

**FEDERATED STATES OF MICRONESIA
SUPREME COURT APPELLATE DIVISION**

Cite as *Damarlane v United States of America*, 8 FSM Intrm. 45 (App. 1997)

**IGNACIA DAMARLANE et al.,
Appellants,**

vs.

**UNITED STATES OF AMERICA, on its own and in the place of the
GOVERNMENT OF THE TRUST TERRITORY OF THE PACIFIC ISLANDS,
FEDERATED STATES OF MICRONESIA, POHNPEI STATE
and POHNPEI TRANSPORTATION AUTHORITY,
Appellees.**

APPEAL CASE NO. P1-1996

OPINION

Argued: September 17, 1996

Decided: April 15, 1997

BEFORE:

Hon. Andon L. Amaraich, Chief Justice, FSM Supreme Court
Hon. Martin Yinug, Associate Justice, FSM Supreme Court
Hon. Ramon G. Villagomez, Temporary Justice, FSM Supreme Court*

*Associate Justice, Supreme Court of the Commonwealth of the Northern Marianas,
Saipan, CNMI

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HEADNOTES

Appeal and Certiorari - Standard of Review; Civil Procedure - Summary Judgment and Judgment on the Pleadings

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).

Constitutional Law - Taking of Property

The government does not engage in a taking where the interests lost are not private property. Damarlane v. United States, 8 FSM Intrm. 45, 52 (App. 1997).

Appeal and Certiorari - Standard of Review

The appropriate standard of review when reviewing a trial court's finding on sufficiency of the evidence is whether the trial court's finding is clearly erroneous. A finding is clearly erroneous when the appellate court, after reviewing the entire body of the evidence and construing the evidence in the light most favorable to the appellee, is left with the definite and firm conviction that a mistake has been committed. Damarlane v. United States, 8 FSM Intrm. 45, 53 (App. 1997).

Appeal and Certiorari - Briefs and Record

A transcript of at least part of the trial court proceedings is generally necessary if the appeal involves issues of fact or evidence. Damarlane v. United States, 8 FSM Intrm. 45, 53 n.6 (App. 1997).

Civil Procedure - Injunctions

When a final judgment has been entered on the merits, a preliminary injunction comes to an end and is superseded by the final order.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).

Costs

Unless the court directs otherwise, costs are allowed as of course to the prevailing party. A prevailing party is the one in whose favor the decision is ultimately rendered when the matter is finally set at rest, and does not depend upon the degree of success at different stages of the suit. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997).

Costs

When the trial court decides the matter on the merits, based on the evidence, in favor of the defendants and the plaintiffs are not granted a permanent injunction, the defendants are

prevailing parties who are appropriately awarded costs. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997).

Attorney, Trial Counselor and Client - Fees

The "private attorney general" theory for an award of attorney's fees whereby a successful party is awarded attorney's fees when it has vindicated an important public right that required private enforcement and benefitted a large number of people has never been applied in the FSM. Damarlane v. United States, 8 FSM Intrm. 45, 55 (App. 1997).

Civil Procedure - Joinder

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).

Civil Procedure - Joinder

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).

Civil Procedure - Sanctions

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).

Appeal and Certiorari - Standard of Review; Civil Procedure - Sanctions

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).

Civil Procedure - Dismissal

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).

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COURT'S OPINION

ANDON L. AMARAICH, Chief Justice:

FACTUAL AND PROCEDURAL HISTORY

This is an appeal taken from the findings of fact and conclusions of law entered orally by the Trial Court at trial in July 1995, the written findings of fact and conclusions of law entered in August 1995, and the written orders entered in December of 1995, all of which

found in favor of appellees. The underlying case before the Trial Court spanned five years and the record on appeal contains over 3,000 pages. The pertinent history of this case is as follows.

Complaints

On September 25, 1990, plaintiffs filed an initial complaint and motion for injunctive relief against Pohnpei Transportation Authority (PTA), Pohnpei State Land Commission, the State of Pohnpei, and the FSM National Government.¹ Plaintiffs asserted that they owned land at Mesenpal, Awak, U Municipality, Pohnpei, which had been originally deeded to appellant Ignacia Damarlane by her father, by virtue of a German Deed, and which was subsequently divided among her family. Plaintiffs alleged that, beginning in 1976, PTA created a peninsula abutting that land over their objections, and began dredging operations. Plaintiffs asserted that this peninsula became part of their property, as abutting landowners. Plaintiffs also claimed, *inter alia*, that defendants' dredging equipment was operated dangerously and created noise and pollution; that the dredging caused silt accumulation, which in turn caused sea life to die; that their fish "mai"² had been destroyed; that defendant PTA used the material from the dredge site for construction of the circumferential road around Pohnpei; and that defendants claimed the site on which they were dredging as public land, thereby depriving plaintiffs of the right to build homes on their land.

Plaintiffs' final amended complaint included thirteen counts. Counts one through three, seven, eleven, and twelve were based on negligence. The fourth and eighth causes of action were based on nuisance. The fifth and ninth causes of action were based on trespass. The sixth and tenth causes of action alleged unconstitutional taking and denial of rights. The thirteenth cause of action alleged that the acts of defendants were willful and malicious, and requested punitive damages.

Preliminary Injunction

In October 1990, the Court granted plaintiffs' request for a preliminary injunction, finding that defendants had failed to obtain a valid permit in violation of applicable earthmoving regulations. Damarlane v. Pohnpei Transp. Auth., 4 FSM Intrm. 347 (Pon. 1990). In November 1990, plaintiffs moved for summary judgment on their underlying claims, which the Court granted in January 1991. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 1 (Pon. 1991). The Court found that only the FSM government may issue an earthmoving permit under 25 F.S.M.C. 501 *et seq.* (Supp. 1987) and the FSM Earthmoving Regulations, and that until the environmental implications of defendants' activities had been studied, the earthmoving permit issued by the FSM government was invalid. The Court enjoined PTA and Pohnpei State from further earthmoving activities of any kind, but did not preclude defendants from seeking a valid earthmoving permit.

PTA subsequently obtained a valid permit. The Court modified the existing injunction to permit PTA to conduct earthmoving activities, finding that defendants had been granted a valid permit and that removal of coral from the dredge site would not cause irreparable harm. After plaintiffs filed a request for an order to show cause, alleging that defendants had violated the terms of the injunction and the earthmoving permit, the Court granted a second preliminary injunction in March 1991. Defendants moved to modify the second preliminary injunction in April 1991. In May 1991, the Court granted the modification,

conditioned upon defendants' compliance with applicable environmental laws and regulations, and with the understanding that Pohnpei Supreme Court was to prevent any irreparable harm to any land-related rights plaintiffs might have.

Motion to Join Joaquim Cantero as a Party

In January of 1991, plaintiffs moved to join Joaquim Cantero as a party under Rule 19(a) of the FSM Rules of Civil Procedure. Plaintiffs asserted that joinder was necessary because there was a dispute over a boundary line between Mr. Cantero's lot and that of one or more of the named plaintiffs, and because Mr. Cantero may have had an interest to protect in any filled areas abutting his land as well as an interest in any damages for the destruction to the lagoon alleged by plaintiffs. Plaintiffs later reversed this stance and argued that Mr. Cantero should not be joined as a party.

Certification of Questions to Pohnpei Supreme Court

In May 1991, the Trial Court certified two questions to the Appellate Division of the Pohnpei Supreme Court:

1. Under Pohnpei State law, do owners of the land adjacent to the lagoon, or do persons having a permit to fill in the lagoon pursuant to a permit such as the 1990 permit issued to the plaintiffs in this case, have sufficient property rights in the reef and the lagoon as to entitle them to monetary compensation or other relief for damage to the reef caused by unauthorized dredging activity in the lagoon near their land?
2. Under Pohnpei State law, including article XII, section 6 of the Pohnpei Constitution, if a reef or a fish mhai is damaged by persons carrying out dredging activities pursuant to authorization of state officials for a public purpose, are adjacent or nearby coastal landowners entitled to a payment of just compensation for the depreciation or the value of the reef and fishing grounds or damage of a fish mhai which they had constructed in the lagoon?

Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 67A, 67F (Pon. 1991).

On February 17, 1995, the Pohnpei Supreme Court issued its opinion with respect to the matters that had been certified to it by this Court. Damarlane v. United States, 7 FSM Intrm. 56 (Pon. S. Ct. App. 1995). That court essentially concluded that damage to reefs or soil in the area below the high water mark, resulting from dredging activities for public purposes, does not justify compensation to abutting land owners. However, if the Public Land Board of Trustees had granted certain rights in writing to an individual to erect a fish maii, and if dredging destroyed or reduced the value of that maii, the owners may be entitled to compensation.³

Cross-motions for Summary Judgment and Judgment on the Pleadings

While the Trial Court was awaiting response on the questions it had certified to the Pohnpei Supreme Court, the parties filed various motions and cross motions for summary judgment. The United States also moved for judgment on the pleadings. On March 23, 1994, the Court granted the United States partial summary judgment. See Damarlane v.

United States, 6 FSM Intrm. 357 (Pon. 1994). The United States subsequently filed a second motion for summary judgment, or, alternatively, a motion to reconsider, which the Trial Court granted in part. *See Damarlane v. United States*, 7 FSM Intrm. 167 (Pon. 1995). The Trial Court also granted defendant Pohnpei State's and PTA's motion for judgment on the pleadings in part.

Upon receipt of the decision of the Pohnpei Supreme Court Appellate Division on the issues certified to it by this Court, this Court granted Pohnpei State's, PTA's and the United States' motions for judgment on the pleadings. The Court found that plaintiffs had no property interest in the submerged lands. Plaintiffs were permitted to proceed on their claims of erosion resulting from dredging; destruction of their fish mhai; inability to make use of a fill permit; and use of a right of way over their land. The Court also granted partial summary judgment in favor of the FSM on certain of plaintiffs' counts grounded in negligence, and dismissed those counts.

Pretrial Statements

On June 2, 1994, plaintiffs filed an amended pretrial statement, as ordered by the Court. The United States moved to strike plaintiffs' pretrial statement on June 20, 1994, asserting that it alleged claims and authority that had already been dismissed by the Court's March 23, 1994, order granting partial summary judgment. The Court granted the United States' motion to strike plaintiffs' pretrial statement on April 17, 1995. Plaintiffs then filed a second amended pretrial statement on May 9, 1995. Again the United States, joined by PTA and Pohnpei State, moved to strike plaintiffs' pretrial statement, and again the Court granted defendants' motion, on July 19, 1995. On the same date, the United States moved for sanctions under Rule 11 of the FSM Rules of Civil Procedure.

The Trial

Upon the call of the case for trial on July 20, 1995, the United States represented that it was unable to properly proceed to trial without a pretrial statement setting out appellants' case against it, and moved for a dismissal. The case proceeded to trial against Pohnpei State, PTA, and the FSM on counts four and five, six against the FSM, and ten against Pohnpei State and PTA. At the close of plaintiffs' case, the FSM, Pohnpei State, and PTA moved for dismissal of the action pursuant to Rule 41(b) of the FSM Rules of Civil Procedure. Excerpt Tr. of Trial at 8 (July 25 & 27, 1995) (filed Aug. 12, 1996). The Court granted the motion and dismissed counts four, five, six, ten, and thirteen. *Id.* at 8-13. Trial continued on plaintiffs' fish trap claim against Pohnpei State and PTA.

In August 1995, the Trial Court severed trial against the United States from the trial against all other defendants. In response to the United States' motion for sanctions, the Trial Division permitted plaintiffs to proceed against the United States on the condition that they pay \$1,636.95 to the Court no later than October 2, 1995, in reimbursement for expenses incurred by counsel for the United States in traveling to Pohnpei for trial on July 20, 1995. The Court stated that if payment were not made, the United States could move for dismissal pursuant to Rule 41(b) of the FSM Rules of Civil Procedure.

Also in August 1995, the Trial Court issued its findings of fact and conclusions of law based on the evidence and arguments presented at trial. It found that plaintiffs had not proven, by a preponderance of the evidence, that their fish weir had been destroyed by the

dredging activities of Pohnpei State and PTA in 1984 or thereafter. The Court, citing FSM Civil Rule 15(b), noted that the issue of laches had been tried with the express consent of the parties. The Court stated that any claim for destruction of the weir dating back to the initial dredging in the late 1970's was barred by the laches of plaintiffs in not asserting that claim until 1990. The Court also noted that the statute of limitations, if defendants had pled it, would have barred that claim as well. The Court therefore dismissed plaintiffs' taking claim based on the destruction of the fish weir, on the merits. Additionally, the Court ordered that the March 18, 1991, injunction be dissolved 30 days after entry of judgment in favor of the three defendants. The Court's order was later amended to provide for dissolution of the injunction on October 10, 1995.

Post-trial Proceedings

On August 18, 1995, plaintiffs moved the Court to reconsider its imposition of sanctions against them. The United States opposed plaintiffs' motion to reconsider, and filed a motion to dismiss the remaining claims against it pursuant to Rule 12(b)(6), and a motion to dismiss based on plaintiffs' failure to comply with Court-ordered sanctions, that is, sanctions for failure to pay the travel costs of counsel for the United States. On September 8, 1995, the Court denied plaintiffs' motion for reconsideration of these sanctions.

Plaintiffs then filed, *inter alia*, a motion to amend the complaint, a proposed amended complaint, and a motion to join Joaquim Cantero as a party. Defendants opposed these motions, and the FSM moved for additional Rule 11 sanctions based on plaintiffs' post-trial motions.

On December 15, 1995, the Court addressed all outstanding motions. The Court denied plaintiffs' request to reconsider the pretrial order which limited plaintiffs' taking claims; denied plaintiffs' motion to join Joaquim Cantero; and denied plaintiffs' post-trial motion to amend their complaint. The Court granted the United States' motion to dismiss based on Rule 12(b)(6) and based on Rule 41(b). Finally, the Court granted the FSM's motion for sanctions against plaintiffs' counsel for her filing of three post-trial motions. Damarlane v. United States, 7 FSM Intrm. 350, 357 (Pon. 1995).

On October 5, 1995, plaintiffs filed a notice of appeal from the Court's August 1995 judgment, which dismissed the action against the FSM, Pohnpei State, and PTA. This was docketed as Appeal No. P6-1995. On January 16, 1996, plaintiffs filed a second notice of appeal, this time from the Court's Order and Judgment of December 15, 1995. This became Appeal No. P1-1996. Finally, on April 23, 1996, plaintiffs filed a notice of appeal from the April 8, 1996 order allowing costs against them. The Court consolidated the first two appeals into P1-1996 on February 26, 1996. The Court dismissed the third appeal on November 25, 1996.

ARGUMENTS ON APPEAL

Appellants' Arguments

On appeal, appellants, plaintiffs below, argue that the Trial Court erred in: (1) failing to award plaintiffs damages for the alleged injury to their riparian rights⁴; (2) dissolving the October 1990 injunction; (3) finding that defendants were prevailing parties and therefore entitled to costs; (4) failing to order the joinder of Joaquim Cantero as a party; (5) entering

sanctions against plaintiffs' counsel under Rule 11 of the FSM Rules of Civil Procedure for filing post-trial motions; and (6) dismissing plaintiffs' claim against the United States under Rule 41(b) of the FSM Rules of Civil Procedure.

Appellees' Arguments

The three appellees necessarily present different arguments on appeal. First, the United States notes that appellants have not appealed the Trial Court's dismissal of their claims against the United States under Rule 12(b)(6). Accordingly, the judgment in favor of the United States must stand. Even if this were not the case, dismissal based upon appellants' failure to reimburse the United States' travel costs should be affirmed. Finally, the United States argues that it is plainly entitled to an award of costs under applicable law.

The FSM argues that appellants' arguments regarding laches and statute of limitations are moot, because the Trial Court did not dismiss plaintiffs' claims against the FSM on either of those grounds. The FSM urges affirmance of the Trial Court's decision to dismiss appellants' riparian rights claims because such rights do not exist under Pohnpei state or FSM law. In brief, the FSM also argues that the Trial Court properly dissolved the preliminary injunction; correctly concluded that defendants were prevailing parties because defendants had successfully defeated each of plaintiffs' claims on the merits; properly declined to order post-trial joinder of Joaquim Cantero; and properly found that sanctions under Rule 11 of the FSM Rules of Civil Procedure were warranted.

Like the FSM, Pohnpei State argues that the Trial Court did not base its findings as to riparian rights on laches or operation of the statute of limitations, but, rather, found that appellants had failed to prove their case by a preponderance of the evidence. Pohnpei State also argues that the Trial Court did not err in ordering dissolution of the injunction, because no permanent injunction was ever issued, and because defendants prevailed and received final judgment in their favor. It also did not err in failing to order payment of attorneys's fees to counsel for appellants on a "private attorney general" theory. Pohnpei State incorporates by reference certain of the arguments made by the FSM and the United States.

DISCUSSION

I. Did the Trial Court Err in Failing to Award Damages to Appellants?

Appellants challenge the Trial Court's denial of damages in two respects. First, appellants argue that they should not have been limited to proof on only four kinds of takings at trial, which occurred when the Trial Court issued pre-trial orders granting judgment on the pleadings in favor of defendants. Second, appellants challenge the Trial Court's oral findings at trial and its written findings of fact and conclusions of law issued in August 1995. Specifically, appellants raise a number of arguments regarding laches and the statute of limitations. We review the Trial Court's judgment on the pleadings and judgment on the merits using two different standards of review.

A. Judgment on the Pleadings

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 judgment on the pleadings de novo, as it does all rulings of law. *See Tafunsak v. Kosrae*, 7 FSM Intrm. 344, 347 (App. 1996).

In May 1991, the Trial Court certified certain questions to the Pohnpei Supreme Court, which were properly addressed by the State. Based on that Pohnpei Supreme court ruling, the Trial Court, in its order of July 19, 1995, granted motions for judgment on the pleadings by defendants Pohnpei State, PTA, and United States on certain of plaintiffs' claims. Plaintiffs were permitted to proceed on their claims of erosion resulting from dredging; destruction of a fish mhai; inability to make use of a fill permit; and use of a right of way over plaintiffs' land.

Appellants now argue, essentially, that the Pohnpei Supreme Court decision, finding that appellants have no property interests in the submerged land, is wrong. We have no reason to believe that the questions certified to the Pohnpei Supreme Court were not pure questions of state law.

Appellants also make a number of other arguments, based on the FSM Constitution, that private property may not be taken for a public purpose without payment, and that they are thus entitled to compensation. They make related arguments under various other statutes that they have suffered injuries to their fishing, swimming, and recreational interests, and that they have been damaged by water, air, and noise pollution. These arguments, however, all spring from the basic assumption that plaintiffs had a property interest in the submerged lands. As noted above, under Pohnpei state law, appellants do not have such an interest. These interests were, therefore, not *private* property, and the government did not engage in a taking.

Accordingly, we affirm the decision of the Trial Court limiting appellants to taking claims on only four bases at trial.

B. Judgment on the Merits; Dismissal Pursuant to FSM Civil Rule 41(b)

At the close of plaintiffs' case, defendants moved for dismissal pursuant to FSM Civil Rule 41(b). The Trial Court granted defendants' motion with respect to counts four, five, six, ten, and thirteen.

Rule 41(b) provides that after the plaintiff has completed presentation of its evidence, the defendant may move for dismissal if, upon the facts and the law, the plaintiff has shown no right to relief. A Rule 41(b) dismissal at the close of plaintiffs' evidence operates as an adjudication on the merits. 10 Charles Alan Wright et al., *Federal Practice and Procedure* §§ 2369, 2373, at 331, 395 (2d ed. 1983).⁵ When reviewing a trial court's finding on sufficiency of the evidence, the appropriate standard of review is whether the trial court's finding is clearly erroneous. *Senda v. Mid-Pac Constr. Co.*, 5 FSM Intrm. 277, 280 (App. 1992). In determining whether a trial court's findings are clearly erroneous, an appellate court must construe the evidence in the light most favorable to the appellee. A finding is clearly erroneous when the appellate court, after reviewing the entire body of evidence, is left with the definite and firm conviction that a mistake has been committed. *Kinere v. Kosrae*, 6 FSM Intrm. 307, 309 (App. 1993).

Appellants argue that the Trial Court erred in applying laches and the statute of limitations

to their claim of injury to riparian rights. The Trial Court heard testimony and found, by a preponderance of the evidence, that plaintiffs had failed to prove any damages to cognizable rights. The Trial Court noted, only in passing, that the issue of laches was tried with the consent of the parties. Appellants have not pointed to any place in the transcript to show that the issue of laches was determinative, or, even if it had been determinative, that it was tried without their consent.⁶ While the Trial Court also noted that the statute of limitations, even if defendants had pled it, would also have barred any claim for destruction of the weir dating back to the initial dredging, this reference to the statute of limitations was extraneous to the Court's decision on the merits. We therefore find that the Trial Court's rulings on defendants' Rule 41(b) motion were not clearly erroneous, and we affirm its decision.

II. Did the Trial Court Err in Dissolving the Injunction?

Appellants next contend that the Trial Court issued a "permanent" injunction in their favor, and that this injunction should not have been dissolved at the conclusion of the trial.

Appellants have pointed to nothing in the record which would support their contention that the injunction was permanent. Appellants' initial complaint and motion for injunctive relief requested a preliminary injunction, and the initial injunction granted by the Court was clearly labeled "preliminary." Appellants also have failed to establish that subsequent modifications of that injunction changed its nature, or that the injunction should properly have been permanent or mandatory. Upon conclusion of the case, there was no reason to continue the injunction. *See Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 610 F. Supp. 750 (D.N.J. 1985)⁷ (where a final judgment has been entered on the merits, the preliminary injunction comes to an end and is superseded by the final order); *Bryfogle v. Carvel Corp.*, 666 F. Supp. 730 (E.D. Pa. 1987). Accordingly, we see no error in the Trial Court's decision to dissolve the injunction and affirm that decision.

III. Did the Trial Court Err in Finding that the Defendants were Prevailing Parties?

Appellants' next challenges to the Trial Court's findings center on their argument that they were the prevailing parties in the litigation below. Appellants first contend that appellants, rather than the appellees, should have been awarded costs. Specifically, appellants argue that they were the prevailing party on the environmental enforcement issues, because the Trial Court granted injunctive relief.

Rule 54(d) of the FSM Rules of Civil Procedure provides, in pertinent part: "Except when express provision therefor is made either in a statute of the Federated States of Micronesia or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The "prevailing party" has been defined as:

The one in whose favor the decision or verdict is rendered and judgment entered. The party ultimately prevailing when the matter is finally set at rest. . . . To be [the prevailing party] does not depend upon the degree of success at different stages of the suit, but whether, at the end of the suit, or other proceeding, the party who has made a claim against the other, has successfully maintained it.

Black's Law Dictionary 1069 (5th ed. 1979) (citations omitted).

Under this definition, appellants cannot be considered prevailing parties. Appellants have provided no basis for their claims that the Court actually granted them a permanent injunction, nor do the facts persuade us that a permanent or mandatory injunction should have issued. The Trial Court decided the matter on the merits, based on the evidence, in favor of defendants, and defendants were therefore the prevailing parties. Accordingly, defendants were appropriately awarded costs under Rule 54(d) of the FSM Rules of Civil Procedure. *See Berman v. Kolonia Town*, 6 FSM Intrm. 242, 244 (Pon. 1993) (when a plaintiff's motion is denied on the merits, the defendant may recover costs under FSM Civil Rule 54(d) if properly verified); *Mailo v. Twum-Barimah*, 3 FSM Intrm. 411, 413 (Pon. 1988) (even if dismissal of plaintiff's claims is voluntary and without prejudice, defendant is the prevailing party within the meaning of Rule 54(d)).⁸

Appellants next argue that the Trial Court erred in failing to order payment of attorneys fees to counsel for appellants on a "private attorney general" theory, because plaintiffs prevailed on their "environmental enforcement" issues, as evidenced by the Court's grant of injunctive relief. Appellants appear to base this argument on a comment made by the Court in *Semens v. Continental Airlines*, 2 FSM Intrm. 200 (Pon. 1986). In that case, the Court stated that it "could consider" application of a private attorney general theory, but noted that such a theory had been rejected by the United States Supreme Court.

The private attorney general theory has never been applied in the FSM and we will not adopt it in this case. Moreover, even if the Court were inclined to consider application of the theory in this case, appellants have not shown that they meet the criteria generally enumerated in those United States cases which do allow fees on this basis. *See, e.g., Kaufman & Broad-South Bay v. Unisys Corp.*, 822 F. Supp. 1468 (N.D. Cal. 1993) (section 1021.5 of the California Code of Civil Procedure provides that a court may award attorneys fees to a *successful* party in a private attorney general action which (a) enforces an important right affecting the public interest and (b) confers a significant benefit upon the general public or a large class of persons, if (c) the necessity and cost to plaintiff in bringing its private enforcement action outweighs its stake in the action); *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993) (the "private attorney general doctrine" allows a *prevailing party* to recover attorneys' fees absent statutory authority or agreement; the doctrine is an equitable rule which permits courts in their discretion to award attorney's fees to a party who has vindicated a right that (1) benefits a large number of people, (2) requires private enforcement, and (3) is of societal importance).

Therefore, we find that the Trial Court properly declined to award fees to appellants either under FSM Civil Rule 54(d), or under a private attorney general theory.

IV. Did the Trial Court Err in Failing to Order Joinder of Joaquim Cantero as a Party?

Appellants next claim that the Trial Court improperly failed to grant their post-trial motion for the joinder of Joaquim Cantero as a party.

Plaintiffs first moved to join Joaquim Cantero in January 1991. At that time, plaintiffs argued that he was a necessary party to the litigation. The Court granted this motion, and plaintiffs included Mr. Cantero as a party in their second amended complaint. Plaintiffs subsequently elected to drop Mr. Cantero as a party in the third amended complaint. At trial, the FSM moved for dismissal of plaintiffs' action, based on plaintiffs' failure to join

an indispensable party, Joaquim Cantero. Plaintiffs at that time opposed the FSM's motion, arguing strenuously that Mr. Cantero had no interest in the litigation. Based on plaintiffs' previous position with respect to Mr. Cantero, the FSM moved for sanctions.

On October 16, 1995, after trial had already concluded, and notwithstanding their previous insistence that Mr. Cantero did not in fact have an interest in the litigation, plaintiffs again moved to join Joaquim Cantero as an indispensable party. This time, plaintiffs argued that Mr. Cantero now had an interest in the subject matter of the action, because the Trial Court had found that defendant PTA had taken an easement over Mr. Cantero's property. Plaintiffs argued that Mr. Cantero was not compensated for this "taking." Plaintiffs also argued that although Mr. Cantero had since filed a lawsuit of his own, his claims for any taking occurring before October 1989 would now be time-barred. Thus, Mr. Cantero's right to obtain damages would be prejudiced if post-trial joinder were not allowed in the instant matter. Plaintiffs also asserted that all owners of riparian property are necessary parties to a dispute over riparian rights.

In denying plaintiffs' post-trial motion for joinder, the Trial Court reasoned that Rule 21 permits joinder at any stage of the proceedings on such terms as are just. However, plaintiffs had failed to present any compelling justification for post-trial joinder when they had been aware of Mr. Cantero's circumstances for well over four of the five years the matter had been pending, and when they themselves had dropped Mr. Cantero from the case after their previous motion for joinder had been granted. The Court noted that while Rule 19(a)(2)(i) requires joinder in a case in which the person's absence would "impair or impede the person's ability to protect that interest," plaintiffs had failed to show that Joaquim Cantero's ability to protect his interest was impaired or impeded at any time, either before or after the filing of this action.

The Appellate Division reviews rulings of law de novo. *See* Tafunsak, 7 FSM Intrm. at 347. Rule 19(a) provides, in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest.

While it is true that joinder of a party may be ordered at any point in the proceedings, plaintiffs would have had to meet an exceedingly high threshold in order to establish that joinder was proper after the Trial Court has already rendered its judgment. *See, e.g., Salik v. U Corp. (II)*, 3 FSM Intrm. 408, 410 (Pon. 1988) (court denied defendant's motion to join the national government as a party in a Pohnpei land dispute, filed on the eve of trial, in part, because the motion was quite late). This is especially true where, as here, appellants' own position has flip-flopped repeatedly throughout the proceedings, and appellants had ample opportunity to argue in favor of joinder before trial.

In addition, counsel for plaintiffs misconstrues the Trial Court's findings with respect to any easement taken over Mr. Cantero's property. The Court did not conclude that there was, in fact, an easement; it merely concluded that any easement complained of was not

on plaintiffs' land. Additionally, on July 25, 1995, counsel for appellants herself argued, in defense of her decision not to join Mr. Cantero as a plaintiff, "I think it's clear he's not a plaintiff because he conceded or he somehow gave permission to PTA so he can't really turn around and sue, can he." *See* Aff. of Carole Rafferty at 2, para. 4 (Nov. 7, 1995).

Based on the record before the Trial Court, we find that Mr. Cantero was not an indispensable party. First, plaintiffs never established either that an easement was taken over Mr. Cantero's land, or that it was taken without Mr. Cantero's permission. The fact that Mr. Cantero may or may not be able to claim damages for an easement that may or may not exist on his land does not make him an indispensable party to this matter. There has been no showing that Mr. Cantero claims an interest relating to the subject matter of this action.

Second, the requirement of FSM Civil Rule 19, that a person shall be joined as a party if, without joinder, "complete relief" may not be accorded among those already parties, is not met. *See* Salik v. U Corp. (II), 3 FSM Intrm. 408 (Pon. 1988).⁹ Complete relief has already been accorded among the parties to this litigation and plaintiffs have lost.

Third, post-judgment joinder of Mr. Cantero as a plaintiff would impair or impede, rather than serve, his ability to protect whatever interest he may have.

Finally, appellants argue that all riparian landowners are necessary parties to any particular dispute over riparian rights. It is not clear to us that plaintiffs ever sufficiently raised this particular argument before the Trial Court to preserve it for appeal. *See* FSM v. Moroni, 6 FSM Intrm. 575, 579 (App. 1994) (an issue not presented to and ruled upon by the trial court cannot properly come before the appellate division for review).

Even assuming for the sake of argument, that appellants had preserved this argument, the logical extension of appellants' argument is that the Trial Court essentially erred by failing to constitute, post-trial, a class of all landowners who might conceivably claim damages to their riparian rights as a result of defendants' actions. Any such exercise would have been futile, in view of the Trial Court's finding that damage to such interests is not compensable.

We find no error in the Trial Court's denial of plaintiffs' motion to join Mr. Cantero as a party.

V. Did the Trial Court Err in Levying Sanctions Against Appellants' Counsel, Mary Berman, for Filing Three Post-Trial Motions?

Next, appellants challenge the Trial Court's ruling imposing sanctions on plaintiffs' counsel for filing three post-trial motions: (1) her motion to join Mr. Cantero as a plaintiff; (2) her motion to reconsider the Trial Court's order of July 19, 1995, and amend it by permitting plaintiffs to allege loss of riparian rights; and (3) her motion for leave to amend the complaint to allege the loss of riparian rights.

With respect to plaintiffs' first post-trial motion, to join Mr. Cantero, the Trial Court found that, although counsel had properly cited Rule 19, she made no attempt to demonstrate how the circumstances of Mr. Cantero met the provisions of that rule. Additionally, on its face, counsel's motion revealed that there could not be an objective belief that Mr. Cantero

was indispensable. Further, her motion represented a position contrary to one she had taken during the course of the trial. Finally, the Trial Court noted that counsel had repeatedly misstated the court's conclusion regarding Mr. Cantero's access easement.

With respect to plaintiff's second post-trial motion, for reconsideration under Rule 60(b), the Trial Court concluded that sanctions were appropriate because counsel raised a matter which had already been decided against plaintiff, without offering any new legal argument. Therefore, counsel had failed to make an objective reasonable inquiry as to whether the relief she sought was warranted by existing law or a good faith argument for extension, modification, or reversal of the Court's ruling. The Trial Court also noted that it had not "overlooked" the "new" allegations of taking, that is, the alleged taking of riparian rights.

Counsel's third post-trial motion, to amend the complaint, made no showing or any attempt to show that the applicable rule of civil procedure permitted the proposed amendment, and all issues presented in plaintiffs' proposed amended complaint had already been adjudicated against the plaintiffs.

The Trial Court directed that counsel not file anything further in the matter without first obtaining leave of the Court. The Trial Court declined to impose monetary sanctions. Instead, it sanctioned counsel by admonition, stating that the December 15, 1995 order would remain in effect.

Rule 11 requires that before affixing his or her signature to a document, an attorney undertake a reasonable inquiry to determine whether the 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. Berman v. Kolonia Town, 6 FSM. Intrm. 433, 435 (App. 1994). A purely frivolous argument, even if made in good faith, may be sanctionable. Id.

We review Rule 11 sanction orders under an abuse of discretion standard. We also use an objective standard, rather than assessing an attorney's subjective intent. In re Sanction of Berman, 7 FSM Intrm. 654, 656 (App. 1996); Berman v. Kolonia Town, 6 FSM Intrm. at 435.

Under this standard, we find no error in the Trial Court's ruling sanctioning Ms. Berman for the filing of the three post-trial motions. The sanctions entered by the Trial Court, that Ms. Berman not file anything further without permission and that the Court's previous order would stand, were extremely lenient. We hereby adopt the reasoning of the Trial Court, and affirm its sanction.

VI. Did the Trial Court Err in Imposing Sanctions Against Appellants' Counsel, Mary Berman, and Then in Dismissing the United States?

Appellants' final issue on appeal is whether the Trial Court erred in imposing monetary sanctions against plaintiffs in connection with their pretrial statements, and whether the Trial Court erred in subsequently dismissing the United States from the case based on plaintiffs' failure to pay that sanction.

The United States was first named as a defendant in plaintiffs' third amended complaint, filed in 1991. By 1995, the only claim remaining against the United States was whether it

could be liable on a taking theory for coral dredging by PTA before November 1986. The Trial Court struck plaintiffs' first pre-trial statement because it incorporated claims that the Trial Court had already ruled inapplicable, and included counts that had already been dismissed. The United States moved to strike plaintiffs' second pre-trial statement for the same reasons, and the Court granted that motion.

On the first day of trial, the United States moved for dismissal based on the Court's order striking plaintiffs' second amended pre-trial statement. The Trial Court denied the motion, but severed the claim against the United States and postponed trial on plaintiffs' sole claim against the United States. In recognition that plaintiffs' repeated failure to present an acceptable pretrial statement had hampered the United States' trial preparation efforts and cause postponement of trial, the Court ordered plaintiffs to make payment of \$1,636.95 to the Court by October 2, 1995. This amount represented the cost of round-trip travel between Honolulu and Pohnpei for counsel for the United States. The Trial Court also ordered that if appellants did not pay the sanction, the United States could move for dismissal pursuant to Rule 41(b).

After judgment was entered in favor of the remaining defendants, the United States filed two motions. First, it filed a motion under Rule 12(b)(6) to dismiss, on the grounds that plaintiffs were collaterally estopped from proceeding on their claims by the judgments in favor of the other defendants.¹⁰ That motion was granted.

Second, the United States moved to dismiss pursuant to Rule 41(b), based on appellants' failure to pay the travel cost sanction. The United States explained that plaintiffs had not paid that sanction, had not requested any additional time in which to do so, and had not made any indication that they intended to pay.

Plaintiffs opposed the monetary sanction, arguing that they were indigent and that a sanction of dismissal was too severe a penalty.

The Trial Court granted defendant's Rule 41(b) motion. It explained that a lesser sanction had been ordered, to wit, payment of the travel costs, but that plaintiffs had failed to comply with that less severe sanction. The Trial Court noted that its sanction was imposed only after the Court had been compelled to strike plaintiffs' second pretrial statement, which again included claims already ruled upon in other orders. The Trial Court also reasoned that the United States would be prejudiced if the Court were to permit plaintiffs to prosecute their case without any requirement that they rectify the loss occasioned by their defiance of Court orders.

As noted above, we review Rule 11 sanction orders under an abuse of discretion standard. In light of plaintiffs' continuing failure to comply with the pre-trial orders, limiting their pre-trial statements to those issues and claims not already ruled upon, we find that the Trial Court did not abuse its discretion in levying a monetary sanction against plaintiffs in the amount of the travel costs for counsel for the United States. We note that the Trial Court did consider plaintiffs' claims of indigence, and did give plaintiffs time within which to comply with the sanctions.

For the same reasons, we find that the Trial Court did not abuse its discretion in dismissing plaintiffs' claim against the United States under Rule 41(b). The Trial Court noted that a less severe sanction had been ordered - to wit, payment of the travel costs -

but that plaintiffs had failed to comply with that sanction.

As the Trial Court has noted, counsel's behavior formed a clear pattern in this case. Plaintiffs' counsel repeatedly ignored Court orders directing her to limit her filings only to claims and/or issues that had not already been adjudicated. Her repetitive filings caused unnecessary expense and delay in bringing this action to conclusion, as the parties were forced to repeatedly review and rebrief arguments on which the Court had already ruled. Counsel's behavior evidences a clear record of "contumacious conduct by the plaintiff" and "a serious showing of willful default." McGillivray v. Bank of the FSM, 7 FSM Intrm. 19, 23 (Pon. 1995); *see also* Paul v. Hedson, 6 FSM Intrm. 146 (Pon. 1993). We find no abuse of discretion in the Trial Court's sanction, and affirm dismissal of plaintiffs' claims against the United States pursuant to Rule 41(b).

CONCLUSION

Based on the foregoing, we affirm all decisions of the Trial Court in all respects.