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FSM SUPREME COURT APPELLATE DIVISION

IOANIS PANUELO d/b/a IP ENTERPRISES,)	APPEAL CASE NO. P4-2001
)	
Appellant,)	
)	
vs.)	
)	
ALFRED AMAYO and ELSA AMAYO, Individually,)	
and as Next Friends of ALFIE AMAYO, APRIL)	
AMAYO, and JILLEEN AMAYO,)	
)	
Appellees.)	
_____)	

OPINION

Argued: January 22, 2003
Decided: February 19, 2004

BEFORE:

Hon. Andon L. Amaraich, Chief Justice, FSM Supreme Court
Hon. Yosiwo P. George, Temporary Justice, FSM Supreme Court*
Hon. Keske S. Marar, Temporary Justice, FSM Supreme Court**

*Chief Justice, Kosrae State Court, Tofol, Kosrae

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

APPEARANCES:

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For the Appellees: Daniel J. Berman, Esq.
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HEADNOTES

Appellate Review – Decisions Reviewable

When a litigant raises an issue for the first time on appeal, he or she is deemed to have waived the right to challenge the issue unless it involves a plain error that is obvious and substantial and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing

The trial court has an obligation to insure that a defendant was served with the notice of trial issued by the trial court, and on that basis an appellate court will reverse the trial court judgment and remand the case for a new trial. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Judgments – Relief from Judgment

The grant or denial of relief under Civil Procedure Rule 60 rests with the sound discretion of the trial court. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Appellate Review – Standard of Review; Judgments – Relief from Judgment

An appellate court reviews a trial court denial of a Rule 60(b) motion under an abuse of discretion standard. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Judgments – Relief from Judgment

Rule 60(b)(1) provides that a court may relieve an affected party from judgment on the basis of mistake, inadvertence, surprise, or excusable neglect. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Appellate Review – Standard of Review

An abuse of discretion occurs when 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence on which the court rationally could have based its decision. Such abuses must be unusual and exceptional; an appeals court will not merely substitute its judgment for that of the trial judge. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Appellate Review – Standard of Review; Judgments – Relief from Judgment

A trial court commits an abuse of discretion when it commits legal error by denying a motion for relief from judgment when a defendant was surprised by the date and time of trial since he was

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never served with a notice of trial because the trial court erred when, through its clerks' office, it failed to serve notice of the trial date and time on the *pro se* litigant. This error seriously affected the judicial proceedings' fairness, integrity, and public reputation, regardless of opposing counsel's service of a trial subpoena on the litigant. Panuelo v. Amayo, 12 FSM Intrm. 365, 372 (App. 2004).

Attorney, Trial Counselor and Client – Appearance

When a court allows an attorney's limited appearance, it is not clear whether litigants represented in a limited manner understand that their attorney is not taking full responsibility for prosecuting or defending them. Thus trial judges should consider carefully, on a case-by-case basis, whether to allow "limited appearances." As a general rule, attorneys should either enter formal appearances and accept full responsibility for a case, or not be permitted to appear before the court. Panuelo v. Amayo, 12 FSM Intrm. 365, 373 (App. 2004).

Attorney, Trial Counselor and Client – Appearance; Attorney, Trial Counselor and Client – Attorney Discipline and Sanctions

If the court learns that an attorney is providing legal advice and/or drafting documents for a *pro se* litigant but concealing that fact from the court, the court should consider ordering the attorney to file a formal notice of appearance or be subjected to sanctions. Panuelo v. Amayo, 12 FSM Intrm. 365, 373-74 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing; Judgments – Relief from Judgment

When the fundamental tenets of due process are violated by the trial court's failure to provide notice of the trial to a *pro se* litigant, the trial court's later denial of his motion for relief from judgment under Rule 60 is an abuse of discretion. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing

Notice and an opportunity to be heard are the essence of due process of law. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing

Specific requirements of due process may vary depending on the nature of decisions to be made and the circumstances. At the core however is the right to be heard. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Constitutional Law – Due Process

The fundamental concept of procedural due process is that the government may not be permitted to strip citizens of "life, liberty or property" in an unfair, arbitrary manner. Before such important individual interests are exposed to possible governmental taking or deprivation, the Constitution requires that the government follow procedures calculated to assure a fair and rational decision making process. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Civil Procedure – Notice; Constitutional Law – Due Process – Notice and Hearing

Even when a litigant was provided with a subpoena by opposing counsel, which accurately stated the trial date, it is essential that the trial court insure that its own notice procedures satisfy the requirements of due process, especially where *pro se* litigants are involved. When unrepresented parties are deluged with legal documents drafted by attorneys on the opposing side, it is conceivable that confusion will result. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Civil Procedure – Notice

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Except as otherwise provided in the rules or by court order, every written notice must be served upon each of the parties. It is mandatory for the court to serve notices on parties, unless they are in default. The court must insure that its own notices and orders are properly served on *pro se* litigants – *pro se* litigants should not be compelled to rely upon opposing counsel to inform them of a trial date. Panuelo v. Amayo, 12 FSM Intrm. 365, 374 (App. 2004).

Civil Procedure – Notice; Constitutional Law – Due Process – Notice and Hearing

When the trial court easily could have concluded a trial on the full merits of the case by extending or delaying the proceedings for a few extra hours, but chose instead to base its determination of liability upon evidence that a litigant did not have an opportunity to oppose because of lack of court-issued notice of trial, and when the law favors the disposition of cases on their merits, the trial court's error in failing to insure that it provided the litigant with notice of the trial date and time brings into question the fairness, integrity, and public reputation of judicial proceedings. Panuelo v. Amayo, 12 FSM Intrm. 365, 375 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing

The procedural due process guarantee of notice protects not only the parties involved but upholds the court's integrity as well. Panuelo v. Amayo, 12 FSM Intrm. 365, 375 (App. 2004).

Constitutional Law – Due Process – Notice and Hearing

A trial court commits plain error, and violates the litigant's right to due process, when it fails to serve notice of a trial date and time on a *pro se* litigant. It therefore abuses its discretion when it denied the litigant's motion for a new trial. Panuelo v. Amayo, 12 FSM Intrm. 365, 375 (App. 2004).

* * * *

COURT'S OPINION

ANDON L. AMARAICH, Chief Justice:

Appellant Panuelo appeals from a judgment entered by the trial court in favor of the Appellees ("the Amayos") and against Panuelo on June 14, 2001, after a trial and a determination by that court that Panuelo was liable for negligence and loss of consortium.¹ Panuelo also appeals from a post-judgment order that denied his motions for a new trial and for relief from the judgment.

It is worth mentioning that this is one of the largest personal injury awards ever made in the Federated States of Micronesia, as the trial court determined that plaintiffs were entitled to more than \$380,000 in damages due to Alfred Amayo's injury; thus, we are concerned whether the verdict was reached only after according the defendant all process that was due to him. This case also was unusual in that the trial judge was not a resident of Pohnpei, where the trial was held, and the trial judge did not have regular interaction with Pohnpei counsel, or with the court clerks who were responsible for entering and serving court process on the parties and on counsel. It is obvious that the trial judge was navigating this case with some difficulty, because defendant Ioanis Panuelo was acting

¹ The award included \$108,000 for lost wages, \$5,400 for medical expenses, \$225,000 for pain and suffering, \$25,000 for the wife's loss of consortium claim, \$10,000 to each of the three children for "loss of parent consortium," the Amayos' costs associated with this litigation, and \$495.50 in costs associated with a pre-trial discovery order.

pro se, and was not actively involved in his own defense. However, it remains vital to the integrity and public perception of court proceedings that any judgment rendered by our courts comport squarely with the tenets of due process in the FSM Constitution. Accordingly, for the reasons that follow, we reverse the trial court judgment, and remand this case for a new trial.

I. FACTS

While working as a laborer on a construction project in Pohnpei, Alfredo Amayo was injured when, on July 17, 1999, he fell from the second floor of the building that was under construction. He suffered a spinal injury and was rendered permanently paraplegic. Amayo filed a complaint against MJ Company, Ron Pangelinan and Ioanis Panuelo d/b/a IP Enterprises, alleging negligence, breach of contract, and "reckless, wanton and willful misconduct."² The complaint requested that general, special and punitive damages be proven at the time of trial.

Panuelo answered the complaint by denying any liability and presenting various defenses based upon his position that Amayo was not his employee, was not under his control or supervision at any time, and may have been injured through his own negligence. Panuelo's Answer was signed by him. No attorney was identified as having prepared the document or as having undertaken Panuelo's legal representation.

Thereafter, a motion to amend the complaint was filed by counsel for the Amayos. The proposed amendment added Alfredo Amayo's wife and children as plaintiffs, and added their claim for loss of consortium. Panuelo did not oppose the motion, nor file an amended answer. The court did not issue an order granting the motion to amend. However, the Amayos filed an amended complaint after the parties' status conference on June 1, 2000, and the case proceeded on the basis of the amended complaint as if their motion had been granted. In all subsequent filings and orders, the caption of the case reflected the new plaintiffs, and evidence regarding loss of consortium was admitted at trial.

At the June 2000 status conference, attorney Joseph Phillip appeared "temporarily" on behalf of Panuelo, but "only for the purposes of that hearing." No Notice of Appearance was ever filed by Phillip. However, documents filed by the parties and orders issued by the court were thereafter served in a random manner – sometimes on Panuelo but not Phillip, sometimes on Phillip but not Panuelo, and sometimes on both. Most notably, the Order Setting Trial was sent (via mail) to Phillip, but not to Panuelo.

The trial, held on February 5, 2001, lasted one day. In the morning, only defendant Ron Pangelinan and Dan Berman, Esq., acting in his capacity as the Amayos' legal representative, were present. The Amayos, Panuelo, and attorney Phillip, were absent. The proceedings began with the judge making the following inquiry:

COURT: Before we begin . . . I have a few questions about this case because it's - my file doesn't seem to be very well organized, so I'm just - I notice that Joe Phillip's name appears at some point but - I don't know. I may be mistaken but is Joe Phillip the one who represents the defendant here or some of the defendants? Now, there's no counsel representing any of the defendants, right?

MR. BERMAN: Yes, that is my understanding, Your Honor.

² Below, this case was captioned "Alfredo Amayo, and Elsa Amayo, individually, and as next friends of Alfie Amayo, April Amayo, and Jilleen Amayo, Plaintiffs, v. MJ Company, Ron Pangelinan and Ioanis Panuelo d/b/a IP Enterprises, Defendants." The trial court found in favor of defendants MJ Company and Pangelinan on all counts. They are not parties to this appeal.

Trial Tr. at 5-6.

In his opening statement, plaintiff's counsel reminded the court of an Order, issued by the court on September 15, 2000, which had stated that Panuelo's liability would be established by default, and that an order to that effect would be entered, if Panuelo failed to produce certain documents pursuant to a discovery request. Plaintiff's counsel requested that the court enter a default as to Panuelo's liability, both on the basis of his failure to respond to the September 2000 Order and on the basis of his failure to appear at trial. Counsel also asked the court to rule on his pending request for \$495.50 in costs relating to the motion to compel discovery that had led to the court's issuance of the September 2000 order.

The trial court took these motions under advisement and stated that he would make a decision "all at once after we've gone through everything." During the morning session, while Panuelo was absent, plaintiff proceeded to offer various documents as exhibits and to present the testimony of two witnesses, Doctor Johnny Hedson and Isagani (Johnny) Ambuyoc, before the court recessed for lunch. During the afternoon session of the trial, both Panuelo and Phillip were present in the courtroom. They did not alert the trial judge to their presence, and Phillip did not inform the court as to his role in the trial. Plaintiff proceeded to offer the testimony of two more witnesses, Wendolin Mendiola and Aren Palik, with no cross-examination requested by Phillip. After Aren Palik testified, the following exchange took place:

COURT: Wait a minute, I noticed that we have Mr. Joseph Phillip sitting, the defendant's counsel and we've been having all the people testifying and leaving. Could we know where Mr. Phillip is coming into this matter because if he wants to ask questions he should be permitted if he's part of this case. Are you representing somebody here today?

MR PHILLIP: Yes, Your Honor.

COURT: I'm sorry for ignoring you for so long, but . . .

MR. PHILLIP: My apology, Your Honor, for not appearing this morning. Saturday, Panuelo called me and said that the case was set for two o'clock, that he had received subpoenas. He was served on Friday and he calls me on Saturday and he - apparently was mistaken because those subpoenas were for the banks and he thought that was - the case was set for two o'clock.

COURT: You represent?

MR. PHILLIP: Panuelo.

COURT: Ioanis Panuelo. I see.

MR. PHILLIP: Ioanis Panuelo.

COURT: Okay, just one of the defendants?

MR. PHILLIP: Yes.

COURT: Well, feel free anytime you want to ask questions of the witnesses. . . .

MR. PHILLIP: Thank you, Your Honor.

COURT: . . . this afternoon, you may. Who's the next witness going to be?

MR. BERMAN: Your Honor, just prior to the next witness just a statement of the record, a subpoena was drawn and served on Mr. Ioanis Panuelo personally to appear in this Court for this trial at 9:00 a.m. The return of service for that subpoena was filed December 15th and the service of subpoena on Mr. Panuelo was December 14th, 2000, approximately forty-five days ago. Just in clarification for the record.

COURT: Yeah, I see a copy of the affidavit of service in the record.

MR. BERMAN: Thank you, Your Honor.

Trial Tr. at 59-60. During the afternoon session of trial, Panuelo testified that he had not hired Alfred Amayo. Attorney Phillip offered into evidence the employment contract between MJ Company and Amayo, to establish that Amayo worked for MJ Company and that Panuelo was therefore not liable for Amayo's injuries. The Amayos' counsel objected to the exhibit, on the ground that liability should already have been established by default either when Panuelo failed to provide documents during discovery, as ordered by the court on September 15, 2000, or when Panuelo failed to appear for trial that morning and plaintiff's counsel had moved for a default. The judge allowed the employment contract to be entered into evidence and stated that he would determine, later, how much weight to accord it. The trial proceeded. At its conclusion, Phillip requested and was granted the opportunity to provide his closing arguments in writing, three weeks later.

Thereafter, the trial court found in favor of Panuelo on two of the four counts.³ It found in favor of the Amayos and against Panuelo on the two remaining counts – negligence and loss of consortium – and awarded the Amayos \$388,895.50. Amayo v. MJ Co., 10 FSM Intrm. 244 (Pon. 2001). Panuelo then retained a new attorney who filed motions for a new trial and for relief from the judgment. Both motions were denied. Amayo v. MJ Co., 10 FSM Intrm. 371 (Pon. 2001).

II. ISSUES

Panuelo assigns error to five pre-trial events, five trial rulings, and the denial of his two post-trial motions. The pre-trial incidents challenged by Panuelo are as follows: (1) Allowing an attorney to make a limited appearance on behalf of Panuelo at a status conference, (2) allowing the plaintiffs to file an amended complaint without obtaining leave of the court, (3) awarding attorney fees associated with a motion to compel discovery, without first holding a hearing, (4) failing to serve Panuelo with an Order Setting Trial, and (5) allowing the plaintiffs to engage in discovery after the deadline for discovery had expired.

The events at trial to which Panuelo assigns error are as follows: (1) Trial was held without the

³ The trial court found in favor of Panuelo on count two of Amayo's complaint – that his contract contained a warranty that the workplace was safe – and count three – that Panuelo was willful, wanton, and reckless in failing to provide medical care and in failing to provide a safe workplace. Amayo v. MJ Co., 10 FSM Intrm. 244, 249 (Pon. 2001).

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presence of the parties, (2) the case was adjudicated based upon the plaintiffs' amended complaint, (3) factual findings were made which Panuelo contends had insufficient evidence to support them, (4) the trial court did not "consider the duty of care owed by a construction contractor in Pohnpei in 1999 when concluding that the Appellant breached his duty of care," and (5) under these circumstances a judgment for several hundred thousand dollars was "an abuse of discretion."

The post-trial rulings assigned as error by Panuelo are the denial of his Motion for New Trial, FSM Civ. R. 59, and the denial of his Motion for Relief from Judgment, FSM Civ. R. 60(b). Both motions were submitted in one document which was filed on June 25, 2001, and denied by the court on September 19, 2001. Amayo v. MJ Co., 10 FSM Intrm. 371 (Pon. 2001). Panuelo asserts that the trial court erred when it concluded that six of the eight assigned errors in the Rule 59 motion related to the "lack of trial notice" issue and therefore should be considered in connection with the Rule 60 motion. He also challenges the trial court's determination that prior to trial, Panuelo had been a *pro se* litigant with actual knowledge of the trial date and time. That determination was the basis for the trial court's denial of the motion for relief from judgment.

III. DISCUSSION

When a litigant raises an issue for the first time on appeal, he or she is deemed to have waived the right to challenge the issue unless it involves a plain error that is obvious and substantial and that "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95 (App. 2001). Because we find that the trial court committed plain error when it proceeded to trial without serving notice of the trial date on Panuelo, we need not reach all of the issues raised by appellant. We find that the trial court had an obligation to insure that Panuelo was served with the notice of trial issued by the trial court, and on that basis will reverse the judgment of the trial court and remand this case for a new trial.

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 Intrm. at 377. We review the denial of a Rule 60(b) motion by the trial court under an abuse of discretion standard. Senda v. Mid-Pacific Constr. Co., 6 FSM Intrm. 440, 445 (App. 1994). Rule 60(b)(1) provides that a court may relieve an affected party from judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect."

An abuse of discretion occurs when (1) the court's decision is clearly unreasonable, arbitrary, or fanciful; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the . . . court rationally could have based its decision. Such abuses must be unusual and exceptional; an appeals court will not merely substitute its judgment for that of the trial judge. Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992).

We find that the trial court committed an abuse of discretion when it denied Panuelo's motion for relief from judgment, because it committed legal error when it determined that Panuelo had adequate notice of the date and time of trial. Panuelo claimed in his motion for relief from judgment that he was surprised by the date and time of trial, because he was never served with a notice of trial. The trial court erred when, through its clerks' office, it failed to serve notice of the trial date and time on *pro se* litigant Panuelo. We find that this error seriously affected the fairness, integrity, and public reputation of the judicial proceedings, regardless of opposing counsel's service of a trial subpoena on Panuelo. Accordingly, we reverse this case and remand it to the trial division for a new trial.

The additional points of error raised by appellant need not be addressed. However, the Court

also is concerned with the cumulative effect of the errors asserted by Panuelo. Particularly, as discussed below, permitting an attorney to make a limited appearance in this case led to errors of service that permeated the entire case below and prejudiced the defendant. Also, it seems unfair to a defendant to enter a judgment against him on an amended complaint, when leave was never granted for the filing of that complaint. The Court also is concerned that plaintiffs were permitted generous leeway in discovery, and that most of the evidence that was used to support the large verdict against defendant was not subject to cross examination or otherwise contested. The following is a discussion of the particular point on which we base our decision to reverse.

A. *Failure to Serve Notice of the Trial Date and Time on Pro-se Litigant Panuelo*

The trial court's decision to allow the appearance of attorney Phillip for the limited purpose of a status conference, was not preserved and presents no legal basis for prevailing on appeal. Nonetheless, it will be considered in the context of our discussion of *pro se* litigants, below. The issue is also related to service of the notice of trial, and whether the trial court's failure to serve notice on Panuelo deprived him of due process.

The final pre-trial issue raised by Panuelo challenges the fact that attorney Phillip was served with the Order Setting Trial, while Panuelo was not. The trial court's failure to serve Panuelo was an obvious error, because Phillip was not the attorney of record. According to the court file, Panuelo was proceeding without legal representation. Therefore, the court was required to ensure that Panuelo was served with the notice of trial. FSM Civ. R. 5. When this issue was raised after the trial, in a Rule 60(b)(1) motion for relief from judgment filed by Panuelo's post-trial attorney, the trial court denied the motion on the ground that Panuelo received adequate notice of the trial when he was served with a Subpoena to appear and testify at 9:00 a.m. on February 5, 2001. Amayo, 10 FSM Intrm at 379.

The record confirms that a document, captioned "TRIAL SUBPOENA" and requiring the recipient to appear at the trial on February 5, 2001, at 9:00 a.m., was personally served by a representative for Dan Berman, counsel for Amayos, by hand-delivery upon Panuelo on December 14, 2000, seven weeks prior to the trial. However, during the week immediately preceding trial, several other subpoenas were issued to other witnesses. Copies of the subpoenas for the Bank of the FSM, Bank of Guam, Bank of Hawaii, and the Court of Land Tenure were served upon Panuelo. These later-issued subpoenas required the recipients to appear at a proceeding "to be held at the FSM Supreme Court, in Palikir, State of Pohnpei on Monday, February 5, 2001 at 2:00 p.m., then and there to testify as a witness in this action." In an affidavit filed after the trial, Panuelo states that because these subpoenas required attendance at 2:00 p.m. on February 5th, he believed that the time of trial had been changed to the afternoon.

The issue of how Panuelo received notice of the trial is tied to the trial court's decision to allow attorney Phillip to appear for the limited purpose of representing Panuelo at a status conference. Accordingly, we address the matter of limited appearances.

The record shows that, prior to the day of trial, Phillip's appearance in this case had been limited to attending a status conference that was held many months before trial. That limited appearance appears to have resulted in legal documents, orders, and notices being served in a somewhat erratic manner. It became unclear who should receive filings - Panuelo, Phillip, or both. It also created a situation of uncertainty as to whether Panuelo could be contacted directly, or whether counsel for the plaintiffs could communicate only through Panuelo's "limited appearance" attorney.

It follows that other uncertainties are created, as well, when a court allows the limited appearance of an attorney – e.g., whether the individual who is represented in a "limited" manner understands that he or she is personally responsible for understanding the content of legal documents that are drafted by the attorney but signed by the individual litigant *pro se*, or whether such individuals understand the import of the claims that have been brought against them. It is not clear whether litigants represented in a limited manner understand that their attorney is not taking full responsibility for prosecuting or defending them.

In light of the above, trial judges should consider carefully, on a case-by-case basis, whether to allow "limited appearances." As a general rule, attorneys should either enter formal appearances and accept full responsibility for a case, or not be permitted to appear before the court. Moreover, if the court learns that an attorney is providing legal advice and/or drafting documents for a *pro se* litigant but concealing that fact from the court, the court should consider ordering the attorney to file a formal Notice of Appearance or be subjected to sanctions.

We return to an analysis of the trial court's failure to serve Panuelo with the Order Setting Trial. As noted above, that failure was an error. We cannot deem this error harmless under the specific circumstances of this case, and find that the fundamental tenets of due process were violated by the trial court's failure to provide notice of the trial to Panuelo as a *pro se* litigant. Accordingly, we deem the trial court's denial of Panuelo's motion for relief from judgment under Rule 60 an abuse of discretion.

"Notice and an opportunity to be heard are the essence of due process of law." In re Sanction of Michelsen, 8 FSM Intrm. 108, 110 (App. 1997) (quoting In re Extradition of Jano, 6 FSM Intrm. 93, 99 (App. 1993)).

Specific requirements of due process may vary depending on the nature of decisions to be made and the circumstances. At the core however is the right to be heard. Etpison v. Perman, 1 FSM Intrm. 405, 423 (Pon. 1984). The fundamental concept of procedural due process is that the government may not be permitted to strip citizens of "life, liberty or property" in an unfair, arbitrary manner. Before such important individual interests are exposed to possible governmental taking or deprivation, the Constitution requires that the government follow procedures calculated to assure a fair and rational decision making process. Suldan (II), 1 FSM Intrm. at 354-55.

Semes v. FSM, 4 FSM Intrm. 66, 74 (App. 1989). Because the trial court committed error when it failed to serve *pro se* litigant Panuelo with the Order Setting Trial, it violated Panuelo's right to notice and an opportunity to be heard in this civil action, which ultimately resulted in a judgment against him in excess of \$380,000. Even though the record contains evidence that Panuelo was provided with a subpoena by opposing counsel, which accurately stated the trial date, we believe that it is essential that the trial court insure that its own notice procedures satisfy the requirements of due process, especially where *pro se* litigants are involved. When unrepresented parties are deluged with legal documents drafted by attorneys on the opposing side, it is conceivable that confusion will result. Panuelo establishes in his affidavit accompanying his motions for post-trial relief that actual confusion did result in this case. He was served with trial subpoenas which contained two different times. The subpoena commanding his personal appearance was for February 5, 2001 at 9:00 a.m., and was served forty-five days in advance of the trial. The subpoenas to the banks and to the Court of Land Tenure were served on Panuelo the week immediately preceding the trial, and required that these witnesses appear for at 2:00 p.m.

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Rule 5(a) of the FSM Rules of Civil Procedure requires that: "Except as otherwise provided in these rules or by order of the court . . . every written . . . notice . . . shall be served upon each of the parties." FSM Civ. R. 5(a). A notice of trial was issued, and was not served on Panuelo. It is mandatory for the court to serve notices on parties, unless they are in default. The court must insure that its own notices and orders are properly served on *pro se* litigants – *pro se* litigants should not be compelled to rely upon opposing counsel to inform them of a trial date. This would discharge the court of its obligation to provide litigants with notice, and erode the due process protections that the FSM Constitution recognizes.

The record shows that the trial court made a proper inquiry as soon as it saw Panuelo in the court room on the afternoon of the trial, and that it did not proceed with the trial until it determined that Panuelo had, in fact, been served with notice of the trial date and time. However, the record also shows that Panuelo's presentation on the afternoon of the trial was limited to the issue of damages, and that evidence as to Panuelo's liability already had been submitted to the trial court without any opportunity for cross examination or objection by Panuelo. It should have been clear to the trial court that Panuelo intended to fully defend himself against the claims advanced by the Amayos, and the trial court should have received and considered Panuelo's evidence contesting his liability. The trial court easily could have concluded a trial on the full merits of the case by extending or delaying the proceedings for a few extra hours, but chose instead to base its determination of liability upon evidence that Panuelo did not have an opportunity to oppose.

It is unfortunate that Panuelo chose to retain the services of an attorney who did not take steps on the day of trial to attempt to recall witnesses and reopen the liability issue. The conduct and performance of attorney Phillip on the day of trial demonstrates a lack of diligence and preparedness. However, the law favors the disposition of cases on their merits, and error on the part of the trial court in failing to insure that it provided Panuelo with notice of the trial date and time brings into question the fairness, integrity, and public reputation of judicial proceedings.

We acknowledge that trial courts may be frustrated when confronted with a *pro se* litigant whose conduct appears to be dilatory and irresponsible. Nonetheless, the procedural due process guarantee of notice protects not only the parties involved but upholds the integrity of the court as well. Where, as here, the integrity of the court is brought into question because the court did not follow its own procedures for providing Panuelo with a notice of trial, the only remedy is to permit a new trial where adequate notice is given.

IV. CONCLUSION

We hold that the trial court committed plain error, and violated appellant's right to due process, when it failed to serve notice of a trial date and time on appellant, who is a *pro se* litigant. It therefore abused its discretion when it denied Panuelo's motion for a new trial. For the reasons set forth above, we reverse the judgment of the trial court and remand this case for proceedings not inconsistent with this decision. The clerk of courts is HEREBY ORDERED to confer with Panuelo and the bank at which the bond Panuelo posted is being held, and make arrangements for release of the remainder of the bond to Panuelo.

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