FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN, Appellant, vs. POHNPEI LEGISLATURE, Appellee.	APPEAL CASE NO. P3-2009 (Civil Action No. 2005-009)

OPINION

Argued: January 13, 2011
Decided: February 18, 2011

BEFORE:

Hon. Martin G. Yinug, Acting Chief Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Appellate Review – Standard of Review – Civil Cases

Although issues of law are reviewed *de novo* on appeal, the standard of review for trial court findings of fact is whether those findings are clearly erroneous. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 346 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

A trial court's factual findings are presumptively correct. When an appellant asserts that trial court findings are clearly erroneous, the appellate court will find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the

entire body of the evidence and construing it in the light most favorable to the appellee, the [illegible] court is left with a definite and firm conviction that a mistake has been made. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 346 (App. 2011).

Civil Procedure – Summary Judgment; Evidence – Stipulations

Since a trial's purpose is to resolve disputed factual issues and to determine the ultimate facts, no trial would have been needed if all the necessary facts had been stipulated. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 347 n.1 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When an appellant asserts that a trial court finding was erroneous but has not provided a full trial transcript, the appellate court cannot determine whether that finding is clearly erroneous or that the trial court should have made a different finding and the trial court's findings of fact will thus remain the only facts on which the appellate court can decide the appeal. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 347 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When an appellant challenges a trial court factual finding that is presumptively correct, in the absence of a trial transcript, that finding must stand as fact, especially when, even with a trial transcript, it would have been difficult to show that this finding was clearly erroneous. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 347 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Absent a trial transcript, a presumptively-correct trial court finding must stand as fact. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 347 (App. 2011).

Evidence – Stipulations

In construing a stipulation, a court should not extend its terms beyond that which fair construction justifies. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 348 (App. 2011).

Evidence – Stipulations

When, by its terms, a stipulation refers only to the attorneys' number of years of legal experience and not to the nature or quality of that experience, it cannot be relied on to prove that a party had the same qualifications as another and thus was entitled to the higher pay that other received. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 348 (App. 2011).

Evidence – Stipulations

Notwithstanding the effect of stipulation as binding judicial admissions dispensing with the necessity of legal proof, when the court makes findings of fact contrary to such stipulations and when ample evidence supports the court's findings, the parties who failed to object or to assert the stipulation in rebuttal to such evidence, have waived their right to rely on the stipulated facts. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 348 (App. 2011).

Constitutional Law – Equal Protection

When the plaintiff and her co-worker were not similarly situated because she had no prior legislative counsel experience and he did and when she was hired for and given lesser job responsibilities and assignments, she was thus not entitled to the same wages and benefits as the other. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 348 (App. 2011).

Constitutional Law – Equal Protection

When the plaintiff was not equally qualified and had a lower level of responsibility than the other

counsel, her lower pay did not violate the Legislature Manual's equal pay provisions since she had neither equal qualifications nor levels of responsibility. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 349 (App. 2011).

Constitutional Law – Equal Protection

Equal protection of the law means the protection of equal laws and requires that those similarly situated must be similarly treated. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 349 (App. 2011).

Constitutional Law – Equal Protection

When the trial court found as fact, which fact remains on appeal, that the plaintiff was not similarly situated to the Legislature's other attorneys because they had prior experience doing legal work for legislative bodies and she had none, she cannot prevail on an equal protection claim based on being hired as a temporary employee on short-term contracts although a permanent long-term position had been advertised. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 349 (App. 2011).

Constitutional Law – Equal Protection

In order to establish a prima facie claim of sex discrimination in the hiring process, a plaintiff must establish that: 1) she is a member of a protected class; 2) she applied for and was qualified for a position for which her employer was seeking applicants; 3) despite her qualifications she was rejected; and 4) thereafter the position remained open and the employer continued to seek applicants with plaintiff's qualifications. If the plaintiff establishes the existence of these four elements, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 349 (App. 2011).

Constitutional Law – Equal Protection

When the trial court found as fact that the defendant Legislature did meet its burden when it articulated legitimate, non-discriminatory reasons for the plaintiff's rejection – she was not similarly qualified since she did not have any prior experience as counsel to a legislative body and all the other male attorneys who were hired did, as well as a female attorney who was offered, but declined, employment, the plaintiff's equal protection contention is without merit. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 349 (App. 2011).

Civil Procedure – Pleadings – Amendment

When the trial court declined to rule cross summary judgment motions on the plaintiff's retaliation claim because it reasoned that the claim was not properly before it because her claim fell outside the scope of her complaint, the plaintiff could have then sought to amend her pleadings either by leave of court or by written consent of the adverse party, but did not. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350 (App. 2011).

Civil Procedure – Pleadings – Amendment

When the proper procedure to assert a new claim is for the plaintiff to move to amend the complaint in accordance with Civil Rule 15(a),and that was not done even though a month and a half elapsed between the trial court's decision on the cross summary judgments motions and its order setting trial and a further month and a half elapsed before trial and when, although courts exercise their discretion liberally to allow pleadings to be amended out of time, the plaintiff did not, before trial, ask for leave to amend the pleadings to include her free speech-retaliation claim and the factual allegations underpinning it, the claim was not then before the court for trial. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350 (App. 2011).

Civil Procedure – Pleadings – Amendment

When an FSM court has not previously construed whether a plaintiff may use a Rule 56 summary judgment motion to make additional claims instead of amending the pleadings through Rule 15 and when those rules are identical or similar to U.S. counterparts, the court may look to U.S. sources for guidance in interpreting the rules. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350 n.3 (App. 2011).

Civil Procedure – Pleadings – Amendment

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). Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Civil Procedure – Pleadings – Amendment

If an issue was actually tried and evidence on the matter admitted with the parties' implied or express consent, it must be treated as if it was raised by the pleadings and the trial court should have ruled on it and granted whatever relief, if any, the plaintiff had proven herself entitled to. But when, without a transcript, it is impossible for the appellate court to determine if the retaliation issue was actually tried with the parties' consent, express or implied, the appellate court will not consider this assignment of error because there is nothing to show that it was ever properly before the trial court since the plaintiff never sought to amend the pleadings to include it although she had ample opportunity to do so, and there is no evidence that it was ever tried by the parties' express or implied consent. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 350-51 (App. 2011).

Contempt

Civil contempt is a prospective remedial measure designed to encourage, or even coerce, compliance with a lawful court order when the contemnor has been found to have the ability to comply with that order, but criminal contempt is retrospective and is punishment for past wrongful conduct. Criminal contempt is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 (App. 2011).

Contempt

A trial court show cause order and hearing were all part of a criminal contempt proceeding when the proceeding's purpose was not to coerce a party's compliance with its order to file a pretrial statement and to mark her exhibits with the clerk since she had already done that in time for trial and the trial had been held on time. Instead, its sole purpose was to punish her for past wrongful conduct – her alleged failure to file a pretrial statement and to mark her exhibits by the dates ordered. Thus, even though it was not labeled as such and was silent on whether the trial court considered it civil or criminal, the trial court order was a criminal contempt finding of guilt and the $200 "sanction" was a criminal sentence – a fine. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 (App. 2011).

Civil Procedure; Criminal Law and Procedure

A document or a filing is what it is regardless of what it has been labeled since form must not be elevated over substance because absent compelling reasons to the contrary, form must ever subserve substance. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 n.5 (App. 2011).

Appellate Review – Decisions Reviewable

An appellate court is obligated to examine the basis of its appellate jurisdiction, *sua sponte*, if necessary. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 (App. 2011).

Appellate Review – Notice of Appeal

A timely filing of a notice of appeal is jurisdictional and mandatory. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 (App. 2011).

Appellate Review – Notice of Appeal

The time to appeal a final order in a civil case is 42 days, but the time to appeal a criminal judgment is only ten days. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 352 (App. 2011).

Appellate Review

When the appellate court has not previously considered whether Appellate Rule 4(a) or 4(b) applies to a criminal contempt finding in a civil case and those FSM appellate procedure rules are identical or similar to U.S. counterparts, the court may consult U.S. sources for guidance in interpreting those rules. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 353 n.6 (App. 2011).

Appellate Review – Notice of Appeal; Contempt

Since a notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment must be treated as filed after such entry and on the day thereof, when a party in a civil case was held in criminal contempt of court, but the contempt finding was entered on the civil docket and not on the criminal docket, the ten-day period for criminal appeals has not begun to run since no entry has yet been made on the criminal docket, making a notice of appeal filed 37 days after the contempt finding timely under Appellate Rule 4(b). Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 353 (App. 2011).

Criminal Law and Procedure

For criminal matters, the court clerk must keep a book known as the "criminal docket" in which, among other things, must be entered each order or judgment of the court. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 353 n.7 (App. 2011).

Contempt

A Criminal Rule 33 motion for a new trial is not timely when it is made over seven days after the guilty finding and it thus cannot toll the time for a criminal appeal or nullify any notice of appeal filed before the motion was decided, which a timely-filed Rule 33 motion would do since if a timely motion for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion, but not before. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 353-54 & n.8 (App. 2011).

Appellate Review – Standard of Review – Criminal Cases; Contempt

The standard of review for a criminal contempt conviction, as for any criminal conviction, is whether the appellate court can conclude that the trier of fact reasonably could have been convinced beyond a reasonable doubt by the evidence which it had a right to believe and accept as true. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 (App. 2011).

Contempt; Evidence – Burden of Proof

An element of criminal contempt is the subjective intent to defy the court's authority, and the requisite intent is specific intent. There is thus more to prove to show criminal contempt. There is also a higher burden of proof, beyond a reasonable doubt than the civil contempt burden of clear and convincing evidence of the predicate misconduct. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 (App. 2011).

Contempt

For a civil contempt finding, it is not enough to find that noncompliance was willful, as shown

by knowledge of the order; there still must also be a recital – a finding in the record – that there was an ability to comply. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 (App. 2011).

Contempt

Since a finding or "recital" that there was an ability to comply is required for civil contempt, it must also be a necessary element of the more difficult to prove criminal contempt. Thus, when nowhere in its contempt order did the trial court make a finding or a "recital" that the contemnor had the ability to comply with its deadlines for filing a pretrial statement and for marking her exhibits with the clerk, the trial court's failure to find a necessary factual element is generally enough to reverse a contempt finding whether civil or criminal. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 (App. 2011).

Contempt; Criminal Law and Procedure – Public Trial

A criminal contempt conviction would have to be vacated when neither the trial court's contempt finding nor its sentencing were done in open court because a criminal defendant's constitutional right to a public trial requires that the finding of guilt or innocence be made in open court and that, if there is a guilty finding, then the sentence must also be imposed in open court. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 n.10 (App. 2011).

Contempt; Criminal Law and Procedure – Public Trial; Criminal Law and Procedure – Right to Counsel

Since the criminal contempt statute provides that no punishment of a fine of more than $100 or imprisonment can be imposed unless the accused is given a right to notice of the charges, to a speedy public trial, to confront the witnesses against him, to compel the attendance of witnesses in his behalf, and to have the assistance of counsel, this statute was violated when a $200 fine was imposed without a public trial and the party having the opportunity to be represented by a public defender. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 n.10 (App. 2011).

Contempt; Criminal Law and Procedure – Sentencing

Notice that the convicted person has a right to appeal must be given orally when a criminal contempt sentence is imposed. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 n.10 (App. 2011).

Contempt; Criminal Law and Procedure – Information

In a criminal contempt proceeding, an order to show cause (the notice) why someone should not be held in contempt must describe the contempt charged as criminal contempt as required by Criminal Procedure Rule 42(b), which requires that the notice shall state the essential facts constituting the criminal contempt charged, describing it as such. Berman v. Pohnpei Legislature, 17 FSM Intrm. 339, 354 n.10 (App. 2011).

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COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

Mary Berman appeals from FSM Supreme Court trial division decisions that found that the Pohnpei Legislature had not discriminated against her or denied her equal protection of the law when hiring her, or employing her, or when it hired others. We affirm those decisions. She also appeals an order finding her in contempt of court for her failure to file a pretrial statement and to have her exhibits marked by court-ordered dates. We reverse the contempt finding. Our reasons for both the affirmance and the reversal follow.

I. Procedural and Factual Background

In 2002, the Pohnpei Legislature announced a staff attorney position opening for a one- or a two-year term with a minimum annual pay of $32,000, depending on experience. Berman applied, as did Cathy Atkins, another female, and Charles Hatcher, a male. Berman met the minimum qualifications. Both Atkins and Hatcher had previous experience as counsel for legislative bodies, but Berman did not. Atkins and Hatcher were thus considered top candidates, but neither accepted the Legislature's job offer. Because the Legislature urgently needed additional help, it offered Berman a temporary position and hired her, starting May 5, 2003, on a series of short-term contracts at the rate of $1,230 for every 80 work hours (equal to $32,000 yearly). The first contract lasted eleven weeks; others were for three-week increments. Berman worked at the Legislature under short-term contracts until January 2004. Throughout all these time periods, Berman was plaintiff's counsel in a civil suit against the Legislature (Damarlane v. Pohnpei Legislature).

Around June 2003, the Legislature rehired Huddy Lucas. He had resigned as staff attorney in February 2003. He returned to the Legislature's employ without having to file a new job application because the Legislature had not processed his resignation paperwork. In either late 2003 or early 2004, the Legislature again announced a staff attorney job opening. Berman again applied and was interviewed for the position, but not hired. The Legislature hired attorney Scott G. Garvey, a male, because he was the most qualified applicant.

On April 4, 2005, Berman sued the Legislature, alleging sex-based discrimination in hiring and employment and unequal treatment in hiring and employment. The parties filed a stipulation on May 29, 2008, for use at "trial and for any pretrial motions." Stipulation at 1 (May 29, 2008). It included a witness list with summary of expected testimony; a list of exhibits; and stipulations of fact. Thereafter, each side filed a summary judgment motion.

The trial court decided the cross-motions on June 17, 2009. Berman v. Pohnpei Legislature, 16 FSM Intrm. 492 (Pon. 2009). It held that Berman had failed to establish a prima facie case of sex discrimination in the hiring process because she had not been rejected for the job since she had interviewed for the position and since the Legislature did hire her and she continued to work there under various contracts until late January 2004. *Id.* at 496 (Legislature granted summary judgment on Berman's claim of sex discrimination in the hiring process). Because material facts remained at issue, the trial court denied both summary judgment motions on Berman's claim that she had been entitled to higher wages and benefits while employed at the Legislature. *Id.* The trial court also granted the Legislature's summary judgment motion on Berman's claims that the Legislature violated her constitutional rights by not requiring Lucas to file a new job application when it rehired him; that the Legislature's 2004 decision to hire Scott G. Garvey, instead of her, was discriminatory; and that the Legislature denied her an employment opportunity without due process of law. *Id.* at 497. Because Berman's complaint did not allege that her right of freedom of speech was violated and because the trial court concluded that it was improper for a party to use a summary judgment motion to *de facto* amend its pleadings to assert a new cause of action, the trial court disregarded Berman's claim that the Legislature had violated her fundamental right of free speech. *Id.* at 498.

Trial of Berman's remaining claims of sex discrimination and denial of equal protection because of the difference between her wages and benefits and those of the other (male) Legislature attorneys was on September 17, 2009.

On September 18, 2009, the trial court ordered Berman to show cause why she should not be held in contempt for not timely filing a pretrial statement and for not timely marking and labeling her trial exhibits, as required by a pretrial order. A hearing was held on September 22, 2009. In a separate

order issued simultaneously with its October 1, 2009 decision on the merits, the trial court found Berman in contempt and "sanctioned" her $200.

In its decision on the merits, the trial court concluded that Berman had not proven any discrimination or equal protection denial because it found as fact that the attorney Lucas had superior and higher qualifications than Berman's; that he was given greater and higher assignments and levels of responsibility than she was; and that the Legislature had hired Berman for lesser responsibilities and assignments than Lucas. Findings of Fact and Conclusions of Law ("Findings") at 3-6, 8-9 (Pon. Civ. No. 2005-009 Oct. 1, 2009). It also concluded that she was not entitled to any back pay or benefits because Pohnpei had shown "that it had significant, gender-neutral reasons for paying Berman less than it paid Lucas" and that Lucas had additional benefits because he was a permanent off-island hire and Berman was a temporary on-island hire. *Id.* at 6-8. The trial court dismissed the case. *Id.* at 10.

Berman appealed both October 1, 2009 decisions.

II. Issues Presented

Berman contends that the trial court erred: 1) by finding that the record does not show that she was hired for the same level of duties, responsibilities, and assignments as the other attorneys; 2) by deciding that the one male employee to whom she was compared was hired to perform a higher level of responsibilities and assignments than she was although her contract and his show no differences in levels of responsibilities and assignments; 3) when it held that the Legislature did not discriminate against her in terms of her wages and benefits compared to male hires; 4) by deciding that the Legislature can pay lower wages to a female employee who is in the same job classification as higher-paid male employees even though the Legislature's Manual of Administration requires equal pay for employees in the same job classification; 5) by deciding that her right to equal protection under the law was not denied when the Legislature hired her as a temporary employee on short-term contracts although it had advertised for a permanent long-term employee and that was what she had applied for; 6) by deciding that she must show that the Legislature made a conscious decision to discriminate against her based on sex when other courts hold that a female employee need only show that she was treated differently from one similarly-qualified male employee; 7) by not finding that the Legislature engaged in unlawful retaliation because she represented the plaintiff in Damarlane v. Pohnpei Legislature, thus violating her free speech rights; and 8) by finding her in contempt of court for missing pretrial deadlines when she had filed a motion to enlarge those deadlines, which the court had not denied.

III. Standard of Review

Although issues of law are reviewed *de novo* on appeal, *e.g.*, Simina v. Kimeuo, 16 FSM Intrm. 616, 619 (App. 2009), the standard of review for trial court findings of fact is whether those findings are clearly erroneous, *e.g.*, George v. George, 17 FSM Intrm. 8, 9 (App. 2010). A trial court's factual findings are presumptively correct. *Id.* at 10; George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010). When an appellant asserts that trial court findings are clearly erroneous, we will find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing it in the light most favorable to the appellee, we are left with a definite and firm conviction that a mistake has been made. George, 17 FSM Intrm. at 9-10; Albert, 17 FSM Intrm. at 30.

Most of Berman's assignments of error either challenge a trial court factual finding or rely on an

assumption that a certain factual finding is erroneous. Berman has not provided a trial transcript.[1] When an appellant asserts that a trial court finding was erroneous but has not provided a full trial transcript, we cannot determine whether that finding is clearly erroneous or that the trial court should have made a different finding. *See* Ponape Island Transp. Co. v. Fonoton Municipality, 13 FSM Intrm. 510, 514 (App. 2005) (appellant must provide transcript setting forth all of the evidence relevant to the trial court decision if it is arguing that the trial court's findings lack evidentiary support; otherwise the appellate court will be unable to identify any trial court finding of fact as clearly erroneous); *see also* Cheida v. FSM, 9 FSM Intrm. 183, 189 (App. 1999) (when appellant fails to provide a transcript of the relevant evidence and fails to identify the portions of the record that support his argument, the presumption is that the evidence was sufficient to sustain the trial court's judgment). The trial court's findings of fact thus remain the only facts on which we can decide the appeal.

IV. Analysis

A. *Berman's Employment Claims*

1. *Whether Hired for the Same Level of Duties as the Others*

Berman asserts that the trial court erred by finding that the record does not show that she was hired for the same level of duties, responsibilities, and assignments as the other attorneys.

Berman challenges a trial court factual finding that is presumptively correct. The trial court found as fact that "Berman was hired for lesser responsibilities and assignments than Mr. Lucas." Findings at 7. In the absence of a trial transcript, that finding must stand as fact. Ponape Island Transp. Co., 13 FSM Intrm. at 514. Even with a trial transcript, it would have been a difficult task to show that this finding was clearly erroneous since Berman had no previous experience as a counsel to a legislature and all the other attorneys did. This assignment of error does not assist Berman.

2. *Whether Comparison Employee Performed at Higher Level*

Berman contends that the trial court erred by deciding that the one male employee [Lucas] to whom she was compared was hired to perform a higher level of responsibilities and assignments than she was, when his contract and hers show no differences in levels of assignments and responsibilities.

This is another challenge to a trial court factual finding. The trial court found as fact "that Berman was not hired to carry the same high level of responsibilities as was Mr. Lucas." Findings at 7. Once again, absent a trial transcript, that presumptively-correct finding must stand as fact. Ponape Island Transp. Co., 13 FSM Intrm. at 514. Even with a trial transcript, it would be difficult to show that this finding is clearly erroneous since Lucas had previous experience as a counsel to the Pohnpei Legislature and Berman did not have any experience as counsel to any legislature, so it would be reasonable to have hired him for greater responsibilities.

Berman also asserts that the parties' pretrial stipulation that "[b]oth Lucas and Garvey are both

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[1] At oral argument, Berman asserted that a trial transcript had not been ordered and was not needed because all the necessary facts had been stipulated in the May 29, 2008 Stipulation. This is a disingenuous statement. A trial's purpose is to resolve disputed factual issues and to determine the ultimate facts. *See* Youngstrom v. NIH Corp., 12 FSM Intrm. 75, 77-78 (Pon. 2003); FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 591 n.8 (Pon. 1994). If all the necessary facts had been stipulated, there would not have been a trial.

male attorney law school graduates with years of practicing law similar to Mary Berman's," Stipulation ¶16 (May 29, 2008), precluded the trial court from finding that, due to his prior experience, Lucas had higher qualifications and was hired to, and did, assume greater responsibilities and duties than Berman was hired for and assigned.

This stipulation would not prevent the trial court from making that finding. First, "[i]n construing a stipulation, a court should not extend its terms beyond that which fair construction justifies." Jones v. Jefferson, 372 S.E.2d 80, 82 (N.C. Ct. App. 1988). The stipulation, by its terms, refers only to the attorneys' number of years of legal experience ("with years of practicing law similar to Mary Berman's"), not to the nature or quality of that experience. As such, Berman cannot rely on it to prove she was entitled to the higher pay Lucas received. Second,

> Notwithstanding the effect of stipulation as binding judicial admissions dispensing with the necessity of legal proof, where the court makes findings of fact contrary to such stipulations and where ample evidence supports the court's findings, the parties who failed to object or to assert the stipulation in rebuttal to such evidence, have waived their right to rely on the stipulated facts.

75 AM. JUR. 2D *Trial* § 415 (rev. ed. 1991). It seems undisputed that Lucas had prior legislative experience and Berman did not and that ample evidence supports that. Without a trial transcript, we must presume that the trial court received without objection the evidence of Lucas's greater qualifications due to his experience. Thus, the stipulation will not overturn the trial court's finding.

3. *Alleged Wages and Benefits Discrimination*

Berman contends that the Legislature discriminated against her in terms of wages and benefits compared to male hires. She points to Lucas's (and Garvey's) higher pay and their added benefits.

In Berman v. College of Micronesia-FSM, 15 FSM Intrm. 582, 594 (App. 2008), we held that a former part-time teacher's assertion that she had made out a *prima facie* case of sex discrimination would hold water only if part-time and full-time teachers were similarly situated, thus allowing her to compare herself to a full-time teacher, but that since, contrary to her assertions, full-time and part-time teachers were not similarly situated, she could not claim sex discrimination when she was, in fact, the highest paid part-time teacher. This case is similar. Berman and Lucas (and Garvey) were not similarly situated. She had no prior legislative experience and she was hired for and given lesser job responsibilities and assignments, thus accounting for the lower pay. And Lucas and Garvey were permanent off-island hires while she was a temporary on-island hire, thus accounting for the added benefits for Lucas (and Garvey).[2] She was thus not entitled to the same wages and benefits as Lucas or Garvey.

4. *Legislature's Manual of Administration and Berman's Pay*

Berman contends that the trial court erred by deciding that the Legislature could pay her (a female employee) lower wages when she was in the same job classification as higher-paid male employees even though the Legislature's Manual of Administration requires equal pay for employees in the same job classification.

This assignment of error presumes that Berman was in the same job classification as the other

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[2] Off-island hires get certain benefits local hires do not.

attorneys and misstates the manual's provisions and the trial court decision. The relevant parts of the manual provide that the Legislature will "pay equal compensation for employees with equal qualifications and levels of responsibility," and that temporary employees "will receive compensation equal to that of a regular employee in the same job classification." Pon. Legislature Manual of Admin. pt. II, §§ 11-1, 11-9 (2002). The trial court found as fact, which fact remains on appeal, that Berman was not equally qualified and had a lower level of responsibility than the other counsel. Therefore her lower pay did not violate the Manual's provisions since she had neither equal qualifications nor levels of responsibility. This assignment of error cannot assist Berman.

5. *Whether Equal Protection Denied by Short-term Contracts*

Berman contends that the Legislature denied her right to equal protection under the law when it hired her as a temporary employee on short-term contracts although a permanent long-term position had been advertised and she had applied for that permanent position and she was the only qualified applicant willing to take the job.

Equal protection of the law means the protection of equal laws and requires that those similarly situated must be similarly treated. College of Micronesia-FSM, 15 FSM Intrm. at 592 (application of the law must be equal). The trial court found as fact, which fact remains on appeal, that Berman was not similarly situated to the Legislature's other attorneys because they had prior experience doing legal work for legislative bodies and she had none. Since, as a factual matter, Berman was not similarly situated, she cannot prevail on this assignment of error.

6. *Showing Conscious Decision to Discriminate*

Berman contends that the trial court erred by deciding that she must show that the Legislature made a conscious decision to discriminate against her based on sex when other courts hold that a female employee need only demonstrate that she was treated differently from one similarly-qualified male employee.

Berman mischaracterizes the trial court's decisions. The trial court did apply the same test that Berman urges – that:

> In order to establish a prima facie claim of sex discrimination in the hiring process, Berman must establish that (1) she is a member of a protected class; (2) she applied for and was qualified for a position for which her employer was seeking applicants; (3) despite her qualifications she was rejected; and (4) thereafter the position remained open and the employer continued to seek applicants with plaintiff's qualifications. If plaintiff establishes the existence of these four elements, the burden shifts to defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection."

Berman v. Pohnpei Legislature, 16 FSM Intrm. 492, 496 (Pon. 2009) (citations omitted) (quoting McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824, 36 L. Ed. 2d 668, 678 (1973)). What Berman overlooks is that the trial court found as fact that the defendant Legislature did meet its burden when it articulated legitimate, non-discriminatory reasons for her rejection – she was not similarly qualified since she did not have any prior experience as counsel to a legislative body and all the other male attorneys who were hired did, as well as a female attorney who was offered, but declined, employment. This contention is without merit.

7. *Retaliation for Exercising Free Speech*

Berman further contends that the Legislature engaged in unlawful retaliation because she represented the plaintiff in Damarlane v. Pohnpei Legislature. The Legislature counters that we should not consider this issue since Berman did not allege it in her complaint and also because she cannot show a causal connection between the lawsuit and the Legislature's decision not to hire her for a permanent position. To establish that causal link, Berman relies on the pretrial stipulation that Legislature employees "believed Berman's ongoing representation of Damarlane in Damarlane v. Pohnpei Legislature was a legal hindrance for Berman's employment with the Legislature," Stipulation ¶ 5 (May 29, 2008).

Berman's complaint did not allege that her free speech rights were violated or that the Legislature engaged in retaliatory actions because of her representation in the Damarlane case. She later tried, based in part on the above-quoted stipulation, to raise that claim in her summary judgment motion. The trial court did not grant either Berman or the Legislature summary judgment on her retaliation claim. It did not rule on that claim at all because it reasoned that the claim was not properly before it. Berman v. Pohnpei Legislature, 16 FSM Intrm. 492, 498 (Pon. 2009) ("the court disregards Berman's freedom of expression claim"). The trial court informed Berman that her retaliation-free speech claim fell "outside the scope of her complaint and [wa]s therefore not properly before th[e] court." *Id.* Berman could have then sought to amend her pleadings either "by leave of court or by written consent of the adverse party," FSM Civ. R. 15(a). She did not.

The trial court did not abuse its discretion by disregarding Berman's retaliation claim. Although, occasionally a court has considered a new claim made in a summary judgment motion, or an opposition thereto, to be a motion to amend the pleadings, Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972), the proper procedure to assert a new claim is for the plaintiff to move to amend the complaint in accordance with Civil Rule 15(a), Gilmour v. Gates, McDonald & Co., 382 F.3d 1312, 1315 (11th Cir. 2004); Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment.").[3] That was not done even though a month and a half elapsed between the trial court's decision on the cross summary judgments motions and its July 31, 2009 order setting trial. A further month and a half elapsed before trial. Although courts exercise their discretion liberally to allow pleadings to be amended out of time, *see* Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 394 (App. 2006) (purpose of Rule 15 is to provide maximum opportunity for each claim to be decided on the merits rather than on procedural technicalities); Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 (App. 2000); Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 87 (App. 1999), Berman did not, before trial, ask for leave to amend the pleadings to include her free speech-retaliation claim and the factual allegations underpinning it. It was not then before the court.

However, under Civil Procedure Rule 15(b), "[w]hen issues not raised by 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." And Civil Procedure Rule 54(c) further provides that "every final judgment

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[3] When an FSM court has not previously construed FSM civil procedure rules which are identical or similar to a U.S. counterpart, the court may look to U.S. sources for guidance in interpreting the rules. *See, e.g.*, Arthur v. FSM Dev. Bank, 14 FSM Intrm. 390, 394 n.1 (App. 2006); Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 413 n.3 (App. 2000); Tom v. Pohnpei Utilities Corp., 9 FSM Intrm. 82, 87 n.2 (App. 1999); Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 444 (App. 1994). We have not previously considered whether a plaintiff may use a Rule 56 summary judgment motion to make additional claims instead of amending the pleadings through Rule 15.

shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." 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).

If, on September 17, 2009, this issue was actually tried and evidence on the matter admitted with the parties' implied or express consent, it must be treated as if it was raised by the pleadings and the trial court should have ruled on it and granted whatever relief, if any, Berman had proven herself entitled to. But the sole mention of the issue in the trial court's findings and conclusions was that Legislative Counsel Thomas Beckmann had testified that when Berman applied for a job at the Legislature she was representing her husband in a civil suit against the Legislature. Findings at 4. That, combined with the stipulation that Legislature employees believed it was a "hindrance" to Berman's employment, would not be enough evidence for Berman to prevail on this claim. And, without a transcript, it is impossible for us to determine if the retaliation issue was actually tried with the parties' consent, express or implied.

Accordingly, we will not consider this assignment of error since there is nothing before us to show that it was ever properly before the trial court – Berman never sought to amend the pleadings to include it although she had ample opportunity to do so,[4] and there is no evidence that it was ever tried by the parties' express or implied consent.

8. *Affirmance*

We therefore affirm the trial court decisions that the Pohnpei Legislature is not liable to Berman for hiring her on a part-time instead of a full-time basis, or for giving her lesser responsibilities and thus less pay than the other Legislature attorneys, or for not continuing her employment.

B. *Contempt Finding*

1. *Background of Berman's Contempt of Court*

On July 31, 2009, a court order set trial for September 17, 2009, and required each party to file a pretrial statement by August 21, 2009, and to mark and label their trial exhibits with the clerk by August 24, 2009. On August 4, 2009, Berman, noting that she had a full-time employment contract with Pohnpei EPA office that would end September 30, 2009, filed a motion to continue trial until the first or second week of October, after her Pohnpei EPA contract ended. On August 14, 2009, she filed a supplement to that motion and asked that the pretrial filing deadlines also be moved to early October. On August 17, 2009, the trial court issued an order denying Berman's August 4, 2009 motion. (That denial did not mention the August 14, 2009 supplement.) That order was not mailed to either party until August 25, 2009. On September 7, 2009, Berman, asserting that the May 29, 2008 Stipulation was a pretrial statement, filed what she styled as an Update of Pretrial Statement, Witness & Document List. She marked and labeled her exhibits on September 15, 2009. Trial on the merits was held, as scheduled, on September 17, 2009.

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[4] We take no position on whether, if Berman's case had been dismissed in its entirety by the trial court's ruling on the cross-motions for summary judgment, we would rule that Berman should have, like the plaintiffs in Sherman v. Hallbauer, 455 F.2d 1236 (5th Cir. 1972), been given the opportunity to proceed under her new claim as an amended pleading.

On September 18, 2009, the court issued an order for Berman to show cause why she should not be held in contempt for not filing a pretrial statement by August 21, 2009 and for not marking and labeling her trial exhibits by August 24, 2009. The hearing was on September 22, 2009. On October 1, 2009, the court found Berman in contempt of its July 31, 2009 order and imposed a $200 "sanction." On October 14, 2009, Berman filed a Motion to Reconsider Show Cause Order [FSM Civ. R. 60(b)] that the trial court has never decided.

2. *Nature of Berman's Contempt of Court*

Civil contempt is a prospective remedial measure designed to encourage, or even coerce, compliance with a lawful court order when the contemnor has been found to have the ability to comply with that order, but criminal contempt is retrospective and is punishment for past wrongful conduct. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 252 (App. 2006). Criminal contempt is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order. *Id.*

The September 18, 2009 show cause order and the September 22, 2009 hearing were all part of a criminal contempt proceeding because the proceeding's purpose was not to coerce Berman's compliance with the July 31, 2009 order to file a pretrial statement and to mark her exhibits with the clerk since she had already done that in time for trial and the trial had been held on time. Instead, its sole purpose was to punish Berman for past wrongful conduct – her alleged failure to file a pretrial statement and to mark her exhibits by the dates ordered. Thus, even though it was not labeled as such [it was not labeled anything except "Order"] and was silent on whether the trial court considered it civil or criminal, the October 1, 2009 order was a criminal contempt finding [of guilt].[5] The $200 "sanction" was a criminal sentence – a fine. Nevertheless, the order was entered on the civil docket and not on the criminal docket.

3. *Appellate Jurisdiction*

We are obligated to examine the basis of our appellate jurisdiction, *sua sponte*, if necessary. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010); Kosrae v. Benjamin, 17 FSM Intrm. 1, 3 (App. 2010); Alanso v. Pridgen, 15 FSM Intrm. 597, 598 n.1 (App. 2008). There are two jurisdictional obstacles to our review of the contempt finding – whether the notice of appeal was timely and whether Berman's pending reconsideration motion nullifies the notice of appeal.

a. *Timeliness of Notice of Appeal*

A timely filing of a notice of appeal is jurisdictional and mandatory. *See, e.g.*, Kosrae v. Langu, 16 FSM Intrm. 83, 86 (App. 2008). Berman's notice of appeal was filed 37 days after the criminal contempt order were entered on October 1, 2009. As an appeal from a civil judgment, the November 6, 2009 Notice of Appeal is timely. The time to appeal a final order in a civil case is 42 days. FSM App. R. 4(a)(1). But the time to appeal a criminal judgment is only ten days. FSM App. R. 4(b).

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[5] A document or a filing is what it is regardless of what it has been labeled. *E.g.*, Neth v. Kosrae, 14 FSM Intrm. 228, 231 (App. 2006) (sentencing order was the only document that could be a judgment of conviction despite what it was labeled or that an earlier order had been labeled the judgment of conviction); McIlrath v. Amaraich, 11 FSM Intrm. 502, 505-06 (App. 2003). Form must not be elevated over substance because "[a]bsent compelling reasons to the contrary, form must ever subserve substance." McIlrath, 11 FSM Intrm. at 505.

In Smith v. Smith, 145 F.3d 335 (5th Cir. 1998), a civil litigant filed a notice of appeal 28 days after she was held in criminal contempt, which had been entered as an order in the civil case. The Smith court (whose Appellate Procedure Rules 4(a) and 4(b) are similar to the FSM Supreme Court's, except that its 4(a) time period for a civil appeal is 30, not 42, days)[6] was faced with the problem of whether the notice of appeal was untimely since the ten days for a criminal appeal had passed before the notice of appeal was filed. *Id.* at 339. The Smith court concluded that since the criminal contempt finding had been entered on the civil docket but had never been entered on the criminal docket, the ten days for a criminal appeal under Appellate Rule 4(b) had not yet started to run and the notice of appeal was thus timely. Smith, 145 F.3d at 339-40. The Smith court reasoned that, alternatively, the appeal could also be timely because it had been filed within the Appellate Rule 4(a) time period from its entry on the civil docket. Smith, 145 F.3d at 341.

In United States v. Thoreen, 653 F.2d 1332, 1338 (9th Cir. 1981), the court reached the same result when a notice of appeal was filed eleven days after a criminal contempt finding was entered in a civil case. It concluded that, although docketed in a civil case, the contempt proceeding was criminal; that the notice of appeal filed eleven days after the criminal contempt entered in a civil case was timely because the contempt judgment had never been entered on the criminal docket; and that, alternatively, the notice could be timely as an appeal from a judgment entered on the civil docket. *Id.*

Berman was held in criminal contempt of court, but the contempt finding was entered on the civil docket, Order [finding contempt] (Pon. Civ. No. 2005-009 Oct. 1, 2009), and not on the criminal docket.[7] Since "[a] notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment shall be treated as filed after such entry and on the day thereof," FSM App. R. 4(b), and since no entry has yet been made on the criminal docket, the ten-day period for criminal appeals has not begun to run, making Berman's notice of appeal timely under Appellate Rule 4(b). *See* Smith, 145 F.3d at 340; Thoreen, 653 F.2d at 1338. Alternatively, it could be timely as an appeal from an order entered on the civil docket. *See* Smith, 145 F.3d at 341; Thoreen, 653 F.2d at 1338.

b. *Effect of Pending Reconsideration Motion*

The other potential obstacle to our jurisdiction is that Berman's October 14, 2009 Motion to Reconsider Show Cause Order [FSM Civ. R. 60(b)] was filed before her Notice of Appeal was filed on November 6, 2009, and the trial court has not ruled on it.

Since it was a criminal contempt finding, the reconsideration motion could not be a Civil Procedure Rule 60(b) motion (relief from civil judgment). It must either be a Criminal Procedure Rule 33 motion for a new trial, which, except for a motion based on the discovery of new evidence (not applicable here), must "be made within seven days after the finding of guilt," FSM Crim. R. 33, or a Criminal Procedure Rule 29 motion for acquittal, which also must be made within seven days of finding of guilt but which, unlike a Rule 33 motion, does not toll the time to file an appeal. As a Criminal Rule

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[6] We have not previously considered whether Appellate Rule 4(a) or 4(b) applies to a criminal contempt finding in a civil case. When we have not previously construed an FSM appellate procedure rule that is identical or similar to a U.S. counterpart, we may consult U.S. sources for guidance in interpreting the rule. *See, e.g.*, Heirs of George v. Heirs of Dizon, 16 FSM Intrm. 100, 107 n.4 (App. 2008); Kosrae v. Langu, 16 FSM Intrm. 83, 87 n.1 (App. 2008); Berman v. College of Micronesia-FSM, 15 FSM Intrm. 622, 624 n.1 (App. 2008).

[7] For criminal matters, the court clerk must keep "a book known as the 'criminal docket' in which, among other things, shall be entered each order or judgment of the court." FSM Crim. R. 55.

33 motion for a new trial, the October 14, 2009 motion was not timely since it was made over seven days after the October 1, 2009 finding of guilt. It thus cannot toll the time for a criminal appeal or nullify any notice of appeal filed before the motion was decided, which a timely-filed Rule 33 motion would do.[8] It is therefore not an obstacle to our jurisdiction.

4. *Contempt Conviction Analysis*

Our standard of review for a criminal contempt conviction, as for any criminal conviction, is whether we can conclude that the trier of fact reasonably could have been convinced beyond a reasonable doubt by the evidence which it had a right to believe and accept as true. Johnny v. FSM, 8 FSM Intrm. 203, 206 (App. 1997). An element of criminal contempt is the subjective intent to defy the court's authority, Davis v. Kutta, 10 FSM Intrm. 125, 127 (Chk. 2001), and the requisite intent is specific intent, In re Contempt of Skilling, 8 FSM Intrm. 419, 426 (App. 1998) (mere negligent failure to comply is not enough). There is thus more to prove to show criminal contempt. There is also a higher burden of proof, beyond a reasonable doubt, Johnny, 8 FSM Intrm. at 206, than the civil contempt burden of clear and convincing evidence of the predicate misconduct, In re Sanction of Woodruff, 10 FSM Intrm. 79, 88 (App. 2001). For a civil contempt finding, it is not enough to find that noncompliance was willful, as shown by knowledge of the order; there still must also be a recital – a finding in the record – that there was an ability to comply. Hadley v. Bank of Hawaii, 7 FSM Intrm. 449, 453 (App. 1996).

Since such a finding or "recital" is required for civil contempt, it must also be a necessary element of the more difficult to prove criminal contempt. Nowhere in its October 1, 2009 [Contempt] Order did the trial court make a finding or a "recital" that Berman had the ability to comply with the July 31, 2009 Order deadlines for filing a pretrial statement and for marking her exhibits with the clerk.[9] The trial court's failure to find a necessary factual element is generally enough to reverse a contempt finding whether civil or criminal.[10] We therefore do not reach Berman's arguments that challenge

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[8] "If a timely motion . . . for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion," FSM App. R. 4(b), but not before.

[9] The order only states that Berman's belief that her continuance motion was still pending was insufficient grounds for her not to comply with the deadlines and that the trial court did not consider the May 2008 Stipulation to be a pretrial statement.

[10] The October 1, 2009 criminal contempt conviction would, at a minimum, have to have been vacated anyway. A criminal defendant's constitutional right to a public trial, FSM Const. art. IV, § 6, requires that the finding of guilt or innocence be made in open court and that, if there is a guilty finding, then the sentence must also be imposed in open court. Neth v. Kosrae, 14 FSM Intrm. 228, 232 (App. 2006) (violation of the constitutional public trial right is plain error that can be raised by the court and is not subject to a harmless error analysis and the defendant need not show any prejudice); Nena v. Kosrae, 14 FSM Intrm. 73, 78-79 (App. 2006) (same). Neither the trial court's contempt finding nor its sentencing were done in open court.

Also, since a $200 fine was imposed, this violated the criminal contempt statute, which provides: "that no punishment of a fine of more than $100 or imprisonment shall be imposed unless the accused is given a right to notice of the charges, to a speedy public trial, to confront the witnesses against him, to compel the attendance of witnesses in his behalf, to have the assistance of counsel . . . ." 4 F.S.M.C. 119(2)(b). Berman should also have had the opportunity to be represented by a Public Defender.

And, notice that the convicted person has a right to appeal must be given orally when sentence is

whether she had the requisite knowledge of the order since a copy of the order denying her August 4th continuance motion was not mailed until after the deadlines had passed and that since that denial order did not mention her August 14th supplement, her August 14th request was never denied. Nor do we reach the contention that the May 29, 2008 Stipulation constituted a pretrial statement.

The contempt finding is reversed and the matter remanded to the trial court.

V. Conclusion

Accordingly, the trial court's decisions on the merits of Berman's claims against the Pohnpei Legislature are affirmed and Berman's criminal contempt conviction is reversed and remanded to the trial court for it to take further action consistent with this opinion. The parties shall bear their own costs.

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imposed, FSM Crim. R. 32(a)(2), but was not given to Berman at all. Another deficiency is that the September 18, 2009 order to show cause (the notice) did not describe the contempt charged as criminal contempt as required by Criminal Procedure Rule 42(b), which provides in part that "[t]he notice shall state . . . the essential facts constituting the criminal contempt charged, describing it as such."