*Robert v. Ikesakes*, 6 ROP Intrm. 234 (1997)
**CLEOFAS ROBERT and ALLEN KANGICHI,**
**Appellees.**

**v.**

**NGIRABOI IKESAKES, et al.,**
**Appellants,**

CIVIL APPEAL NO. 4-95
Civil Action No. 398-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: September 22, 1997

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Mariano W. Carlos

BEFORE: JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; JANET HEALY WEEKS, Part Time Associate Justice.

MICHELSEN, Justice:

Although it has been stated that Airai traditional leaders ⊥235 used customary eviction only twice in German times and once in Japanese times,[1] this case already marks the second time since the adoption of the Constitution that plaintiffs have sued for damages for destruction of residences by Airai traditional leaders who defended their actions on the basis of customary authority.[2] The Defendants were found liable in the civil action below and have appealed. We affirm.

I. FACTS

The Plaintiffs, Mr. and Mrs. Kangichi ("Kangichi"), executed a residential lease agreement with Governor Obichang of Airai State. The lease pertained to a plot of land, "Ked," in Airai State located near the airport. The Airai State Government issued a building permit to Kangichi authorizing the construction of a house on Ked. Kangichi later hired Appellant Cleofas Robert ("Robert") as contractor for the construction.

After construction began, the Appellants, who are members of the Ngara-Irrai (the traditional council of chiefs of Ordomel Hamlet, Airai State), caused to be delivered to Kangichi a letter ordering a halt to the construction of the house based upon the assertion that the land was

[1] *Ngirmekur v. Municipality of Airai*, 1 ROP Intrm. 22, 27 (High Ct. Tr. Div. 1982).
[2] *Id.*

hamlet land under the control of the Ngara-Irrai. Although the notice gave no deadline for response, Appellant Ngiraboi Ikesakes ("Ikesakes") demolished the partially-constructed house without any further notice two or three days later. It is undisputed that he was carrying out the decision and order of the remaining Appellants.

At the time of the destruction Mr. Kangichi was in the United States; however, upon his return he and Mrs. Kangichi met with the Ngara-Irrai. At this meeting, they offered $100 to Appellants. Defendant Roman Tmetchul (who the pleadings identify as Ngiraked, paramount chief in the Ngara-Irrai) said the payment was a "fine." The Ngara-Irrai indicated a willingness to lease other land to Kangichi. Appellants and Kangichi signed a lease agreement with Ngara-Irrai for another parcel of land on which Kangichi would be permitted to build. Kangichi paid a $50 fee to Appellants, and two Appellants agreed to assist Kangichi with building materials.

It turned out that the suggested land was also claimed by Airai State as public land, that the lot was too small, and that ⊥236 Airai State would not grant a building permit. Consequently, these settlement efforts came to naught.

Plaintiff initiated this suit for damages. Defendants disputed none of the material factual allegations but defended their actions on various affirmative defenses such as privilege. At trial, the trial court found Appellants liable as a result of the destruction of the house, and awarded damages both to Mr. and Mrs. Kangichi, and to Kangichi's building contractor, Robert. The damage award also included a punitive damages component in the amount of $12,605.65. This opinion will review the affirmative defenses and the components of the damages award.

II. Affirmative Defense

a. Accord and Satisfaction.

Appellants suggest that the signing of the lease with Ngara- Irrai, payment by Kangichi to Appellants of the $100 "fine," a second payment of $50, and the agreement of two Appellants to assist Kangichi with building materials constituted a compromise in connection with the dispute between Kangichi and Appellants.

> Compromises, like other agreements, are ordinarily based upon the assumption by both parties that certain facts although not all the facts as claimed by one side exist.

Restatement of Restitution § 311, comment b (1937).

As the Trial Division noted, it would be plausible to glean from the evidence that, at most, Kangichi agreed to release the Appellants if a new house were built with the financial assistance of Appellants on a substituted parcel. However, a new house was not built on the second lot because the lot was too small and the Kangichis would still be caught in the middle of a land title dispute between Ngara-Irrai and the State of Airai over who controls public land in Airai. A compromise cannot be created from these circumstances.

The Trial Division's finding that the parties did not enter into a compromise agreement should not be disturbed.

b. Privilege.

Appellants argue that they were privileged to destroy the house because Ked is Ngara-Irrai property, or, alternatively, because plaintiffs had no right to build there. The legal ⊥237 principle defendants invoke is set forth in Section 260 of the Restatement (Second) of Torts § 260 (1977),[3] which explains that barring an exception not relevant here:

> [O]ne is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if the act is, or is reasonably believed to be, necessary to protect the actor's land or chattels or his possession of them, and the harm threatened.

Appellants assert Ngara-Irrai has the superior claim to Ked. In response, Kangichi submitted two deeds relating to public lands in Airai. According to the Trial Division, the first deed transferred certain lands from the Trust Territory Government to the Palau Public Lands Authority ("PPLA") and the second deed transferred such lands from the PPLA to the Airai State Public Lands Authority ("ASPLA").[4]

The Trial Division found that the subject parcel, "Ked," was within the transferred property. Furthermore, the Trial Division noted that Appellant Roman Tmetuchl, who claimed ownership in the instant appeal on behalf of Appellants as Ngara-Irrai paramount chief Ngiraked, was counsel for Airai State when the Trust Territory Government divested itself of certain public lands including "Ked," and that Appellant Tmetuchl then accepted such lands as Chairman of AMPLA. As noted by the Trial Division, such actions indicate that Mr. Tmetuchl, who in these pleadings asserts he is the Ngara-Irrai paramount chief, was aware at the time of the transfer that "Ked" was being treated as public land controlled by a government entity other than Ngara-Irrai, yet failed to file a claim for such land on behalf of Ngara-Irrai at the time of such ⊥238 transfer to AMPLA.[5] The Trial Division further noted that because the law required that traditional leaders compose one-half of the board members for state lands authorities, Ngara-Irrai might not

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[3] Because no statute or custom is applicable, the Court looks to United States common law as set forth in the Restatement. 1 PNC § 303.

[4] The parties dispute whether the deeds relate to the property at issue. Appellees argue that the deeds relate to "Ked," while Appellants claim that "Ked" is within the Old Japanese Communication Site ("OJCS") and that OJCS specifically was excluded from the deeds. The Trial Division took judicial notice that OJCS was transferred to PPLA.

ASPLA originally had been the Airai Municipal Public Land Authority ("AMPLA"). When the state government replaced the municipal government, AMPLA became known as ASPLA.

[5] Moreover, 35 PNC § 1304 (b)(2) specifically states that "[a]ll claims for public land must have been filed on or before January 1, 1989."

have seen any need to file a claim on its own behalf. [6] In light of the evidence offered by Kangichi indicating that (1) public records showed that the land at issue was public land, (2) the Ngara-Irrai paramount chief knew of this treatment of the land as public land, and (3) the failure of Ngara-Irrai to file a timely claim for the land, a reasonable trier of fact could have concluded, as the Trial Division concluded, that Ngara-Irrai was not the owner of the land at the time Kangichi's house was destroyed.

c. Public Nuisance.

Appellants allege that construction of the house constituted a public nuisance because "[t]he common right of the public was preservation of the status of the real property as hamlet land, subject to control, for the common good, by the Ngara-Irrai." However, we have rejected the argument that Ngara-Irrai had an interest in the subject land. In addition, Appellants have not alleged that construction of the house on "Ked" invaded any other personal or property rights of Appellants or the public. Appellants have not alleged that the construction was so noisy, unsightly, malodorous, polluting or otherwise injurious to public health and welfare that Appellants and/or others could not enjoy the use of their land or other property.

Consequently, construction of the house did not constitute a nuisance.

d. Individual Liability of Appellants.

Appellants argue that they should be liable only in their official capacities (i.e., not in their individual capacities) in connection with ordering the destruction of, and destroying, the house. Previous Trust Territory case law has held that:

> [A] public official . . . who destroys property by ⊥239 willfully acting in excess of his authority under the circumstances . . . can be held liable as an individual for the destruction of the property illegally destroyed.

*Uchel v. Owen*, 8 T.T.R. 132, 134 (1968).

Appellants note that Plaintiff's attorney accepted a stipulation that Appellants are members of the Ngara-Irrai and were acting in their capacity as chiefs. They argue that such a stipulation indicated that Appellees brought suit against them as chiefs rather than as individuals. This reasoning is faulty because it makes a large, unwarranted leap. It assumes that because Appellees recognized that Appellants acted as chiefs in the actions they undertook, Appellees named Appellants only as chiefs as defendants in the underlying cause of action. On the contrary, Appellees merely recognized that the liability of Appellants arose from actions they undertook as members of Ngara-Irrai. The Trial Division correctly found no stipulation whereby Appellees agreed only to sue, and recover from, the Appellants as members of Ngara -Irrai, and not in their individual capacities.

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[6] Palau District Law No. 5-8-10 recognized the authority of traditional leaders by constituting them as at least half of the members of state lands authorities. *See* 35 PNC § 215(a).

e. Contributory or Comparative Negligence.

Since destruction of the house constituted an intentional tort, and the defenses of contributory negligence and comparative negligence do not apply in connection with such torts, this defense is not available to Appellants. *Greycas Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987).

III. Damages

The Trial Division awarded Appellee Robert; (1) loss of the profit Robert had expected to gain from construction of the house, (2) out-of-pocket expenses, and (3) deducted from the subtotal of expected profit plus expenses the salvage value of items Robert recovered from the construction site.

The Trial Division awarded Appellee Kangichi; (1) the advance that Kangichi paid to Robert, (2) interest and other costs relating to Kangichi's construction loan, (3) the incremental increase in the cost to construct a new house, and (4) damages in connection with emotional distress.

Finally, the Trial Division also awarded each Appellee punitive damages in an amount equal to the attorneys' fees each Appellee incurred.

⊥240 a. Damages Payable to Appellee Robert.[7]

Appellants argue that, subsequent to the destruction of the house, Appellees Robert and Kangichi entered into a contract for the construction of a house to be built instead of the destroyed house. Appellants further argue that this second contract places Robert in the same position he had occupied before the destruction: he has a contract to build a house. Appellants base this argument on testimony by Kangichi that "[w]e gonna do [sic] my house . . . after I have enough money," and testimony by Robert that "as soon as the . . . dispute over the land is . . . taken care of, then that's when I will start . . . constructing [Kangichi's] house."

This sparse testimony does not prove that Kangichi and Robert had entered into a binding agreement regarding future construction of a house. Neither Robert nor Kangichi testified that he had entered into such an agreement. Moreover, even if one gleans from such testimony that Appellees planned to enter into a contract for the construction of another house, there is no indication of agreement with respect to the material term of price. Accordingly, inclusion of the lost profits component in the award was appropriate.

b. Damages Payable to Appellee Kangichi.

(i) Actual Damages: Reimbursement for Payments Made by Kangichi to Robert.

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[7] Appellants do not argue that in destroying Kangichi's house, they did not breach any legal duty owed to Robert. Accordingly, we do not address this issue, and we assume without deciding that Appellants' conduct breached a legal duty owed to Robert as well as Kangichi.

Appellants argue that the damages payable to Kangichi should not include payments made by Kangichi to Robert since, they argue, as noted in section III(a) of this opinion, that Robert is not entitled to "lost profit" since he will gain this benefit in the future by constructing another house for Kangichi.

However, we have found no indication that Kangichi and Robert entered into a contractual agreement for the future construction of a house. Consequently, the trial court properly determined that damages payable to Kangichi should include those payments made by Kangichi to Robert.

⊥241 (ii) Actual Damages: Incremental Cost to Build a New House.

Kangichi's damage award included a $5,800 element representing the incremental cost, beyond the cost originally negotiated between Robert and Kangichi, to build a new house.

Kangichi was to pay Robert $25,000 in 1992 for construction of the house. Kangichi provided evidence that the cost of building another house at the time of trial (1994) would be $30,800. The Trial Division recognized that such an increase, after a lapse of only two years, is "somewhat steep." The Trial Division included this incremental increase in the award, however, based on testimony indicating that of the numerous estimates Kangichi obtained (in 1992 and in 1994), $30,800 was not the highest. Based on this evidence, a trier of fact reasonably could conclude that the cost to Kangichi to construct a house in 1994 would be $30,800. Consequently, the incremental increase in the cost to construct the house was properly calculated at $5,800.

(iii) Actual Damages: Emotional Distress Element.

The trial court award included a $2,000 emotional distress element. Appellants claim that award is excessive.

> One who has a cause of action for a tort may be entitled to recover as an element of damages for that form of mental distress known as humiliation, that is, a feeling of degradation . . . . This state of mind may result from . . . the deliberate trespass to land or destruction or dispossession of chattels.

Restatement (Second) of Torts 2d § 905, comment d (1977).

The trial transcript indicates that Kangichi was shocked and angry upon learning of the destruction. During the trial, Kangichi testified that:

> I was more than upset . . . . [I was] more than angry too . . . . [A]fter the destruction . . . [my wife] cried . . . a lot and [kept] asking 'why, why? Why is this happening to us?' . . . . My kids as well as my wife were asking . . . 'why, why,' which I could not answer.

Since a reasonable trier of fact could determine in light of ⊥242 the evidence that Kangichi suffered extreme emotional distress in connection with the destruction of the partially-constructed house -- distress caused both by the destruction and the strong effect that such destruction had on Kangichi's wife and children -- the $2,000 award as compensation for emotional distress is not excessive and should not be disturbed.

(iv) Punitive Damages.

Early on, this Court had a number of opportunities to consider punitive damage awards. *Ngirmekur v. Airai* , 1 ROP Intrm. 22 (High Ct. App. 1982); *Kiep v. Rengiil* , 1 ROP Intrm. 193 (Tr. Div. 1985); *Owens v. House of Delegates* , 1 ROP Intrm. 320 (Tr. Div. 1986); *Usui v. Mishizono*, 1 ROP Intrm. 358 (App. 1987). This case requires a discussion of the concept at some greater length.

Appellants question whether punitive damages may be awarded at all, noting that "[t]he general rule today is that no punitive damages are allowed unless expressly authorized by statutes." *City of Newport v. Fact Concerts, Inc* . 101 S.Ct. 2748, 2756 n. 21 (1981). Punitive damages in Palau are, however, expressly authorized by statute. 1 PNC § 303 states, in relevant part:

> The rules of the common law, as expressed in the restatement of the law approved by the American Law Institute . . . shall be the rules of decision in the courts of the Republic . . .

The Restatement (Second) of Torts § 908 (2) (1977) provides:

> Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.

We conclude punitive damages may be awarded in appropriate cases in this jurisdiction.

Appellants also argue that the trial court improperly considered the amount of legal expenses incurred in assessing punitive damages, asserting that Restatement (Second) of Torts § 908 (1977) "does no more than indicate that being put to legal trouble is [but] one reason among several which, taken together, indicate that punitive damages are appropriate," Appellants' Opening Brief, pp. 45-46.

Comment (a) to Section 914 of the Restatement expressly states that "[i]n awarding punitive damages when they are otherwise ⊥243 allowable, the trier of fact may consider the actual or probable expense incurred by the plaintiff in bringing the action."

Consistent with this Restatement comment, a number of United States jurisdictions have expressly permitted attorney fee expenses to be considered when fixing an award of punitive damages. *See* Annotation, "Attorney's Fees or Other Expenses of Litigation as Element in Measuring Exemplary or Punitive damages." 30 A.L.R. 3d § 4(a) at 1448 (1991).

Consequently the Trial Division's consideration of Plaintiff's attorney fees when determining the punitive damage award was not error.

Appellants also argue that the punitive damages award is invalid because it was awarded without taking into account the wealth of Appellants. Consideration of various factors in setting the amount of punitive damages is sanctioned by the Restatement when it constitutes an attempt to further the punishment and/or deterrence goals of punitive damages. To that end:

> [t]he wealth of the defendant is . . . relevant, since . . . the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

Restatement (Second) of Torts § 908, comment e (1977).

There is no indication in the record that any of the Appellants offered any evidence concerning their wealth. Had they done so, the evidence would be admissible because it is relevant. That does not mean that such evidence was required. Where, as here, no evidence concerning Appellants' wealth is offered, a court may set a punitive damage award without taking into account the wealth of the defendant, as long as the court seeks to achieve the goals of punishment and/or deterrence that are the benchmark of punitive damages. Considering wealth is merely one way to ensure that a punitive damage award achieves its purpose. However, it is possible to set a punitive damage award which will achieve the punishment and/or deterrence goals without consideration of the wealth of the defendant. Although the court below did not consider the wealth of Appellants in fashioning the punitive damages award, this alone does not vitiate the award.

Finally, Appellants argue that punitive damages are not justifiable in the absence of 'malice.' Appellants' Opening Brief, p. 48. We need not delve into the legal definition of 'malice' or ⊥244 whether Appellants' conduct was undertaken with malice since the law is clear that "[p]unitive damages may be awarded for conduct that is outrageous [] because of the defendant's . . . reckless indifference to the rights of others." Restatement (Second) of Torts § 908(2) (1977). The bulldozing of Kangichi's partially-constructed home demonstrated Appellants' reckless disregard for the rights of Kangichi such that imposition of punitive damages was warranted.

We finally note that the Trial Division's estimate of intangible damages is reviewed using the "clearly erroneous" standard. *Douglas v. Metro Rental Services Inc* . 827 F.2d 252 (7th Cir. 1987). At $12,605.65, the relatively modest punitive damages award assessed by the Trial Division does not leave us with a "definite and firm conviction that a mistake has been committed."[8] Consequently, this award is also upheld.

## IV. CONCLUSION

Construction of the house by Appellees did not constitute trespass to land owned by

[8] *Umedib v. Smau*, 4 ROP Intrm. 257, 258-59 (1994).

Appellants; Appellants did not have the right to destroy the house under the rubric of self-help or pursuant to a privilege; the affirmative defenses of contributory and comparative negligence are not applicable; and no compromise ending Kangichi's right to recover was effected at the meeting between Kangichi and Appellants.

Robert's award appropriately included a lost profits component and Kangichi's award properly included those amounts Kangichi had advanced to Robert. Furthermore, Kangichi's award appropriately included $2,000 for emotional distress; $5,800 for the incremental increase in the cost to build a house; and a punitive damages element.

Appellants are liable for such damages in their individual capacities.