 373 (Pon. 1994).

Where a party has not raised a material issue regarding the one factual question that might bear on the applicability of the rule of primogeniture, it is appropriate for the court to decide the rule's applicability at the summary judgment stage. Etscheit v. Adams, 6 FSM Intrm. 365, 374 (Pon. 1994).

A motion to dismiss is not to be granted unless it appears to a certainty that the non-moving party is entitled to no relief under any state of facts which could be proved in support of the claim, and if on the motion to dismiss matters outside the pleading are presented to and not excluded by the court, the motion shall then be treated as one for summary judgment. Etscheit v. Adams, 6 FSM Intrm. 365, 386 (Pon. 1994).

Where there is an issue of fact regarding the authenticity of a deed, summary judgment will not be granted to the parties claiming under the deed, and both sides will be allowed to present evidence on the issue. Etscheit v. Adams, 6 FSM Intrm. 365, 389 (Pon. 1994).

Where both the plaintiffs and defendant claim that the other party is liable and dispute the amounts, viewing the plaintiffs' motion for summary judgment in the light most favorable to the defendant, genuine issues of triable material fact remain precluding summary judgment. House of Travel v. Neth, 6 FSM Intrm. 402, 403 (Pon. 1994).

A defendant's mere denial that the calendar was used for advertising purposes does not set forth specific facts to show that this is a genuine issue for trial as an adverse party must do when faced with a motion for summary judgment. Nethon v. Mobil Oil Micronesia, Inc., 6 FSM Intrm. 451, 459 (Chk. 1994).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party. The burden of showing a lack of triable issues of fact belongs to the moving party. Adams v. Etscheit, 6 FSM Intrm. 580, 582 (App. 1994).

Where the facts lead to differing reasonable inferences, thus establishing a genuine issue of fact, summary judgment is not available. Adams v. Etscheit, 6 FSM Intrm. 580, 583 (App. 1994).

Because conditions precedent are disfavored at law and require plain and unambiguous language to establish, when differing inferences create an issue of fact, summary judgment that a condition precedent exists is inappropriate. Adams v. Etscheit, 6 FSM Intrm. 580, 584 (App. 1994).

Whether a proposed boundary line on a map is insufficiently definite and certain to be located on the ground is a material fact genuinely at issue, precluding summary judgment. Adams v. Etscheit, 6 FSM Intrm. 580, 584 (App. 1994).

Where the resolution of the legal questions raised by a summary judgment motion will not perceptibly shorten the trial, and a determination at trial of the fact issues may eliminate the need for deciding the legal questions which the motion raises, a court may exercise its discretion to reserve judgment on the motion until after trial. This exercise of discretion is even more appropriate where the legal issues raised involve constitutional adjudication because unnecessary constitutional adjudication is to be avoided. Pohnpei v. Kailis, 6 FSM Intrm. 619, 620 (Pon. 1994).

Once a party moving for summary judgment has presented a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. Urban v. Salvador, 7 FSM Intrm. 29, 30 (Pon. 1995).

Where uncontested evidentiary submissions establish the existence of a contract, performance by the plaintiff, and breach by the defendant, the plaintiff may be granted summary judgment because no question of material fact has been raised. Urban v. Salvador, 7 FSM Intrm. 29, 31-32 (Pon. 1995).

Unsupported statements of counsel at oral argument do not qualify as competent evidence upon which a court could find a genuine issue for trial. Urban v. Salvador, 7 FSM Intrm. 29, 32 (Pon. 1995).

Where a moving party provides no documentation other than his own affidavit to support the existence of an agreement, denied by the defendant, to pay 12% interest on past due sums, there is a genuine issue of material fact requiring a court to deny summary judgment. Urban v. Salvador, 7 FSM Intrm. 29, 32-33 (Pon. 1995).

A court must deny a motion for summary judgment unless the court, viewing the facts presented and the inferences made in the light most favorable to the non-moving party, finds there is no genuine issue as to any material fact. Thus if the appellants can show there was a genuine issue of material fact then the trial court's summary judgment must be reversed. Luzama v. Ponape Enterprises Co., 7 FSM Intrm. 40, 48 (App. 1995).

Where the opposing party has not filed a timely response to a motion for summary judgment, that party is deemed to have consented to the granting of the motion and the court may decline to hear oral argument. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 n.1 (Chk. 1995).

The series "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," found in Civil Rule 56 merely lists those items the court shall consider on a summary judgment motion if present in the file. Not all of these items need to be present for a court to grant summary judgment. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 (Chk. 1995).

Admissions obtained through a failure to respond to requests for admissions may be used as the factual basis for summary judgment. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 85 (Chk. 1995).

Although a motion to file a late response to the requests for admissions is considered a motion to amend or withdraw, an untimely response to a summary judgment motion cannot be deemed a motion to withdraw or amend. Mailo v. Bae Fa Fishing Co., 7 FSM Intrm. 83, 86 (Chk. 1995).

A motion for summary judgment should be granted only when the evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. In considering a motion for summary judgment, the facts and inferences to be drawn from those facts must be viewed in the light most favorable to the party opposing the motion. Klavasru v. Kosrae, 7 FSM Intrm. 86, 89 (Kos. 1995).

Summary judgment may be granted in favor of the party opposing a summary judgment motion even where that party has not made a cross-motion under Rule 56. When summary judgment is granted in favor of the non-moving party, the facts and inferences to be drawn from them must be viewed in the light most favorable to the party that originally moved for summary judgment. Klavasru v. Kosrae, 7 FSM Intrm. 86, 89 (Kos. 1995).

Failure to file a response to a summary judgment motion constitutes a consent to the motion. But even when an opposing party consents to a motion, that motion may only be granted if it is well grounded in fact and law. Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995).

A motion for summary judgment is well grounded in fact and law and shall be granted when the moving party demonstrates that there are no questions of material fact and that the moving party is entitled to judgment as a matter of law. Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995).

Once the party moving for summary judgment presents a *prima facie* case of entitlement to judgment, the burden shifts to the non-moving party to raise some question of material fact. Kyowa Shipping Co. v. Wade, 7 FSM Intrm. 93, 95 (Pon. 1995).

If, when determining whether a triable issue of material fact exists and viewing the facts presented and the inferences drawn from them in the light most favorable to the non-moving party, a court determines that there is only one reasonable conclusion that can be drawn from the undisputed facts, there is no question of material fact and the case is ripe for disposition by summary judgment. Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 176 (Pon. 1995).

When a party in support of or in opposition to a Rule 12(b)(6) motion to dismiss submits matters outside of the pleadings a court has complete discretion to exclude those matters from consideration or to accept those matters and treat the motion as one for summary judgment. Latte Motors, Inc. v. Hainrick, 7 FSM Intrm.

190, 192 (Pon. 1995).

A motion to dismiss pursuant to Rule 12(b)(6) may be transformed into a motion for summary judgment if matters outside the pleadings are presented to and not excluded by the court. The burden is on the movant. A court, in reviewing a motion for summary judgment, must view the facts and any inferences deduced therefrom in the light most favorable to the party opposing the summary judgment, and before summary judgment will be granted it must be clear what the truth is, and any doubt as to the existence of a genuine issue of material fact will be resolved against the movant. Berman v. Santos, 7 FSM Intrm. 231, 235 (Pon. 1995).

When the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable issue of fact. FSM Dev. Bank v. Bruton, 7 FSM Intrm. 246, 249 (Chk. 1995).

Summary judgment may be granted only if it is clear that there is no genuine issue of material fact and that the moving party must prevail as a matter of law. A court must view the facts presented and inferences made in the light most favorable to the nonmoving party. If summary judgment is not rendered for all the relief requested, a court may enter partial summary judgment on such material facts that exist without substantial controversy. FSM Social Sec. Admin. v. Kingtex (FSM), Inc. (I), 7 FSM Intrm. 280, 283 (Yap 1995).

If the adverse party does not respond to a motion for summary judgment with affidavits or other competent evidence, summary judgment, if appropriate, shall be entered against the adverse party. Black Micro Corp. v. Santos, 7 FSM Intrm. 311, 314 (Pon. 1995).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party, and the burden of showing a lack of triable issues of fact belongs to the moving party. Nanpei v. Kihara, 7 FSM Intrm. 319, 323 (App. 1995).

When the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. Nanpei v. Kihara, 7 FSM Intrm. 319, 325 (App. 1995).

An appellate court applies the same standard in reviewing a trial court's grant of a summary judgment motion as that initially employed by the trial court under Rule 56(c) – summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Thus, review is *de novo.* The facts must be viewed in the light most favorable to the party against whom judgment was entered. Tafunsak v. Kosrae, 7 FSM Intrm. 344, 347 (App. 1995).

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Issues of statutory and constitutional construction and interpretation are not issues of material fact but matters of law. Sauder v. Chuuk State Legislature, 7 FSM Intrm. 358, 360, 363 (Chk. S. Ct. Tr. 1995).

An order granting summary judgment does not constitute a judgment. Before an adjudication can become an effective judgment, the judgment must be set forth in writing on a separate document, and the judgment so set forth must be entered in the civil docket. Bank of the FSM v. Kengin, 7 FSM Intrm. 381, 382 (Yap 1996).

When moving for a summary adjudication of all issues of a cause of action, including affirmative defenses, a plaintiff must put forth evidence that there is no issue of material fact and that the defense is insufficient as a matter of law. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (I), 7 FSM

Intrm. 387, 389 (Pon. 1996).

If a plaintiff moves for summary judgment on an affirmative defense, putting forth arguments and evidence indicating that there is no material fact at issue and that the affirmative defense is insufficient as a matter of law, the party asserting the affirmative defense must produce some evidence or the moving party is entitled to partial summary judgment. Etscheit v. Nahnken of Nett, 7 FSM Intrm. 390, 394 (Pon. 1996).

An order of partial summary adjudication, a finding that certain issues exist without controversy, is not an order granting partial summary judgment. An interlocutory order summarily granting adjudication of a portion of a party's claim cannot be transformed into a final judgment because issues of fact remain to be resolved. Richmond Wholesale Meat Co. v. Kolonia Consumer Coop. Ass'n (II), 7 FSM Intrm. 407, 408 (Pon. 1996).

Once the moving party has presented a *prima facia* case of entitlement to summary judgment, the non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact, and that there is enough evidence supporting its position to justify a decision upholding its claim by a reasonable trier of fact. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 442, 444 (Pon. 1996).

The Social Security Administration is entitled to summary judgment for unpaid taxes when it supported its motion with an affidavit detailing the a taxpayer's audit and other evidence indicating the taxpayer's liability, and the taxpayer has provided no evidence to indicate otherwise. FSM Social Sec. Admin. v. Weilbacher, 7 FSM Intrm. 442, 445-46 (Pon. 1996).

A plaintiff seeking an interlocutory adjudication of all issues of a cause of action must show that there is no issue of material fact and that the affirmative defenses raised are insufficient as a matter of law. Mid-Pacific Constr. Co. v. Semes, 7 FSM Intrm. 522, 526-27 (Pon. 1996).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material issue and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 586 (App. 1996).

Argument alone cannot create a disputed fact that will defeat summary judgment. Nahnken of Nett v. United States, 7 FSM Intrm. 581, 589 (App. 1996).

In considering a summary judgment motion, a court is required to view facts and draw inferences in a light as favorable to the party against whom the judgment is sought as may reasonably be done. The motion may then be granted only if it is clear that there is no genuine issue of material fact and that the moving party must prevail as a matter of law. Gimnang v. Yap, 7 FSM Intrm. 606, 608 (Yap S. Ct. Tr. 1996).

Summary judgment will be granted on the issue of the state's liability for the its employee's act when there is no genuine issue of material fact that at the time of the accident the employee was negligent, that he was acting at the direction of his employer and within the scope of his employment, and that his conduct was not wanton or malicious. Glocke v. Pohnpei, 8 FSM Intrm. 60, 61-62 (Pon. 1997).

A statement, which if it had been made by the defendant would have been admissible as an admission of a party-opponent, is inadmissible hearsay when made by the defendant's then spouse as part of a traditional apology, and cannot be considered on a summary judgment motion. Glocke v. Pohnpei, 8 FSM Intrm. 60, 62 (Pon. 1997).

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 79, 81 (Pon. 1997).

Once the party moving for summary judgment presents a *prima facia* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing that a genuine issue of material fact remains for resolution. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden. It must present some competent evidence that would be admissible at trial to demonstrate that there is a genuine issue of fact, and that there is enough evidence supporting its position to justify a decision upholding its claim by a reasonable trier of fact. FSM v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 79, 82 (Pon. 1997).

An appellate court applies the same standard in reviewing a trial court's grant of a summary judgment motion as that initially employed by the trial court under Rule 56(c). Thus, the review is *de novo*. Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The facts must be viewed in the light most favorable to the party against whom judgment was entered. Iriarte v. Etscheit, 8 FSM Intrm. 231, 236 (App. 1998).

When no affidavit or deposition is filed in opposition to a motion for summary judgment, there is no genuine issue presented as to any material fact and summary judgment will be affirmed. Iriarte v. Etscheit, 8 FSM Intrm. 231, 240 (App. 1998).

An appellate court applies the same standard in reviewing a trial court's grant of a summary judgment motion as that initially employed by the trial court under Rule 56(c). Thus, the review is *de novo*. Taulung v. Kosrae, 8 FSM Intrm. 270, 272 (App. 1998).

A court must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The facts must be viewed in the light most favorable to the party against whom judgment was entered. Taulung v. Kosrae, 8 FSM Intrm. 270, 272 (App. 1998).

Summary judgment on a contribution and indemnity claim is not precluded when the only issue remaining is the legal effect of the plaintiff's and defendant's court-filed settlement on the defendant's contribution claims against a third-party defendant. Joy Enterprises, Inc. v. Pohnpei Utilities Corp., 8 FSM Intrm. 306, 310 (Pon. 1998).

Article IV, section 4 is designed to guarantee that similarly situated individuals are not treated differently due to some sort of invidious discrimination, but where there is no admissible competent evidence of any such intentional discrimination, a court will grant summary judgment against an equal protection claim. Issac v. Weilbacher, 8 FSM Intrm. 326, 336 (Pon. 1998).

Cross motions for summary judgment on an exemplary damages claim will both be denied when neither motion has presented any evidence on the claim. Issac v. Weilbacher, 8 FSM Intrm. 326, 337 (Pon. 1998).

Once the party moving for summary judgment presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing that a genuine issue of material fact remains for resolution. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial to demonstrate that there is a genuine issue of fact, and that there is enough evidence supporting its position to justify a decision upholding its claim by a reasonable trier of fact. Chuuk v. Secretary of Finance, 8 FSM Intrm. 353, 362 (Pon. 1998).

As to a motion and a cross-motion for summary judgment, the familiar standard for granting a summary judgment motion is that judgment should be granted in favor of the moving party only if the pleadings, depositions, answers to interrogatories, and admissions on file, taken together with any affidavits, demonstrate that there is no genuine issues as to any material fact, and that the movant is entitled to judgment as a matter

of law. The court must view the facts and inferences in a light most favorable to the party against whom judgment is sought. Mid-Pacific Liquor Distrib. Corp. v. Edmond, 9 FSM Intrm. 75, 77 (Kos. 1999).

On a motion for summary judgment, a court must consider the facts and inferences therefrom in a light as favorable to the non-moving party as is reasonable. Therefore summary judgment for payment of an invoice is precluded when there is a C.O.D. notation on the invoice, creating an issue of fact whether the goods were paid for before the defendant received them. Mid-Pacific Liquor Distrib. Corp. v. Edmond, 9 FSM Intrm. 75, 79 (Kos. 1999).

When a plaintiff's interest and attorney's fee claim rests on a paragraph on the bottom left portion of each invoice and none of the invoices bears the defendant's signature, an issue of fact exists as to whether this pre-judgment interest and fee clause ever formed a material part of the open account agreement between the parties. Summary judgment is therefore denied on the issue. Mid-Pacific Liquor Distrib. Corp. v. Edmond, 9 FSM Intrm. 75, 79 (Kos. 1999).

It is appropriate to grant summary judgment to the non-moving party when there are no material facts at issue and when the non-moving party is entitled to summary judgment as a matter of law. Sigrah v. Kosrae State Land Comm'n, 9 FSM Intrm. 89, 94 (Kos. S. Ct. Tr. 1999).

Affidavits containing disputed facts about custom and tradition do not preclude summary judgment when custom and tradition do not apply to the case. Chuuk v. Secretary of Finance, 9 FSM Intrm. 99, 102 (Pon. 1999).

In summary judgment motion, supporting and opposing affidavits must be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of his pleading, but must respond by affidavits setting forth specific facts showing that there is a genuine issue for trial. Ueda v. Stephen, 9 FSM Intrm. 195, 197 (Chk. S. Ct. Tr. 1999).

Summary judgment under FSM Civil Procedure Rule 56 is appropriate when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Weno v. Stinnett, 9 FSM Intrm. 200, 206 (App. 1999).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party, and the burden of showing a lack of triable issues of fact belongs to the moving party. Marar v. Chuuk, 9 FSM Intrm. 313, 314 (Chk. 2000).

When the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party cannot rely upon a general denial in its answer to overcome the affidavit and the documents produced by the moving party and may not rely on unsubstantiated denials of liability or inferences culled from the record to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. Marar v. Chuuk, 9 FSM Intrm. 313, 314-15 (Chk. 2000).

An appellate court applies the same standard in reviewing a trial court's grant of a summary judgment motion that the trial court initially employed under Rule 56(c). An appellate court, viewing the facts in the light most favorable to the party against whom judgment was entered, determines *de novo* whether genuine issues of material fact are absent and whether the prevailing party is entitled to judgment as a matter of law. Chuuk v. Secretary of Finance, 9 FSM Intrm. 424, 430 (App. 2000).

A court may grant a summary judgment motion only it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The facts and inferences must be viewed

in the light most favorable to the party opposing the motion. Harden v. Primo, 9 FSM Intrm. 571, 573 (Pon. 2000).

When no response to a summary judgment motion appears in the record and the opposing party does not appear at the noticed hearing the motion is due to be granted for that reason alone. Udot Municipality v. Chuuk, 9 FSM Intrm. 586, 587 (Chk. S. Ct. Tr. 2000).

A plaintiff's summary judgment motion that fails to comply with the certification requirements of Civil Procedure Rule 6(d) may, for this reason alone, be denied without prejudice and may be renewed subject to plaintiff making reasonable attempts to reach agreements on its disposition with the defendants affected by any order requested. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 597 (Pon. 2000).

Summary judgment motions are only granted if there are no disputed issues of material fact pertinent to the given cause of action or affirmative defense addressed by the motion. If any material facts are in dispute, the parties are entitled to a trial on the merits of their causes of action or affirmative defenses. O'Sullivan v. Panuelo, 9 FSM Intrm. 589, 597 (Pon. 2000).

A court must deny a motion for summary judgment unless it finds no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party, and the burden of showing a lack of triable issues of fact belongs to the moving party. FSM Dev. Bank v. Gouland, 9 FSM Intrm. 605, 607 (Chk. 2000).

In a summary judgment motion the moving party has the initial burden of showing that there are no triable issues of fact. Once the moving party has done this, the burden then shifts to the nonmoving party to show that there is a triable issue. The nonmoving party must show that there is enough evidence supporting his position to justify a decision upholding his claim by a reasonable trier of fact. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 31 (Pon. 2001).

When the only issues to be decided are issues of law, summary judgment is appropriate. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 31 (Pon. 2001).

Once a party moving for summary judgment has presented a prima facie case of entitlement to summary judgment, the non-moving party may not rely on unsubstantiated denials of liability to carry its burden to produce evidence showing a genuine issue of material fact, but must present affidavits or some other competent evidence that would be admissible at trial that there is a genuine issue of material fact. Counsel's unsupported statements at oral argument do not qualify as competent evidence upon which a court could find a genuine issue for trial. Argument alone cannot create a disputed fact that will defeat summary judgment. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 31 (Pon. 2001).

When the taxpayer has failed to meet its the burden of showing that the Secretary's assessment was incorrect and has failed to put forth competent evidence in opposition to the Secretary's summary judgment motion and its lengthy opposition contained only legal argument, the taxpayer has failed to submit evidence establishing that the Secretary's assessment was incorrect and summary judgment in the Secretary's favor is appropriate. Ting Hong Oceanic Enterprises v. Ehsa, 10 FSM Intrm. 24, 31 (Pon. 2001).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party, and the burden of showing a lack of triable issues of fact belongs to the moving party. MGM Import-Export Co. v. Chuuk, 10 FSM Intrm. 42, 44 (Chk. 2001).

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Moses v. M.V. Sea Chase, 10 FSM Intrm.

45, 50 (Chk. 2001).

Summary judgment will be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 72 (Pon. 2001).

In considering a summary judgment motion, the court must view the facts and inferences in a light that is most favorable to the party opposing the motion. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 72 (Pon. 2001).

The presence of factual issues will not bar summary judgment if they are not material to the controlling legal issue of the case, and thus have no dispositive significance. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 77 (Pon. 2001).

When the undisputed facts show that a party clearly entered into a legally binding agreement whereby he agreed and promised to make payments to the bank in exchange for purchasing a taxi service and when he breached it by failing to make the required payments, the court will grant summary judgment to the taxi service seller. The fact that the taxi service was losing money does not excuse the buyer from his responsibility. Nor does the fact that it might have been a bad investment. FSM Dev. Bank v. Mudong, 10 FSM Intrm. 67, 78 (Pon. 2001).

When a party moving to dismiss for failure to state a claim states that an agreement is referred to in the complaint, and that by attaching a copy to its motion, it does not intend to present matter outside the pleadings, regardless of intent, the agreement is "matter outside the pleadings" under Rule 12(b)(6), and the court will therefore treat the motion to dismiss as one for summary judgment under Rule 56, as is expressly provided for by Rule 12(b). Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 114 (Kos. 2001).

Rule 56 provides for summary judgment in a movant's favor if the pleadings and facts properly before the court show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. For purposes of a summary judgment motion, the court views all facts in the light most favorable to the nonmovant. Dai Wang Sheng v. Japan Far Seas Purse Seine Fishing Ass'n, 10 FSM Intrm. 112, 114 (Kos. 2001).

Summary judgment is appropriate when, viewing the facts in the light most favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Skilling v. Kosrae, 9 FSM Intrm. 608, 610 (Kos. S. Ct. Tr. 2000).

A court must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party, and the burden of showing a lack of triable issues of fact belongs to the moving party. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 172 (Chk. 2001).

When a fishing agreement requires that the signatory organizations must only take "necessary steps to ensure" that their members comply with the laws, regulations, and their permits and the government has made no allegation and introduced no evidence that the signatory has failed to take any of these "necessary steps," the government cannot seek to impose some sort of strict liability on the signatory for the actions of its members' employees because the fishing agreement's terms, without more, do not create liability for the signatory organizations for each and every violation of FSM fishery law or the foreign fishing agreement that their members commit. The government is therefore not entitled to summary judgment because, as a matter of law, the foreign fishing agreement's contractual terms do not impose vicarious liability on the signatory. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 173-74 (Chk. 2001).

When a party's summary judgment motion has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, a court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM Intrm. 169, 174-75 (Chk. 2001).

A summary judgment motion must be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183 (Pon. 2001).

A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining, and that it is entitled to judgment as a matter of law. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183 (Pon. 2001).

Once the moving party has presented a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden; it must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183, 184 (Pon. 2001).

In considering a summary judgment motion, a court must view the facts and the inferences to be drawn from those facts in the light most favorable to the party opposing the motion. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183 (Pon. 2001).

When the court stated in its order granting a preliminary injunction that it would consider at the time of trial all of the admissible evidence which was presented at the preliminary injunction hearing, the court thereby made that evidence part of the record. It is thus also appropriate to consider this uncontroverted evidence to decide summary judgment motions. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 183 n.3 (Pon. 2001).

A defense to a trespass action that someone other than the plaintiff owned the land would only be material if the defendant alleged that that someone authorized him to use the land. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 185 (Pon. 2001).

In order for an issue of fact to be material, it must be supported by substantial probative evidence in the record, going beyond the allegations. The evidence must be in the nature of facts – not conclusions, unsupported allegations of counsel, opposing party's own contradictions in the record, or opposing party's subjective characterizations. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 186 (Pon. 2001).

On a summary judgment motion, the court must penetrate the allegations of fact contained in pleadings and look to any evidential source to determine whether there is an issue of fact. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 186 (Pon. 2001).

When a defendant produces only incompetent evidence, regarding other people and other tracts of land, wholly unrelated to the land on which he is allegedly trespassing, and when the speculative and conflicting statements contained in his pleadings are insufficient to create a material fact as to his right to possess any part of the land, there are no material issues of fact and the plaintiff is entitled to summary judgment on its trespass claim. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 186 (Pon. 2001).

If a plaintiff moves for summary judgment on an affirmative defense, putting forth arguments and evidence indicating that there is no material fact at issue and that the affirmative defense is insufficient as a matter of law, the party asserting the affirmative defense must produce some evidence or the moving party is entitled to partial summary judgment. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 186 (Pon.

2001).

A trespass defendant's bald assertions of third party ownership does nothing to diminish a plaintiff's superior right to possession of the land as to him and is immaterial to the issue of which party to the trespass action has the superior right of possession. A plaintiff's summary judgment motion will therefore be granted as to this affirmative defense. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 187-88 (Pon. 2001).

A defendant's summary judgment motion based on assertions of the validity of a third party's potential claim is insufficient as a matter of law to establish a triable issue of fact as to the plaintiff's superior right of possession. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 188 (Pon. 2001).

When all of the bases upon which a party seeks summary judgment are legally insufficient to create a prima facie case of entitlement to such judgment, that party's summary judgment motion will be denied. College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 189 (Pon. 2001).

Summary judgment must be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. In considering a summary judgment motion, a court must view the facts and inferences in a light that is most favorable to the party opposing the motion. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282 (Pon. 2001).

When a summary judgment motion is made and supported, an adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts, by affidavits or otherwise, showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, must be entered against the adverse party. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282 (Pon. 2001).

In a summary judgment motion, the moving party has the initial burden of showing that there are no triable issues of fact. Once the moving party has done this, the burden then shifts to the nonmoving party to show that there is a triable issue. The nonmoving party must show that there is enough evidence supporting his position to justify a decision upholding his claim by a reasonable trier of fact. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282 (Pon. 2001).

When the only issues to be decided in a case are issues of law, summary judgment is appropriate. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282 (Pon. 2001).

Once a party moving for summary judgment has presented a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 282-83 (Pon. 2001).

In order to be successful on a summary judgment motion, the plaintiff must also overcome all affirmative defenses that the defendants have raised. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 284 (Pon. 2001).

When the plaintiff has presented a prima facie case of entitlement to summary judgment, the burden shifted to the defendant to produce evidence showing a genuine issue of material fact to defeat plaintiff's motion for summary judgment, and when the defendant has not shown there is a triable issue of fact which will defeat the plaintiff's summary judgment motion, the plaintiff is entitled to judgment as a matter of law. Bank of the FSM v. Hebel, 10 FSM Intrm. 279, 286 (Pon. 2001).

In considering a summary judgment motion, the court must view the facts and the inferences to be drawn from those facts in a light as favorable to the non-moving party as reasonably may be done. Kosrae v. Worswick, 10 FSM Intrm. 288, 291 (Kos. 2001).

When a movant makes out a prima facie case for summary judgment which, if uncontroverted at trial, would entitle it to a directed verdict on the issue, then the burden shifts to the nonmoving party to produce some competent evidence admissible at trial showing that there is a genuine issue of fact. Kosrae v. Worswick, 10 FSM Intrm. 288, 291 (Kos. 2001).

A party is entitled to summary judgment when factual support for an essential element of the claim being asserted against the movant is absent from the case record. Kosrae v. Worswick, 10 FSM Intrm. 288, 291 (Kos. 2001).

Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Kosrae v. Worswick, 10 FSM Intrm. 288, 291-92 (Kos. 2001).

A moving party is "entitled to a judgment as a matter of law" when the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001).

The inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. The process of evaluating the proof in this way takes place in the framework of viewing the facts in a light as favorable to the nonmovant as may reasonably be done. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001).

A corporation's president's statement that he bought the barge made eight years after the event and which accurately describes his activity on the corporation's behalf is insufficient to create an issue of material fact precluding summary judgment in his favor when it is consistent with his acting on the corporation's behalf and when the evidence shows that neither he nor the corporation ever took interest in the barge because the purchase was canceled. Kosrae v. Worswick, 10 FSM Intrm. 288, 292 (Kos. 2001).

A summary judgment motion filed with the complaint is premature because a party seeking to recover upon a claim may only move for summary judgment after the expiration of 20 days from the action's commencement. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 294 (Pon. 2001).

When a plaintiff seeks summary judgment on the question of liability, it must initiate the inquiry even as to affirmative defenses. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 294 (Pon. 2001).

When the opposing party does not respond to a motion for summary judgment, the court must still ascertain that the basis for the motion is well grounded both in fact and law. To make this determination the court requires at least some quantum of factual material competent under Rule 56(c) on the question of the affirmative defenses or the motion will be denied. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 293, 294 (Pon. 2001).

When the state has not paid plaintiff employees as mandated by its state law and has alleged as affirmative defenses that a supervening cause prevented performance and that funds intended to pay lapsed, frustrating performance, these are defenses of payment, not liability, and the plaintiffs are entitled to judgment as a matter of law, the liability or obligation resting on the public law of the defendant state itself with the affirmative defenses being inadequate as a matter of law as to liability. Saret v. Chuuk, 10 FSM Intrm. 320, 322-23 (Chk. 2001).

An opposition to a summary judgment motion that merely states that the defendants do not understand how the plaintiff arrived at its figure and rely on their answer that they lack sufficient knowledge as to the exact amount owed does not create an genuine issue of material fact. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342,

344-45 (Chk. 2001).

When a moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the non-moving party may not rely on unsubstantiated denials of liability or denials in its answer to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345 (Chk. 2001).

When the defendants have presented no evidence, competent or otherwise, that the plaintiff's figure is incorrect, there is no genuine issue as to the amount owed. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345 (Chk. 2001).

A plaintiff's motion for summary judgment has the obligation to clearly establish the lack of any triable issue of fact as to any affirmative defenses. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345 (Chk. 2001).

A summary judgment motion that deals only with the note and the balance owed and fails to respond to the defendants' affirmative defenses will be denied. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 345 (Chk. 2001).

When the statute does not create a duty for the FSM Development Bank to provide technical assistance, and the movants have failed to put forth any competent evidence, such as affidavits or documentary evidence, to show that such a duty was created contractually or by justified detrimental reliance, their summary judgment motion based on that alleged duty must be denied because since they did not make out a prima facie case that the Bank had a duty to provide them technical assistance there was no factual basis for the motion and thus no proper grounds on which to grant it. FSM Dev. Bank v. Ifraim, 10 FSM Intrm. 342, 346 (Chk. 2001).

When opposing affidavits show the existence of a genuine issue of material fact, summary judgment must be denied. Marcus v. Truk Trading Corp., 10 FSM Intrm. 387, 389 (Chk. 2001).

Summary judgment will be denied when questions must be resolved before the movant can present a sufficient factual basis for a summary judgment. Marcus v. Truk Trading Corp., 10 FSM Intrm. 387, 390 (Chk. 2001).

A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining and that it is entitled to judgment as a matter of law. E.M Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM Intrm. 400, 405 (Pon. 2001).

Once the moving party has presented a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. The non-moving party must show that there is enough evidence supporting its position to justify a decision upholding his claim by a reasonable trier of fact. E.M Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM Intrm. 400, 405 (Pon. 2001).

The court, in considering a summary judgment motion, must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the party opposing the motion. E.M Chen & Assocs. (FSM), Inc. v. Pohnpei Port Auth., 10 FSM Intrm. 400, 405 (Pon. 2001).

Summary judgment under Rule 56 is appropriate when, viewing the facts in the light more favorable to the party against whom judgment is sought, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Jonas v. Kosrae, 10 FSM Intrm. 441, 442 (Kos. S. Ct. Tr. 2001).

When plaintiffs should have been classified at the time the state hired them in 1997 at the same pay level as the medical officers who the state hired as Staff Physicians I prior to the plaintiffs and when the

plaintiffs' grievances were granted increasing their pay in 2000 only partially corrected the situation from May 1, 2000 forward, the plaintiffs are entitled to summary judgment for a retroactive adjustment to their entrance salary. Jonas v. Kosrae, 10 FSM Intrm. 441, 444-45 (Kos. S. Ct. Tr. 2001).

The court shall grant summary judgment if the pleadings, discovery responses and affidavits show that there is no genuine issue to any material fact and that the moving party is entitled to judgment as a matter of law. Skilling v. Kosrae, 10 FSM Intrm. 448, 450 (Kos. S. Ct. Tr. 2001).

For a summary judgment motion, supporting and opposing affidavits must be made on personal knowledge, and must set forth such facts as would be admissible in evidence. An adverse party may not rest upon the mere allegations or denials of his pleading, but must set forth by affidavit or otherwise, specific facts showing that there is a genuine issue for trial. The facts are viewed in the light most favorable to the nonmovant. Skilling v. Kosrae, 10 FSM Intrm. 448, 450 (Kos. S. Ct. Tr. 2001).

When an opposing party fails to respond to a motion for summary judgment, the court must still determine that there is a good basis both in law and in fact for the granting of the motion. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 475, 476 (Pon. 2001).

When a plaintiff seeks summary judgment on the question of liability, the plaintiff must initiate the inquiry even as to affirmative defenses. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 475, 476 (Pon. 2001).

In determining whether a genuine issue of material fact exists under Rule 56(c), a court will consider the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 479, 480 (Pon. 2001).

When factual differences in the bank and development authority loan documents and the promissory note and loan agreement raise genuine issues of material fact, summary judgment for either party is precluded. FSM Dev. Bank v. Arthur, 10 FSM Intrm. 479, 480-81 (Pon. 2001).

The fact that a party's understanding of an agreement is at variance with its express terms does not raise an issue of fact precluding summary judgment. Jayko Int'l, Inc. v. VCS Constr. & Supplies, 10 FSM Intrm. 502, 505 (Pon. 2002).

On motion for summary judgment, facts and inferences therefrom should be viewed in a light most favorable to the opposing party, and when facts lead to differing reasonable inferences, then summary judgment is not appropriate. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578 (Pon. 2002).

If genuine fact issues can be reasonably resolved only in the movant's favor, then summary judgment in movant's favor is appropriate, but if those same fact issues may be reasonably in favor of either party, summary judgment will be denied. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578 (Pon. 2002).

Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 578 (Pon. 2002).

After the movant has made out a *prima facie* case for summary judgment, a shifting of the burden occurs which requires the responding party to come forward with evidence to show that a genuine issue of material fact exists, and in so doing the responding party may not look to unsubstantiated denial of liability but must come forward with competent evidence, admissible at trial, to establish that there is a genuine issue of fact. Unsupported factual assertions are insufficient to oppose a motion for summary judgment. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 579 (Pon. 2002).

A defendant moving for summary judgment may rely on the absence of evidence to support an essential element of the plaintiff's case. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 579 (Pon. 2002).

When a movant has demonstrated that no genuine issue of material fact exists, he must still show that applicable law entitles him to judgment in his favor. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 579 (Pon. 2002).

In responding to a summary judgment motion, an adverse party may not rest upon the mere allegations or denials of its pleading, but the adverse party's response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, will be entered against the adverse party. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 579 (Pon. 2002).

Only when the opposing parties submit affidavits that set forth specific facts showing a genuine issue for trial will summary judgment be barred. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 579 (Pon. 2002).

In considering a summary judgment motion, the court will consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, and the scope of the foregoing is sufficient to encompass sworn trial testimony where that testimony goes to the same contamination and subsequent causation issues raised in the instant case. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 580 (Pon. 2002).

To state an opinion is not to set forth specific facts. In the context of a summary judgment motion, an expert must back up his opinion with specific facts. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 580 (Pon. 2002).

No expert opinion arises simultaneously with the events that ultimately gives rise to that opinion, but comes to harvest in the course of a lawsuit and in the usual case is a gloss on the occurrence or events on which the lawsuit is based. In that sense an opinion is not a "fact" within the meaning of Civil Rule 56(e), but since Evidence Rules 702-704 expressly allow for expert witnesses' opinion testimony, the question is whether any given opinion is backed up with specific facts. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 580 (Pon. 2002).

The precise combustive characteristics of kerosene, gasoline, and mixtures of the two lie beyond the ordinary ken of the court. In these circumstances, an expert's opinion is indispensable to the finder of fact in determining whether questions of fact may be reasonably resolved only in favor of the moving party. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 581 (Pon. 2002).

When the expert opinion offered by the nonmovant does not go to the causation issue presented by the facts, and on which the movant's expert offered his opinion, it does not create a fact issue under Rule 56. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 582 (Pon. 2002).

The litigation process is designed not only to discover information, but also to reduce it to the essentials necessary to advance a party's case. When a lawsuit deals with scientific, technical, or other specialized knowledge, an expert's opinion is a useful tool in this paring process. Its value derives in no insubstantial part from the fact that it reflects a synthesis of relevant facts. When such an opinion goes to a necessary element of the case, and stands unopposed by a countervailing, factually supported expert opinion that fairly meets the moving party's opinion, it may be dispositive in the context of a summary judgment motion. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 582 (Pon. 2002).

When the plaintiff's expert's testimony does not set forth specific facts showing that there is a genuine issue of fact as to the kerosene contamination issue and since the defect's existence goes to a necessary element of the plaintiff's case, the plaintiff has failed to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial and summary judgment in the defendants' favor is therefore appropriate. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm.

574, 583 (Pon. 2002).

Facts that go to the question of a contamination source are rendered immaterial in light of the defendants' expert's competent, uncontroverted expert testimony that nothing about the combustion event that caused the injury led him to believe that the kerosene was contaminated. Suldan v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 574, 583-84 (Pon. 2002).

Summary judgment must be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 586 (Pon. 2002).

On motion for summary judgment, facts and inferences therefrom should be viewed in a light most favorable to the opposing party, and where facts lead to differing reasonable inferences, then summary judgment is not appropriate. William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 586 (Pon. 2002).

When the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 586 (Pon. 2002).

The plaintiff has not shown a causative link between the alleged contamination and her injury sufficient to withstand the defendants' summary judgment motion when, as between contaminated and uncontaminated kerosene, a reasonable trier of fact could not exclude the latter so as to conclude that it was the former that caused her injury. William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 586 (Pon. 2002).

When a reasonable trier of fact could not exclude the plaintiff's playing with matches and uncontaminated – as opposed to contaminated – kerosene as the cause of her injuries, it follows that the record taken as a whole could not lead a rational trier of fact to find for her and that the defendants' summary judgment motion must be granted. William v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 584, 587 (Pon. 2002).

When the plaintiff fails to guide the court to any part of the record that contains a competent opinion based on the facts of this case that contradicts the defendants' expert's competent opinion in a manner sufficient to raise an issue of fact, summary judgment for the defendants is appropriate. Adolip v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 587, 590 (Pon. 2002).

When the plaintiff offered no objection to the defendants' expert's competent opinion and does not point to any part of the record that contains a countervailing, competent opinion based on the facts of the case that is sufficient to raise an issue of fact, summary judgment for the defendants is appropriate. George v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 590, 592 (Pon. 2002).

When the defendants' expert has testified, and the plaintiff conceded, that gasoline and kerosene are completely miscible, when the plain inference from expert's miscibility testimony is that the fuel which first burned normally was identical in its chemical makeup to the fuel which the plaintiff later claimed exploded, and when the defendant offers nothing in her response to address the anomaly created by the expert's specific testimony on the miscibility point as it relates to her memory of what occurred, in the absence of such evidence, and given the expert's competency to opine on a verifiable physical phenomenon like miscibility, no issue of fact exists on this specific point. George v. Mobil Oil Micronesia, Inc., 10 FSM Intrm. 590, 592 (Pon. 2002).

A moving party is entitled to summary judgment when it has demonstrated that there are no genuine issues of material fact remaining, and that it is entitled to judgment as a matter of law. Once it has presented a *prima facie* case of entitlement to summary judgment, the burden shifts to the non-moving party to produce some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of fact. Pohnpei Cmty. Action Agency v. Christian, 10 FSM Intrm. 623, 628 (Pon. 2002).

When it appears that there are no disputed genuine issues of material fact which remain to be tried in

the case, the standard for granting summary judgment under KRCP Rule 56(c) has been satisfied. James v. Lelu Town, 10 FSM Intrm. 648, 649 (Kos. S. Ct. Tr. 2002).

Summary judgment must be granted if the pleadings, discovery responses under oath, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In considering a summary judgment motion, the court must view the facts and inferences in a light that is most favorable to the party opposing the motion. Livaie v. Micronesia Petroleum Co., 10 FSM Intrm. 659, 662 (Kos. S. Ct. Tr. 2002).

Argument alone cannot create a disputed fact that will defeat summary judgment. Livaie v. Micronesia Petroleum Co., 10 FSM Intrm. 659, 664 (Kos. S. Ct. Tr. 2002).

Summary judgment will be granted against a terminated employee on his claim for breach of his verbal employment contract when he has failed to show that he had an assurance of continued employment through actions of a supervisor with authority to establish employment terms; when even assuming that former general manager did give the employee verbal assurances of continued employment, those verbal assurances ended with the general manager's termination; and when cause was not required for an employee's termination because the statute permitted employees to be terminated for other reasons, as the employer deemed appropriate. Livaie v. Micronesia Petroleum Co., 10 FSM Intrm. 659, 664 (Kos. S. Ct. Tr. 2002).

When failure to adopt a manual of administration was not a violation of statute because the statute does not set a time limit for the board to adopt one and when the employer is specifically exempted by statute from the Public Service System Act, summary judgment will be granted against a terminated employee on his claim that failure to adopt a manual made the employer liable for his termination. Livaie v. Micronesia Petroleum Co., 10 FSM Intrm. 659, 665 (Kos. S. Ct. Tr. 2002).

The defendant employer will be granted summary judgment on a plaintiff's due process claim when the plaintiff has not satisfied his burden showing that the employer is a state actor and that its termination of his employment was a state action because the due process clause may only be invoked through state action. Livaie v. Micronesia Petroleum Co., 10 FSM Intrm. 659, 667 (Kos. S. Ct. Tr. 2002).

A summary judgment movant must go forward as to the nonmovant's affirmative defenses, since the burden of demonstrating that no triable fact issues exist encompasses affirmative defenses as well as the movant's own factual allegations. Bank of the FSM v. Mori, 11 FSM Intrm. 13, 14 (Chk. 2002).

When it appears that triable issues of fact would still exist that would compel denial of the motion even if the court were to convert the motion from one to dismiss for failure to state a claim to one for summary judgment because matter outside the pleadings was included, the court will instead exercise its discretion to set the case for trial at the earliest opportunity. William v. Director of Public Works, 11 FSM Intrm. 45, 47 (Chk. S. Ct. Tr. 2002).

A motion to dismiss for failure to state a claim may be brought after an answer has been filed by a motion for judgment on the pleadings or at the trial on the merits. But when the movant presents matter outside the pleadings as part of his motion to dismiss, then under Rule 12(c), the motion will be treated as one for summary judgment and disposed of as provided in Rule 56. Richmond Wholesale Meat Co. v. George, 11 FSM Intrm. 86, 88 (Kos. 2002).

When summary judgment is granted for a portion of the plaintiff's claim and when the court finds pursuant to Rule 54(b) that as to this portion of the claim there is no just reason for delay, the court will expressly direct entry of final judgment for that amount. Richmond Wholesale Meat Co. v. George, 11 FSM Intrm. 86, 88 (Kos. 2002).

When questions of fact and law exist as to liability for interest charges, a cross motion for summary judgment which seeks dismissal of the interest claim will be denied. Richmond Wholesale Meat Co. v. George, 11 FSM Intrm. 86, 88 (Kos. 2002).

For purposes of a summary judgment motion, the court views all facts and inferences in the light most favorable to the party opposing the motion. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99 (Pon. 2002).

When the only issues to be decided are issues of law, summary judgment is appropriate. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99 (Pon. 2002).

Once a movant has presented a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99 (Pon. 2002).

The presence of factual issues will not bar summary judgment if they are not material to the case's controlling legal issue, and thus have no dispositive significance. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 99 (Pon. 2002).

The plaintiffs have made a prima facie case for a trespass cause of action when they have established that they own the land pursuant to certificates of title and that the defendants are on the property without their consent, but in order to determine whether the plaintiffs should be granted summary judgment, the court needs to consider the defendants' arguments in opposition to the plaintiffs' motion, and if the defendants' arguments fail to establish a genuine issue of material fact exists, then it is appropriate for the court to enter summary judgment. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 100 (Pon. 2002).

When to dispute the plaintiffs' ownership of the property, the defendants have the burden of showing that the plaintiffs' certificates of title are not valid or authentic, or that the relevant certificate of title does not cover the land the defendants occupy, whether the land the defendants occupy was part of the land in a 1903 auction is not a genuine issue of material fact because the defendants' unsupported contention does not dispute the validity of the certificates showing the plaintiffs to be the property's owners. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 101 (Pon. 2002).

When the defendants have failed to show the elements of adverse possession have been met and have thus failed to show that they own or have a right to possess the property they presently occupy, the defendants' claim of long use and occupation of the land does not create a genuine issue as to a material fact since the defendants failed to establish that they acquired ownership or a right to possession. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 103 (Pon. 2002).

When it is irrelevant to the litigation's outcome who built the house on the land, this fact, though disputed, is not a genuine issue as to material fact which would prevent summary judgment from being entered. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 103 (Pon. 2002).

Whether a certificate of title issued in 1983 was voidable is not a genuine issue as to a material fact which would prevent the granting of summary judgment because the plaintiffs presently hold a certificate of title for the property defendants presently occupy. The party challenging the certificate's validity bears the burden of proving that it is not valid or authentic, and when the defendants have failed to show that the relevant certificate of title is invalid, their argument does not create a genuine issue of material fact. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 104 (Pon. 2002).

When the plaintiffs, by virtue of certificates of title, have established ownership of the property presently occupied by the defendants, and when the defendants have failed to show that they have acquired ownership or a right to possession of the property, the defendants have failed to show a genuine issue of material fact exists as to the property's ownership and they have not raised a genuine issue of material fact which would prevent the court from granting the plaintiffs summary judgment. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 104 (Pon. 2002).

When the defendants' contention that the certificate of title issued in 1983 is voidable is without merit, it does not show a genuine issue as to a material fact which would prevent summary judgment from being entered in plaintiffs' favor. Carlos Etscheit Soap Co. v. Gilmete, 11 FSM Intrm. 94, 104 (Pon. 2002).

There is no need to remand a matter for a new trial judge to consider the summary judgment motions when the knowledge that the defendants lived on part of the land was in the record and did not stem from an extrajudicial source; when there was no extrajudicial conduct because the trial judge received information from the former special master when both counsel were present; when trial counsel as well as the judge engaged in appeals to divine aid at the motion hearing; and when the judge encouraged settlement. Bualuay v. Rano, 11 FSM Intrm. 139, 148-49 (App. 2002).

If a genuine issue of material fact is present then the trial court has to deny the summary judgment motion. Bualuay v. Rano, 11 FSM Intrm. 139, 149 (App. 2002).

An appellate court uses the same standard in reviewing the grant or denial of a summary judgment that the trial court initially did. Therefore, if the appellate court concludes that a genuine issue of material fact was present, then it must rule that the summary judgment should have been denied; and if it concludes that a genuine issue is not present, then, viewing the facts in the light most favorable to the nonmovant, it rules *de novo* on whether the movant was entitled to judgment as a matter of law. This is true even when the appeal comes from another appellate court. Bualuay v. Rano, 11 FSM Intrm. 139, 149 (App. 2002).

When an earlier Trust Territory High Court judgment clearly stated that someone owned only half of a land parcel and the plaintiff's only claim to the land is through his purchase of that person's rights, he cannot own any more of the land than the half that the seller owned, and when that judgment was res judicata and binding on the parties to that case and all claiming under them, there was no genuine issue of fact as to whether the plaintiff owned half or all of the land. He owned only half, and the defendants were therefore entitled, as a matter of law, to a summary judgment to that effect. Bualuay v. Rano, 11 FSM Intrm. 139, 150 (App. 2002).

An appellate court may affirm the trial court's summary judgment on a different theory when the record contains adequate and independent support for that basis. Bualuay v. Rano, 11 FSM Intrm. 139, 150 n.3 (App. 2002).

When a genuine issue of material fact exists about where the boundary between the two halves of a piece of land lies, summary judgment on this issue is not possible, and the trial court's summary judgment concerning the boundary will be vacated, and that issue remanded to the trial court. Bualuay v. Rano, 11 FSM Intrm. 139, 151 (App. 2002).

When a summary judgment was properly made in the defendants' favor, the plaintiff, as a matter of law, cannot be entitled to a contrary summary judgment. Bualuay v. Rano, 11 FSM Intrm. 139, 151 (App. 2002).

Default, under Rule 55, is typically granted when a defendant has failed to answer or respond to a complaint within the prescribed time limit. A default judgment under Rule 55 will not be granted for the plaintiff's failure to timely respond to a summary judgment motion. Sigrah v. Kosrae State Land Comm'n, 11 FSM Intrm. 169, 171 (Kos. S. Ct. Tr. 2002).

Summary judgment must be granted if the pleadings, discovery responses under oath, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In considering a summary judgment motion, the court must view the facts and inferences in a light that is most favorable to the party opposing the motion. Sigrah v. Kosrae State Land Comm'n, 11 FSM Intrm. 169, 171 (Kos. S. Ct. Tr. 2002).

The same standard that a trial court uses in its determination of a motion for summary judgment is applied *de novo* by the appellate court. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Kosrae v. Skilling, 11 FSM Intrm.

311, 315 (App. 2003).

In reviewing the trial court's grant of summary judgment, the appellate court applies the same standard employed by the trial court under Civil Procedure Rule 56. Under that rule, unless a court finds that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the court must deny the motion. In considering a motion for summary judgment, the court views the facts and inferences in the light most favorable to the nonmoving party. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 358 (App. 2003).

When the College presented competent evidence that the land to which a deed refers is located miles from the disputed property and when Rosario produced only incompetent evidence regarding other people and other tracts of land that was wholly unrelated to land at issue, the trial court correctly concluded that Rosario's evidence relating to his claim of a possessory interest was insufficient to create a genuine issue of material fact as to his right to possess any part of the land. Thus, as between the parties, the College has the greater right of possession. Rosario v. College of Micronesia-FSM, 11 FSM Intrm. 355, 360-61 (App. 2003).

A partial summary judgment motion will be denied when it does not address the non-movant's affirmative defenses, when there are issues of fact related to the movants' entitlement to recover, and when the movants have not established as a matter of law that the non-movants' affirmative defenses will not be successful. Island Homes Constr. Corp. v. Falcam, 11 FSM Intrm. 414, 416 (Pon. 2003).

In reviewing a summary judgment motion, the court will grant the motion if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. LPP Mortgage, Ltd. v. Ladore, 11 FSM Intrm. 601, 602 (Pon. 2003).

When the defendants have not alleged that the bank records are inadequate or incorrect and they do not allege that payments have been made but not credited to their account and when the defendants have not submitted documentation nor proffered proof of any type that establishes or even suggests that the bank records are in error, a defendant's flat denial of the amount, without any effort to show how or why the amount is incorrect, does not create a genuine issue of material fact. LPP Mortgage, Ltd. v. Ladore, 11 FSM Intrm. 601, 602-03 (Pon. 2003).

An answer that alleges that they had made the monthly payments until a defendant became unemployed may be germane in a hearing on a motion for order in aid of judgment or other proceeding, but it does not create a genuine issue as to whether the defendants owe what they are alleged to owe, whether they stopped paying on that debt, and whether the plaintiff is entitled to recover the unpaid balance as a matter of law. LPP Mortgage, Ltd. v. Ladore, 11 FSM Intrm. 601, 603 (Pon. 2003).

When the defendants have failed to file any opposition to the plaintiff's summary judgment motion, they are deemed to have consented to the granting of that motion. LPP Mortgage, Ltd. v. Ladore, 11 FSM Intrm. 601, 603 (Pon. 2003).

Summary judgment is appropriate if the record before the court demonstrates that there is no genuine issue as to any material fact such that the moving party is entitled to summary judgment as a matter of law. AHPW, Inc. v. FSM, 12 FSM Intrm. 114, 117 (Pon. 2003).

Summary judgment will be granted when, viewing the facts in the light most favorable to the plaintiff, the defendant national government's $40,000 appropriation did not, as a matter of law, violate any of the plaintiff's constitutional rights since the allotment was not a subsidy or other payment to pepper farmers that arguably reduced or otherwise affected its competitive advantage in a way that violated its constitutional rights and when the court does not construe this allotment as some form of financing of Pohnpei's allegedly unlawful activities. Any connection between the FSM allotment and the destruction of AHPW's pepper business is too remote since there is no showing that the allotment caused, or even contributed to the cause of, the destruction of its pepper operation. AHPW, Inc. v. FSM, 12 FSM Intrm. 114, 118 (Pon. 2003).

When the FSM had no involvement in or authority over Pohnpei's decisions not to declare a trochus harvest, summary judgment in the FSM's favor is appropriate with respect to the alleged constitutional violations concerning the plaintiff's trochus business. AHPW, Inc. v. FSM, 12 FSM Intrm. 114, 118-19 (Pon. 2003).

Summary judgment will be denied when the parties' two contentions, taken together, generate fact questions whether Pohnpei's conduct arises to the level of a constitutional violation; and when Pohnpei could not, in the guise of assisting pepper farmers, violate 32 F.S.M.C. 301 *et seq.* AHPW, Inc. v. FSM, 12 FSM Intrm. 114, 124 (Pon. 2003).

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 145 (Pon. 2003).

Once the party moving for summary judgment presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing that a genuine issue of material fact remains for resolution. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 145-46 (Pon. 2003).

A party opposing a summary judgment motion may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial which demonstrates that there is a genuine issue of material fact. When the non-moving party fails to present competent evidence in response to a properly supported summary judgment motion, the court must evaluate the moving party's evidentiary submissions and any other admissible evidence to determine if the movant has presented a prima facie case of entitlement to summary judgment. If the movant has presented such a prima facie case, the movant is entitled to summary judgment. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 146-47 (Pon. 2003).

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay is generally not admissible, and therefore cannot be relied upon to create a material issue of fact when opposing a summary judgment motion. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 147 (Pon. 2003).

When the argument that the defendants should not be bound in their personal capacities but that only a corporation should be bound by the agreement, contradicts the promissory note's plain meaning, as it is worded, and when the individuals, in their depositions, acknowledged that they read and signed the agreement, they should not be permitted to claim that they did not understand the clear terms. And when at the same time the individuals clearly intended to encumber their personal property and assets, not merely those of the corporation, based upon the promissory note's plain, unambiguous language, the plaintiff is entitled to summary judgment as to the affirmative defense of lack of capacity. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 148 (Pon. 2003).

When defendants' counsel supplied his own opinion that the plaintiff no longer exists based on a review of documents that were prepared by one person and translated by a second person, neither of whom supplied affidavits signifying that the statements were sworn and based on personal knowledge, defendants' counsel's affidavit clearly is not based on his personal knowledge and cannot be considered competent evidence for purposes of opposing plaintiff's summary judgment motion or to support defendants' cross-motion for summary judgment and motion to dismiss. And when the plaintiff submits affidavits of its bankruptcy trustee and its Guam representative, which are based on these individuals' personal knowledge and clearly establish that it was not liquidated, the defendants have not provided competent evidence to make the fact of the plaintiff's corporate status a material dispute, and the defendants' summary judgment motion must be denied. Goyo Corp. v. Christian, 12 FSM Intrm. 140, 149 (Pon. 2003).

A summary judgment motion will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Once the party moving

for summary judgment presents a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing that a genuine issue of material fact remains for resolution. Fredrick v. Smith, 12 FSM Intrm. 150, 151-52 (Pon. 2003).

Failure to file a response to a summary judgment motion constitutes a consent to that motion; but even when an opposing party consents to a motion, that motion may only be granted if it is well grounded in fact and in law. Fredrick v. Smith, 12 FSM Intrm. 150, 152 (Pon. 2003).

Civil Rule 56(d) provides that when summary judgment has been denied such that trial is necessary, the court shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. AHPW, Inc. v. FSM, 12 FSM Intrm. 164, 168 (Pon. 2003).

No summary adjudication can be granted when a key issue of material fact is genuinely in dispute. Such a determination cannot be based on proffered conflicting affidavits, both based on personal knowledge. It must be based upon an adversarial proceeding, with cross-examination, before a judge. Enlet v. Bruton, 12 FSM Intrm. 187, 190 (Chk. 2003).

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a motion for summary judgment unless it finds there is no genuine issue of any material fact and that the moving party is entitled to judgment as a matter of law. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 212 (Pon. 2003).

Once a party moving for summary judgment has presented a prima facie case of entitlement to summary judgment, the burden shifts to the non-moving party to produce evidence showing a genuine issue of material fact. The non-moving party may not rely on unsubstantiated denials of liability to carry its burden, but must present some competent evidence that would be admissible at trial that there is a genuine issue of material fact. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 212 (Pon. 2003).

The presence of factual issues will not bar summary judgment if they are not material to the controlling legal issue of the case, and thus have no dispositive significance. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 212 (Pon. 2003).

When a party has failed to show that there are issues of material fact preventing the court from entering summary judgment against it on the trespass or nuisance claims, it is appropriate to enter summary judgment in the movant's favor. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 214 (Pon. 2003).

A court must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 214 (Pon. 2003).

Summary judgment is appropriate where, viewing the facts in a light most favorable to the non-moving party, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Summary judgment may be granted on the issue of liability alone. Wortel v. Bickett, 12 FSM Intrm. 223, 225 (Kos. 2003).

Summary judgment will not be granted when the documentary evidence does not resolve the fact issues relative to that defendant's precise role in the cancellation of the plaintiff's permit. Wortel v. Bickett, 12 FSM Intrm. 223, 227 (Kos. 2003).

If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court must if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. But when the material facts center on what the defendants actually believed at the relevant times, not to mention disputed questions about who said what to whom and when, and since the determination of these facts will turn on credibility, it is not practicable within the meaning of Rule 56(d) for the court to make a finding on what material facts exist without substantial

controversy. This determination must await trial. Wortel v. Bickett, 12 FSM Intrm. 223, 227-28 (Kos. 2003).

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The burden of showing a lack of triable issues of fact belongs to the moving party, and when the moving party has made out a prima facie case that there are no triable issues of fact and that it is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. Buruta v. Walter, 12 FSM Intrm. 289, 293 (Chk. 2004).

When nothing in the record indicates under what tenure a person held the municipal election commissioner's office, the court cannot conclude as a matter of law that he held that position when he conducted an election on August 1, 2003 and that his purported removal from office was unlawful. Summary judgment that the August 1st election was valid will therefore denied. Buruta v. Walter, 12 FSM Intrm. 289, 295 (Chk. 2004).

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Once a *prima facie* case of entitlement to judgment has been presented, the burden shifts to the non-moving party to raise a question of material fact. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 304 (Pon. 2004).

When the insurance contract language excludes bailment leases, a plaintiff vehicle rental business is not entitled to judgment as a matter of law on a claim that the defendants breached the insurance contract when they did not pay for a damaged rental vehicle. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 305 (Pon. 2004).

Once a plaintiff has presented a *prima facie* case of entitlement to judgment on a cause of action, the burden shifts to the defendants to raise a question of material fact. Thus when the defendants have raised no such question, and where there is a duty of care, a breach of that duty, damage caused by the breach, and the value of the damage can be determined, liability as to the defendants' negligence has been established. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 308 (Pon. 2004).

Summary judgment on a negligent misrepresentation claim will be granted when the uncontroverted and dispositive fact is that the defendants misled the plaintiff to believe that his rental fleet would be covered by the insurance policy if the vehicles were damaged while driven by renters, but the defendants failed to bind the type of coverage that was both requested and promised and when the defendants have not attempted to meet their burden of showing that there is a genuine issue of fact as to this claim. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 308-09 (Pon. 2004).

Before an insurance company can obtain summary judgment on an action for enforcement of a premium note, the defenses available to the enforcement of a premium note must be addressed. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 301, 309 (Pon. 2004).

When a party's summary judgment motion has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470 (Pon. 2004).

Summary judgment cannot be granted when there appears to be a genuine issue of material fact whether the pickup's damage was total, and, assuming that it was, what the amount of these total damages were. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 470-71 (Pon. 2004).

When a movant requests an extension of time to do additional discovery in order to resist a summary judgment motion, the movant must demonstrate that the proposed discovery would lead to facts essential to

justify the opposition to the motion, but when, even with the benefit of additional time to make an offer of proof, the movant has come forward with nothing to show how an extension would lead to facts essential to opposing a summary judgment motion, the motion for an extension will be denied. Joe v. Kosrae, 13 FSM Intrm. 45, 46-47 (Kos. 2004).

When there is a summary judgment motion pending to which no response has been filed, under Civil Procedure Rule 6(d), failure to respond to a motion is deemed consent to the granting of the motion. However, there still must exist a good basis in law and fact upon which to grant the motion. Joe v. Kosrae, 13 FSM Intrm. 45, 47 (Kos. 2004).

When, according to the complaint's allegations, the defendants' medical malpractice led to the deceased's death, and when, attached to the defendants' summary judgment motion is an affidavit of a medical doctor who is board certified in the field of family practice and the affidavit recites that the doctor has reviewed the medical records and that his opinion is that her diagnosed illness, tuberculosis of the spine, was so serious that in order to avoid paralysis, it would have been acceptable practice to administer the medications in question even if the deceased's treating doctors had been aware of her hepatitis history, the doctor's affidavit is relevant evidence based on an adequate foundation, that tends to show that the defendants did not violate the applicable standard of care. This evidence is of sufficient weight that left unopposed, no genuine issue of material fact exists under FSM Civil Rule 56, and the defendants are entitled to judgment as a matter of law. Since the plaintiffs have offered nothing to meet the evidence offered by the defendants, no genuine issues of material fact therefore exist, and the defendants are entitled to summary judgment in their favor. Joe v. Kosrae, 13 FSM Intrm. 45, 47 (Kos. 2004).

A court must deny a motion for summary judgment unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court must view the facts presented and inferences made in the light most favorable to the nonmoving party. The burden of showing a lack of triable issues of fact belongs to the moving party. Lee v. Lee, 13 FSM Intrm. 68, 70 (Chk. 2004).

When the moving party has made out a prima facie case that there are no triable issues of fact and that he is entitled to summary judgment as a matter of law, the nonmoving party then has the burden to show by competent evidence that there is a triable material issue of fact. A nonmovant's failure to respond to a summary judgment motion, is a failure to meet his burden to overcome the plaintiff's prima facie case. In order to succeed on a summary judgment motion, the plaintiff must also overcome all affirmative defenses that the defendant has raised. Lee v. Lee, 13 FSM Intrm. 68, 71 (Chk. 2004).

When matter outside the pleadings is presented to and not excluded by the court, a motion to dismiss for failure to state a claim upon which relief can be granted (under Rule 12(b)(6)), shall be treated as one for summary judgment under Rule 56. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 125 (Chk. 2005).

Laches and failure to mitigate damages are not grounds on which to grant summary judgment when a sufficient factual basis to support either ground has not yet been developed. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 127 (Chk. 2005).

Since a bank owed no duty of care to a plaintiff when it took a mortgage to secure a loan to another, and that mortgage, even if it is unenforceable, was not the proximate cause of the plaintiff's alleged damages, the bank is entitled to summary judgment as a matter of law on the plaintiff's negligence and void mortgage causes of action. Additional reasons for this are that the bank has not attempted to foreclose its mortgage and that the mortgage does not cover the lot for which the plaintiff has a determination of ownership. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 128 (Chk. 2005).

When, viewing the facts in the light most favorable to the plaintiff and accepting his well-pled allegations (which remain to be proven) as true, a corporation (while under receivership) took dominion over the plaintiff's property; quarried it for rock; crushed the rock into aggregate; sold it; paid various expenses, including workers' wages, the operator's fees, and the receiver's fee; and then paid the royalties, to which the corporation was entitled, to the bank to reduce its indebtedness to the bank, the bank never took dominion

over the property the plaintiff alleges is his and the bank is therefore entitled to summary judgment in its favor as a matter of law on the plaintiff's conversion and the "unauthorized sale of property" (the quarried aggregate) claims. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 129 (Chk. 2005).

When the bank's real property mortgage has never been enforced because receivership was the chosen remedy; when no agent of the bank is alleged to have entered or to have quarried the property the plaintiff contends is his; when the receivership was not the bank's agent over which it had control, direction, or authority; when the execution of a mortgage, even an invalid mortgage, is not an "authorization" by the mortgagee for anyone to either enter the mortgaged land or to trespass on another's land, viewing the facts in the light most favorable to the plaintiff, the bank, by asking for and obtaining amended receivership terms to facilitate aggregate production to meet another's needs and to set up a payment plan for the judgment-creditors' benefit, did not commit or authorize a trespass. The bank is therefore entitled to summary judgment in its favor on the trespass cause of action. Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 129-30 (Chk. 2005).

A sua sponte summary judgment motion is proper so long as the court provides adequate notice to the parties and adequate opportunity to respond to the court's motion. FSM Social Sec. Admin. v. Jonas, 13 FSM Intrm. 171, 173 (Kos. 2005).

– Venue

In litigation brought by a mother seeking child support payments from the father, the court will not grant the defendant-father's motion to change the venue to the FSM state in which he now resides from the FSM state in which: 1) the mother initiated the litigation; 2) the couple was married and resided together; 3) their children were born and have always lived; and 4) the mother still resides. Pernet v. Aflague, 4 FSM Intrm. 222, 224 (Pon. 1990).

In an admiralty and maritime case for the *in rem* forfeiture of a vessel, jurisdiction and venue are so interrelated that the government, or its agents, may not move a defendant vessel from the state in which it was arrested where the FSM admiralty venue statute does not anticipate transfer even though the civil rules allow improper venue to be raised as a defense or to be waived. It is unclear what the result of such a move would be. FSM v. M.T. HL Achiever (I), 7 FSM Intrm. 221, 222-23 (Chk. 1995).

When an alleged tax liability arose in a state and the government attempted to collect the tax in that state, venue is proper in that state under 6 F.S.M.C. 301(2), which allows an action, other than contract, to be brought where the cause of action arose. Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 114 (Chk. 1997).

6 F.S.M.C. 304(3) allows part or all of a case to be heard in a state other than the one in which it was brought "if the interests of justice were served thereby." Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 114 (Chk. 1997).

Venue does not refer to jurisdiction at all. Jurisdiction of the court means the inherent power to decide a case, whereas venue designates the particular county or city in which a court with jurisdiction may hear and determine the case. On the other hand, forum means a place of jurisdiction. National Fisheries Corp. v. New Quick Co., 9 FSM Intrm. 120, 125 (Pon. 1999).

The venue provision of 32 F.S.M.C. 306(2) must be read in conjunction with the service provisions of the FSM "long-arm statute," 4 F.S.M.C. 204, and with the FSM Code's venue provisions. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 (Pon. 2001).

A venue provision that permits a civil action against a defendant who does not live in the FSM to be brought in a court within whose jurisdiction the defendant can be served or his property can be attached does not limit the FSM Supreme Court's subject matter jurisdiction, and does not render the long-arm statute superfluous. Such provisions do not preclude actions which are made procedurally possible by the long-arm

statute, which gives litigants the means to effect service on entities not found within the FSM. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 (Pon. 2001).

An action not connected with a contract may be brought in a court within whose jurisdiction the cause of action arose. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 200, 204 & n.3 (Pon. 2001).