

**FEDERATED STATES OF MICRONESIA
SUPREME COURT TRIAL DIVISION**

Cite as *Pohnpei v M/V Miyo Maru No. 11*, 8 FSM Intrm. 281 (Pon. 1998)

**STATE OF POHNPEI and POHNPEI ENVIRONMENTAL PROTECTION
AGENCY,
Plaintiffs,**

vs.

**M/V MIYO MARU NO. 11, CAPTAIN HISAMITSU FURUTA,
MASAYO FURUTA and NATIONAL FISHERIES ASSOCIATION OF JAPAN,
Defendants,**

vs.

**SAPWUAFIK MUNICIPAL GOVERNMENT,
Third-Party Defendant.**

CIVIL ACTION NO. 1994-136

ORDER

Andon L. Amaraich
Chief Justice

Argued: December 2, 1997
Decided: April 8, 1998

APPEARANCES:

For the Plaintiff:
James P. Woodruff, Esq.
Assistant Attorney General
Pohnpei Department of Justice
P.O. Box 1555
Kolonia, Pohnpei FM 96941

For the Defendants (except Nat'l Fisheries Ass'n):
Stephen V. Finnen, Esq.
Law Offices of Saimon & Associates
P.O. Box 1450
Kolonia, Pohnpei FM 96941

For the Third-Party Defendant:
Ron Moroni, Esq.
P.O. Box 1618
Kolonia, Pohnpei FM 96941

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HEADNOTES

Civil Procedure - Discovery

Upon motion by a party or by the person against whom discovery is sought, and for good cause shown, a court may issue an order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including that certain matters not be inquired into, or that the scope of discovery be limited to certain matters. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Civil Procedure - Discovery

Under FSM Civil Rule 26, parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Civil Procedure - Discovery; Civil Procedure - Interrogatories

Any party may serve upon any other party written interrogatories to be answered by the party served. There is no requirement that two parties be directly adverse in order for one to seek discovery against another. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Civil Procedure - Discovery

Generally, discovery should be permitted under Rule 26 when the information sought is relevant to the claim or defense of the party seeking discovery, or to the claim or defense of any other party. Discovery should be allowed under the "relevancy" standard set forth in Rule 26 unless it is clear that the information sought can have no possible bearing upon the subject matter of the action. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287 (Pon. 1998).

Civil Procedure - Discovery

Relevant information is discoverable unless it is privileged. FSM Civil Rule 26(b)(3) protects against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party concerning the litigation. Information prepared in anticipation of litigation is discoverable only upon a showing of "good cause." Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 287-88 (Pon. 1998).

Civil Procedure - Interrogatories

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact. Many legal conclusions require the application of law to fact and are appropriate under Rule 33. The only type of interrogatory that is objectionable, without more, as a legal conclusion, is one that extends to legal issues unrelated to the facts of the case. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 288 (Pon. 1998).

Civil Procedure - Discovery

The fashioning of remedies and sanctions for failure of a party to comply with discovery requirements is a matter within the trial court's discretion. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290 (Pon. 1998).

Civil Procedure - Discovery

Generally, a party should move for a protective order before the date set for discovery because a party may not remain completely silent when it regards discovery as improper. If it desires not to respond it must object properly or seek a protective order. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290 (Pon. 1998).

Civil Procedure - Discovery; Civil Procedure - Sanctions

Under Rule 37(b), if a party fails to obey an order to permit or provide discovery, a court may order, among other things, that facts be designated as admitted, that the disobedient party not be allowed to support or oppose designated claims, that pleadings or parts thereof be stricken, or that a party be held in contempt of court. In addition, or in lieu of any of these, the court shall require a disobedient party, or the party's attorney or trial counselor, or both, to pay reasonable expenses (including attorney's fees) caused by the disobedient party's failure to obey the court's order. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 290-91 (Pon. 1998).

Civil Procedure - Discovery; Civil Procedure - Sanctions

Instead of ordering that certain facts be designated as admitted as requested by a party that had previously obtained a court order requiring another party to comply with its discovery requests, a court may order that for failure to comply with that discovery order that the disobedient party pay all of the moving party's reasonable expenses in preparing, filing, and defending its motions for sanctions. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 291 (Pon. 1998).

Civil Procedure - Dismissal

In evaluating a motion to dismiss, a court must accept as true the allegations in the complaint. Relief should be granted only if it appears certain that no relief could be granted under any facts which could be proven in support of the complaint. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 291 (Pon. 1998).

Torts - Duty of Care

Acts that do not provide for a private citizen's cause of action for monetary damages cannot be used to create a duty for the breach of which damages may be awarded. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 292 (Pon. 1998).

Torts - Duty of Care; Torts - Trespass

The common law "incomplete privilege" of one to enter onto the land of another in times of private necessity is essentially codified by 19 F.S.M.C. 805(3), which states that "no person, including the owner or occupier of land may hinder or impede a rescuer." But it cannot have been the intent of 19 F.S.M.C. 805(3) to prevent law enforcement officials from carrying out their official duties in the face of an emergency rescue situation. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 292 (Pon. 1998).

Torts; Torts - Duty of Care

The general principle is that one person may be liable in tort to another only if the first intentionally or negligently violates a duty owed to the other, and the other is injured as a result. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 293, 294 (Pon. 1998).

Torts - Negligence

The definition of "negligence," as the term is used in the common law countries, is

applicable or similar to the Pohnpeian understanding of negligence. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 293 (Pon. 1998).

Torts - Negligence

Negligence is the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 293 (Pon. 1998).

Torts - Negligence

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 293 (Pon. 1998).

Common Law; Torts; Torts - Negligence

United States common law decisions are an appropriate source of guidance for this court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the Federated States of Micronesia. United States courts have generally followed the provisions of the Restatement of Torts in situations where a plaintiff alleges that a defendant has negligently prevented a third party from rendering assistance. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 293-94 (Pon. 1998).

Torts - Negligence

One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid for which he has prevented the third person from giving. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 294 (Pon. 1998).

Civil Procedure - Dismissal; Torts - Governmental Liability; Torts - Negligence

A complaint's allegations that officials' knowing interference prevented two ships from refloating their ship after it had grounded on a reef, that the ship's crew were arrested by the officials without cause, and that this actively and unreasonably prevented rescue the vessel's by other boats, and that that interference was the direct cause of the boat's damage, set forth a claim in negligence and are sufficient to survive a motion to dismiss. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 294 (Pon. 1998).

Choice of Law; Contracts; Torts

State law controls in the resolution of contract and tort issues. When the Supreme Court, in the exercise of its jurisdiction, decides a matter of state law, its goal should be to apply the law the same way the highest state court would. When no existing case law is found the FSM Supreme Court must decide issues of tort law by applying the law as it believes the state court would. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 294-95 (Pon. 1998).

Torts - False Imprisonment

A redressible civil wrong is committed when a person is unlawfully detained against his will. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 295 (Pon. 1998).

Constitutional Law - Due Process; Constitutional Law - Equal Protection

The constitutional guarantees of due process and equal protection extend to aliens.

Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 295 n.8 (Pon. 1998).

Torts - False Imprisonment

The elements of false imprisonment are 1) detention or restraint of one against his or her will, and 2) the unlawfulness of such detention or restraint. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 295 (Pon. 1998).

Civil Procedure - Dismissal; Civil Rights

A civil rights claim against a municipal government will be dismissed when it fails to allege that the officials were acting pursuant to governmental policy or custom when the allegedly unconstitutional actions occurred or when it fails to allege that the violations were caused by the officials who were responsible for final policy making, and when those officials made a deliberate choice to follow a course of action chosen from various alternatives. Pohnpei v. M/V Miyo Maru No. 11, 8 FSM Intrm. 281, 296 (Pon. 1998).

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COURT'S OPINION

ANDON L. AMARAICH, Chief Justice:

This case came before the Court for a hearing on all pending motions on December 2, 1997. The Court heard argument from counsel for third-party defendant/cross-claimant Municipality of Sapwuafik ("Sapwuafik") and plaintiff, the State of Pohnpei and the Pohnpei Environmental Protection Agency ("Pohnpei State"), on pending discovery motions. The Court also heard argument from counsel for Sapwuafik and defendants/third-party plaintiffs (the M.V. *Miyo Maru No. 11*, Captain Hisamitsu Furuta, Masayo Furuta, and National Fisheries Association of Japan) on Sapwuafik's motion to dismiss the third-party plaintiffs' complaint.¹

Background

(1) Claims of the Parties

On August 22, 1994, the State of Pohnpei filed a Complaint ("Pl. Compl.") in Pohnpei Supreme Court alleging two counts of negligence against each of the defendants. The complaint alleges that the defendants negligently caused the grounding of the fishing vessel M.V. *Miyo Maru* on the Sapwuafik reef on August 11, 1994. Plaintiff claims that, as a result of this grounding, submerged lands and reef belonging to Pohnpei State were damaged and destroyed, and petroleum products were spilled into Pohnpei State waters. Pl. Compl. paras. 9-10.

On October 20, 1994, defendants removed the action to this Court. On February 21, 1995, the Court ordered this case stayed pending completion of administrative proceedings before the Pohnpei Environmental Protection Agency. On July 3, 1996 the Court lifted the stay after the parties notified the Court that they were unable to resolve the case in the administrative proceeding.

On July 19, 1996, defendants² filed an answer to the original complaint, and defendants Hisamitsu Furuta and Masayo Furuta filed counterclaims against the State of Pohnpei and a third-party complaint against Sapwuafik. The counterclaims and third-party complaint set forth claims against the State of Pohnpei and Sapwuafik, respectively, for negligence, false arrest/imprisonment, and violation of the third-party plaintiffs' right to due process.

(2) Discovery Disputes

On July 9, 1997, Sapwuafik served Pohnpei State with a number of interrogatories and requests for supporting documents (hereinafter "Discovery Requests"). On September 4, 1997, pursuant to Rule 37(d) of the FSM Rules of Civil Procedure, Sapwuafik filed a motion for discovery sanctions against Pohnpei State for Pohnpei State's failure to respond to the Discovery Requests. On September 26, 1997, the Court issued an order ("9/26/97 Order") denying Sapwuafik's motion for discovery sanctions, denying the pending motion for a discovery conference, and directing Pohnpei State to respond to Sapwuafik's Discovery Requests within thirty (30) days.

Pohnpei State responded by answering four interrogatories, objecting to the other Discovery Requests, and requesting a protective order.

On October 28, 1997, Sapwuafik filed a Renewed Motion for Sanctions and requested a hearing and expedited consideration of these motions. On November 6, 1997, Sapwuafik filed its opposition to Pohnpei State's motion for a protective order. On November 12, 1997, Pohnpei State filed a response to Sapwuafik's renewed motion for sanctions.

(3) Motion to Dismiss Third Party Complaint

On November 6, 1997, Sapwuafik moved to dismiss the third-party complaint of third-party plaintiffs Hisamitsu Furuta and Masayo Furuta with respect to all claims alleged against Sapwuafik. On November 14, 1997, third-party plaintiffs Hisamitsu Furuta and Masayo Furuta responded to Sapwuafik's motion to dismiss their claims.

On November 12, 1997, the Court issued a notice of hearing on all pending motions for December 2, 1997 at 10:00 a.m.

Discussion

(1) Pohnpei State's Objections to Discovery and Motion for a Protective Order

After the Court issued its 9/26/97 Order requiring Pohnpei State to respond to Sapwuafik's Discovery Requests within thirty days, Pohnpei State responded to Sapwuafik's Discovery Requests on October 27, 1997, by filing objections to interrogatories numbered 3 through 17 and 20 through 34, answering interrogatories numbered 1, 2, 18 and 19, and moving for a protective order. Pohnpei State asserted objections to the interrogatories as follows:

Nos. 3 through 17 and 21 through 34:

"Objection. Said interrogatories are excessive, burdensome, irrelevant to the issues raised by the pleadings, seek Plaintiffs' legal theories, impressions and work

product from this or other pending litigation in which Third Party Defendant's counsel is involved."

No. 20:

"Objection. Said information is more properly the subject of a pre-trial statement which will be filed prior to trial."

Pohnpei State sought a protective order under FSM Rule of Civil Procedure 26(c)(4), requesting that Sapwuafik not be allowed to seek additional discovery, or in the alternative, that Sapwuafik be compelled to seek information through discovery that is not work product or otherwise objectionable.

Rule 26(c)(4) provides that "[u]pon motion by a party or by the person against whom discovery is sought, and for good cause shown," a court may issue an order "which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that certain matters not be inquired into, or that the scope of discovery be limited to certain matters." FSM Civ. R. 26(c)(4).

Pohnpei State seeks a protective order on the following grounds: (1) that the Discovery Requests seek to ascertain Pohnpei State's legal theories; (2) that the Discovery Requests are substantively irrelevant to the issues in this case; and (3) that the Discovery Requests are excessive, oppressive and burdensome.

It does not appear that most of Sapwuafik's Discovery Requests are substantively improper as Pohnpei State claims. However, as discussed in further detail below, some should be narrowed in scope for purposes of this lawsuit.

Most of the interrogatories and documents requests served on Pohnpei State by Sapwuafik seek to discover evidence regarding Pohnpei State's claim of ownership of the reef and submerged lands that it alleges were damaged by the grounding of the M.V. *Miyo Maru*. At the hearing on Pohnpei State's motion for a protective order, Pohnpei State argued that ownership of the reef and the submerged lands was not an issue in this case. Pohnpei State asserted that, since Sapwuafik was made a party to this action by the defendants, and since Sapwuafik only asserted counterclaims against the defendants, and not against the plaintiffs, it is not entitled to discovery regarding the issue of land ownership from the plaintiffs.

The Court does not agree with this position. Even though Sapwuafik has not asserted claims directly against Pohnpei State in this action, both Sapwuafik and Pohnpei State are claiming against the defendants for the same injury: damage allegedly done to the reef and submerged lands adjacent to Sapwuafik by the grounding of the M.V. *Miyo Maru*. Thus, assuming damages can be proven, a primary issue in this case will be whether Pohnpei State or Sapwuafik is the owner of the damaged property, and as such, is entitled to recover from the defendants.

Under FSM Civil Rule 26, parties are entitled to discovery regarding any matter, not privileged, which is relevant and reasonably calculated to lead to the discovery of admissible evidence. FSM Civ. R. 26(b); *See also Chuuk v. Secretary of Finance*, 7 FSM Intrm. 563, 570 (Pon. 1996). FSM Civil Rule 33 specifically provides that "[a]ny party

may serve upon *any other party* written interrogatories to be answered by the party served." FSM Civ. R. 33(a) (emphasis added). There is no requirement in the rules that two parties be directly adverse in order for one to seek discovery against another, and the Court will not imply such a limitation. Generally, discovery should be permitted under Rule 26 when the information sought is relevant "to the claim or defense of the party seeking discovery, or to the claim or defense of *any other party*." 23 Am. Jur. 2d *Depositions and Discovery* § 21, at 353-54 (1983) (emphasis added). Discovery should be allowed under the "relevancy" standard set forth in Rule 26 "unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." *Id.* § 22.

Most of the information sought by Sapwuafik is relevant, and thus discoverable under Rule 26, unless it is privileged. Pohnpei State also asserts that the Discovery Requests seek to ascertain Pohnpei State's legal theories and work product, which are privileged and immune from discovery under FSM Civil Rule 26. Under FSM Civil Rule 26(b)(3), the Court is required to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories . . . of a party concerning the litigation." FSM Civ. R. 26(b)(3). Information prepared in anticipation of litigation is discoverable only upon a showing of "good cause." *Id.*

In this case, the limitations on discovery contained in Rule 26(b)(3) must be read in conjunction with Rule 33(b), which relates to information that is obtainable by written interrogatories. Rule 33(b) states that "[a]n interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or *the application of law to fact*." FSM Civ. R. 33(b) (emphasis added). Many legal conclusions require the application of law to fact and are appropriate under Rule 33. 8A Charles Alan Wright et al., *Federal Practice and Procedure* § 2167, at 248 (1994). The only type of interrogatory that is objectionable, without more, as a legal conclusion, is one that extends to "legal issues unrelated to the facts of the case." *Id.* at 249; *see also O'Brien v. International Bhd. of Elec. Workers*, 443 F. Supp. 1182, 1187 (D. Ga. 1977) (citing Wright & Miller).

Thus, where Sapwuafik seeks information from Pohnpei State that would require Pohnpei State to address legal issues that are unrelated to this case, the Court will narrow the scope of the interrogatories. However, where Sapwuafik seeks information from Pohnpei State that requires application of law to the specific facts of this case, Pohnpei State is required to respond to the Discovery Requests fully and completely. The Court finds as follows regarding each interrogatory to which Pohnpei State has objected:

Interrogatories 3 and 4 seek information from Pohnpei State related to the factual and legal basis of Pohnpei State's claim to entitlement to proceeds from damage to the reef. Interrogatory No. 3 requests Pohnpei State to indicate whether it will contend that the submerged reef was "public land" within the meaning of the Public Lands Act of 1987. Responding to this interrogatory requires a "yes" or "no" answer and does not require Pohnpei State to divulge any work product or legal reasoning. Pohnpei State must answer this interrogatory.

Interrogatory No. 4 requests that Pohnpei State identify witnesses and documents it would use to support its contention, if Pohnpei State responds to Interrogatory No. 3 in the affirmative.³ Information regarding relevant witnesses and documents is clearly within the

bounds of discovery. Pohnpei State must respond to this interrogatory, subject to the limitations set forth in footnote 3, *supra*.

Interrogatory No. 5 requests Pohnpei State to state whether it contends that the Board of Trustees of the Pohnpei Public Lands Trust "is empowered with the power, duty, and legal capacity to receive and hold title to public lands for the people of Pohnpei." Interrogatory No. 6 requests that Pohnpei State "explain or state whom or what" it contends is the owner or titleholder to public lands (as defined by Pon. S.L. No. 1L-155-87) within the State of Pohnpei. Interrogatory No. 7 requests identity of witnesses and information that support Pohnpei State's position in No. 6. These three interrogatories should be narrowed, as they would require the State of Pohnpei to take a definitive position regarding ownership of *all* public lands in the State of Pohnpei, and are not restricted to application of the facts of this case to laws related to public lands.

Thus, Pohnpei State is required to fully and completely answer these three interrogatories, but only with respect to the land which it claims was damaged by the M.V. *Miyo Maru*.

Interrogatory No. 8 requests Pohnpei State to state whether any law established during the Japanese administration declared that marine areas below the high water mark belong to the government in Pohnpei. Interrogatory No. 9 requests identity of witnesses and documents that would support such a contention. Pohnpei State is required to answer these interrogatories fully, but only with respect to the land which it claims was damaged by the M.V. *Miyo Maru*.

Interrogatory No. 10 requests Pohnpei State to state whether it contends that the state is the owner or titleholder of the submerged reef that was damaged by the *Miyo Maru*. Interrogatory No. 11 requests identity of witnesses and information that would support this contention. Interrogatory Nos. 12 and 13 request the same information from the Pohnpei Environmental protection Agency. Pohnpei State is required to fully and completely answer these four interrogatories.

Interrogatory No. 14 asks whether Pohnpei State or the Pohnpei EPA intend to rely upon any other legal or equitable basis upon which they claim damages for acts of the defendants described in the complaint. Interrogatory No. 15 requests identity of witnesses and information that would support this contention. Interrogatory No. 16 requests the State of Pohnpei to substantiate the damages and damage calculations based upon any additional legal or equitable basis set forth in response to Interrogatory No. 14. Interrogatory No. 17 seeks identity of witnesses and information that would support this contention. These interrogatories seek information which is clearly relevant to the instant lawsuit and which would substantially narrow the issues surrounding Pohnpei State's claims. It is not unreasonable to expect Pohnpei State to disclose the basis for its entitlement to damages at this late stage of the litigation, when all that remains is for Pohnpei State to submit proof of its damages at trial.⁴ Thus, Pohnpei State must fully and completely answer these four interrogatories.

Interrogatory No. 20 requests identity of witnesses and information which would support the preceding interrogatory. Pohnpei State is required to fully and completely answer this interrogatory, subject to limitations placed on similar interrogatories and discussed in footnote 3, *supra*.

Interrogatory No. 21 is improper, as it seeks a pure legal conclusion: whether Pohnpei State agrees with a statement made by the Pohnpei Supreme Court. Thus, No. 22 which seeks identity of witnesses and information which would support Pohnpei State's response to No. 21, is also inappropriate. Interrogatories 23, 24, 25 and 26 are also inappropriate for this reason, and Pohnpei State will not be required to submit responses to these interrogatories.

Interrogatory No. 27 requests Pohnpei State to state whether it contends that the German or Japanese government took physical possession of the submerged reef in or around where the M.V. *Miyo Maru* grounded. Interrogatory No. 28 requests identity of witnesses and information which would support this contention. These interrogatories are appropriate because they seek application of the facts of the instant case to a central legal issue, which is who holds title to the reef which was damaged and how such title was obtained. Evidence sought by Sapwuafik through these Discovery Requests is necessary for Sapwuafik to prove its own claims, or negate claims by Pohnpei State that it has obtained rights or title to the reef in Sapwuafik. Interrogatory Nos. 29, 30, 31, 32, 33 and 34 are appropriate for the same reason. Thus, Pohnpei State must fully and completely answer these interrogatories, subject to the limitations set forth in footnote 3, *supra*.

(2) *Sapwuafik's Motion for Sanctions*

The fashioning of remedies and sanctions for failure of a party to comply with discovery requirements is a matter within the trial court's discretion. Nakamura v. Bank of Guam (II), 6 FSM Intrm. 345, 349 (App. 1994). Sapwuafik seeks an order that its title to the reef that is the subject of the instant lawsuit be taken as a designated fact for purposes of this action, and that the State of Pohnpei not be allowed to contest Sapwuafik's claim to all damages incurred as a result of the grounding of the *Miyo Maru*. Sapwuafik's Motion for Sanctions at 1 (Sept. 4, 1997); Sapwuafik's Renewed Motion for Sanctions (Oct. 28, 1997). No FSM cases were found in which discovery sanctions as severe as those requested by Sapwuafik were granted.

The Discovery Requests originally were served on Pohnpei State on July 9, 1997. Under FSM Civil Rule 33, Pohnpei State should have answered or objected to the Discovery Requests, and filed its motion for a protective order, by August 8, 1997. On September 26, 1997, the Court directed Pohnpei State to respond fully to Sapwuafik's discovery requests within thirty days or face possible imposition of sanctions. Pohnpei State should have filed its objections and request for a protective order before the Court directed Pohnpei State to fully respond to the interrogatories.⁵

Generally, a party should move for a protective order before the date set for discovery. *See* 8 Charles Alan Wright et al., *Federal Practice and Procedure* § 2035, at 479, 481 (1994) ("a party may not remain completely silent when it regards discovery as improper. If it desires . . . not to respond it must object properly or seek a protective order."). Pohnpei State has offered no grounds for failing to object to the interrogatories or seek a protective order prior to the time the discovery responses originally were due on August 8, 1997, or at the latest, before Sapwuafik's agreed extension expired on September 3, 1997.

The Court then ordered Pohnpei State to "fully respond" to Sapwuafik's interrogatories or face possible imposition of sanctions. When Pohnpei State responded to the interrogatories, it presented the Court with the same blanket objections to virtually every

Discovery Request. Sapwuafik then filed a Renewed Motion for Sanctions on October 28, 1997. At the December 2, 1997 hearing, Pohnpei State argued that its objections and request for a protective order were an appropriate and timely "response" under the Court's order. However, Pohnpei State never filed a response to Sapwuafik's renewed motion for sanctions.

Under Rule 37(b), a court may make certain orders "[i]f a party . . . fails to obey an order to permit or provide discovery." FSM Civ. R. 37(b). If the Court determines that Pohnpei State has failed to obey this Court's order, the FSM Civil Rules provide that the Court may order, among other things, that facts be designated as admitted, that the disobedient party not be allowed to support or oppose designated claims, that pleadings or parts thereof be stricken, or that a party be held in contempt of Court. FSM Civ. R. 37(b)(2). In addition, or in lieu of any of the foregoing, the Court shall require a disobedient party, or the attorney or trial counsel representing the party, or both, to pay reasonable expenses (including attorney's fees) caused by the failure of the disobedient party to obey the Court's order. Id.

The Court will not order that certain facts be designated as admitted at this time. However, the Court will not tolerate further delays in this case, and recognizes that Sapwuafik was required to make two motions which would not have been necessary had Pohnpei State complied with the time limits set forth in the FSM Rules of Civil Procedure. Thus, the Court orders Sapwuafik to submit to the Court an accounting of all of its reasonable expenses in preparing, filing, and defending its two motions for sanctions caused by Pohnpei State's delay, and orders Pohnpei State to pay all of these expenses once they are approved by the Court.

(3) *Motion to Dismiss Third Party Complaint*

In evaluating a motion to dismiss, the Court must accept as true the allegations in the complaint. FSM Civ. R. 12(b)(6); Latte Motors, Inc. v. Hainrick, 7 FSM Intrm. 190, 192 (Pon. 1995) (relief should be granted only if it appears certain that no relief could be granted under any facts which could be proven in support of the complaint).

The Third-Party Complaint ("Compl."), filed July 19, 1996, alleges that, when the *Miyo Maru* vessel grounded in Sapwuafik, the captain requested assistance from two nearby vessels to refloat his ship. These ships had been cleared by immigration to assist. Compl. paras. 8, 9. The Complaint further alleges that the Sapwuafik Municipal Government officials actively prevented the refloating of the *Miyo Maru* by arresting the captain and crew. The captain and crew were not released and the vessel could not be refloated. Compl. paras. 12-14. As a result of these arrests, the boats coming to the *Miyo Maru*'s assistance fled, and the boat became unsalvageable as a result of Sapwuafik officials' actions. Compl. paras. 17, 18, 21, 25. Third-party plaintiff Hisamitsu Furuta allegedly was arrested, and detained against his will by Sapwuafik officials for ten days. Compl. paras. 19, 20. The complaint states that his detention was without probable cause, without a warrant being issued, and without any crime having been committed. Compl. para. 27.

1. Negligence Claim

The first cause of action alleged in the third party complaint is a tort action in negligence against Sapwuafik and Pohnpei officials. The complaint alleges that the "Sapwuafik and

Pohnpei officials had a duty" to allow the refloat of the M.V. *Miyo Maru* after it grounded, and "a duty to assist in the refloat of the vessel if necessary, in order to avoid damage to the environment and to property." Compl. para. 22.

Sapwuafik, in its motion to dismiss, argues that it had "no duty to assist [the third-party plaintiffs] in rescuing the vessel that they had recklessly run aground on the Sapwuafik reef." Sapwuafik's Motion to Dismiss Third-Party Complaint ("Sap. Mot.") at 3. Sapwuafik cites the Restatement (Second) of Torts and American Jurisprudence (Negligence) to support the proposition that "the law imposes no duty on one person actively to protect or assist in the preservation of the person or property of another from injury, even though the means by which harm can be averted are in his possession." Sap. Mot. at 4.

Third-party plaintiffs responded to Sapwuafik by arguing that Sapwuafik "actively prevented" the refloat of the *Miyo Maru* by stopping other boats in the area from providing assistance. See Restatement (Second) of Torts § 327 (1977). Third-party plaintiffs also assert that Sapwuafik had a statutory duty not to interfere with the attempted rescue under Title 25 F.S.M.C. 102 and under Title 19 F.S.M.C. 805(3).

Title 25 F.S.M.C. 102, the introductory section of the Trust Territory Environmental Protection Act, generally sets forth a statement of Trust Territory public policy in maintaining the health and safety of the environment. Thus, it declares that the goal of that legislation is to "achieve, maintain, and restore such levels of air, land, and water quality as will protect human health, welfare, and safety and to the greatest degree practicable prevent injury to plant and animal life and property." 25 F.S.M.C. 102.

19 F.S.M.C. 805(3) states that: "[N]o person including the owner or occupier of land over which rescuers must pass, may impede or hinder any rescuer or impede the deposit of cargo or other rescued articles."

The Court will address each of these statutes in turn.

25 F.S.M.C. 102 could be interpreted to dictate a "standard of conduct"; however, it does not create any specific duty for Sapwuafik officials that is relevant to this case. This Court previously has held that "acts that do not provide for a private citizen's cause of action for monetary damages cannot be used to create a duty for the breach of which damages may be awarded." Damarlane v. United States, 6 FSM Intrm. 357, 360-61 (Pon. 1994). The Damarlane case is instructive, as the plaintiff in that case attempted to assert several different causes of action in tort based upon the United States government's alleged failure to comply with standards set forth in various United States environmental laws.

Similarly, third-party plaintiffs in this case attempt to isolate a particular statutory provision in Title 25, an environmental statute, and read it to create a specific duty upon which they base their negligence tort claim. However, the specific provisions cited by third-party plaintiffs, section 102, cannot be read in a vacuum. Title 25 of the FSM Code does not create a cause of action for a private citizen for monetary damages for violation of any portion thereof. Reading this act in its entirety, it is apparent that this law was not intended to impose liability for the specific acts of which third-party plaintiffs complain.

Title 19 F.S.M.C. 805(3) also does not establish a statutory basis for third-party plaintiff's

negligence claim, but for a different reason. 19 F.S.M.C. 805(3) does specifically dictate a standard of conduct for marine "rescue" situations; however, the duty imposed by this statute does not adequately account for the particular relationship between the parties in this case. The statute states that "no person, *including the owner or occupier* of land . . . may hinder or impede a rescuer." 19 F.S.M.C. 805(3) (emphasis added). This statute essentially codifies the common law "incomplete privilege" of one to enter onto the land of another in times of private necessity. *See* Restatement (Second) of Torts § 197 cmt. k (1977).⁶

Both Sapwuafik and Pohnpei State claim ownership of the property upon which the M.V. *Miyo Maru* grounded; however, as evidenced in third-party plaintiff's own complaint, the Sapwuafik officials were purportedly acting in the capacity of law enforcement officials, rather than mere landowners, when they detained the crew of the ship and allegedly prevented other ships from refloating the grounded vessel. As such, the Sapwuafik officials cannot be held to the same standard of care as mere landowners. Stated another way, it cannot have been the intent of 19 F.S.M.C. 805(3) to prevent law enforcement officials from carrying out their official duties in the face of an emergency rescue situation. The statute does not create any additional duty for the Sapwuafik officials acting in their capacity as law enforcement officials.

However, the fact that third-party plaintiffs have not established a statutory basis for the duty that they allege was breached in this negligence action does not mean that such a duty does not exist.

The general principle is that one person may be liable in tort to another only if the first intentionally or negligently violates a duty owed to the other, and the other is injured as a result. Semens v. Continental Air Lines, Inc. (I), 2 FSM Intrm. 131, 142 (Pon. 1985).

The definition of "negligence," as the term is used in the common law countries, is applicable or similar to the Pohnpeian understanding of negligence:

The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do.

Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances; it is the doing of some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances.

Black's Law Dictionary 930-31 (5th ed. 1979) (cited in Koike v. Ponape Rock Products, Inc., 3 FSM Intrm. 57, 65-66 (Pon. S. Ct. Tr. 1986)).

While the Court finds that neither of the statutes cited by third-party plaintiffs directly impose a duty on the Sapwuafik officials, the Sapwuafik officials still had the duty to act as "reasonable people" *under the specific circumstances* present in this case. Thus, they had the duty to act as reasonable law enforcement officials, faced with a grounded vessel containing crew members.

Third-party plaintiffs allege that, when the M.V. *Miyo Maru* vessel grounded in Sapwuafik, the captain of the M.V. *Miyo Maru* requested assistance from two other nearby vessels to refloat his ship. They further allege that the Sapwuafik officials actively prevented the refloating of the M.V. *Miyo Maru* by arresting the captain and crew of the M.V. *Miyo Maru*. The complaint states that the arrests were made despite desperate communications from the master of the *Miyo Maru* to Sapwuafik officials that the crew of the *Miyo Maru* needed to remain on board the vessel because the two other vessels were approaching to assist in the refloat. The complaint further alleges that, as a result of these arrests, the boats coming to the *Miyo Maru*'s assistance fled, and the boat became unsalvageable.

No FSM cases were found which discuss tort liability of those who negligently prevent a third party from rendering assistance to another to prevent injury to property. "Common law decisions of the United States are an appropriate source of guidance for this court for contract and tort issues unresolved by statutes, decisions of constitutional courts here, or custom and tradition within the Federated States of Micronesia." Semens (I), 2 FSM Intrm. at 142.

Courts in the United States have generally followed the provisions of the Restatement of Torts in situations where a plaintiff alleges that a defendant has negligently prevented a third party from rendering assistance. The Restatement (Second) § 327 provides that:

one who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid for which he has prevented the third person from giving.

Restatement (Second) of Torts § 327 (1977). Conduct for which a cause of action for preventing aid from a third party has been recognized includes, for example, knowingly interfering with firefighting operations, Boston Fish Market Corp. v. Universal Ins. Co., 388 F.2d 773 (1st Cir. 1968), and preventing a bystander from aiding the victim of an assault, Riggs v. Colis, 695 P.2d 413 (Idaho Ct. App. 1985).

The Court finds that the allegations in the complaint are sufficient to survive a motion to dismiss. Third-party plaintiffs allege that Sapwuafik officials' knowing interference prevented two ships from refloating the *Miyo Maru* after it had grounded on the Sapwuafik reef. The complaint alleges that the crew of the M.V. *Miyo Maru* were arrested by the Sapwuafik officials without cause, and that this prevented the rescue of the vessel. Assuming that third-party plaintiffs can demonstrate that Sapwuafik actively and unreasonably prevented rescue by other boats, and that that interference was the direct cause of the damage to the boat, they set forth a claim in negligence.⁷ Thus, Sapwuafik's motion to dismiss this count is denied.

2. False Imprisonment Claim

The second cause of action asserted by third-party plaintiffs is a claim for false imprisonment against the Sapwuafik officials. Sapwuafik's motion to dismiss erroneously treats this claim as a civil rights claim. Third-party plaintiffs assert that Sapwuafik officials committed a tort when they imprisoned a M.V. *Miyo Maru* crew member against

his will and without just cause.

Third-party plaintiff Hisamitsu Furuta alone asserts a cause of action based upon unlawful imprisonment. The complaint states that Hisamitsu Furuta was arrested and detained against his will for 10 days, and that such detention was illegal because it was done without probable cause, without a warrant, and without any crime having been committed. Compl. paras. 26, 27. The complaint alleges that damage to the ship was a result of this imprisonment. Compl. paras. 11, 12, 14.

Accepting all of the allegations in the complaint as true, the Court must determine whether the complaint asserts a cause of action in tort for "false imprisonment" against the Sapwuafik officials. A threshold issue is whether "false imprisonment" is recognized as a tortious act in Pohnpei State.

As stated above, the general principle is that one person may be liable in tort to another only if the first intentionally or negligently violates a duty owed to the other, and the other is injured as a result. Semens (I), 2 FSM Intrm. at 142. State law controls in the resolution of contract and tort issues. Edwards v. Pohnpei, 3 FSM Intrm. 350, 360 n.22 (Pon. 1988). "When the Supreme Court, in the exercise of its jurisdiction, decides a matter of state law, its goal should be to apply the law the same way the highest state court would." Id.

No existing case law was found which recognizes false imprisonment as a tort in Pohnpei State. Because state law does not provide guidance, this Court must decide issues of tort law by applying the law as it believes the Pohnpei Supreme Court would. Id. This Court believes that the highest court in Pohnpei would recognize that a redressible civil wrong is committed when a person is unlawfully detained against his will. The Pohnpei State Constitution, like the FSM Constitution, guarantees that "[n]o person may be deprived of . . . liberty . . . without due process of law." Pon. Const. art. 4, § 4. The Pohnpei Constitution also guarantees citizens the right to "be secure in their persons . . . against unreasonable searches and seizures." Pon. Const. art. 4, § 8.

Thus, the Pohnpei State Constitution recognizes that the citizens of Pohnpei have a right to personal liberty unless they are lawfully detained and afforded the right to due process. To unreasonably physically restrain an individual without cause violates this recognized right. This Court has, in the context of criminal prosecutions, interpreted Article IV, section 5 of the FSM Constitution, which is identical to Article 4, section 8 of the Pohnpei State Constitution. In FSM v. Tipen, 1 FSM Intrm. 79 (Pon. 1982), the Court found that police officers conducted an unlawful search when they searched the belongings of a bar patron without a search warrant or an arrest warrant. Id. at 89. Because the Tipen case was a criminal prosecution rather than a civil action, the result of the illegal search and seizure in Tipen was that the evidence which was unlawfully obtained was suppressed in the defendant's criminal trial. Here, third-party plaintiff Hisamitsu Furuta attempts to impose civil liability on the Sapwuafik officials for allegedly unlawfully imprisoning him for ten days.

This Court finds the language in the Tipen case instructive in elucidating the principles behind the FSM and Pohnpei State constitutional guarantees of liberty and freedom from unreasonable seizures. Looking to United States law, the Tipen court recognized that: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint

or interference of others, unless by clear and unquestionable authority." 1 FSM Intrm. at 86 (citation omitted). The Tipen court further recognized that protections against unlawful searches and seizures were intended to "protect the sanctity of the individual citizen and to prevent the growth and exercise of unchecked government power." Id. The Court believes that the rationale for allowing a tort claim for false imprisonment is as compelling as that requiring suppression of unlawfully seized evidence: to deter government officials from acting beyond their lawful authority and violating constitutional rights of citizens of Pohnpei State.⁸

The elements of false imprisonment are (1) detention or restraint of one against his or her will, and (2) the unlawfulness of such detention or restraint. 32 Am. Jur. 2d *False Imprisonment* § 8 (1982). The complaint alleges that third-party plaintiff was held against his will for ten days, without a warrant, without probable cause, and without a crime having been committed.

Accepting the allegations of the third-party complaint as true, third-party plaintiff asserts a cause of action for false imprisonment.

3. Civil Rights Claims

The third and fourth causes of action in the complaint allege due process violations by Hisamitsu Furuta and Masayo Furuta, respectively, under 11 F.S.M.C. 701.9 In its motion to dismiss, Sapwuafik asserts that the third-party plaintiffs have not presented allegations in their complaint sufficient to state a claim against a municipal government like Sapwuafik. Specifically, Sapwuafik states that these causes of action should be dismissed because the complaint does not allege that Sapwuafik officials were acting pursuant to governmental policy or custom when the allegedly unconstitutional actions occurred. Sap. Mot. at 6.

In response, third-party plaintiffs argue that, under Plais v. Panuelo, 5 FSM Intrm. 179, 205-06 (Pon. 1991), civil rights liability may attach to a municipal government when violations are caused by the officials who are responsible for final policy making, and when those officials make a deliberate choice to follow a course of action chosen from various alternatives. In Plais, the action of one police officer, the Pohnpei Chief of Police, burning a prisoner with his cigarette, was sufficient to establish an official policy. Id. at 207.

The Plais case stands for the proposition asserted by third-party plaintiffs: that isolated actions of one or of a few officials can be sufficient to impose liability on a governmental unit. However, no allegation that Sapwuafik officials were acting under an official policy, or that their actions constituted the official municipal policy, is contained in the third-party complaint. Third-party plaintiffs argue that "[t]he complaint states Sapwuafik officials [detained third-party plaintiffs against their will], but it could easily be amended to state Sapwuafik policy-making officials." Third-Party Response to Sap. Mot. at 7 (Nov. 14, 1997).

Third-party plaintiffs have omitted a necessary allegation from their complaint, and the Court will not infer allegations where none have been made. The Court will not assume that Sapwuafik officials were "policy-making" officials without such an allegation being stated in third-party plaintiffs' complaint. Thus, even accepting all allegations of the third-

party plaintiffs' complaint as true, these allegations are not sufficient to state claims under 11 F.S.M.C. 701. However, third-party plaintiffs will be granted an opportunity to amend their complaint in order to assert claims for civil rights violations against third-party defendants.

Sapwuafik's motion to dismiss the Third and Fourth causes of action in the third-party complaint is hereby granted. Third-party plaintiffs will be allowed leave to file amendments to their complaint, if any, within 30 days of the date of this Order.

Conclusion

Based upon the foregoing, Pohnpei State is hereby ordered to respond to Sapwuafik's Discovery Requests, according to the specific guidelines set forth in this Order, within 30 days of the date that this Order is entered. Sapwuafik's motion for sanctions is hereby granted. Sapwuafik is hereby ordered to submit to this Court an accounting of its reasonable expenses in preparing, filing and defending its first motion for sanctions on September 4, 1997 and the instant motion for sanctions, including reasonable attorney's fees. Pohnpei State is hereby ordered to reimburse Sapwuafik for those expenses that the Court determines to be reasonable.

Sapwuafik's motion to dismiss the third-party complaint is hereby denied as to Count I (Negligence) and Count II (False Imprisonment) of the third-party complaint, and hereby granted as to Count III (Civil Rights) and Count IV (Civil Rights) of the third-party complaint. Third-party plaintiffs are granted leave to file an amended complaint, if they choose, within 30 days of the date of this Order, without further motion to the Court.