FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN, Appellant, vs. POHNPEI STATE GOVERNMENT, Appellee.	APPEAL CASE NO. P5-2008 (Civil Action No. 2008 [illegible]

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:

For the Appellant: Mary Berman, Esq.
P.O. Box 163
Kolonia, Pohnpei FM 96941

For the Appellee: Ira J. Shiflett, Esq.
Pohnpei Assistant Attorney General
Pohnpei Department of Justice
P.O. Box 1555
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Civil Procedure – Parties; Civil Procedure – Pleadings

There is no authority to proceed against unknown persons in the absence of a statute or rule, and since the FSM has no rule or statute permitting the use of fictitious names to designate defendants, the naming of "John Doe" defendants in *in personam* actions is not a pleading practice recognized in the FSM. Berman v. Pohnpei, 17 FSM Intrm. 360, 366 n.1 (App. 2011).

Civil Procedure – Parties; Civil Procedure – Pleadings – Amendment

Since, in order to replace a "John Doe" defendant with a named party, a plaintiff would still have to move, under Civil Procedure Rule 15, to amend the pleadings to replace the John Doe defendant with a named defendant, and that to do so, all of Rule 15's specifications still must be met, and since, even in the absence of John Doe defendants, a plaintiff can move to amend her pleadings should she identify

through discovery other persons who may be liable on her claims, the presence of "John Doe" defendants serves no purpose and a trial court should dismiss them without prejudice. Berman v. Pohnpei, 17 FSM Intrm. 360, 366 n.1 (App. 2011).

Civil Procedure – Dismissal; Civil Procedure – Pleadings – Amendment

The dismissal of "John Doe" defendants will not prevent a plaintiff from later seeking to amend her complaint if she ascertains that others should also be named defendants. Berman v. Pohnpei, 17 FSM Intrm. 360, 366 n.1 (App. 2011).

Civil Procedure – Parties; Judgments – Void

Since any judgment *in personam* against an unknown defendant would be void, the retention of "John Doe" defendants is pointless. Berman v. Pohnpei, 17 FSM Intrm. 360, 366 n.1 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Courts – Recusal

An appellate court may first address the ground that the trial judge ought to have recused himself because if the appellant were to prevail on it, the case would be remanded for a new trial and no other issue would need to be addressed. Berman v. Pohnpei, 17 FSM Intrm. 360, 367 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Generally, an appellate court will not consider an issue raised for the first time on appeal because when a litigant raises an issue for the first time on appeal, he or she is deemed to have waived the right to challenge the issue unless it involves a plain error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. Berman v. Pohnpei, 17 FSM Intrm. 360, 367 (App. 2011).

Courts – Recusal

An application to disqualify a trial judge ought to be filed at the earliest opportunity. This principle should be applied against a party who, having knowledge of the facts constituting a disqualification, does not seek to disqualify the judge until after an unfavorable ruling has been made. Berman v. Pohnpei, 17 FSM Intrm. 360, 367 (App. 2011).

Courts – Recusal

To permit a party to disqualify a judge after learning how the judge intended to rule on a matter would permit forum-shopping of the worst kind. It would also be inequitable, because it would afford the moving party an additional opportunity to achieve a favorable result while denying a similar opportunity to its adversary. For these reasons, it is generally agreed that a party who has a reasonable basis for moving to disqualify a judge should not be permitted to delay filing a disqualification motion in hope of first obtaining a favorable ruling, and then complain only if the result is unfavorable to his cause. Berman v. Pohnpei, 17 FSM Intrm. 360, 367 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Courts – Recusal

The appellate court will not consider a recusal issue when, by her own account, the appellant knew of the factual basis for a recusal motion long before trial but she delayed raising the issue in the case until she filed her appellate brief. Berman v. Pohnpei, 17 FSM Intrm. 360, 367-68 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

The standard of review for findings of fact is whether the trial court's findings are clearly erroneous. A trial court's findings are presumptively correct. Berman v. Pohnpei, 17 FSM Intrm. 360, 368 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When an appellant claims 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 the evidence in the light most favorable to the appellee, the appellate court is left with a definite and firm conviction that a mistake has been made. Berman v. Pohnpei, 17 FSM Intrm. 360, 368 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

If an appellant asserts that there was no evidence to support certain findings or that the evidence compels a different finding but has not provided a full transcript, the appellate court cannot determine that the trial court's findings were clearly erroneous or that the trial court should have made other findings. Thus, without a trial transcript, the appellate court will be unable to identify any trial court finding of fact as clearly erroneous, and the trial court's findings of fact will remain the only facts on which the appeal can be decided. Berman v. Pohnpei, 17 FSM Intrm. 360, 368 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Contentions involving due process issues are generally questions of law, and questions of law are reviewed *de novo*. Berman v. Pohnpei, 17 FSM Intrm. 360, 369 (App. 2011).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Investigatory Stop

Reasonable suspicion, not probable cause, is all that is required for police officers to make an investigatory stop of a vehicle. "Reasonable suspicion" is a particularized and objective basis for suspecting that a person is engaged in a criminal activity. Investigatory stops are based upon less than probable cause and are temporary in nature, and the information gained at the investigatory stop is used to confirm or dispel the initial suspicion, and then either arrest or release the person stopped. Berman v. Pohnpei, 17 FSM Intrm. 360, 369-70 (App. 2011).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

A traffic stop, no matter how brief, is a seizure. But this seizure is not a warrantless arrest such that probable cause is needed and the person stopped must immediately be advised of his or her rights. Berman v. Pohnpei, 17 FSM Intrm. 360, 370 (App. 2011).

Criminal Law and Procedure – Arrest and Custody; Search and Seizure – Probable Cause

When the police had information from an off-duty police officer that gave them reason to suspect that a person had been involved in a car accident and that he was intoxicated, these facts equate to reasonable suspicion to stop him and investigate. Berman v. Pohnpei, 17 FSM Intrm. 360, 370 (App. 2011).

Constitutional Law – Case or Dispute – Standing

Whether Pohnpei had reasonable suspicion to stop someone or probable cause to arrest him is not an issue his wife has standing to raise. A party cannot rest her claim for relief on the rights of third persons since she lacks standing to raise a non-party's claims and rights. Berman v. Pohnpei, 17 FSM Intrm. 360, 370 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Whether a party has standing to sue is a question of law reviewed de novo on appeal. Berman v. Pohnpei, 17 FSM Intrm. 360, 370 n.3 (App. 2011).

Constitutional Law – Case or Dispute – Standing

A party lacks standing to make any contention about an unequal application of state policy for

completing accident reports when it is her husband's claim, and not hers, since that "policy" was not applied to her (she had not been in an "accident") but to her husband. Only he could raise a claim arising from an unequal application of accident report obligations. She lacks standing. Berman v. Pohnpei, 17 FSM Intrm. 360, 370 (App. 2011).

Search and Seizure – Probable Cause

Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. In probable cause determinations, a court must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. Berman v. Pohnpei, 17 FSM Intrm. 360, 371 (App. 2011).

Criminal Law and Procedure – Obstructing Justice; Search and Seizure – Probable Cause

Since the police may arrest without a warrant persons who are in the process of committing an offense in their presence, when the trial court found as fact that a person had, in the presence of the police, been argumentative; had prevented them from gaining access to her husband, who they had reasonable suspicion to stop and to whom they wanted to talk about a car abandonment; and that when a sergeant arrested her it was for obstructing justice and for pushing him in the chest and when these facts remain the facts on appeal, the facts, viewed from the law enforcement officers' vantage point, would constitute probable cause for an arrest on an obstructing justice charge. Berman v. Pohnpei, 17 FSM Intrm. 360, 371 (App. 2011).

Search and Seizure – Probable Cause

That the police had probable cause for an arrest on an obstructing justice charge does not mean that the arrestee was guilty beyond a reasonable doubt of that charge or that there was sufficient evidence to convict her on that charge; it only means that the police had enough to arrest her. Berman v. Pohnpei, 17 FSM Intrm. 360, 371 (App. 2011).

Constitutional Law – Due Process; Criminal Law and Procedure – Right to Counsel

An arrestee's right to be informed of her right to counsel when arrested is a due process right. Berman v. Pohnpei, 17 FSM Intrm. 360, 371 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Although, when denying the plaintiff's due process claims, the trial court may have been imprecise when it failed to specify that the one claim Pohnpei was liable for was also a due process claim and it was on all of the other due process claims that the trial court ruled in Pohnpei's favor, any imprecision in, or confusion caused by, the trial court language would not entitle the appellant to any relief. Berman v. Pohnpei, 17 FSM Intrm. 360, 371-72 (App. 2011).

Torts – Assault; Torts – Battery

A trial court errs as a matter of law by using, in a civil case, a criminal statute to determine the torts' elements and whether the plaintiff was an assault and battery victim. Because it was not a criminal prosecution, the trial court should have looked to Pohnpei tort law and used the elements of the torts of assault and of battery. Berman v. Pohnpei, 17 FSM Intrm. 360, 372 (App. 2011).

Torts – Assault; Torts – Battery

Under Pohnpei tort law, a battery is a harmful, offensive contact with a person resulting from an act intended to cause the contact, while an assault has to do with the apprehension of the offensive contact. When a court is satisfied from the evidence that an actual injury has occurred, that is,

determined that a battery has occurred, it need not consider the separate tort of assault. Berman v. Pohnpei, 17 FSM Intrm. 360, 372 (App. 2011).

Torts – Assault; Torts – Battery

Privilege is a legal defense to the torts of assault and battery and may be based upon the fact that the touching is a necessity to protect some private or public interest which is of such importance as to justify the threatened harm. A lawful arrest is just such a privilege and a valid defense to the assault claim and to the battery claim so long as excessive force is not used. Berman v. Pohnpei, 17 FSM Intrm. 360, 372 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Torts – Battery; Torts – Use of Excessive Force

Whether the Pohnpei police injured an arrestee through the use of excessive force and thus battered her is a question of fact. Thus, when the trial court found as fact that the arrestee had caused her own injuries by struggling with the handcuffs during the travel from the arrest site to the police station, which resulted in the handcuffs tightening further around her wrists and that the handcuffs' tightening was not the result of an officer's conduct, but rather was the result of her own movements, the police did not cause her injury and no use-of-excessive-force battery could have occurred. Berman v. Pohnpei, 17 FSM Intrm. 360, 372 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

While the trial court incorrectly used the Pohnpei criminal statutes to decide tort elements, this was a harmless error since, if the trial court had correctly applied Pohnpei tort law, the plaintiff still would not have prevailed on her assault and battery claims. A harmless error is not a ground to grant a new trial or to vacate, modify, or otherwise disturb a judgment or order. Berman v. Pohnpei, 17 FSM Intrm. 360, 372 (App. 2011).

Civil Procedure – Pleadings; Judgments

A contention that a trial court could not make as a ground for relief a claim that was not in the plaintiff's complaint is incorrect because, except as to a party against whom a judgment is entered by default, every final judgment must 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. Berman v. Pohnpei, 17 FSM Intrm. 360, 373 n.5 (App. 2011).

Appellate Review – Decisions Reviewable

An appellee that has not filed a cross-appeal cannot urge or be granted any affirmative relief in the manner of a modification, vacation, or reversal of a trial court ruling in the appellant's favor. Berman v. Pohnpei, 17 FSM Intrm. 360, 373 (App. 2011).

Civil Procedure – Motions

Even when a motion is unopposed, a court still needs good grounds in order to grant it. Berman v. Pohnpei, 17 FSM Intrm. 360, 374 (App. 2011).

Costs

A costs award is not an additional award to the prevailing party but is a reimbursement to the prevailing party of certain actual expenses (costs) incurred. Berman v. Pohnpei, 17 FSM Intrm. 360, 374 (App. 2011).

Costs

Costs for service of process and service of subpoenas are routinely allowable to the prevailing party under Civil Rule 54(d). Berman v. Pohnpei, 17 FSM Intrm. 360, 374 (App. 2011).

Costs

Since between a supporting affidavit and the returns of service filed by the process servers, it should be apparent on the record that the claims for service costs represented payments to others for service, and since this has been sufficient when cost awards for service have been sought, an attorney's affidavit plus a return of service in the record showing that someone other than the attorney's office performed the service will suffice although the better practice would be to also file receipts with the costs request rather than relying on the trial court to consult the record to see who performed the service. Berman v. Pohnpei, 17 FSM Intrm. 360, 374 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Attorney's Fees – Court-Awarded – Statutory

Whether a litigant is entitled to an attorney's fee award is a question of law, which an appellate court reviews de novo. Berman v. Pohnpei, 17 FSM Intrm. 360, 375 (App. 2011).

Attorney's Fees – Court-Awarded – Statutory

There are sound policy reasons for a rule denying a pro se litigant, whether a lay person or an attorney, an attorney fee award: 1) the statutory language makes any other construction unlikely because the phrase "reasonable attorney's fees" presupposes the existence of an attorney-client relationship; 2) a pro se litigant (whether a lawyer or a lay person) will not have the expense of compensating another for legal representation; 3) if the FSM Congress had intended that a pro se litigant be granted a fee award, it could easily have said so, but it did not; 4) awarding "attorney's fees" to pro se litigants may unwholesomely encourage the creation of a "cottage industry" of filing lawsuits with little merit in the hope of a fee award; 5) attorneys representing themselves might be tempted to protract litigation for their own financial betterment; 6) it would discourage pro se litigants from employing an independent and detached professional who is not emotionally involved in the case and who could make sure reason, not emotion, dictated the litigation strategy and tactics; and 7) the public would see the FSM justice system as unfair and one-sided if prevailing pro se lawyer plaintiffs were treated more favorably and are eligible to receive an additional award beyond what a pro se lay person would be granted. Berman v. Pohnpei, 17 FSM Intrm. 360, 375-76 (App. 2011).

Attorney's Fees – Court-Awarded – Statutory

Granting pro se non-lawyers an attorney fee award would raise the concern of the difficulty in valuing the non-attorney's time spent performing legal services, *i.e.*, the problem of overcompensating pro se litigants for excessive hours spent thrashing about on uncomplicated matters. Berman v. Pohnpei, 17 FSM Intrm. 360, 375 n.6 (App. 2011).

Attorney's Fees – Court-Awarded – Statutory

An attorney's fee award should not be made to pro se litigants regardless of whether they are lawyers or lay persons. Berman v. Pohnpei, 17 FSM Intrm. 360, 376 (App. 2011).

* * * *

COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

This is an appeal from an FSM Supreme Court trial division judgment that the defendant State of Pohnpei was liable to Mary Berman for one dollar nominal damages resulting from Pohnpei state police officers' failure to fully inform Berman, on arresting her, of her rights pertaining to access to legal counsel, as required by 62 Pon. C. § 2-118(2)(b) and (c), and that dismissed with prejudice all her other claims, Berman v. Pohnpei, 16 FSM Intrm. 567, 577 (Pon. 2009), and from the trial court's denial of Berman's request for an award of attorney's fees and costs, Order at 1 (Oct. 22, 2009). We affirm

the trial court's judgment and its denial of attorney's fees, but reverse part of its denial of costs. Our reasons follow.

I. Procedural History

On June 20, 2008, Berman filed suit against the Pohnpei state government and various "John Doe" police officers, alleging that the Pohnpei policemen's conduct constituted: 1) violations of her civil rights; 2) unlawful search and seizure; 3) unlawful arrest; 4) false arrest; 5) assault; 6) battery; 7) intentional infliction of emotional distress; 8) negligent infliction of emotional distress; 9) use of excessive and unreasonable force; 10) unlawful summary punishment; 11) compelling testimony without first informing Berman of her right to remain silent; 12) denial of access to legal counsel; 13) denial of liberty without due process; 14) denial of equal protection of the law; 15) unlawful refusal to inform Berman of the reason for her arrest and detention; and 16) malicious prosecution.

The trial court properly dismissed the "John Doe" defendants.[1] Order at 1 (July 28, 2008). The malicious prosecution claim was dismissed by the trial court's June 4, 2009 order on Pohnpei's summary judgment motion. Berman raised each of the other fifteen issues at trial except for the intentional and negligent infliction of emotional distress claims. Pohnpei denied liability on each of Berman's claims, whether raised at trial or in the complaint.

The trial court concluded that Pohnpei was liable to Berman for one dollar nominal damages resulting from the Pohnpei police officers' failure to fully inform Berman, when she was arrested, of her rights pertaining to access to legal counsel as required by 62 Pon. C. § 2-118(2)(b) and (c), and dismissed with prejudice each of her other claims. Berman v. Pohnpei, 16 FSM Intrm. 567, 577 (Pon. 2009). Berman, as a prevailing civil rights litigant, then moved for attorney's fees and costs. The trial court denied the fees request because Berman had not employed an attorney and denied the costs request because she had not documented that her "costs" were actual expenses. Order (Oct. 22, 2009). She then timely appealed both orders. Pohnpei did not file a cross-appeal.

II. Issues Presented

Appellant Mary Berman contends that the trial court erred: 1) by holding that there was probable

---

[1] There is no authority to proceed against unknown persons in the absence of a statute or rule, and since the FSM has no rule or statute permitting the use of fictitious names to designate defendants, the naming of "John Doe" defendants in *in personam* actions is not a pleading practice recognized in the FSM. Foods Pacific, Ltd. v. H.J. Heinz Co. Australia, 10 FSM Intrm. 409, 412 n.1 (Pon. 2001); Amayo v. MJ Co., 10 FSM Intrm. 244, 254 (Pon. 2001). Since, in order to replace a "John Doe" defendant with a named party, a plaintiff would still have to move, under Civil Procedure Rule 15, to amend the pleadings to replace the John Doe defendant with a named defendant, and that to do so, all the Rule 15's specifications still must be met, and since, even in the absence of John Doe defendants, a plaintiff can move to amend her pleadings should she identify through discovery other persons who may be liable on her claims, the presence of "John Doe" defendants serves no purpose and a trial court should dismiss them without prejudice. People of Weloy *ex rel.* Pong v. M/V Micronesian Heritage, 12 FSM Intrm. 506, 508 (Yap 2004); Moses v. Oyang Corp., 10 FSM Intrm. 210, 213 (Chk. 2001) (replacing an unnamed or "John Doe" party with a named party constitutes a change in the party sued and can only be accomplished by meeting Rule 15(c)'s specifications; thus the presence, or addition, of described, but unnamed defendants serves no purpose). The dismissal of "John Doe" defendants will not prevent a plaintiff from later seeking to amend her complaint if she ascertains that others should also be named defendants. Foods Pacific, Ltd., 10 FSM Intrm. at 412 n.1. Furthermore, since any judgment *in personam* against an unknown defendant would be void, the retention of "John Doe" defendants is pointless. *Id.* at 412-13 n.1.

cause to arrest her when her husband was a passenger in her car and the police had only "suspicions" about why her husband had earlier abandoned his own car off-road; 2) by deciding that it was unlawful for her to "argue" with officers within the meaning of state law that makes it a crime to "unlawfully resist or interfere with any law enforcement officer"; 3) by deciding that Pohnpei did not deny her due process of law when it held that the police unlawfully failed to give her information about her rights to access to legal counsel when she was arrested; 4) by finding that the police did not assault or batter her and by finding that she was injured by "struggling with handcuffs" the police had put on her wrists; 5) by not awarding her attorney's fees and costs under the FSM civil rights statute although she was the prevailing party; and 6) because the trial judge failed to recuse himself.

Appellee Pohnpei state government characterizes the issues on appeal as: 1) whether a police officer needs reasonable suspicion or probable cause to stop a vehicle; and 2) whether the trial court erred in concluding that Pohnpei was civilly liable for the failure to give Berman information about her rights to access to legal counsel when arrested under 62 Pohnpei Code § 2-118(2)(b) and (c).

III. Trial Judge's Failure to Recuse Himself

Berman contends that the trial judge should have recused himself "because [she] had already filed numerous motions [to recuse] while she was engaged in litigation against the judge's wife's favorite niece in Smith v. Nimea et al., FSM Civ. No. 2005-004." Appellant's Br. at 35. We address this ground first because if Berman were to prevail on it, the case would be remanded for a new trial and no other issue would need to be addressed.

Berman did not file a motion in this case seeking to recuse the trial judge. She raises it now for the first time. Berman asserts that since the [ABA] Code of Judicial Conduct Canon 3D does not set a time limit within which a judge must recuse himself, she can raise the recusal issue at any time.

Generally, we will not consider an issue raised for the first time on appeal, George v. Nena, 12 FSM Intrm. 310, 319 (App. 2004), because when a litigant raises an issue for the first time on appeal, he or she is deemed to have waived the right to challenge the issue unless it involves a plain error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004); Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95 (App. 2001). Because no plain error is apparent in the record, we will not consider this ground since Berman did not raise it below.

An application to disqualify a trial judge ought to be filed at the earliest opportunity. Nakamura v. Sharivy, 15 FSM Intrm. 409, 412 (Chk. S. Ct. Tr. 2007). This principle should be applied against a party who, having knowledge of the facts constituting a disqualification, does not seek to disqualify the judge until after an unfavorable ruling has been made. *Id.*

> To permit a party to disqualify a judge after learning how the judge intended to rule on a matter would permit forum-shopping of the worst kind. It would also be inequitable, because it would afford the moving party an additional opportunity to achieve a favorable result while denying a similar opportunity to its adversary. For these reasons, it is generally agreed that a party who has a reasonable basis for moving to disqualify a judge should not be permitted to delay filing a disqualification motion in hope of first obtaining a favorable ruling, and then complain only if the result is unfavorable to his cause.

City of Bessemer v. McClain, 957 So. 2d 1061, 1089 (Ala. 2006)(quoting Richard E. Flamm, Judicial Disqualification § 18.2.2, at 532-33 (1996)). By her own account, Berman knew of the factual basis

for a recusal motion long before trial but she delayed raising the issue in this case until she filed her appellate brief.

IV. Standard of Review for Factual Findings Alleged Erroneous

Our standard of review for findings of fact is whether the trial court's findings are clearly erroneous. George v. George, 17 FSM Intrm. 8, 9 (App. 2010). A trial court's findings are presumptively correct. *Id.* at 10; George v. Albert, 17 FSM Intrm. 25, 30 (App. 2010). When an appellant claims 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 the evidence 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.

If an appellant asserts that there was no evidence to support certain findings or that the evidence compels a different finding, but has not provided a full transcript, we cannot determine that the trial court's findings were clearly erroneous or that the trial court should have made other findings. *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's 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 an appellant has failed to provide a transcript of the relevant evidence, the presumption is that the evidence was sufficient to sustain the trial court's judgment).

Berman has not provided a trial transcript.[2] Therefore, we will be unable to identify any trial court finding of fact as clearly erroneous. The trial court's findings of fact will remain the only facts on which this appeal can be decided.

V. Factual Background

The trial court found that on the night of June 21, 2006, police officers Joseph Jackson and James Edgar were conducting a routine patrol in Nett when they received a report, relayed from an off-duty police officer who had heard a car crash while he was standing outside of his home and who then witnessed Kadalino Damarlane walking away from the abandoned Honda sedan on the side of the road. The officers also suspected that Damarlane had been consuming alcohol at the time of that incident. They then spotted a red Jeep, in which Damarlane was a passenger, being driven by his wife, Mary Berman. They initiated a routine traffic stop of Berman's vehicle with the purpose of investigating whether their suspicions were true about Damarlane's abandonment of the Honda.

Berman and Damarlane were not cooperative. Berman was argumentative and prevented the police officers from speaking with her husband by instructing him to remain inside the Jeep with the doors locked and the passenger window rolled up. The officers communicated with Berman while she remained inside the Jeep with her door window partially rolled down. When she told the officers that she and her husband needed to return to their Awak home because he had a headache, they offered

---

[2] At oral argument, Berman stated that she had not ordered a transcript because transcripts were too expensive. We cannot give this excuse any weight since the record does not show that Berman ever tried to proceed in forma pauperis under FSM Appellate Rule 24 or that she tried to arrange payment terms for a transcript.

to provide medical assistance on the scene or go to the hospital for treatment, after which they could proceed with obtaining an accident report. The offer was refused. The officers asked more than once that Damarlane go to the Kolonia police station to make a report about the abandoned Honda incident and they asked that he submit to a field sobriety test. Damarlane did not respond. Berman refused to go to the police station and continued to argue with the police officers. Damarlane remained silent.

Sergeant Iriarte, who after his arrival was the officer in charge, arrested Berman for obstruction of justice and for pushing Iriarte in the chest. He advised her that she was being arrested for obstructing justice because she refused to give the officers access to her car and was interfering with their peaceful attempts to communicate with Damarlane. Damarlane was arrested on suspicion of driving his Honda while intoxicated and for abandoning his vehicle by the roadside. When Berman was handcuffed, Sergeant Iriarte advised her of her right to remain silent, but he did not advise her of her rights to access to legal counsel. Berman was then taken to the police station in Kolonia. When she was first handcuffed, there was enough space for a regular-sized ballpoint pen to fit between her wrist and the handcuffs – enough room for the handcuffs to slide up and down her wrists. But on the way to the police station, she struggled with the handcuffs and this resulted in the handcuffs tightening around her wrists which in turn caused bruising on her wrists.

After arriving at the police station, an officer removed Berman's handcuffs and she was again told her rights, this time both orally and in writing – including those rights about access to legal counsel, 62 Pon. C. § 2-118(2)(b) and (c), which she had not been told at the time of her arrest. Berman was also allowed to use a telephone to call different attorneys of her choosing. She did not reach any of the attorneys she tried to call. At least one call was made to the Public Defender's office, which was closed since it was 10:00 p.m. Berman was then released from police custody. The total time that elapsed from when Berman's car was stopped until she was released was about two hours.

Berman's medical treatment for the handcuff bruises consisted of one appointment at the Pohnpei Family Health Clinic with Dr. Bryan Isaac who advised her to soak them in warm water. When she saw Dr. Isaac, she did not complain about any psychiatric injuries or depression. Berman also met with Dr. Garsten, who works in the Pohnpei Family Health Clinic, for stress. Other than these two doctors' visits, she did not receive any medical treatment.

VI. Berman's Assignments of Error on the Merits

A. *Probable Cause to Stop and Arrest Berman and Her Husband*

Berman contends that the police must have "full probable cause" before they can arrest someone and that the police did not have "full probable cause" to arrest her before they stopped her and arrested her. Berman further contends that the police did not have probable cause to arrest her when her husband was a passenger in her car and the police only had "suspicions" about why he had abandoned his Honda. She asserts that the police insistence that Damarlane go immediately to the police station to make out an accident report violated equal protection of the law because this was an illegal state policy which was applied to Berman and not to others, who, by state law, were allowed 24 hours to file a written accident report.

These contentions involve due process issues which are generally questions of law, and we review questions of law *de novo*. Albert v. George, 15 FSM Intrm. 574, 579 (App. 2008).

Berman mischaracterizes the nature of the stop and the sequence of events. It was an investigatory stop of her husband, Damarlane, not her. Reasonable suspicion, not probable cause, is all that is required for police officers to make an investigatory stop of a vehicle. Kosrae v. Tosie, 12

FSM Intrm. 296, 299 (Kos. S. Ct. Tr. 2004). "Reasonable suspicion" is a particularized and objective basis for suspecting that a person is engaged in a criminal activity. *Id.* Investigatory stops are based upon less than probable cause and are temporary in nature, and the information gained at the investigatory stop is used to confirm or dispel the initial suspicion, and then either arrest or release the person stopped. *Id.* at 300. Berman is correct that a traffic stop, no matter how brief, is a seizure. But this seizure is not a warrantless arrest such that probable cause is needed and the person stopped must immediately be advised of his or her rights. *See* Sigrah v. Kosrae, 12 FSM Intrm. 320, 328 (App. 2004).

The trial court found that the police had had information from an off-duty police officer that gave them reason to suspect that Damarlane had been involved in a car accident and that he was intoxicated. Berman, 16 FSM Intrm. at 572, 574. These facts equate to reasonable suspicion to stop Damarlane and investigate.

Even if the police did not have reasonable suspicion, this is Damarlane's claim for a violation of his rights, not Berman's claim for a violation of her rights. Whether Pohnpei had reasonable suspicion to stop Damarlane or probable cause to arrest him is not an issue Berman has standing to raise. A party lacks standing[3] to raise a non-party's claims and rights and cannot rest her claim for relief on the rights of third persons. FSM v. Udot Municipality, 12 FSM Intrm. 29, 40 (App. 2003); FSM v. Sias, 16 FSM Intrm. 661, 664 (Chk. 2009); Sipos v. Crabtree, 13 FSM Intrm. 355, 365 (Pon. 2005); Eighth Kosrae Legislature v. FSM Dev. Bank, 11 FSM Intrm. 491, 497, 500 (Kos. 2003); College of Micronesia-FSM v. Rosario, 10 FSM Intrm. 175, 188 (Pon. 2001), *aff'd*, 11 FSM Intrm. 355, 360 (App. 2003); Dorval Tankship Pty, Ltd. v. Department of Finance, 8 FSM Intrm. 111, 115 (Chk. 1997). Only Damarlane, a non-party, had standing to raise the issue and assert the claim. Berman cannot assert it.

The same is true for any contention about the unequal application of state policy for completing accident reports. It is Damarlane's claim, and not Berman's, since that "policy" was not applied to her (she had not been in an "accident") but to Damarlane. Only Damarlane could raise a claim arising from an unequal application of accident report obligations. Berman lacks standing to raise a claim about unequal application of Pohnpei's accident report policy.

B. *Berman's Arguing with Officers*

Berman contends that she was not on trial for obstructing justice or interfering with a police officer but that the trial court nevertheless decided that, by her preventing the police access to her car and interfering with their peaceful attempts to talk to Damarlane, she had committed obstruction of justice and this was a valid reason for her arrest. Berman contends that she was already "arrested" before this because she had been stopped while driving her car.[4] She asserts that she was merely exercising her free speech rights by demanding from the police information they were obligated to give her anyway, such as their identities and why they stopped her. Berman contends that the trial court erred by deciding that her "arguing" with the police constituted obstruction of justice. She further contends that refusing the police access to her car could not have been obstruction of justice because the police must be engaged in "the lawful pursuit of their duties" before they can be obstructed and

---

[3] Whether a party has standing to sue is a question of law reviewed de novo on appeal. M/V Kyowa Violet v. People of Rull *ex rel.* Mafel, 16 FSM Intrm. 49, 59 (App. 2008).

[4] As noted above, although this stop was a seizure, it was not an "arrest" requiring probable cause and the immediate right to an advice of rights.

the police, in her view, could not have been in the lawful pursuit of their duties when they stopped her car because at that time they did not have probable cause to arrest either her or her husband. Berman asks that the trial court ruling that she obstructed justice be reversed.

Berman misunderstands the trial court decision. It never ruled that she had obstructed justice. The issue before the trial court (and before us for review) was whether probable cause existed for her to be arrested on an obstruction of justice charge, not whether she had actually committed the offense.

The trial court found as fact that Berman had, in the presence of the police, been argumentative; had prevented them from gaining access to her husband, who they had reasonable suspicion to stop and to whom they wanted to talk about the Honda abandonment; and that when Sergeant Iriarte arrested her it was for obstructing justice and for pushing him in the chest. Berman, 16 FSM Intrm. at 571-72, 574. These facts, as found by the trial court, remain the facts on appeal. Since the police may arrest without a warrant persons who are in the process of committing an offense in their presence, 62 Pon. C. § 2-111(2), our task is to determine if Berman's acts, which the trial court found as fact, constitute probable cause to arrest her for obstructing justice.

Probable cause exists when there is evidence and information sufficiently persuasive to warrant a cautious person to believe it is more likely than not that a violation of the law has occurred and that the accused committed that violation. FSM v. Wainit, 10 FSM Intrm. 618, 621 (Chk. 2002); FSM v. Zhong Yuan Yu No. 621, 6 FSM Intrm. 584, 588-89 (Pon. 1994). In probable cause determinations, a court must regard the evidence from the vantage point of law enforcement officers acting on the scene but must make its own independent determination as to whether, considering all the facts at hand, a prudent and cautious law enforcement officer, guided by reasonable training and experience, would consider it more likely than not that a violation has occurred. Ishizawa v. Pohnpei, 2 FSM Intrm. 67, 77 (Pon. 1985).

The facts found by the trial court, viewed from the law enforcement officers' vantage point, would constitute probable cause for an arrest on an obstructing justice charge. This does not mean that Berman was guilty beyond a reasonable doubt of that charge or even that there was sufficient evidence to convict her on that charge; it only means that the police had enough to arrest her. *See* Kosrae v. Paulino, 3 FSM Intrm. 273, 276 (Kos. S. Ct. Tr. 1988) (probable cause is not proof of guilt, but shows that a reasonable ground for suspicion, sufficiently strong to warrant a cautious man to believe that the accused is guilty of the offense, exists). Berman cannot prevail on this assignment of error. The trial court did not rule that Berman had obstructed justice.

C. *Police Failure to Inform Berman and Her Due Process Claims*

Berman contends that the trial court erred by, in her view, deciding that Pohnpei did not deny her due process of law when it held that the police unlawfully failed to give her information about her rights to access to legal counsel when she was arrested because an arrestee's right to be informed of her right to counsel when arrested is a due process right.

Berman is correct that an arrestee's right to be informed of her right to counsel when arrested is a due process right. However, Berman's problem here is confusion that she herself may have helped create. She made a number of claims of denials of various rights during and after her arrest, each of which could constitute a claim that a due process right was violated. The trial court ruled in her favor on a claim that she had not been informed of her right to counsel when she was arrested. Berman, 16 FSM Intrm. at 576. That was one of her many due process claims. Thus, when the trial court later held that "Pohnpei [wa]s not liable to Berman on the claims of denial of equal protection of the laws, violation of due process, and violation of her civil rights," *id.* at 577, the trial court was referring to

those specified and unspecified alleged due process (and civil rights) claims other than the one due process violation that the trial court found Pohnpei had committed. The trial court may have been imprecise when it failed to specify that the one claim Pohnpei was liable for was also a due process claim and it was on all of Berman's other due process claims that the trial court ruled in Pohnpei's favor. But any imprecision in, or confusion caused by, the trial court language would not entitle Berman to any relief.

D. *Berman's Assault and Battery Claims*

Berman contends that the trial court erred by finding that the police did not assault or batter her and by finding that she was injured by "struggling with handcuffs" the police had put on her wrists. Berman further contends that the trial court erred as a matter of law by using the Pohnpei criminal statute to determine whether she was an assault and battery victim when this is a civil case and the court should have used the elements of the torts of assault and of battery.

Berman is correct that the trial court erred by using the criminal statutes to determine the torts' elements. The trial court should have looked to Pohnpei tort law. (This was not a criminal prosecution.) Under Pohnpei tort law, a battery is a harmful, offensive contact with a person resulting from an act intended to cause the contact, while an assault has to do with the apprehension of the offensive contact; and when a court is satisfied from the evidence that an actual injury has occurred, that is, determined that a battery has occurred, it need not consider the separate tort of assault. Elymore v. Walter, 9 FSM Intrm. 450, 458 (Pon. 2000); Conrad v. Kolonia Town, 8 FSM Intrm. 183, 191 (Pon. 1997). Privilege is a legal defense to the tort of [assault and] battery and may be based upon the fact that the touching is a necessity to protect some private or public interest which is of such importance as to justify the threatened harm. *See* Conrad, 8 FSM Intrm. at 193. A lawful arrest is just such a privilege and a valid defense to the assault claim and to the battery claim so long as excessive force is not used. *Id.* at 191 (tort of use of excessive force results from the arrest by a person having the authority to do so but accomplished by the use of unreasonable force).

Whether the Pohnpei police injured Berman through the use of excessive force and thus battered her is a question of fact. The trial court found as fact that Berman caused her own injuries by struggling with the handcuffs during the travel from the arrest site to the police station, which resulted in the handcuffs tightening further around her wrists and that the handcuffs' tightening "was not the result of an officer's conduct, but rather was the result of Berman's own movements." Berman, 16 FSM Intrm. at 575. This remains the facts on appeal. Thus, Berman's injuries were self-inflicted. Since the police did not cause an injury to Berman, no use-of-excessive-force battery could have occurred.

While the trial court incorrectly used the Pohnpei criminal statutes to decide tort elements, this was a harmless error since, if the trial court had correctly applied Pohnpei tort law, Berman would still not have prevailed on her assault and battery claims. A harmless error is not a ground to grant a new trial or to vacate, modify, or otherwise disturb a judgment or order. FSM Civ. R. 61; *see also* George v. Albert, 17 FSM Intrm. 25, 32 (App. 2010). Berman cannot prevail on this assignment of error.

VII. Pohnpei's Contention of Error

Pohnpei contends that not only should Berman not prevail on her claims for further relief but also that the trial court should not have granted her the relief that it did. It contends that the trial court erred by holding Pohnpei civilly liable for failure to give Berman information, at the time she was arrested, about her right to access to legal counsel under 62 Pohnpei Code 2-118(2)(b) and (c). Pohnpei relies on what it calls a well-developed body of U.S. case law that there is no civil remedy for the failure to properly inform an arrestee of her rights and that the violation of the right against self-

incrimination only occurs if the arrestee is compelled to give evidence against herself and further that there is no case law that makes the misreading of an arrestee's rights enough to warrant a civil remedy because the proper remedy is the suppression of any evidence illegally obtained. Pohnpei argues that the court should follow U.S. law and reverse the trial court judgment.[5] Pohnpei further notes that under FSM case law an arrestee must be fully informed of her rights before being interrogated and that Berman was fully informed later at the police station and even then was never interrogated so there was no harm that warranted a civil remedy.

The problem with Pohnpei's position is that it never filed a cross-appeal. An appellee that has not filed a cross-appeal cannot urge or be granted any affirmative relief in the manner of a modification, vacation, or reversal of a trial court ruling in the appellant's favor. *See, e.g.*, El Paso Natural Gas Co. v. Neztsosie, 526 U.S. 473, 479, 119 S. Ct. 1430, 1434-35, 143 L. Ed. 2d 635, 642 (1999) (absent a cross-appeal, an appellee may urge support of the lower court's decree although it may involve an attack on the lower court's reasoning; but the appellee may not attack the decree with a view to either enlarging the appellee's own rights or lessening the appellant's); Radio Steel & Mfg. Co. v. MTD Prods., Inc., 731 F.2d 840, 844 (Fed. Cir. 1984) (party not permitted to argue on issue on which it lost and hasn't appealed when the argument's acceptance would result in a reversal or modification instead of an affirmance); In re FitzSimmons, 725 F.2d 1208, 1212 (9th Cir. 1984) (party that did not appeal cannot attack decision); Kailin v. Callum County, 220 P.3d 222, 229 (Wash. Ct. App. 2009) (notice of cross review is essential if appellee seeks affirmative relief as distinguished from urging a different ground for affirmance); Happy Bunch, LLC v. Grandview North, LLC, 173 P.3d 959, 964 & n.2 (Wash. Ct. App. 2007) (appellee that did not file notice of appeal cannot obtain affirmative relief); McKay v. Boise Project Bd. of Control, 111 P.3d 148, 153 (Idaho 2005) (respondent must file cross-appeal if affirmative relief by way of reversal, vacation, or modification is sought); Koinis v. Colorado Dep't of Pub. Safety, 97 P.3d 193, 197 (Colo. Ct. App. 2003) ("appellee must file a cross-appeal in order to raise a contention that, if successful, would increase its rights under the judgment or order being reviewed"); Meyer v. Sunrise Hosp., 22 P.3d 1142, 1153 n.6 (Nev. 2001) (when appellee did not cross-appeal and claim wasn't made in trial court, appellate court lacks jurisdiction to consider its claim); Walston v. Sun Cab Co., 298 A.2d 391, 394 (Md. 1973) (appellee who did not cross-appeal "cannot obtain any affirmative relief by way of reversal, amendment or modification of the judgment or decree under review"); Alaska Brick Co. v. McCoy, 400 P.2d 454, 457 (Alaska 1965) (when no cross-appeal taken "[o]rderly procedure will not permit an appellee to attack a judgment for the first time in his brief in the appellant's appeal").

Thus, no matter how meritorious Pohnpei's contentions might be, it cannot raise them now. Because it did not cross-appeal, Pohnpei cannot seek any affirmative relief. At most, it can seek an affirmance of the trial court decision on a different ground.

VIII. Berman's Attorney's Fees and Costs Claim

Berman moved, as the prevailing party in a civil rights action, for an award of attorney's fees and costs, which the trial court denied in its entirety. She cites this as reversible error.

---

[5] Pohnpei also asserts that Berman's complaint never included a claim that, when she was arrested, her rights were misread and she was not informed of her rights to counsel and that, since it was not in her complaint, the trial court could not make this a ground for relief. This contention is incorrect because "[e]xcept as to a party against whom a judgment is entered by default, every final judgment 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." FSM Civ. R. 54(c).

A. *Costs*

Berman sought $77.75 as the total cost of copies plus service fees. She asserts that the trial court improperly denied her unopposed costs request "on its own motion."

Berman is mistaken. The trial court did not deny her request for costs "on its own motion." It denied her costs request on the ground that she had made an inadequate factual showing. The trial court clearly indicated that if Berman had shown that her claimed costs for service of process and photocopying represented payments to others, it would have allowed those costs, and it invited her to submit such evidence. Order at 2 (Oct. 22, 2009) ("Berman may submit to the Court proof of payment to others in the form of invoices and receipts or other documents sufficient to establish entitlement to reimbursement."). Apparently, she did not. Even when a motion is unopposed, a court still needs good grounds in order to grant it. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 442 (App. 1994).

Berman's affidavit is oddly worded. She states that "Xerox costs at Nihco currently are 15 cents per page" but nowhere does she state that she had the copies made at Nihco (or somewhere else) and paid Nihco (or someone else) that amount to make the copies. Verified Statement of Costs ¶ 2 (Oct. 8, 2009). A costs award is not an additional award to the prevailing party but is a reimbursement to the prevailing party of certain actual expenses (costs) incurred. Nena v. Kosrae (III), 6 FSM Intrm. 564, 569-70 (App. 1994) (motion to tax costs must be denied if it fails to adequately verify appellee's actual costs). The trial court's denial of costs for copies is affirmed.

The service costs are a different matter. Costs for service of process and service of subpoenas are routinely allowable to the prevailing party under Civil Rule 54(d). *E.g.*, Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 151 (Pon. 2010). Here, Berman states, under oath, "I paid a process server to serve the complaint and summons and subpoenas for trial as shown." Verified Statement of Costs ¶ 3 (Oct. 8, 2009). She lists "Cost of service of complaint and summons $10" and "6-23-09 subpoena service $25.00." Berman's affidavit ("verified statement") and the certificates of service for the summons and complaint (signed by Tristan Samuel July 7, 2008, filed July 11, 2008) and for the trial subpoenas (signed by Paul Salvador June 29, 2009, filed June 30, 2009) should have been enough to allow the trial court to grant her those sums. Between Berman's affidavit and the returns of service filed by the process servers, it should have been apparent on the record that these claims represented payments to others for service. We believe that, in the past, this has always been sufficient when cost awards that included service have been sought – the attorney's affidavit plus a return of service in the record showing that someone other than the attorney's office performed the service.

Accordingly, we vacate the trial court's denial of costs for service and direct the trial division to enter a cost award to Berman of $35. Although the better practice would have been to also file receipts with the request rather than relying on the trial court to consult the record to see who performed the service, we have not required such diligence in the past and decline to make it a requirement now.

B. *Attorney's Fees*

Berman sought an attorney fee award of $10,490 (104.9 hours at $100 an hour) for the work she performed for herself on this case. The trial court, relying on Hartman v. Krum, 14 FSM Intrm. 526, 532 (Chk. 2007) and Hauk v. Lokopwe, 14 FSM Intrm. 61, 66 (Chk. 2006) (which cited Kay v. Ehrler, 499 U.S. 432, 437-38, 111 S. Ct. 1435, 1438, 113 L. Ed. 2d 486, 492-93 (1991)), held that "FSM precedent does not permit a *pro se* litigant to recover attorneys' fees." Order at 1 (Oct. 22, 2009). Berman contends that FSM law should depart from the principle cited in the U.S. Supreme Court case because local circumstances require it. She contends that, unlike the U.S. where there are

many lawyers willing to take civil rights cases on contingency, there are few private practitioners in the FSM and, in her personal experience, none are willing to take such cases without advance payment, and, even then, each one of those practitioners is opposing counsel in an adversary proceeding where Berman represents a client.

Whether a litigant is entitled to an attorney's fee award is a question of law, which we review de novo. *See, e.g.* North Coast Elec. Co. v. Selig, 151 P.3d 211, 215 (Wash. Ct. App. 2007). We conclude that there are sound policy reasons for a rule denying a pro se litigant, whether a lay person[6] or an attorney, an attorney fee award. These reasons follow.

The statutory language makes any other construction unlikely. The statute reads: "In an action brought under this section, the court may award costs and reasonable attorney's fees to the prevailing party." 11 F.S.M.C. 701(3). The phrase "reasonable attorney's fees" presupposes the existence of an attorney-client relationship – a legal practitioner representing a client-party (usually, but not always, with the practitioner expecting some recompense if the client prevails). *E.g.*, Merrell v. Block, 809 F.2d 639, 642 (9th Cir. 1986) (when statute defines "fees" as "reasonable attorney fees" it leads to "the conclusion that Congress intended that an attorney have been retained for a prevailing *pro se* litigant to recover attorneys fees"); Connor v. Cal-Az Props., Inc., 668 P.2d 896, 899 (Ariz. Ct. App. 1983) (since "presence of an attorney-client relationship is a prerequisite to the recovery of attorneys' fees" an attorney "who represents himself has no right to be compensated by the payment of attorneys' fees because of the absence of an attorney-client relationship").

A pro se litigant (whether a lawyer or a lay person) will not have the expense of compensating another for legal representation. If the FSM Congress had intended that a pro se litigant be granted a fee award anyway, it could easily have said so, but it did not. *See, e.g.*, Barrett v. United States Customs Serv., 482 F. Supp. 779, 780 (E.D. La. 1980). An attorney fee award to a pro se litigant represents a windfall to that litigant. *See* Cunningham v. Federal Bureau of Investigation, 664 F.2d 383, 385 (3d Cir. 1981) (if attorney fees are "awarded to litigants regardless of whether those fees were actually incurred, the award becomes something of a cash bonus to a successful litigant as well as a financial penalty to the defendant government agency"); Crooker v. United States Dep't of Justice, 632 F.2d 916, 921 (1st Cir. 1980) ("any award which provides compensation in excess of actual costs incurred" not allowed), *vacated on other grounds*, 469 U.S. 926, 105 S. Ct. 317, 83 L. Ed. 2d 255 (1984).

Awarding "attorney's fees" to pro se litigants may also unwholesomely encourage the creation of a "cottage industry" of filing lawsuits with little merit in the hope of a fee award. *Cf.* Crooker v. United States Dep't of Treasury, 634 F.2d 48, 49 (2d Cir. 1980). And "attorneys representing themselves might be tempted to protract litigation for their own financial betterment." Connor, 668 P.2d at 898.

It would discourage pro se litigants from employing an independent and detached professional who is not emotionally involved in the case and who could make sure reason, not emotion, dictated the litigation strategy and tactics. Kay v. Ehrler, 499 U.S. 432, 437-38, 111 S. Ct. 1435, 1438, 113 L. Ed. 2d 486, 492-93 (1991); White v. Arlen Realty & Dev. Corp., 614 F.2d 387, 388-89 (4th Cir. 1980) (fee award denied because of pro se attorney's personal embroilment and lack of objectivity and

---

[6] Granting pro se non-lawyers an attorney fee award would raise one further concern: "the difficulty in valuing the non-attorney's time spent performing legal services, *i.e.*, the problem of overcompensating *pro se* litigants for 'excessive hours [spent] thrashing about on uncomplicated matters.'" Alaska Fed. Sav. & Loan Ass'n v. Bernhardt, 794 P.2d 579, 581 (Alaska 1990) (citation omitted) (alteration in original).

because statutory goals not fostered by self-representation or fee generation).

The public would see the FSM justice system as unfair and one-sided if prevailing pro se lawyer plaintiffs are treated more favorably and are eligible to receive an additional award beyond what a pro se lay person would be granted. *See, e.g.*, Swanson & Setzke, Chtd. v. Henning, 774 P.2d 909, 913 (Idaho Ct. App. 1989) (palpably unfair that a pro se lawyer litigant would be eligible for an attorney fee award but a pro se nonlawyer litigant would not; public perception of fairness in legal system is more important than a pro se lawyer's claim to an attorney fee); Connor, 668 P.2d at 899 ("cannot . . . have one rule for attorneys acting on their own behalf and another rule for lay persons acting on their own behalf").

The counter argument of a pro se lawyer's "opportunity cost" (that is, the lawyer could have been engaged in other income-generating work if not representing self pro se) is unpersuasive and easily overridden by the legal and sound policy reasons listed above. And awarding pro se litigants "attorneys' fees" still would not alleviate Berman's personal concern that other private attorneys will not take these cases without advance payment.

We therefore affirm the trial court's denial of an attorney's fee award since such awards should not be made to pro se litigants regardless of whether they are lawyers or lay persons.

IX. Conclusion

Accordingly, we decline to consider whether the trial judge should have recused himself. We affirm the trial court judgment and the trial court's denial of attorney's fees, but reverse, in part, its denial of costs and direct the trial division to tax $35 in costs for service.

The trial court may take such further action as is consistent with this opinion. The parties shall bear their own costs.

* * * *