

FSM SUPREME COURT TRIAL DIVISION

IN RE CONTEMPT OF MARSTELLA JACK,)	CIVIL ACTION NO. 2001-056
_____)	
COCA-COLA BEVERAGE CO.,)	
)	
Plaintiff,)	
)	
vs.)	
)	
BERNARD'S ENTERPRISES, INC.,)	
)	
Defendant.)	
_____)	

ORDER DENYING MOTION TO VACATE AND ADJUSTING ATTORNEY'S FEES

Dennis K. Yamase
Chief Justice

Hearing: March 14, 2016
Decided: June 8, 2016

APPEARANCES:

For the Plaintiff: Michael A. White, Esq.
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HEADNOTES

Judgments – Relief from Judgment

Rule 60(b)(6) is a grand reservoir of equitable power to do justice in a particular case, subject to the requirement that the provision is applicable only when there is a basis for relief different from those enumerated in subsections (1) through (5) of Rule 60(b), and when extraordinary circumstances exist for justifying relief. In re Contempt of Jack, 20 FSM R. 452, 459 (Pon. 2016).

Judgments – Relief from Judgment

The "extraordinary circumstances" required for Rule 60(b)(6) relief usually means that the movant himself or herself was not at fault for his or her predicament, and conversely, the usual implication of fault on the movant's part is that there are no "extraordinary circumstances." Relief under Rule 60 is simply not appropriate where a party has demonstrated a pattern of delay and neglect. In re Contempt of Jack, 20 FSM R. 452, 459 (Pon. 2016).

Judgments – Relief from Judgment

Rule 60(b) is not meant to relieve a party from its own carelessness and neglect, or from its counsel's carelessness and neglect. Rule 60(b) relief is precluded when the complained of injuries result solely from the carelessness or neglect of the moving party, or of the moving party's counsel, except when the neglect itself is excusable under FSM Civil Rule 60(b)(1). *In re Contempt of Jack*, 20 FSM R. 452, 459 (Pon. 2016).

Judgments – Relief from Judgment

Rule 60(b)'s purpose is to provide the trial court with a tool for navigating between the conflicting principles that litigation must be brought to an end and that justice should be done. To meet this intended purpose, Rule 60(b), which combines aspects of both law and equity, reposes a high degree of discretion in the trial court. *In re Contempt of Jack*, 20 FSM R. 452, 460 (Pon. 2016).

Judgments – Relief from Judgment – Grounds

With the exception of void judgments under Rule 60(b)(4), the grant or denial of relief under Rule 60 rests with the trial court's sound discretion, but that discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles, and the factors that should inform the court's consideration are: 1) that final judgments should not lightly be disturbed; 2) that the Rule 60(b) motion is not to be used as a substitute for appeal; 3) that the rule should be liberally construed in order to achieve substantial justice; 4) whether the motion was made within a reasonable time; 5) whether (if the judgment was a default or a dismissal in which the merits were not considered) the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; 6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; 7) whether there are intervening equities that would make it inequitable to grant relief; and 8) any other factors relevant to the justice of the judgment under attack. *In re Contempt of Jack*, 20 FSM R. 452, 460 & n.3 (Pon. 2016).

Judgments – Relief from Judgment – Grounds

Rule 60(b) is not intended as a substitute for a direct appeal from an erroneous judgment. The fact that a judgment is erroneous does not constitute a ground for relief under the Rule. Nor is Rule 60(b) designed to circumvent the policy evidenced by the rule limiting the time for appeal. *In re Contempt of Jack*, 20 FSM R. 452, 460 (Pon. 2016).

Judgments – Relief from Judgment – Time Limits

A Rule 60(b) motion must be made within a reasonable time. A factor to consider in determining whether Rule 60(b) relief has been sought within a reasonable time is whether good reason has been presented for failure to act sooner. *In re Contempt of Jack*, 20 FSM R. 452, 460 (Pon. 2016).

Judgments – Relief from Judgment – Time Limits

If a court's legal error were considered a "mistake" under Rule 60(b)(1), or if relief is sought under Rule 60(b)(6) for error involved a fundamental misconception of law, the "reasonable time" for a motion of this kind may not exceed the time in which appeal might have been taken a reasonable time for a motion to relief cannot exceed the 42-day time limit provided by FSM Appellate Rule 4(a)(1). Rule 60(b)(6)'s broad power is not for the purpose of relieving a party from free, calculated, and deliberate choices he or she has made. It is ordinarily not permissible to use a Rule 60(b) motion to remedy a failure to take an appeal. *In re Contempt of Jack*, 20 FSM R. 452, 460-61 (Pon. 2016).

Contempt

The court's first duty in reviewing a contempt judgment is to determine whether the nature of the contempt proceeding was civil or criminal. That the court earlier characterized the contempt as civil

or criminal is not conclusive. *In re Contempt of Jack*, 20 FSM R. 452, 461 & n.5 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. The purpose of a civil contempt is remedial or compensatory, while the purpose of a criminal contempt is punitive. *In re Contempt of Jack*, 20 FSM R. 452, 461 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority but also seeking to give effect to the law's purpose of modifying the contemnor's behavior. The confusion between civil and criminal contempt arises as a result of civil contempt often having the incidental effect of vindicating the court's authority, while, conversely, criminal contempt may permit the movant to derive the incidental benefit of preventing future noncompliance. *In re Contempt of Jack*, 20 FSM R. 452, 461 n.7 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

The distinction between civil and criminal contempt is that the former is prospective, while the latter is retrospective, which is to say that a civil contempt proceeding's purpose is to bring about compliance with a court order, while the criminal contempt's purpose is to punish for past wrongful conduct. *In re Contempt of Jack*, 20 FSM R. 452, 461-62 (Pon. 2016).

Contempt – Criminal

Criminal contempt is retrospective and is punishment for past wrongful conduct. It is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order. *In re Contempt of Jack*, 20 FSM R. 452, 462 (Pon. 2016).

Contempt – Civil

The relief granted in civil contempt proceedings, is compensatory or coercive. This often takes the form of a fine in the amount of the damage sustained by the plaintiff and an award of costs and attorney's fees. *In re Contempt of Jack*, 20 FSM R. 452, 462 (Pon. 2016).

Contempt – Civil

The sanction of civil contempt serves two remedial purposes, 1) to enforce compliance with a court order, and 2) to compensate for losses caused by noncompliance. *In re Contempt of Jack*, 20 FSM R. 452, 462 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

The distinction between civil and criminal contempt is somewhat elusive and has plagued the courts. Contempt proceedings, while usually called civil or criminal, are, strictly speaking, neither civil nor criminal but are instead *sui generis*. They partake of the characteristics of both but are procedurally different from other actions. Despite the verbiage used to designate them, they are neither wholly civil or criminal. Thus, criminal contempt is often said not to be a crime at all. *In re Contempt of Jack*, 20 FSM R. 452, 462-63 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

Generally, civil contempt invokes the rules of civil procedure, and criminal contempt invokes the rules of criminal procedure. *In re Contempt of Jack*, 20 FSM R. 452, 463 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

Even though the court chooses to sanction an attorney with a civil contempt, that does not

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prohibit the court from also sanctioning the attorney with a criminal contempt. The choice is not mutually exclusive and a single contumacious act may in fact necessitate both. *In re Contempt of Jack*, 20 FSM R. 452, 463 n.8 (Pon. 2016).

Contempt – Civil

A contempt sanction is compensatory and correctly characterized as a civil contempt action when it goes directly to the aggrieved party's benefit, not to the state's; when the attorney's fee award is not a fixed fine, but is dependent on actual injuries incurred, and demonstrated in the record; and when the show cause hearing was ordered following a motion by the plaintiff, and not prosecuted separately by the government, nor brought *sua sponte* by the court itself. While it is true that the attorney did not have the ability to purge for her absence, as this is an act which has already occurred, the excuse is contemporaneous with the finding. *In re Contempt of Jack*, 20 FSM R. 452, 463 (Pon. 2016).

Contempt – Direct; Contempt – Indirect

The court's second duty in reviewing a contempt action is to determine if the contempt was direct or indirect. Each class of contempt has two subcategories, direct and indirect. Thus there are four possible classifications of contempt: direct-criminal, indirect-criminal, direct-civil, and indirect-civil. *In re Contempt of Jack*, 20 FSM R. 452, 463 (Pon. 2016).

Contempt – Direct

A direct contempt is used by the court to protect itself against gross violations of decorum. All of the essential elements of the misconduct are under the eye of the court. Direct contempt includes words, acts, or omissions that present an imminent threat to the administration of justice; it must immediately imperil the judge in the performance of his judicial duty. *In re Contempt of Jack*, 20 FSM R. 452, 463 (Pon. 2016).

Contempt – Acts Constituting; Contempt – Civil; Contempt – Indirect

Generally, the failure to obey a court's order is considered civil contempt, and when the refusal takes place outside of the court's presence, it is an indirect civil contempt. Because the court has no personal knowledge of the indirect contempt, the acts must be proven through the testimony of third parties or the contemnor. Thus minimal due process requirements apply to indirect contempts. *In re Contempt of Jack*, 20 FSM R. 452, 463-64 (Pon. 2016).

Contempt – Acts Constituting; Contempt – Direct

An attorney's absence alone does not constitute contempt, but if the attorney offers an insulting, frivolous, or clearly inadequate explanation, a direct contempt has been committed in the presence of the judge. Patently false, flippant, inconsistent, contradictory, and evasive replies support a contempt finding, as does an attorney's refusal to give any explanation for his or her absence or lateness in arriving for a trial or hearing since that is the equivalent of the lack of a valid excuse. *In re Contempt of Jack*, 20 FSM R. 452, 464 n.10 (Pon. 2016).

Contempt – Acts Constituting; Contempt – Indirect

Contemptuous behavior includes not only intentionally avoiding a hearing, but also intentionally arriving late for a hearing. Thus, failure to appear or even tardiness may be treated as an indirect civil contempt pursuant to 4 F.S.M.C. 119(2)(a), or as an indirect criminal contempt pursuant to 4 F.S.M.C. 119(2)(b), or both. But in either case, it cannot be treated summarily. *In re Contempt of Jack*, 20 FSM R. 452, 464 (Pon. 2016).

Contempt – Civil; Contempt – Indirect

If the court elects to pursue an attorney's absence as a civil contempt under 4 F.S.M.C.

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119(2)(a), the accused has a right to notice of the charges and an opportunity to present a defense and mitigation. In a civil contempt proceeding, this due process requirement is usually met through a show cause hearing where the defendant is given the opportunity to explain or justify the failure to appear. *In re Contempt of Jack*, 20 FSM R. 452, 464 (Pon. 2016).

Contempt – Civil; Evidence – Burden of Proof

The movant bears the burden of establishing the elements of civil contempt by clear and convincing evidence, which is a higher standard than the preponderance of the evidence standard, common in civil cases, although not as high as beyond a reasonable doubt. *In re Contempt of Jack*, 20 FSM R. 452, 464 (Pon. 2016).

Appellate Review – Standard – Criminal Cases; Contempt – Criminal; Evidence – Burden of Proof

The standard of review for a criminal contempt conviction under 4 F.S.M.C. 119(1)(b), like the standard for any criminal conviction, is whether the appellate court can conclude that the trier of fact reasonably could have been convinced beyond a reasonable doubt. *In re Contempt of Jack*, 20 FSM R. 452, 464 n.11 (Pon. 2016).

Contempt – Acts Constituting; Evidence – Burden of Proof

A contemnor's intent must be ascertained from all the acts, words, and circumstances surrounding the occurrence. Ultimately, most *bona fide* representations tend to excuse, but cannot justify the act. Notably, an attorney's good faith belief that they were not obligated to appear at that time may be accepted or rejected. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

Contempt – Civil; Evidence – Burden of Proof

The clear and convincing standard will be applied to the evidence in a civil contempt case. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

The court has the power to punish any intentional disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command and may do so either criminally or civilly, but the standard is not the same. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

Contempt – Criminal; Criminal Law and Procedure – Standard of Proof

The element that escalates contempt to criminal status is the level of willfulness associated with the conduct. Criminal intent is a specific intent to consciously disregard an order of the court. Criminal intent is defined by 11 F.S.M.C. 104(4) as acting with the conscious purpose to engage in the conduct specified. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

Contempt – Civil; Contempt – Criminal; Criminal Law and Procedure – Standard of Proof

Civil intent can be demonstrated by general intent, or by knowledge defined in 11 F.S.M.C. 104(5) as being aware of the nature of the conduct or omission which brings the conduct or omission within the provision of the code. This standard is expressly distinguished from mere negligence, a negligent act is one born of inattention or carelessness – the opposite of an intended act. An act, not willfully intending the result, creating a substantial risk of the unlawful result, is not an act done purposefully or intentionally. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

Contempt

There are four states of culpability which establish the requisite mental element: intentional, knowing, reckless, and negligent, but only the first two subjective states of mind, intent or knowledge, can be used to support a contempt finding. *In re Contempt of Jack*, 20 FSM R. 452, 465 (Pon. 2016).

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Contempt – Civil

The civil standard of volition is "knew and had the ability to comply." Thus, the court may not punish a contemnor for civil contempt when the contemnor lacks the ability, through no fault of his own, to comply with the order. It is not enough to find that noncompliance was willful, as shown by knowledge of the order; there still must also be a recital – a finding in the record – that there was an ability to comply. In re Contempt of Jack, 20 FSM R. 452, 465 (Pon. 2016).

Contempt – Civil; Contempt – Criminal

An attorney's representation that she forgot about the hearing, will not be accepted and the attorney will be found in contempt when she filed a motion to continue the hearing only a few days before the scheduled hearing and when, in her motion for relief, she represents that she assumed the court would grant her motion to continue and if she had known that the court would not approve her motion she would have called in telephonically. In re Contempt of Jack, 20 FSM R. 452, 466 (Pon. 2016).

Contempt – Acts Constituting

Although an act of negligence is not sufficient to support a finding of contempt, an act of willful neglect is. Thus, while a single act of negligence is usually not sufficient by itself to support a finding of contempt, a pattern of neglect can give rise to the inference of an intentional design to disobey. In re Contempt of Jack, 20 FSM R. 452, 466 (Pon. 2016).

Attorney and Client – Appearance

Being off-island does not prohibit an attorney from appearing telephonically. In re Contempt of Jack, 20 FSM R. 452, 466 (Pon. 2016).

Contempt – Acts Constituting

When an attorney's off-island notice was filed several weeks after a court order set the hearing date; when the off-island notice's filing indicates that the attorney knew of the conflict over a month in advance, but failed to notify the court until the last minute; and when the attorney never notified the opposing counsel, the off-island notice cannot be used to imply that the court scheduled the hearing in error since the attorney had a professional duty to not only notify the court, but also the opposing party in a timely manner in order to reschedule the hearing. While this alone is not contemptuous, it can be used as further support the inference of intent to disobey a court order when supported by a pattern or other similar acts and omissions drawn from the surrounding circumstances. Collectively, the attorney's acts and omissions form a pattern and indicate that she knew her duty, had the ability to perform it, and willfully neglected to perform it. In re Contempt of Jack, 20 FSM R. 452, 466 (Pon. 2016).

Contempt

In finding contempt, the court must first determine whether the contempt was a civil contempt or criminal contempt; second it must determine whether the contempt was direct or indirect – whether it was committed in the court's presence or not; and third, it must determine, by a clear and convincing standard, that the defendant intentionally disobeyed a court order. In re Contempt of Jack, 20 FSM R. 452, 467 (Pon. 2016).

Contempt – Civil

The moving party must show that the contemnor knew and had the ability to comply. This culpable state of mind can be ascertained through the words, acts and surrounding circumstances of the case, including a previous pattern of delay and neglect. If the court so finds, a civil sanction compensating the other party for costs and attorney's fees is appropriate. In re Contempt of Jack, 20 FSM R. 452, 467 (Pon. 2016).

Contempt – Acts Constituting

When an attorney failed to appear as required and the court held a show cause hearing to determine why she failed to appear at the scheduled hearing; when, after receiving her explanation, the court found her in contempt because she knew of the hearing and had the ability to appear, at least telephonically; and when this was supported in the record, clearly and convincingly, this was an act of intentional disobedience of a court order within the meaning of 4 F.S.M.C. 119(1)(b), and a sanction will be imposed that is not punitive but which is made to compensate the opposing party for losses he incurred. In re Contempt of Jack, 20 FSM R. 452, 467 (Pon. 2016).

Attorney's Fees – Court-Awarded

The court, when making an attorney's fee award, can only award reasonable attorney's fees based on the customary fee in the locality where the case is, or will be tried. In re Contempt of Jack, 20 FSM R. 452, 467 (Pon. 2016).

Contempt

An attorney who is again found in contempt in a case, may be subject to further payments to compensate the opposing party for any additional attorney's fees and costs. In re Contempt of Jack, 20 FSM R. 452, 467 (Pon. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On March 14, 2016, the court held a show cause hearing for failure to pay attorney's fees. The plaintiff was represented by attorney Michael White, Esq. (White) and the defendant was represented by Marstella Jack, Esq. (Jack). During this hearing, Jack explained that she had not paid the attorney's fees as ordered on January 13, 2014, because the court had not yet ruled on her Motion to Vacate Order Finding Contempt and Awarding Attorney's Fees. The court does so now.

I. FACTS

On January 10, 2014, the court found Jack in contempt of court for her failure to appear for a scheduled hearing on June 10, 2013.¹ On March 21, 2013, this court scheduled the aforementioned hearing for June 10, 2013, because the defendant failed to appear at a prior hearing². On May 28, 2013, Jack filed a notice with the court that she would be off-island from June 7 to 21, 2013, but the record shows this notice was delivered two weeks after the June 10, 2013 hearing had already been scheduled. Additionally, on June 7, 2013, three days prior to the hearing date, Jack filed a Motion to Continue, notifying the court that she would be off-island and unable to attend the proceedings. The motion to continue did not contain a Rule 6(d) certification and White testified that he did not receive service of this motion.

After Jack failed to appear, a show cause hearing was set for January 6, 2014, but due to a court error, Jack was not served with this order. The court then rescheduled the hearing for the next

¹ On June 10, 2013, this court held a hearing, but Jack failed to appear.

² The prior hearing was set for December 17, 2012. The absence at this earlier hearing was excused based on medical necessity.

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day, January 7, 2014, and served Jack with notice. After Jack was given the opportunity to explain her absence, she was found in contempt and the plaintiff's counsel was ordered to submit to the court reasonable expenses incurred in preparation for, and attendance at the hearing. This order was issued on January 10, 2014.

On February 4, 2014, White submitted his reasonable expenses and attorney's fees of \$304.33. On March 19, 2014, the court found the submitted expenses reasonable and required Jack to compensate the plaintiff in the amount of \$304.33 before the next scheduled hearing in this matter on July 28, 2014. On June 28, 2014, Jack filed a motion for relief from judgment pursuant to FSM Civil Rule 60(b)(6).

II. RELIEF FROM JUDGMENT

Under FSM Civil Rule 60(b), the court has the discretion to grant relief from any judgment or order:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Subsection (6) has been described as a "'grand reservoir of equitable power to do justice in a particular case,'" subject to the requirement that the provision is applicable only where there is a basis for relief different from those enumerated in subsections (1) through (5) of Rule 60(b), and to the requirement that "extraordinary circumstances" exist for justifying relief.

Amayo v. MJ Co., 10 FSM R. 371, 383 (Pon. 2001); see FSM Dev. Bank v. Arthur, 15 FSM Intrm. 625, 634 (Pon. 2008) ("extraordinary circumstances"); Farata v. Punzalan, 11 FSM R. 175, 178 (Chk. 2002) ("Relief under Rule 60(b)(6) is reserved for 'extraordinary circumstances'").

1. *Extraordinary Circumstances*

"[E]xtraordinary circumstances' usually means that the movant himself [or herself] was not at fault for his [or her] predicament." Amayo, 10 FSM R. at 383. "Conversely, the usual implication of fault on the part of the movant is that there are no 'extraordinary circumstances.'" *Id.* That court noted that "relief under Rule 60 is [simply] not appropriate where a party has demonstrated a 'pattern of delay and neglect.'" Amayo, 10 FSM R. at 382 n.5. In general, "[r]ule 60(b) is not meant to relieve a party from its own carelessness and neglect, or from the carelessness and neglect of its counsel." Mid-Pacific Constr. Co. v. Senda, 7 FSM R. 129, 134 (Pon. 1995). "[T]he universal approach of the United States federal courts in applying their identical Rule 60(b) to these cases is to preclude Rule 60(b) relief where the complained of injuries result solely from the carelessness or neglect of the moving party, or of the moving party's counsel." Elymore v. Walter, 10 FSM R. 267, 269 (Pon. 2001). "The exception to this rule is where the neglect itself is excusable" under FSM Civil Rule 60(b)(1). *Id.*

The purpose of this rule is to provide the trial court with a tool for navigating between "the conflicting principles that litigation must be brought to an end and that justice should be done." Mid-Pacific Constr. Co., 7 FSM R. at 133. To meet this intended purpose, Rule 60(b), which combines aspects of both law and equity, reposes a high degree of discretion in the trial court." *Id.*; see Truk Transp. Co. v. Trans Pacific Import Ltd., 3 FSM R. 440, 443 (Truk 1988) ("addressed to the discretion of the court"). "With the exception of void judgments under Rule 60(b)(4), the grant or denial of relief under Rule 60 of the FSM Rules of Civil Procedure rests with the sound discretion of the trial court." Amayo, 10 FSM R. at 377. However, that "discretion is not an arbitrary one to be capriciously exercised, but a sound legal discretion guided by accepted legal principles." *Id.*³

Finally, "[r]ule 60(b) was not intended as a substitute for a direct appeal from an erroneous judgment. The fact that a judgment is erroneous does not constitute a ground for relief under the Rule." Hartman v. Lauchli, 304 F.2d 431, 432 (8th Cir. 1962); see Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981) ("motion is not to be used as a substitute for appeal"); Elgin Nat'l Watch Co. v. Barrett, 213 F.2d 776, 780 (5th Cir. 1954) ("Rule 60(b) was not intended as, and it is not, a substitute for a direct appeal from an erroneous judgment."). As noted in Amayo, "other remedies" are frequently available. 10 FSM R. at 381. Nor was this rule "designed to 'circumvent the policy evidenced by the rule limiting the time for appeal.'" *Id.*⁴

2. Reasonable Time

Pursuant to FSM Civil Rule 60(b)(6), "[t]he motion shall be made within a reasonable time." "A factor to be considered in determining whether Rule 60(b) relief has been sought within a reasonable time is whether good reason has been presented for failure to act sooner." Arthur, 15 FSM R. at 633. "The court takes no position on whether a court's legal error can be considered a 'mistake' under Rule 60(b)(1), but notes that the courts that have so held have ruled that 'reasonable time' to seek relief in those cases cannot exceed the time in which an appeal might have been timely filed." *Id.* at 633 n.4; see 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2858, at 296-98 (2d ed. 1995); Hill v. McDermott, Inc., 827 F.2d 1040, 1043 (5th Cir. 1987) (can "correct judicial error when the motion was filed within the time for appeal").

³ Factors that should inform the district court's consideration of a motion under Rule 60(b): (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether if the judgment was a default or a dismissal in which there was no consideration of the merits the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981) (quoting 7 MOORE'S FEDERAL PRACTICE ¶ 60.19, at 237-39 (2d ed. 1981)).

⁴ "Rule 60 is not a substitute of appeal." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2851, at 230 (2d ed. 1995). "There is some authority, however, that on a motion made before the time for appeal has run, the district court may, however, correct its own legal errors." *Id.* at 231.

Analysis under Rule 60(b)(6) is the same and usually a "'reasonable time' for a motion of this kind may not exceed the time in which appeal might have been taken if the error involved a fundamental misconception of law." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2866, at 389 (2d ed. 1995). "Thus the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated, and deliberate choices he [or she] has made." *Id.* § 2864 at 359. "In particular, it is ordinarily not permissible to use this motion to remedy a failure to take an appeal." *Id.* As a general rule, therefore, a reasonable time for a motion to relief cannot exceed the 42 day time limit provided by FSM Appellate Rule 4(a)(1).

III. CONTEMPT

Even if this motion were not barred for the reasons stated above, the court would have denied the motion based on the merits. The court further explains its decision and finding of contempt on January 13, 2014.

Pursuant to 4 F.S.M.C. 119(1), "[a]ny Justice of the Supreme Court shall have the power to punish contempt of court." As a threshold issue, the court must determine whether the contempt was a civil contempt or a criminal contempt, notwithstanding the court's initial characterization of it as civil. See *Berman v. Pohnpei Legislature*, 17 FSM R. 339, 353-54 (App. 2001).⁵

1. *Criminal Contempt v. Civil Contempt*

The first duty of the court "in reviewing a contempt judgment is to determine whether the nature of the contempt proceeding was civil or criminal." 3A CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 703, at 280 n.5 (4th ed. 2010). "The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised." 17 AM. JUR. 2D *Contempt* § 9, at 375-76 (1990).⁶ "The purpose of a civil contempt is remedial or compensatory, while the purpose of a criminal contempt is punitive." 3A CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 703, at 282 (4th ed. 2010).⁷ Our court has similarly stated, "[t]he distinction between civil and criminal contempt is that the former is prospective, while the latter is retrospective,

⁵ The fact that the court characterizes the contempt as civil or criminal is not conclusive." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2960 at 586 (1973).

⁶ It is the purpose and nature of the punishment imposed that is important." 11 CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 2960 at 586 (1973). The U.S. Supreme Court's landmark decision emphasizes, its "character and purpose." *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 441, 31 S. Ct. 492, 498, 55 L. Ed. 797, 806 (1911).

⁷ "In contempt cases, both civil and criminal relief have aspects that can be seen as either remedial or punitive or both: when a court imposes fines and punishments on a contemnor, it is not only vindicating its legal authority but also seeking to give effect to the law's purpose of modifying the contemnor's behavior." 3A CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 703 at 282-83 n.9 (2010) (quoting *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 635, 108 S. Ct. 1423, 1431, 99 L. Ed. 2d 721, 734 (1988)). "The confusion between civil and criminal contempt arises as a result of civil contempt often having the incidental effect of vindicating the court's authority, while, conversely, criminal contempt may permit the movant to derive the incidental benefit of preventing future noncompliance." *LeMay v. Leander*, 994 P.2d 546, 554 (Haw. 2000); see *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 443, 31 S. Ct. 492, 498, 55 L. Ed. 797, 806 (1911) ("[I]f the case is civil and the punishment purely remedial, there is also a vindication of the court's authority But such indirect consequences will not change imprisonment which is merely coercive and remedial, into that which is solely punitive in character or *vice versa*.").

which is to say that a civil contempt proceeding's purpose is to bring about compliance with a court order, while the criminal contempt's purpose is to punish for past wrongful conduct." Davis v. Kutta, 10 FSM R. 125, 127 (Chk. 2001). Criminal contempt "is retrospective and is punishment for past wrongful conduct. It is not designed to secure compliance with a court order, but instead punishes the intentional violation of a lawful court order." Rodriguez v. Bank of the FSM, 11 FSM R. 367, 382 n.23 (App. 2003) (citation omitted).

Various articulations of the so called punishment versus coercion test or the retrospective versus prospective tests are the most frequently cited in case law, however, both have been criticized for obscuring the fact that civil contempt is either "compensatory or conditional." 3A Charles Alan Wright & Sarah Welling, FEDERAL PRACTICE AND PROCEDURE § 703 at 286-87 (4th ed. 2010). In Damarlane v. Pohnpei Transportation Authority, the court articulated the distinction between civil and criminal contempt, emphasizing the compensatory quality, stating:

In general, it may be said that a contempt of court for which punishment is inflicted for the primary purpose of vindicating public authority is denominated criminal. Those in which the ultimate object of the punishment is the enforcement of the rights and remedies of a litigant are civil contempt. The relief granted in civil contempt proceedings, therefore, is *compensatory or coercive*. This often takes the form of a fine in the amount of the damage sustained by plaintiff and an award of costs and attorney's fees. Since any incarceration ordered in a civil contempt proceeding is intended to force defendant into doing what he was ordered to do, he can secure his discharge by so acting. Thus, in a famous phrase, he carries the "keys to his prison." The commitment is viewed as coercive only. Punishment for criminal contempt on the other hand is unconditional, since it penalizes yesterday's defiance rather than seeking to coerce tomorrow's compliance. It cannot be ended or shortened by any act by defendant. When a fine is imposed on someone who has been adjudged guilty of contempt, partly as compensation to the complainant and partly as punishment, the criminal feature of the order is dominant and fixes its character for purposes of appellate review.

5 FSM R. 62, 65 (Pon. 1991) (quoting 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2960 at 584-85 (1973)) (emphasis added). Thus "[t]he sanction of civil contempt serves two remedial purposes, (1) to enforce compliance with an order of the court, and (2) to compensate for losses caused by noncompliance." National Labor Relations Bd. v. Monfort, 29 F.3d 525, 528 (10th Cir. 1994); see 17 C.J.S. *Contempt* § 9, at 21 (1999).

As the U.S. Supreme Court stated, the distinction between civil and criminal contempt is "somewhat elusive." United Mine Workers v. Bagwell, 512 U.S. 821, 830, 114 S. Ct. 2552, 2559, 129 L. Ed. 2d 642, 654 (1994); see Grohman v. State, 267 A.2d 193, 194 (Md. Ct. Spec. App. 1970) ("The line between civil and criminal contempt is often indistinct"). This is partly because "[t]he same conduct may be the basis for both criminal and civil contempt, and the same sanctions . . . may be imposed for both." 3A CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 703, at 278 (4th ed. 2010). "The distinction has plagued the courts for decades." *Id.* at 279 n.4. "Contempt proceedings, while usually called civil or criminal, are, strictly speaking, neither civil nor criminal but are instead *sui generis*." 17 C.J.S. *Contempt* § 10, at 23 (1999). "They partake of the characteristics of both but are procedurally different from other actions." *Id.* "In spite of the verbiage used to designate them . . . they are 'neither wholly civil or criminal.'" 3A CHARLES ALAN WRIGHT & SARAH WELLING, FEDERAL PRACTICE AND PROCEDURE § 703, at 194-95 (4th ed. 2010); see 17 AM. JUR. 2D *Contempt* § 2, at 370 (1990) ("Contempt proceedings are said to be neither fully civil nor fully criminal"); Myers v. United States, 264 U.S. 95, 103, 44 S. Ct. 272, 273, 68 L. Ed. 577, 579 (1924) ("neither civil actions nor prosecutions for offenses, within the ordinary meaning of those terms").

Thus, "criminal contempt is often said not to be a crime" at all. 17 AM. JUR. 2d *Contempt* § 8, at 375 (1990). Nevertheless, generally, civil contempt invokes the rules of civil procedure, and criminal contempt invokes the rules of criminal procedure.⁸

The Contempt Order of January 10, 2014, found Jack in contempt under 4 F.S.M.C. 119(1)(b) and a show cause hearing was held pursuant to 4 F.S.M.C. 119(2)(a), indicating that the court perceived her violation as one of a civil nature.⁹ That characterization, however, is not conclusive and we must analyze the nature and purpose of the sanctions.

First, the sanction is compensatory as it goes directly to the benefit of the aggrieved party, not to the state. Additionally, the attorney's fee award is not a fixed fine; it is dependent on actual injuries incurred, and demonstrated in the record. Second, the show cause hearing was ordered following a motion by the plaintiff, and not prosecuted separately by the government, nor brought *sua sponte* by the court itself. In sum, the action was correctly characterized as a civil contempt action. While it is true that Jack does not have the ability to purge for the absence, as this is an act which has already occurred, the excuse is contemporaneous with the finding. Further this test by itself is not conclusive of the nature of the contempt action and it should therefore not be mistakenly perceived as punitive. Every contempt action has both remedial and punitive consequences, however, and those indirect consequences are not sufficient to change the sanction's fundamental purpose. See note 7, *supra*.

2. *Direct Contempt v. Indirect Contempt*

The second duty of the court in reviewing a contempt action is to determine if the contempt was direct or indirect. "Each class of contempt has two subcategories, direct and indirect. Thus there are four possible classifications of contempt: direct-criminal, indirect-criminal, direct-civil, and indirect civil." 17 C.J.S. *Contempt* §3, at 13 (1999). A direct contempt is committed "in the presence of the court." 17 AM. JUR. 2d *Contempt* §19, at 383 (1990); see *In re Contempt of Skilling*, 8 FSM R. 419, 424 (App. 1998) ("directly saw or heard the conduct constituting the contempt"). A direct contempt "is used by the court to protect itself against gross violations of decorum." 17 C.J.S. *Contempt* § 4, at 14 (1999). "All of the essential elements of the misconduct are under the eye of the court." *Id.* Direct contempt includes words, acts, or omissions that "present an imminent threat to the administration of justice; it must immediately imperil the judge in the performance of his judicial duty." 17 AM. JUR. 2d *Contempt* § 17, at 382 (1990); see FSM Crim. R. 42(a) (summary contempt power). An indirect contempt is "a contempt not in the presence of the judge." *Contempt of Skilling*, 8 FSM R. at 425; (denying the exercise of the summary contempt power because the court "should have scheduled a show cause hearing"). See *In re Iriarte (III)*, 1 FSM Intrm. 255, 262 (1983) (summary contempt proceedings "viewed with disfavor").

"Generally, the failure to obey a court's order is considered civil contempt, and where the refusal takes place outside of the presence of the court, it is an indirect civil contempt." 17 C.J.S. *Contempt*

⁸ It should be noted that even though the court chooses to sanction an attorney with a civil contempt, that does not prohibit the court from also sanctioning the attorney with a criminal contempt. See 17 C.J.S. *Contempt* § 8, at 19 (1999) ("depending on the circumstances, an act may support a finding of both criminal and civil contempt"); *United States v. Shore*, 193 B.R. 598 (S.D. Fla. 1996) (civil contempt filed with criminal contempt proceedings). Thus, the choice is not mutually exclusive and a single contumacious act may in fact necessitate both.

⁹ The court notes and corrects a typographical error and a mistaken reference to 6 F.S.M.C. 119(1)(b) and 6 F.S.M.C. 119(2)(a).

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§ 9, at 22 (1999). Because "the court has no personal knowledge of the indirect contempt . . . the acts must be proven through the testimony of third parties or the contemnor." *Id.* § 6, at 16. "Thus [minimal] due process requirements apply to [indirect] contempts." *Id.* Although U.S. district courts are split on this issue, and some treat absence summarily, the majority view is that absence is an indirect contempt, committed outside of the presence of the court. See *In re Lamson*, 468 F.2d 551, 552 (1st Cir. 1972) ("fairly heavy majority"); *United States v. Willett*, 432 F.2d 202, 204 (4th Cir. 1970) ("states are divided on this question"); *United States v. Delahanty*, 488 F.2d 396, 397 (6th Cir. 1973); *Klein v. United States*, 151 F.2d 286 (D.C. Cir. 1945).¹⁰ Our FSM case history appears to support the majority view, that absence is an indirect contempt, committed outside of the presence of the court. See *In re Contempt of Skilling*, 8 FSM R. 419, 425 (App. 1998); *In re Iriarte (III)*, 1 FSM R. 255, 262 (1983). The court has announced that "[c]ontemptuous behavior includes not only intentionally avoiding a hearing, but also intentionally arriving late for a hearing." *In re Contempt of Cheida*, 7 FSM R. 183, 185 (App. 1995); see *In re Robert*, 1 FSM R. 18, 19 (Pon. 1981). Thus, in the FSM, failure to appear or even tardiness may be treated as an indirect civil contempt pursuant to 4 F.S.M.C. 119(2)(a), or as an indirect criminal contempt pursuant to 4 F.S.M.C. 119(2)(b), or both. But in either case, it cannot be treated summarily. If the court elects to pursue the absence as a civil contempt pursuant to 4 F.S.M.C. 119(2)(a), the accused "shall have a right to notice of the charges and an opportunity to present a defense and mitigation." In a civil contempt proceeding, this due process requirement is usually met through a show cause hearing where the defendant is given the opportunity to explain or justify the failure to appear.

In this case, Jack's absence was apparent to the court, the reason, however, was not. Therefore, Jack was entitled to minimal due process, and it was incumbent on the court not to treat her absence summarily. Appropriately, Jack was served with the notice and the court held a show cause hearing in which Jack was given the opportunity to explain or justify her failure to appear.

IV. STANDARD OF PROOF

"[I]n federal courts, the movant bears the burden of establishing the elements of civil contempt by clear and convincing evidence." 17 C.J.S. *Contempt* § 90, at 157-58 (1999); see *United States v. Rizzo*, 539 F.3d 458, 465 (5th Cir. 1976) ("clear and convincing", a higher standard than the "preponderance of the evidence standard, common in civil cases, although not as high as 'beyond a reasonable doubt'").¹¹ Although the court has not expressly determined this standard in any reported cases, the Appellate Division has found this "heightened standard of proof is particularly appropriate" for the inherent contempt power of the court. *In re Sanction of Woodruff*, 10 FSM R. 79, 88 (App. 2001) ("clear and convincing evidence is the proper standard of proof"). Moreover, the *Woodruff* court noted this standard "is also consistent with the standard of proof needed to discipline an attorney.

¹⁰ "It has been said that an attorney's absence alone does not constitute contempt, but if the attorney offers an insulting, frivolous or clearly inadequate explanation, a direct contempt has been committed in the presence of the judge." 17 AM. JUR. 2D *Contempt* § 90, at 443 (1990) (justifying summary contempt in some circumstances). "Patently false, flippant, inconsistent, contradictory, and evasive replies" have been used to support a finding of contempt. 17 AM. JUR. 2D *Contempt* § 103, at 460 (1990). Similarly "refusal of an attorney to give any explanation for his or her absence or lateness in arriving for a trial or hearing is the equivalent of the lack of a valid excuse." 17 AM. JUR. 2D *Contempt* § 90, at 443 (1990).

¹¹ "The standard of review for a criminal contempt conviction under 4 F.S.M.C. 119(1)(b), like the standard for any criminal conviction, is whether the appellate court can conclude that the trier of fact reasonably could have been convinced beyond a reasonable doubt." *Johnny v. FSM*, 8 FSM R. 203, 206 (App. 1997).

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FSM Dis. R. 5(e)." Sanction of Woodruff, 10 FSM R. at 88. Finally, a contemnor's intent "must be ascertained from all the acts, words, and circumstances surrounding the occurrence." Davis v. Kutta, 10 FSM R. 125, 127 (2001). 17 AM. JUR. 2d *Contempt* § 27, at 390 (1990). Ultimately, most *bona fide* representations "tend to excuse, but cannot justify the act." 17 AM. JUR. 2d *Contempt* § 37, at 396 (1990). Notably, an attorney's good faith belief, belief that they were not obligated to appear at that time . . . may be accepted . . . or rejected." *Id.* at 446.

In this case, we apply the clear and convincing standard to the evidence.

V. INTENT

Under 4 F.S.M.C. 119(1)(b), the court has "the power to punish . . . any intentional disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command." Johnny v. FSM, 8 FSM R. 203, 206 (App. 1997); Atesin v. Kukkun, 11 FSM R. 400, 402 (Chk. 2003). The court may do so either criminally or civilly, however, the standard is not the same. See FSM Social Security Admin. v. Weillbacher, 17 FSM R. 217, 225 (Kos. 2010) ("another difference between civil and criminal contempt revolves around intent"). It has been elsewhere stated that "[t]he element that escalates contempt to criminal status is the level of willfulness associated with the conduct." 17 C.J.S. *Contempt* § 8, at 21 (1999); see also Weillbacher, 17 FSM R. at 225. Criminal intent is "a specific intent to consciously disregard an order of the court." In re Contempt of Skilling, 8 FSM R. 419, 426 (App. 1998). Criminal intent is defined by 11 F.S.M.C. 104(4) as "acting with the conscious purpose to engage in the conduct specified."

Civil intent, on the other hand, can be demonstrated by general intent, or by knowledge defined in 11 F.S.M.C. 104(5) as "being aware of the nature of the conduct or omission . . . which brings the conduct or omission within the provision of the code. "This standard has been expressly distinguished from mere negligence, "[a] negligent act is one born of inattention or carelessness – the opposite of an intended act. An act, not willfully intending the result, creating a substantial risk of the unlawful result, is not an act done purposefully or intentionally." In re Tarpley (II), 3 FSM R. 145, 149 (App. 1987). Thus, "[f]our states of culpability have developed which establish the requisite mental element: intentional, knowing, reckless and negligent"; however, only the first two subjective states of mind, intent or knowledge, can be used to support a finding of contempt. *Id.* at 150.

Accordingly, the court has variously formulated the civil standard of volition as "knew . . . [and] had the ability to comply." Hadley v. Bank of Hawaii, 7 FSM R. 449, 452 (App. 1996); see Weillbacher, 17 FSM R. at 225 ("knew of the order and had the ability to comply"); Carlos Etscheit Soap Co. v. Gilmete, 15 FSM R. 285, 289 (Pon. 2007) ("knew of the order, and had the ability to obey"); Barrett v. Chuuk, 12 FSM R. 558, 561 (Chk. 2004) ("knowledge of the order and ability to obey").

Thus "the court may not punish a contemnor for civil contempt where the contemnor lacks the ability, through no fault of his own, to comply with the order." Davis, 10 FSM R. at 127; see Hicks ex rel. Feiock v. Feiock, 485 U.S. 624, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1998). Furthermore, "it is not enough to find that noncompliance was willful, as shown by knowledge of the order; there still must also be a recital – a finding in the record – that there was an ability to comply." Berman v. Pohnpei Legislature, 17 FSM R. 339, 354 (App. 2011).

In this case, the court's recital of the show cause hearing indicates that Jack represents she forgot about the hearing. After hearing her explanation the court did not accept it and found Jack in contempt noting that she filed a Motion to Continue on Friday at 4:45PM on June 7, 2013, only a few days before the scheduled hearing. In her motion for relief, Jack represents that she assumed the court would grant her Motion to Continue and if she had known that the court would not approve her motion

she would have called in telephonically. This explanation merely demonstrates that she both knew about the scheduled hearing and had the ability to be at the hearing, at least telephonically.¹² Upon reconsideration, therefore, the court affirms its earlier decision.

Jack's reliance on the aforementioned assumption is disingenuous. The court does not always grant enlargements when the movant has not certified that the opposing party was contacted and that the opposing party's acquiescence was sought. The court has denied such motions specifically because of the lack of that certification. Jack is well aware of the Rule 6(d) certification requirement. While it is true that the court routinely grants enlargements when the opposing party's acquiescence has been certified, it is the duty of the movant to secure that acquiescence and properly file it with the court. Not only did Jack's motion for a continuance not contain a Rule 6(d) certification, but the opposing counsel represented that the motion was never served on him. Jack had a duty to contact opposing counsel, either in person, by phone or by e-mail, but she failed to do so. She makes no representation that she lacked the ability or had an incapacity that prevented her from contacting opposing counsel before she filed the Motion to Continue. From the absence of the Rule 6(d) certification and notice to the opposing party, the court finds intent and a willful neglect of duty that resulted in additional legal expenses for the opposing party.

Although an act of negligence is not sufficient to support a finding of contempt, an act of willful neglect is. Thus, while a single act of negligence is usually not sufficient by itself to support a finding of contempt, a pattern of neglect can give rise to the inference of an intentional design to disobey. This is not the first time that Jack, or her client, has failed to appear for a scheduled hearing or filed a continuance.¹³

Additionally, Jack asserts that she filed a notice with the court on May, 28, 2013, that she would be off-island. Implicitly it is reasonable to assume that she would not be able to attend any hearings during that time, although the court notes that being off-island does not prohibit an attorney from appearing telephonically. This off-island notice however was filed several weeks after the court's scheduling order on March, 26, 2013 was issued. Filing this notice indicates that Jack knew of the conflict over a month in advance, but failed to notify the court until the last minute, and never notified the opposing counsel. Nor can this notice be used to imply that the court scheduled the hearing in error.

Jack had a professional duty to not only notify the court, but also the opposing party in a timely manner in order to reschedule the hearing. While this act alone is not contemptuous, it can be used as further support the inference of intent to disobey a court order when supported by a pattern or other similar acts and omissions drawn from the surrounding circumstances. Collectively, Jack's acts and omissions form a pattern. They indicate that she knew her duty, had the ability to perform it, and willfully neglected to perform it.

¹² On July 29, 2014, Jack appeared telephonically in this matter and has done so on a number of other occasions not related to this matter.

¹³ On December 14, 2007, failure to appear; on February 13, 2009, failure to appear; on February 24, 2009, failure to appear; on March 21, 2012, Motion for Continuance; on May, 28, 2012, failure to appear; on December 17, 2012, failure to appear; on June 7, 2013, Motion for Continuance; on June 10, 2013, failure to appear; on January 6, 2014, failure to appear; and on August 8, 2014, Motion for Enlargement of Time.

VI. SUMMARY

First, the court must determine whether the contempt was a civil contempt or criminal contempt. Second, the court must determine whether the contempt was direct or indirect; whether it was committed in the presence of the court or not. Third, the court must determine, by a clear and convincing standard, that the defendant intentionally disobeyed a court order. In a civil case, the moving party must show that the contemnor knew and had the ability to comply. This culpable state of mind can be ascertained through the words, acts and surrounding circumstances of the case, including a previous pattern of delay and neglect. If the court so finds, a civil sanction compensating the other party for costs and attorney's fees is appropriate.

In this case, Jack failed to appear as required and the court held a show cause hearing to determine why she failed to appear at the scheduled hearing. After receiving her explanation, the court found her in contempt. The court found that she knew of the hearing and had the ability to appear, at least telephonically. This is supported in the record, clearly and convincingly. Accordingly, the court affirms this to be an act of intentional disobedience of a court order within the meaning of 4 F.S.M.C. 119(1)(b). Finally, Jack was sanctioned for the cost of the opposing party's attorney's fees (.5 hours at \$250 per hour for \$125) and a proportionate share of his cost for attending the hearing (\$179.33). This sanction is not punitive; it is made to compensate the opposing party for losses he incurred.

VII. OPPOSITION PARTY'S COMPENSATION

The court when making an attorney's fee award, can only award reasonable attorney's fees based on the customary fee in the locality where the case is, or will be tried. FSM v. GMP Hawaii, Inc., 17 FSM R. 86, 89 (Pon. 2010). The civil sanction in this case is reset to \$62.50, representing .5 hours of work at \$125 an hour. This is changed from the earlier .5 hours of work at \$250 an hour. This change is made because the customary rate of attorney's fees in Pohnpei should have been used instead of the rate in the Commonwealth of the Northern Mariana Islands.

The \$62.50, plus the costs of \$179.33 is payable to White within 20 days, and evidence of such a payment must be filed with the court. If Jack cannot make such payment she has 20 days to file with this court proof indicating why she does not have the ability to comply. Jack is notified that if she is again found in contempt in this case, further payments may become due to compensate the opposing party for any additional attorney's fees and costs.

VIII. CONCLUSIONS

In conclusion, the court denies the motion for relief from a final order finding no extraordinary circumstances in this case, and finds that the movant has placed herself in this position through a neglect of professional duty. Furthermore, the court finds that the motion is untimely, and that such motions are not to be used to circumvent the appellate procedure. Nevertheless, the court would have upheld the contempt finding in this case noting that Jack both knew and had the ability to appear for the scheduled hearing telephonically, but failed to do so. Finally, the court *sub sponte* remits and partially reduces the remedial sanction in this case.

ACCORDINGLY, the motion for relief pursuant to FSM Civil Rule 60(b)(6) is DENIED and the contempt finding is affirmed. However, the remedial sanction is reduced and Jack has 20 days to pay the opposing party \$239.83 and file proof of such payment with the court.

* * * *