

justice may therefore consider this opposed bill of costs. "The action of a single justice may be reviewed by the court." FSM App. R. 27(c).

Since the appellants prevailed by having the permanent injunction – a final decision – against them vacated and they are now in a position where either they or the other side may ultimately obtain a final judgment in their favor on remand. They are thus prevailing parties for the purpose of this appeal. Costs will be taxed in their favor. The appellees assert that the expense of service of the briefs should not be taxed because courier service costs are not taxable. However, costs of service of process are routinely awarded, but this \$15 was not for service of process but for the service of briefs. It will be disallowed. Postage is also considered overhead and generally not allowed as a cost. Expenses for postage and delivery services are disallowed because they are not a part of the usual costs recoverable under Appellate Rule 39. Santos v. Bank of Hawaii, 9 FSM Intrm. 306, 308 (App. 2000). The \$5 claimed for postage is thus disallowed.

Accordingly, the clerk shall tax costs in the amount of \$65 in the appellants' favor.

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FSM SUPREME COURT TRIAL DIVISION

FEDERATED STATES OF MICRONESIA,	)	CIVIL ACTION NO. 2013-1007
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
AICHIE MUTY,	)	
	)	
Defendant.	)	
_____	)	

ORDER GRANTING SUMMARY JUDGMENT

Ready E. Johnny  
Associate Justice

Decided: August 6, 2014

APPEARANCES:

For the Plaintiff:	Aaron L. Warren, Esq. Assistant Attorney General FSM Department of Justice P.O. Box PS-105 Palikir, Pohnpei FM 96941
For the Defendant:	Derensio S. Konman Micronesian Legal Services Corporation P.O. Box D Weno, Chuuk FM 96942

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#### HEADNOTES

##### Torts – Conversion

Conversion is the civil equivalent of theft. FSM v. Muty, 19 FSM R. 453, 457 n.1 (Chk. 2014).

##### Civil Procedure – Pleadings

Although general denials are disfavored, a pleader may make a general denial subject to the obligations of honesty in pleading set forth in Rule 11. An answer consisting of a general denial is available to a party acting in good faith only in the most exceptional cases. FSM v. Muty, 19 FSM R. 453, 457-58 n.2 (Chk. 2014).

##### Civil Procedure – Summary Judgment – Grounds

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The movant has the burden of showing a lack of triable issues of fact. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

##### Evidence – Hearsay

Evidence Rule 803(22) is an exception to the general rule that makes hearsay inadmissible. This exception allows evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment even when the declarant is available as a witness. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

##### Civil Procedure – Collateral Estoppel; Civil Procedure – Summary Judgment – Grounds; Evidence – Hearsay

Evidence Rule 803(22) merely makes a person's conviction admissible evidence. To make that evidence conclusive in a summary judgment motion, a plaintiff must rely on a legal principle known as collateral estoppel or issue preclusion. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

##### Civil Procedure – Collateral Estoppel

The collateral estoppel doctrine provides that a right, question, or fact which is distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent action between the same parties, even if the subsequent action is on a different cause of action. The prior judgment is not, however, conclusive as to matters which might have been, but were not, litigated and determined in the prior action. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

##### Civil Procedure – Collateral Estoppel

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim under the doctrine of collateral estoppel or issue preclusion, but not when a judgment is entered by stipulation or default since none of the issues are actually litigated. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

##### Civil Procedure – Collateral Estoppel

A prior criminal proceeding operates as an estoppel in a later civil proceeding so long as the question involved was distinctly put in issue and determined. Thus, when an issue is resolved in the government's favor in a criminal prosecution, the defendant may not contest that same issue in a subsequent civil suit brought by the government. FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014).

Criminal Law and Procedure – Pleas

A guilty plea is as an admission of all the elements of a formal criminal charge. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Criminal Law and Procedure – Pleas

A guilty plea constitutes an admission to all of the facts averred in the information. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Civil Procedure – Collateral Estoppel

The collateral estoppel doctrine applies to issues litigated in a criminal case which a party seeks to relitigate in a subsequent civil proceeding. In some instances, the criminal conviction may be a plea agreement: a defendant is precluded from retrying issues necessary to his plea agreement in a later civil suit. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Civil Procedure – Collateral Estoppel

A party who has pled guilty to a crime is collaterally estopped from relitigating elements of that crime in a subsequent civil proceeding. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Civil Procedure – Collateral Estoppel; Criminal Law and Procedure – Pleas

A plea of no contest or nolo contendere, a plea in which an accused does not expressly admit guilt but consents to be punished as if guilty, is insufficient to satisfy the actually litigated requirement and thus cannot be used to apply collateral estoppel or issue preclusion in a later civil proceeding. FSM v. Muty, 19 FSM R. 453, 459 n.3 (Chk. 2014).

Criminal Law and Procedure – Pleas

Although a guilty plea eliminates the need for a contested trial, the FSM Supreme Court cannot enter a judgment of conviction on the plea unless it determines that a factual basis exists for it. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Civil Procedure – Collateral Estoppel; Civil Procedure – Summary Judgment – Grounds – Particular Cases

The FSM has conclusively established that there are no triable issues of material fact that a defendant had fraudulently converted \$24,252.80 when the wrongdoing to which the defendant pled guilty and was convicted involved obtaining the \$24,252.80 but the FSM has not established the remaining part of its current claim that the defendant is liable to it for \$38,501.76 since that was not a question distinctly put at issue and determined in the defendant's prior criminal case so collateral estoppel or issue preclusion cannot be used to establish the defendant's liability for that larger sum. Any wrongdoing involved in obtaining the rest of the \$38,501.76 was not what the defendant pled guilty to and thus was not a question distinctly put at issue and determined in that criminal case. FSM v. Muty, 19 FSM R. 453, 459 (Chk. 2014).

Civil Procedure – Summary Judgment – Procedure

In order to succeed on a summary judgment motion, a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Civil Procedure – Collateral Estoppel

A defendant is collaterally estopped from arguing that the funds converted – the salary overpayments to her – were not national government funds, when that was an element of the offenses to which she pled guilty. That being so, she is precluded from denying that those funds were national government funds. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Compact of Free Association; Federalism – National/State Power

While a state may be designated as the administrator and allottee of Compact sector funds that are used to pay state employees, those funds are appropriated by the FSM Congress and remain subject to the provisions of the FSM Financial Management Act and the Compact of Free Association financial controls. The FSM Secretary of Finance has full and complete oversight over, and at all times full and complete access to all financial records for, all Compact funds of the state and national governments of the FSM. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Compact of Free Association; Constitutional Law – Case or Dispute – Standing

The FSM has standing to sue for conversion when it was Compact sector funds that were converted. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Statutes of Limitation

The general rule is that statutes of limitations do not run against the sovereign. The policy behind the rule is that the public interest should not be prejudiced by the negligence of public officials. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Statutes of Limitation; Torts – Conversion

Conversion has a six-year statute of limitations. FSM v. Muty, 19 FSM R. 453, 460 (Chk. 2014).

Statutes of Limitation – Accrual of Action; Torts – Fraud

In general, the statute of limitations in an action for fraud begins to run from the time of discovery of the fraud or when reasonable diligence should have led to discovery of the fraud. FSM v. Muty, 19 FSM R. 453, 460-61 (Chk. 2014).

Remedies – Restitution

Money withheld from wages for social security and income taxes does not count as restitution to the FSM of funds fraudulently converted from Compact sector grant money. FSM v. Muty, 19 FSM R. 453, 461 (Chk. 2014).

Civil Procedure – Pleadings

Pleadings do not have to be consistent. A party may plead in the alternative. FSM v. Muty, 19 FSM R. 453, 461 (Chk. 2014).

Civil Procedure – Collateral Estoppel; Civil Procedure – Summary Judgment – Grounds – Particular Cases

A plaintiff cannot use collateral estoppel to obtain summary judgment for an amount that was not a question distinctly put at issue and determined in the defendant's prior criminal case but can obtain partial summary judgment for the amount that was put at issue in the prior case with credit for the amount she had already paid. FSM v. Muty, 19 FSM R. 453, 461-62 (Chk. 2014).

Torts – Conversion; Torts – Damages

One whose property is converted is entitled to interest at the legal rate from the time of conversion. FSM v. Muty, 19 FSM R. 453, 462 (Chk. 2014).

Torts – Damages – Punitive

Punitive damages may be recoverable for conversion when the defendant's act was accompanied by fraud, or when they are authorized by statute. FSM v. Muty, 19 FSM R. 453, 462 (Chk. 2014).

Torts – Damages

Generally, statutes authorizing multiple damages are remedial and nonpunitive, particularly in anti-

trust cases. FSM v. Muty, 19 FSM R. 453, 462 n.4 (Chk. 2014).

Civil Procedure – Summary Judgment; Torts – Damages – Punitive

Liability for punitive damages is determined by the fact-finder after an evidentiary proceeding. This is in part because the tortfeasor's finances must be examined. Since the purpose of punitive damages is to punish the tortfeasor, not to compensate the victim, a defendant's financial condition is relevant to a punitive damages claim because the defendant's financial condition has a bearing on the amount of punitive damages that can be awarded. Punitive damages will therefore not be granted on summary judgment. FSM v. Muty, 19 FSM R. 453, 462 (Chk. 2014).

Attorney's Fees – Court-Awarded

Attorney's fees are awarded to the prevailing party only if authorized by contract or by statute. FSM v. Muty, 19 FSM R. 453, 462 (Chk. 2014).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on the plaintiff's Motion for Summary Judgment, filed February 24, 2014; the defendant's Opposition to Motion for Summary Judgment, filed April 7, 2014; and the plaintiff's Reply to Defendant's Response to Plaintiff's Motion for Summary Judgment, filed May 21, 2014. The motion is granted in the form described below.

I. BACKGROUND

On March 4, 2013, the FSM filed a criminal information charging Aichie Muty with aggravated theft and criminal mischief in relation to her receiving an increased classroom teacher salary based on her falsification of her academic credentials. The FSM charged that she falsely claimed to have an associate degree instead of just a high school diploma and as a result she was overpaid by \$275.60 per pay period for 88 pay periods (total overpayment: \$24,252.80) from pay period 21, 2009 to March 2013. Muty's teacher position was funded by the FSM national government through a United States Compact sector grant.

On July 30, 2013, Muty pled guilty to both counts and was sentenced on August 16, 2014. Her sentence included \$200 of "partial restitution." She has paid that \$200. Satisfaction of J. of Conviction (Crim. No. 2013-1500 Nov. 21, 2013).

On October 16, 2013, the FSM filed a civil complaint against Muty. The FSM, relying on conversion<sup>1</sup> and fraud causes of action, alleged that she was liable to it for her misrepresentation of her academic credentials that caused her to be overpaid from FSM funds. The FSM sought \$24,252.80 in compensatory damages, plus prejudgment interest from the dates of Muty's conversion of the funds; punitive damages; and attorney's fees. Muty's answer was close to a general denial<sup>2</sup> but included the

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<sup>1</sup> Conversion is the civil equivalent of theft. *Individual Assurance Co. v. Iriarte*, 16 FSM Intrm. 423, 443 (Pon. 2009).

<sup>2</sup> Although general denials are disfavored, a pleader may make a general denial subject to the obligations of honesty in pleading set forth in Rule 11. *People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No.*

affirmative defenses of failure to state a claim, statute of limitations, restitution, and lack of jurisdiction. The FSM was given leave to amend its complaint to add a cause of action for unjust enrichment and a prayer that sought \$38,501.76 in compensatory damages or restitution as that was Muty's full Classroom Teacher II salary paid by the national government. (The \$24,252.80 (overpayment) was the difference between Muty's Classroom Teacher II salary and a Classroom Teacher I salary which her educational credentials qualified her for.)

The FSM now moves for summary judgment on its claims, arguing that Muty's conviction in Criminal Case No. 2013-1500 is conclusive evidence of her liability and that there are therefore no issues of material fact genuinely in dispute.

## II. COLLATERAL ESTOPPEL

A court, viewing the facts presented and inferences made in the light most favorable to the nonmoving party, must deny a summary judgment motion unless it finds there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Nanpei v. Kihara, 7 FSM Intrm. 319, 323 (App. 1995). The movant has the burden of showing a lack of triable issues of fact. *Id.* The FSM asserts that it has met this burden by use of Muty's Judgment of Conviction in Criminal Case No. 2013-1500, which it says is, under FSM Evidence Rule 803(22), admissible and conclusive proof of Muty's liability.

Rule 803(22) is an exception to the general rule that makes hearsay inadmissible. This exception allows "[e]vidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment" even when the declarant is available as a witness. FSM Evid. R. 803(22). The FSM's confidence in this rule's reach is misplaced. Evidence Rule 803(22) merely makes Muty's conviction admissible evidence. To make that evidence conclusive, the FSM must rely on a legal principle known as collateral estoppel or issue preclusion.

The collateral estoppel doctrine provides that a right, question, or fact which is distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent action between the same parties, even if the subsequent action is on a different cause of action. Berman v. FSM Supreme Court (II), 7 FSM Intrm. 11, 16 (App. 1995). The prior judgment is not, however, conclusive as to matters which might have been, but were not, litigated and determined in the prior action. *Id.* When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim under the doctrine of collateral estoppel or issue preclusion, but not when a judgment is entered by stipulation or default since none of the issues are actually litigated. Mid-Pacific Constr. Co. v. Semes (II), 6 FSM Intrm. 180, 185 & n.3 (Pon. 1993).

A prior criminal proceeding operates as an estoppel in a later civil proceeding so long as the question involved was distinctly put in issue and determined. McNally v. Pulitzer Publ'g Co., 532 F.2d 69, 76 (8th Cir. 1976). Thus, when an issue is resolved in the government's favor "in a criminal prosecution, the defendant may not contest that same issue in a subsequent civil suit brought by the government." United States v. Nardone, 782 F. Supp. 996, 998 (M.D. Pa. 1990). The argument has been made that a conviction on a guilty plea means that the criminal case's merits have not been fully

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168, 18 FSM Intrm. 284, 289 (Yap 2012). An answer consisting of a general denial will be available to a party acting in good faith only in the most exceptional cases. *Id.*

litigated and that therefore collateral estoppel should not apply. This argument has been rejected. "[A] guilty plea is as an admission of all the elements of a formal criminal charge." McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 1171, 22 L. Ed. 2d 418, 425 (1969). "[I]t is well settled that a guilty plea constitutes an admission to all of the facts averred in the [information]." Commonwealth Dep't of Transp. v. Mitchell, 535 A.2d 581, 585 (Pa. 1987). The collateral estoppel doctrine applies "to issues litigated in a criminal case which a party seeks to relitigate in a subsequent civil proceeding. In some instances, the criminal conviction may be a plea agreement: a defendant is precluded from retrying issues necessary to his plea agreement in a later civil suit." United States v. Wight, 839 F.2d 193, 196 (4th Cir. 1987).

Thus, a party who has pled guilty to a crime is collaterally estopped from relitigating elements of that crime in a subsequent civil proceeding.<sup>3</sup> *E.g.*, Jiron v. City of Lakewood, 392 F.3d 410, 417 (10th Cir. 2004); Appley v. West, 832 F.2d 1021, 1026 (7th Cir. 1987) (acknowledging "a guilty plea may be used to establish issue preclusion in a subsequent civil suit"); Gray v. Commissioner, 708 F.2d 243, 246 (6th Cir. 1983) (conviction for income tax evasion, either on guilty plea or on a jury verdict of guilt, conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of collateral estoppel doctrine); In re Raiford, 695 F.2d 521, 523 (11th Cir. 1983) (judgment based on guilty plea has same collateral effect as any other criminal conviction because criminal standard of proof is higher and greater procedural protections are attached, "a conviction is sufficiently reliable determination of the relevant issue"); Fontneau v. United States, 654 F.2d 8, 10 (1st Cir. 1981) (conviction for income tax evasion, either on guilty plea or on a jury verdict of guilt, conclusively establishes fraud in a subsequent civil tax fraud proceeding through application of collateral estoppel doctrine); United States v. Podel, 572 F.2d 31, 35 (2d Cir. 1978) (well settled that conviction by guilty plea constitutes estoppel in the government's favor); United States v. Ben Grunstein & Sons Co., 127 F. Supp. 907, 909-11 (D.N.J. 1955) (guilty plea to conspiracy to defraud the U.S. by obtaining payment of a knowingly false claim estopped defendants from relitigating conspiracy issue in civil suit under False Claims Act).

Although a guilty plea eliminates the need for a contested trial, the FSM Supreme Court cannot enter a judgment of conviction on the plea unless it determines that a factual basis exists for it. FSM Crim. R. 11(f). *See, e.g.*, In re Raiford, 695 F.2d at 523 (guilty plea has same collateral estoppel effect because of colloquy required by Rule 11 under which court cannot enter judgment on the plea unless it determines there was a factual basis for it); Fontneau, 654 F.2d at 10 (guilty plea collaterally estops defendant because he had "a full and fair opportunity to litigate the issue in question to a final conclusion"); Ben Grunstein & Sons Co., 127 F. Supp. at 909-10 (formal admission of guilt in a guilty plea at times given greater scope than a conviction after trial where the defendant denied his guilt).

The FSM has therefore conclusively established that there are no triable issues of material fact that Muty fraudulently converted \$24,252.80. The remaining part of the FSM's current claim that Muty is liable to it for \$38,501.76 was not a question distinctly put at issue and determined in Muty's prior criminal case so collateral estoppel or issue preclusion cannot establish Muty's liability for that larger sum. That is, it was the wrongdoing involved in obtaining the \$24,252.80 to which Muty pled guilty and was convicted. Any wrongdoing involved in obtaining the rest of the \$38,501.76 was not what Muty pled guilty to and thus was not a question distinctly put at issue and determined in that criminal case.

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<sup>3</sup> But a plea of no contest or nolo contendere, a plea in which an accused does not expressly admit guilt but consents to be punished as if guilty, is insufficient to satisfy the actually litigated requirement and thus cannot be used to apply collateral estoppel or issue preclusion in a later civil proceeding. *See, e.g.*, Klen v. City of Loveland, 661 F.3d 498, 516 (10th Cir. 2011); Lichon v. American Universal Ins. Co., 459 N.W.2d 288, 298 (Mich. 1990).

III. AFFIRMATIVE DEFENSES

But, in order to succeed on a summary judgment motion, a movant plaintiff must also overcome all affirmative defenses that the defendant has raised. Chuuk Health Care Plan v. Pacific Int'l, Inc., 17 FSM Intrm. 535, 538 (Chk. 2011). Muty, in her amended answer, raised as affirmative defenses: failure to state a claim, statute of limitations, restitution, and lack of jurisdiction.

A. *Failure to State a Claim and Jurisdiction (Standing)*

In her opposition to the FSM's motion, Muty combines the failure to state a claim and lack of jurisdiction grounds into a defense that the FSM lacks standing to sue her because she was a state employee and any funds that were converted were state funds, not FSM funds, and that therefore the FSM Supreme Court lacks jurisdiction since it would be the State of Chuuk, not the FSM, that would be the proper party (that is, have standing) to sue for the recovery of funds.

Muty is collaterally estopped from making this argument. That the funds converted – the salary overpayments to her – were national government funds, was an element of the offenses to which she pled guilty. That being so, she is now precluded from denying that those funds were national government funds.

Furthermore, Muty concedes that she was paid from Compact sector funds. While a state may be designated as the administrator and allottee of Compact sector funds that are used to pay state employees such as Muty, those funds are appropriated by the FSM Congress and remain subject to the provisions of the FSM Financial Management Act and the Compact of Free Association financial controls. See, e.g., FSM Pub. L. No. 15-71, § 9(1)(a), 15th Cong., 6th Reg. Sess. (2009). The FSM Secretary of Finance has "full and complete oversight over, and at all times full and complete access to all financial records for, all Compact funds of the State and National governments of the Federated States of Micronesia." 55 F.S.M.C. 309. The state law that Muty relies on to assert that her salary was state funds, Chk. S.L. No. 10-09-03, is the state budget that lists "Compact Sectorial Grants" as part of "Anticipated Revenues." *Id.* § 1(1)(a)(1)a).

Accordingly, the court concludes that the FSM has standing. The court therefore has exclusive jurisdiction over the FSM's claims in this case. FSM Const. art. XI, § 6(a).

B. *Statutes of Limitation*

Muty also contends that the statute of limitations must bar any recovery of at least some of the funds since many of the dates of the alleged conversion of those funds are over two years before this lawsuit was filed.

This defense will not bar the FSM from recovery. "The general rule is that statutes of limitations do not run against the sovereign. The policy behind the rule is that the public interest should not be prejudiced by the negligence of public officials." FSM Dev. Bank v. Yap Shipping Coop., 3 FSM Intrm. 84, 86 (Yap 1987). The statute of limitations is thus not a defense available to Muty.

But even if the statute of limitations did run against the FSM national government, Muty still could not prevail on that defense. Conversion is not one of the claims or causes of action enumerated in the two-year statute of limitations. 6 F.S.M.C. §§ 803, 804. It therefore has a six-year statute of limitations. 6 F.S.M.C. 805. Thus, even if the statute of limitations were to run against the national government, it still would not bar the FSM's conversion claims against Muty. The same would be true for the FSM's fraud cause of action. Since, in general, the statute of limitations in an action for fraud



begins to run from the time of discovery of the fraud, or when reasonable diligence should have led to discovery of the fraud, Mid-Pacific Constr. Co. v. Semes (I), 6 FSM Intrm. 171, 177 (Pon. 1993), and since the fraud was discovered in early 2013, the statute of limitations could not have run for the FSM's fraud cause of action either.

The FSM has overcome Muty's statute of limitations defense.

### C. *Restitution*

Muty does not develop this affirmative defense but she seems to base it on her claim that since income taxes and social security taxes were withheld from her paychecks, the FSM national government has already obtained the return of those sums withheld and that she should not have to pay restitution to the FSM national government for those amounts.

The court must reject this argument. First, the social security taxes go to an independent agency and go into a fund "separate and apart from all public monies or funds of the Federated States of Micronesia, [and] which [are] administered by the Social Security Administration exclusively" for social security purposes and not for anything else. 53 F.S.M.C. 1001. Muty may receive future benefits based on her payment into that fund. Second, the money withheld for income taxes went into the FSM general fund, which has since been appropriated for whatever purpose Congress chose. The funds Muty fraudulently converted came from Compact sector grant money. Except for the \$200 partial restitution paid as part of the criminal sentence, Muty has not returned any money to the Compact sector grant funds.

### D. *Inconsistent Unjust Enrichment Pleading*

Muty asserts that the FSM cannot seek summary judgment on both its conversion and its unjust enrichment causes of action. Muty contends that the FSM must choose between those causes of action because they are mutually exclusive.

The FSM's pleadings do not have to be consistent. "A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." FSM Civ. R. 8(e)(2). "A party may plead in the alternative." People of Eauripik ex rel. Sarongelfeg v. F/V Teraka No. 168, 18 FSM Intrm. 307, 315 (Yap 2012).

However, since under its unjust enrichment cause of action, the FSM asserts that Muty was unjustly enriched by \$38,501.76 and the court has just denied summary judgment on the FSM's claim for that figure because Muty cannot be collaterally estopped from contesting that amount, the court does not have to address Muty's inconsistent pleading defense to the FSM's unjust enrichment cause of action now.

## IV. DAMAGES

### A. *Compensatory*

#### 1. *Amount*

The FSM seeks as compensatory damages \$38,501.76, Muty's full salary as a Classroom Teacher II on the ground that the FSM paid for a Classroom Teacher II and did not get one. This was not a question distinctly put at issue and determined in Muty's criminal case. That case distinctly put in issue and determined the question that Muty was qualified to be paid as a Classroom Teacher I, but,

because of her falsification of her academic credentials, committed criminal mischief and aggravated theft of \$24,252.80 (\$275.60) by being paid as a Classroom Teacher II for 88 pay periods. The FSM has shown there is no dispute as to the material fact that Muty is liable to it for this sum. Therefore, on the summary judgment before it, the court can grant the FSM partial summary judgment for \$24,052.80, giving Muty credit for the \$200 partial restitution she has already paid.

## 2. *Prejudgment Interest*

The FSM asks that it be awarded pre-judgment interest. One whose property is converted is entitled to interest at the legal rate from the time of conversion. Phillip v. Marianas Ins. Co., 12 FSM Intrm. 464, 471 (Pon. 2004); Bank of Guam v. Nukuto, 6 FSM Intrm. 615, 616 (Chk. 1994). When prejudgment interest is awarded in a conversion case, the interest starts running on the date of the conversion. Iriarte v. Individual Assurance Co., 18 FSM Intrm. 340, 363 (App. 2012).

In Iriarte, the court found it too difficult to calculate all the various dates on which pre-judgment interest might start to accrue and so set the prejudgment interest starting date as the most recent possible date. Individual Assurance Co. v. Iriarte, 16 FSM Intrm. 423, 449 (Pon. 2009). When challenged by a defendant, this was affirmed on appeal because any determination of the precise dates for each conversion could only work to the challenger's detriment. Iriarte v. Individual Assurance Co., 18 FSM Intrm. 340, 364 (App. 2012). In this case, the court will start the prejudgment interest at the last possible conversion date on March 4, 2013.

## B. *Punitive Damages*

The FSM asks that punitive damages, treble the amount of actual damages, be imposed. Punitive damages may be recoverable for conversion where the defendant's act was accompanied by fraud. Iriarte, 16 FSM Intrm. at 441-42; Bank of Hawaii v. Air Nauru, 7 FSM Intrm. 651, 653 (Chk. 1996), or when they are authorized by statute.<sup>4</sup> It is undisputed that Muty's conversion was accompanied by fraud.

Liability for punitive damages is determined by the fact-finder after an evidentiary proceeding. 22 AM. JUR. 2D *Damages* §986 (rev. ed. 1988). This is in part because the tortfeasor's finances must be examined. Since the purpose of punitive damages is to punish the tortfeasor, not to compensate the victim, a defendant's financial condition is relevant to a punitive damages claim because the defendant's financial condition has a bearing on the amount of punitive damages that can be awarded. Herman v. Municipality of Patta, 12 FSM Intrm. 130, 139 (Chk. 2003) (when defendant with no net worth and no income is liable for punitive damages in addition to a substantial damage award, only a nominal punitive damage award of \$1 is proper). It is therefore inappropriate to award parties punitive damages on summary judgment. See Centrifugal Acquisition Corp. v. Moon, 849 F. Supp. 2d 814, 839 (E.D. Wis. 2012). If the FSM intends to pursue punitive damages, an evidentiary hearing will be needed. Punitive damages will not be granted on summary judgment.

## C. *Attorney's Fees*

The FSM is the prevailing party. Attorney's fees are awarded to the prevailing party only if authorized by contract or by statute. FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 256 (App. 2006).

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<sup>4</sup> But "[g]enerally, statutes authorizing multiple damages are remedial and nonpunitive, particularly in anti-trust cases." Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 20 (App. 2006) (construing the treble damages statute, 32 F.S.M.C. 306(2), for anticompetitive practices).

The FSM has not shown that any contract or statute authorizes its request for attorney's fees and none are apparent. It is therefore denied.

V. CONCLUSION

Accordingly, based on collateral estoppel and issue preclusion, the FSM is granted partial summary judgment in the amount of \$24,052.80 with 9% interest thereon starting March 4, 2013. The FSM shall file and serve, no later than August 26, 2014, its statement on whether it will proceed on its remaining claims and its proposal for future proceedings.

\* \* \* \*

FSM SUPREME COURT TRIAL DIVISION

KANNY KON,	)	CIVIL ACTION NO. 2012-1033
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK STATE,	)	
	)	
Defendant.	)	
_____	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ready E. Johnny  
Associate Justice

Trial: April 28, 2014  
Submitted: May 26, 2014  
Decided: August 11, 2014

APPEARANCES:

For the Plaintiff: Derensio S. Konman, Esq.  
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\* \* \* \*