FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN and KADALINO DAMARLANE, Appellants, vs. POHNPEI STATE GOVERNMENT and POHNPEI TRANSPORTATION AUTHORITY, Appellees.	)	APPEAL CASE NO. P7-2011 (Civil Action No. 2008-036)

OPINION

Argued: June 27, 2013
Decided: August 13, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Camillo Noket, Temporary Justice, FSM Supreme Court*

*Chief Justice, Chuuk State Supreme Court, Weno, Chuuk

APPEARANCES:

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HEADNOTES

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Civil Procedure – Injunctions

A trial court decision issuing, modifying, or denying an injunction is reviewed using an abuse of discretion standard. A trial court's abuse of discretion occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. Berman v. Pohnpei, 19 FSM R. 111, 114-15 (App. 2013).

Civil Procedure – Injunctions; Environmental Protection

The FSM Environmental Protection Act, 25 F.S.M.C. 501 *et seq.*, and its enforcement provisions, 25 F.S.M.C. 703-707, do not, as a matter of law, provide for a private cause of action or a citizen's claim for money damages but may support a claim for injunctive relief. Berman v. Pohnpei, 19 FSM R. 111, 116 (App. 2013).

Administrative Law

Regulations have the force and effect of law. Berman v. Pohnpei, 19 FSM R. 111, 116 (App. 2013).

Administrative Law – Statutory Construction

Regulatory language is interpreted the same way statutory language is. Berman v. Pohnpei, 19 FSM R. 111, 116 (App. 2013).

Administrative Law – Statutory Construction; Environmental Protection

When a regulation's plain language applies only to toilet facilities that might contaminate sources of water that could be used for drinking purposes – in other words, fresh water and when the term "body of water" might be construed as covering the lagoon but in light of the regulation's clear intent to preserve potable water sources, it must be read as a catchall phrase meant to cover any other potential potable water source, the regulation does not apply to a toilet on a berm in a salt-water lagoon. Berman v. Pohnpei, 19 FSM R. 111, 116-17 (App. 2013).

Administrative Law – Statutory Construction

When a law's plain language is ambiguous, a court may look to the law's purpose – the evil that it was intended to remedy – to interpret the law. Berman v. Pohnpei, 19 FSM R. 111, 117 (App. 2013).

Administrative Law – Statutory Construction; Environmental Protection

When a regulation's purpose – the evil that the regulation is designed to prevent – is the contamination of drinking water, it would not apply to a case where it might be proven that the privy on the berm leaks pollutants into the lagoon as the lagoon is not a possible potable water source since it is salt water and that evil is not covered by the regulation. Berman v. Pohnpei, 19 FSM R. 111, 117 (App. 2013).

Environmental Protection

Money damages are not available in a private environmental protection lawsuit even if injunctive relief is available. Berman v. Pohnpei, 19 FSM R. 111, 117 (App. 2013).

Torts – Governmental Liability

Pohnpei cannot be held liable for money damages for the actions of non-state actors. Berman v. Pohnpei, 19 FSM R. 111, 117 (App. 2013).

Attorney's Fees – Court-Awarded; Costs – Disallowed; Costs – When Taxable

Costs are always available to the party who ultimately prevails, but attorney's fees are not available for pro se litigants even if they prevail. Berman v. Pohnpei, 19 FSM R. 111, 117 (App. 2013).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This appeal is from an October 21, 2011 order, Berman v. Pohnpei, 18 FSM Intrm. 67 (Pon. 2011), denying the plaintiffs' motions for declaratory relief and injunctive relief and granting the defendants' summary judgment motion and dismissing this case, Civil Action No. 2008-036, based on the outcome of a previous case, Civil Action No. 1990-075. We remand the case for the trial court to consider whether the plaintiffs have a cause of action or are entitled to relief under other FSM law. Our reasons follow.

I. BACKGROUND

A. *Previous Litigation*

Civil Action No. 1990-075 was filed on September 25, 1990. The trial court granted a preliminary injunction the next month enjoining dredging at Mesenpal, Awak, U. On November 21, 1990, the Pohnpei Department of Health Services issued an earthmoving permit. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 1, 5 (Pon. 1991). The Damarlane plaintiffs ("Damarlanes") moved for summary judgment. On December 29, 1990, the FSM national government issued an earthmoving permit identical to the state's permit issued the previous month. On January 14, 1991, the trial court granted the summary judgment motion and issued a preliminary injunction enjoining all government officials and their agents from further activities on the Mesenpal dredge site because no valid FSM earthmoving permit could be issued until the environmental implications of the proposed activities were properly assessed. *Id.* at 9.

On February 4, 1991, the FSM Department of Human Resources held an earthmoving hearing, and on February 5, 1991, issued the Pohnpei Transportation Authority ("PTA") an earthmoving permit for Mesenpal. Pohnpei then moved to modify or vacate the injunction. On February 8, 1991, finding that Pohnpei now had a valid earthmoving permit "and that removal of coral from the dredge site would not cause irreparable harm," the trial court modified the injunction to allow activities authorized by the permit. Damarlane v. United States, 8 FSM Intrm. 45, 48 (App. 1997).

On March 15, 1991, after a hearing, the trial court found that Pohnpei had overstepped the permit's bounds and was violating the January 14, 1991 injunction, and issued a second preliminary injunction. On April 11, 2013, the Secretary of Human Resources made supplemental findings about the Pohnpei Transportation Authority's application for an earthmoving permit for Mesenpal and concluded that a permit to remove the Mesenpal berm must, at some unspecified point, be issued and that the berm should be removed in a certain way. On April 15, 1991, Pohnpei filed another motion to modify or vacate the injunction. After a May 16, 1991 hearing, the trial court, on May 17, 1991, issued an order stating that it would be prepared to modify its March 15, 1991 injunction to permit earthmoving activities authorized by the Secretary of Human Resources if certain conditions were fulfilled.

The Damarlanes appealed. We dismissed the appeal for lack of jurisdiction since it was an interlocutory appeal that did not fall within the rule permitting interlocutory appeals from interlocutory orders granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions because the trial court order appealed from did not modify or dissolve the injunction and since "the preliminary injunction, issued at plaintiffs' behest on March 15th, remain[ed] undisturbed," and observed that the trial court order only noted that it might modify the injunction in the future if certain circumstances changed. Damarlane v. Pohnpei Transp. Auth., 5 FSM Intrm. 332,

334 (App. 1992). We held that the order did not, "by any fair reading," change the temporary injunction's requirements. *Id.*

Trial began on July 20, 1995. On August 17, 1995, the trial court, in its findings of fact and conclusions of law, held that the Damarlanes had not proved their case by a preponderance of the evidence. On September 12, 1995, the trial court issued an amended judgment in Pohnpei's favor, dismissing all remaining claims against it and dissolving the March 15, 1991 preliminary injunction within 30 days (effected by an October 10, 1995 amended judgment). The Damarlanes then moved to reconsider a pretrial order that had limited takings claims; to join a party who was not an indispensable party; and for leave to amend the complaint to allege loss of riparian rights. These motions were denied on December 15, 1995. Damarlane v. United States, 7 FSM Intrm. 350, 352-53 (Pon. 1995). The trial court granted the United States's motion for dismissal, *id.* at 355, and the FSM's motion for sanctions against the Damarlanes' counsel, *id.* at 357.

The Damarlanes appealed. On April 15, 1997, we affirmed the trial court "in all respects." Damarlane v. United States, 8 FSM Intrm. 45, 59, *reh'g denied*, 8 FSM Intrm. 70 (App. 1997).

B. *Current Litigation*

Mary Berman and Kadalino Damarlane filed this suit on October 16, 2008, alleging that the May 17, 1991 order in Civil Action No. 1990-075 required the PTA to obtain an earthmoving permit from the national government to remove the berm and causeways at Mesenpal in conformity with an environmental impact study. They also alleged that an illegal bar business had been started on the berm and that Pohnpei state had done nothing to curb it or its impact on nearby residents such as themselves. They sought as relief an order that the PTA obtain a permit, remove the berm, prevent patrons of the illegal business from entering the site, that it not damage the filled land owned by plaintiff Kadalino Damarlane, and that it pay compensation for the disturbances by the illegal business and for any inconvenience during the berm removal.

On October 21, 2011, the trial court denied the plaintiffs' motion for a declaratory judgment because a proper pleading had not been filed, Berman v. Pohnpei, 18 FSM Intrm. 67, 70 (Pon. 2011); granted Pohnpei's summary judgment motion, *id.* at 72-73; denied the plaintiffs' renewed motion for injunctive relief, *id.* at 74; and then dismissed the matter, *id.* at 75. Berman and Damarlane then timely appealed.

II. Issues Presented

Appellants Berman and Damarlane contend that the trial court erred by 1) refusing to issue an injunction or enforce environmental protection laws requiring the removal of the berm in front of their lagoon-side home; and 2) refusing to issue an injunction or enforce environmental protection laws so as to ban the use of a toilet on the berm in front of their lagoon-side home.

Berman and Damarlane ask us to enjoin the state and 1) compel it to obtain an earthmoving permit that complied with the May 17, 1991 order; 2) order it to close the berm to the public; 3) order it to remove an illegal toilet on the berm; 4) order it to ban public use of the berm; and 5) remand the case to the trial court for further proceedings including awards of damages, attorney's fees, and costs. Appellants' Br. at 13 (Aug. 13, 2012).

III. Standard of Review

We review a trial court decision issuing, modifying, or denying an injunction using an abuse of

discretion standard. *See* FSM v. Udot Municipality, 12 FSM Intrm. 29, 52 (App. 2003). A trial court's abuse of discretion occurs when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 246 (App. 2006); Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001); Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992).

IV. ANALYSIS

A. *Injunction to Remove Berm*

Berman and Damarlane asked us to issue an injunction while this appeal is pending. On October 2, 2012, we denied that motion because it did not comply with Appellate Rule 8(a)'s technical requirements to file the relevant parts of the record with the motion, Berman v. Pohnpei, 18 FSM Intrm. 418, 421 (App. 2012), because the usual purpose of an injunction pending appeal is to maintain the status quo pending appeal and Berman and Damarlane were seeking a change in the status quo, *id.*, and because they had not shown irreparable harm, *id.* at 421-22. The relief Berman and Damarlane now seek is substantially similar.

1. *Opening Brief*

Berman and Damarlane, in their opening brief, contend that the May 17, 1991 order in Civil Action No. 1990-075 affirmed an agency decision that an earthmoving permit had to be obtained to remove the berm once the site was no longer used for dredging and that, based on what, in their view, was a still effective May 17, 1991 court order, the trial court abused its discretion when it did not grant the relief sought.

In Damarlane v. Pohnpei Transp. Auth., 18 FSM Intrm. 366, 374, 375 (App. 2012),[1] we ruled that the temporary March 15, 1991 preliminary injunction and the May 17, 1991 order in Civil Action No. 1990-075 "ceased to be valid, subsisting orders" once the final judgment in that case was entered and that since the "May 1991 interlocutory order and the March 1991 preliminary injunction were not included in the 1995 final judgment nor were they made into a separate final judgment[, t]hey were overruled, superseded, or made irrelevant by the 1995 amended judgment dissolving the injunction even if the May 17, 1991 order was not explicitly mentioned in the judgment." The parties were thus invited to supplement their briefs to take into account our August 15, 2012 decision and to bring their arguments in line with our opinion since it was now controlling law in the case and the jurisdiction.

2. *Supplement*

In their supplement, Berman and Damarlane note that our August 15, 2012 decision had stated that if their claims were valid, they had to seek relief through means other than trying to enforce a superseded interlocutory order in Civil Action No. 1990-075. They assert that this appeal is their "other means." Berman and Damarlane have now changed the emphasis of the legal basis of their claims from the May 17, 1991 court order to Dr. Pretrick's April 11, 1991 administrative agency decision that earthmoving permit shall be issued to remove the berm at Mesenpal. They further assert that since this agency decision was not appealed it is a final administrative order that must be obeyed. They ask us

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[1] That appeal was from a sanction imposed on attorney Berman in Berman v. Pohnpei, 18 FSM Intrm. 67, 74-75 (Pon. 2011), the same October 21, 2011 order of dismissal the merits of which are now before us in this appeal.

to enforce the administrative agency April 11, 1991 "order." They also rely on the FSM Environmental Protection Act, 25 F.S.M.C. 501 *et seq.*; its attendant regulations; and the earthmoving permits issued to the PTA that as part of their terms require that the berm be removed once the dredging has ceased.

The April 11, 1991 administrative agency decision by the Secretary of Human Resources Dr. Pretrick said that a permit shall be issued to the PTA, but neither Pohnpei nor the PTA have applied for a permit. From the record it is unclear whether Dr. Pretrick's decision can be read as an order by the FSM that Pohnpei must apply for the permit. Dr. Pretrick's decision certainly is an order that if a permit is applied for, one must be granted under the terms set forth in the order. The requirement to remove the berm was part of the conditions under which one or more of the earthmoving permits was issued to the PTA.

Berman and Damarlane seek a mandatory injunction ordering Pohnpei to apply for the permit to remove the Mesenpal berm, and that once it is obtained, ordering Pohnpei or the PTA to actually remove the berm and causeway under the conditions in the April 11, 1991 Supplemental Findings of the Secretary of Human Resources in the Matter of the Application of the Pohnpei Transportation Authority for a Permit to Perform Earthmoving Activities at Mesenpal. The trial court rightly concluded that the May 17, 1991 court order could not be relied on to support such an injunction since the May 17, 1991 court order was no longer valid. The trial court never addressed the Secretary's 1991 Supplemental Findings, probably because it and Berman and Damarlane were all focused on the invalid May 17, 1991 interlocutory court order.

Dr. Pretrick's April 11, 1991 and February 5, 1991 administrative orders are part of the trial court record. We therefore remand this case to the trial court for it to develop a further record on and consider the effect and enforceability of the April 11, 1991 administrative agency decision and the terms of the dredging permits issued to Pohnpei. The trial court shall rule on whether the April 11, 1991 decision and the permits validly issued require the PTA to apply for a permit to remove the berm and whether they are enforceable against Pohnpei and the PTA.

It is undisputed that the FSM Environmental Protection Act, 25 F.S.M.C. 501 *et seq.*, and its enforcement provisions, 25 F.S.M.C. 703-707, do not, as a matter of law, provide for private cause of action or a citizen's claim for money damages but may support a claim for injunctive relief. Damarlane v. FSM, 8 FSM Intrm. 119, 121 (Pon. 1997). The trial court, on remand, shall therefore also determine whether the statute does so in this case.

B. *Injunction to Remove Toilet Facilities on Berm*

Berman and Damarlane also seek an injunction requiring Pohnpei to remove what they call illegal toilet facilities on the berm because they are less than 50 feet from a body of water and otherwise do not conform to the regulatory requirements for toilet facilities. The trial court denied this injunction in part because the activities on the berm were less of a nuisance and more sanitary with toilet facilities there than before when there were none. Berman v. Pohnpei, 18 FSM Intrm. at 74.

Regulations have "the force and effect of law." KCCA v. FSM, 5 FSM Intrm. 375, 377 (App. 1992). The Trust Territory (adopted by the FSM) sanitary toilet regulation that Berman and Damarlane rely on requires that "[n]o . . . privy shall be located, constructed or maintained so as to contaminate any potable water supply, and in no case shall any . . . privy (outside benjo) be located at a horizontal distance of less than fifty feet from any river, creek, pond, reservoir, stream, well, spring, or body of water . . . ." I FSM Regs. 571, Toilet Facilities & Sewage Disposal Regs. pt. 5.2.

A toilet located on a berm in a salt water lagoon cannot "contaminate any potable water supply"

because salt water is not potable water. ("Potable" means drinkable.) Regulatory language is interpreted the same way statutory language is. *See* FSM v. Nifon, 14 FSM Intrm. 309, 313 (Chk. 2006). By the regulation's plain language, part 5.2 applies only to toilet facilities that might contaminate sources of water that could be used for drinking purposes – potable water – in other words, fresh water. The salt-water lagoon is not a drinking water source. Several water sources, such as reservoir, spring, and well, that are used solely to obtain potable water are specifically listed in the regulation. The regulation does not mention lagoons or ocean or any such non-drinkable water sources. Only the term "body of water" might be construed as covering the lagoon, but in light of the regulation's clear intent to preserve potable water sources, it must be read as a catchall phrase meant to cover any other potential potable water source. The regulation does not apply to this toilet.

Even if we were to consider the regulation's language to be ambiguous, the same result would occur. When a law's plain language is ambiguous, a court may look to the law's purpose – the evil that it was intended to remedy – to interpret the law. *See* Combs v. International Ins. Co., 354 F.3d 568, 592 (6th Cir. 2004); United States ex rel. Steele v. Turn Key Gaming, Inc., 260 F.3d 971, 974 (8th Cir. 2001); United States *ex rel.* Shakope v. Pan Am. Mgt. Co., 616 F. Supp. 1200, 1217 (D. Minn. 1985). Looking at the regulation's purpose – the evil that this regulation is designed to prevent – it is the contamination of drinking water. It would thus not apply to this case as the Lagoon is not a possible potable water source since it is salt water. While it might be proven that the privy on the berm now leaks pollutants into the lagoon, that evil is not covered by this regulation. Contamination of potable fresh water was the evil that the regulation intended to remedy.

The trial court's denial of an injunction to remove the privy on the berm on the basis of the Toilet Facilities regulations was therefore not an abuse of discretion. It is affirmed on the ground that the regulation does not apply to the privy or toilet on the berm. We may affirm the trial court decision on a different theory or on a different grounds when the record contains adequate and independent support for that basis. Chuuk v. Actouka Executive Ins. Underwriters, 18 FSM Intrm. 111, 121 (App. 2011); FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 249 (App. 2006); Nahnken of Nett v. United States, 7 FSM Intrm. 581, 589 (App. 1996).

Berman and Damarlane are, however, not without remedies. They have another suit, Damarlane v. Damarlane, Civil Action No. 2011-004, an action for trespass and nuisance against the persons who operate the allegedly illegal bar business with the privy on the berm and causeway. If the facts alleged in that suit are proven and the suit is successful, a judgment of liability for nuisance could result in the removal of the business and its privy. Furthermore, if Berman and Damarlane prevail in this case and the PTA is ordered to get a permit and remove the berm, the toilet will be removed along with the berm. Berman and Damarlane indicated during argument that there were other regulations applicable to water pollution but that the Toilet Facilities regulation seemed most on point. On remand, the trial court, on application by Berman and Damarlane, shall develop a record about the extent to which those regulations may apply and whether Berman and Damarlane may obtain injunctive relief based on any of them.

C. *Remand and Damages*

As we noted above, money damages are not available in a private environmental protection lawsuit even if injunctive relief is available. Damarlane v. FSM, 8 FSM Intrm. 119, 121 (Pon. 1997). They are therefore not available in this case. We further note that Pohnpei cannot be held liable in this case for money damages for the actions of non-state actors (the bar business on the berm with the polluting toilet). Primo v. Pohnpei Transp. Auth., 9 FSM Intrm. 407, 412 (App. 2000). Costs are always available to the party who ultimately prevails, FSM Civ. R. 54(d), but attorney's fees are not available for pro se litigants even if they prevail, Berman v. Pohnpei, 17 FSM Intrm. 360, 375-76 (App.

2011).

Accordingly, on remand the case is limited to whether injunctive relief is available and, if so, the nature and extent of that relief.

V. Conclusion

Accordingly, we affirm the denial of the injunction to remove the toilet on the berm based on the regulation cited because that regulation does not apply to the situation; we affirm that the May 17, 1991 order in Civil Action No. 1990-075 is no longer valid and cannot support the issuance of an injunction; and we remand for the trial court to consider and develop a record on whether Dr. Pretrick's April 11, 1991 agency decision, the previously-issued earthmoving permits, and FSM statutory and regulatory law may require Pohnpei or the PTA to apply for and obtain an earthmoving permit to remove the Mesenpal berm or whether that agency decision combined with national statutory law would require Pohnpei to apply for an earthmoving permit to remove the Mesenpal berm. The parties shall bear their own costs.

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FSM SUPREME COURT APPELLATE DIVISION

MARY BERMAN and KADALINO DAMARLANE, Appellants, vs. FSM NATIONAL POLICE, FSM MARINE SURVEILLANCE POLICE, and FSM GOVERNMENT, Appellees.	)	APPEAL CASE NO. P7-2012 (Civil Action No. 2011-007)

OPINION

Argued: June 28, 2013
Decided: August 13, 2013

BEFORE:

Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court

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