IN THE SUPREME COURT OF GUAM

ORION and JULIE ANN MENDIOLA, husband and wife, and GEMMA DE GUZMAN and ALEJANDRO A. AUSTRIA, husband and wife,
Plaintiffs-Appellants,

v.

ERIC BELL and RICK BELIVEAU,
Defendants-Appellees.

OPINION

Cite as: 2009 Guam 15

Supreme Court Case No.: CVA08-012
Superior Court Case No.: CV0782-04

Appeal from the Superior Court of Guam
Argued and submitted on July 7, 2009
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] This appeal arises out of a complaint brought by Plaintiffs-Appellants Orion and Julie Ann Mendiola, and Gemma De Guzman and Alejandro Austria against the developer of the subdivision in which they purchased homes, TTI Properties, Inc., and three of its officers and shareholders – Robert Terry, Eric Bell, and Rick Beliveau. In the complaint, Orion and Julie Ann Mendiola, and Gemma De Guzman and Alejandro Austria alleged claims of negligence, breach of contract, fraudulent deceit, and violations of the Guam Consumer Protection Act stemming from severe flooding of their homes during two typhoons in 2002, seeking the remedies of rescission and restitution. The flooding was alleged to have been the result of the lack of a storm drainage system in their subdivision. TTI Properties, Inc., and Terry eventually initiated bankruptcy proceedings, and the civil action against them was stayed as a consequence. The trial court proceeded to try only the claims against Bell and Beliveau, ruling in favor of Bell and Beliveau on the claims of fraudulent deceit and violations of the Consumer Protection Act, and in favor of Mendiola and De Guzman on the negligence issue, finding Bell and Beliveau jointly and severally liable – but only as to damages resulting from the latter typhoon. Orion and Julie Ann Mendiola, and Gemma De Guzman and Alejandro Austria now appeal. For the reasons stated herein, we REVERSE several findings of the trial court, but AFFIRM the Judgment.

I. FACTUAL AND PROCEDUREAL BACKGROUND

[2] Some time in 1998, TTI Properties, Inc. ("TTI") purchased a tract of land in Talofofo, Guam, known as Lot No. 92-5-5. Appellant's Excerpts of Record ("ER") at 33 (Finds. Fact &

Concl. L., Mar. 21, 2008). TTI was a Guam corporation made up of equal shareholders, who also served as officers and directors, namely Robert Terry, Eric Bell, Rick Beliveau, and Brian Schaeffer. TTI subdivided this lot into smaller lots in 1999. At the time of subdivision, Terry was the general manager and president of TTI, and the only representative of TTI responsible for subdividing the lot. Transcripts (Tr.), Vol. IV at 4, 5 (Cont'd. Bench Trial, Nov. 1, 2007). Terry hired a land surveyor to prepare a subdivision map, and Terry testified that he went through all the necessary government agencies to sign off on the map. *Id.* at 5. Terry personally signed the subdivision map, certifying that he complied with the requirements of Guam's Subdivision Law, Title 21 GCA, Chapter 62. *Id.* at 6.

[3] In November 1999, Appellants Orion and Julie Ann Mendiola, husband and wife (collectively "Mendiola"), purchased one of the lots in the subject subdivision, Lot No. 92-5-5-4, from TTI, through Terry. Similarly, in January 2000, Appellants Gemma De Guzman and Alejandro Austria, husband and wife (collectively "De Guzman"), purchased Lot No. 92-5-5-1. Mendiola and De Guzman constructed homes on the lots through self arranged bank financing. ER at 34 (Finds. Fact & Concl. L.). TTI required as part of the land purchase that Sea Star, Inc., ("Sea Star") would be the building contractor to construct the homes. *Id.* Terry testified at trial that he was the one who marketed the properties. Tr., Vol. IV at 6.

[4] Terry was the General Manager and President of TTI at the time the lots were sold to Mendiola and De Guzman. Tr., Vol. IV at 4. During the time Terry was in charge of TTI, he rarely communicated with Appellee Beliveau, who did not reside in Guam. Appellee Bell served merely as a bookkeeper for TTI. Tr., Vol. IV at 19. Bell and Beliveau eventually became the officers in charge of TTI upon the resignation of Terry as an officer on July 28, 2000.

[5] Mendiola obtained a loan from Bank of Hawaii in the amount of $112,500.00 -- $47,500.00 was to pay TTI for the lot, and $58,996.60 went to Sea Star for the construction of the house. ER at 34 (Finds. Fact & Concl. L.). De Guzman also obtained a loan from Bank of Hawaii totalling $103,000.00 -- $45,112.00 went toward the purchase of the lot from TTI and $53,388.00 went to Sea star for the construction of the house. These amounts represent only the contract prices for the land and home, and not the entire cost of improvements made nor interest paid on the loans. Before issuing the loan to Mendiola, the bank inspected the land and ordered an appraisal report, which indicated that the drainage of excess waters appeared to be adequate. Tr., Vol. II at 45 (Cont'd. Bench Trial, Oct. 30, 2007).

[6] De Guzman testified that her home experienced some flooding before Typhoon Chata'an, as a result of heavy rainfall. Tr., Vol. II at 65. She further testified that she brought this to the attention of Terry, and Terry told her he would remedy the problem. Tr., Vol. II at 66. Mendiola and De Guzman experienced severe flooding of their homes during Typhoon Chata'an, which hit Guam in July 2002. De Guzman testified that she tried to reach Terry after the typhoon but was told that he was no longer in charge of TTI. Tr., Vol. II at 68. She spoke instead with Bell and informed him that Terry had promised to do something about the drainage on her property. According to De Guzman, to her knowledge, Bell never took action to fix the situation. Tr., Vol. II at 69. However, Bell testified that he got a letter from De Guzman about the flooding problem in May 2003, and that he put in a drainage pit, or leaching field, to alleviate future flooding. Tr., Vol. IV at 45-47.[1]

[7] The flooding situation at the Mendiola home was also brought to the attention of TTI, and specifically Beliveau and Bell, a couple of days after Typhoon Chata'an. According to the

[1] This, however, was not done until after Supertyphoon Pongsona hit Guam in December 2002.

testimony of Orion Mendiola, he first spoke to Beliveau two days after the July typhoon, and Beliveau referred him to Bell. Tr., Vol. II at 37. During numerous conversations Mendiola had with Bell, Mendiola testified that Bell discussed possibly putting in berms or a ponding basin to rectify the flooding problem. Tr., Vol. II at 38. Although Bell testified that he did eventually put in a ponding basin, this was not done until some time after Supertyphoon Pongsona. Mendiola and De Guzman again experienced severe flooding of their homes during Supertyphoon Pongsona, which hit Guam five months after Typhoon Chata'an, in December 2002.

[8] After failed attempts to resolve the flooding concerns out of court, Mendiola and De Guzman filed a lawsuit against TTI, Terry, Bell, and Beliveau. They filed claims for negligence and breach of contract against TTI and Terry, and fraudulent deceit and violations of Guam's Consumer Protection Act against all defendants. They sought the remedies of rescission and restitution against TTI. TTI and Terry later filed for bankruptcy, triggering a stay of proceedings against those two defendants.[2] The trial court, therefore, only proceeded with a bench trial on the claims against Bell and Beliveau, which began on October 25, 2007. Mendiola and De Guzman also sought to have Bell and Beliveau held jointly and severally liable for damages they suffered as a result of TTI's negligence in failing to provide adequate storm drainage.

[9] After the conclusion of the evidence, the trial court issued its Findings of Fact and Conclusions of Law on March 21, 2008, ruling in favor of Bell and Beliveau on the claims of fraudulent deceit and violations of the Consumer Protection Act, and in favor of Mendiola and De Guzman on the negligence issue, finding Bell and Beliveau jointly and severally liable, but only as to damages resulting from Supertyphoon Pongsona. The trial court later issued a decision and order denying Mendiola and De Guzman rescission and full restitution against Bell and

[2] Mendiola and De Guzman have claims against Terry in the bankruptcy proceedings. Tr., Vol. IV at 17, 18.

Beliveau. On October 28, 2008, the trial court issued its Judgment Following 54(b) Certification. Mendiola and De Guzman timely appealed.

II. JURISDICTION

[10] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 USC § 1424-1(a)(2) (West 2009); 7 GCA §§ 3107(b) and 3108(a) (2005).

III. STANDARD OF REVIEW

[11] This court is asked to interpret whether the remedies under the Guam Consumer Protection Act are available under the facts of this case. We review issues of statutory interpretation under a *de novo* standard of review. *Quichocho v. Macy's Dep't. Stores, Inc.*, 2008 Guam 9 ¶ 13. We review a trial judge's findings of facts after a bench trial for clear error. *Yang v. Hong,* 1998 Guam 9 ¶ 4. A trial judge's conclusions of law, however, are reviewed *de novo. Craftworld Interior, Inc. v. King Enter.*, 2000 Guam 17 ¶ 6.

[12] The trial court's decision regarding the award of equitable remedies is reviewed for an abuse of discretion. *Abalos v. Cyfred Ltd.*, 2006 Guam 7 ¶ 14 ("We review for an abuse of discretion the [trial] court's equitable orders. The [trial] court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding[.]") (citation and quotation omitted); *see also Williams v. Rhodes*, 393 U.S. 23, 65 n.3 (1968) (Warren, C.J., dissenting); *Forest Grove Sch. Dist. v. T.A.*, 523 F.3d 1078, 1084 (9th Cir. 2008) ("This court therefore has applied an abuse of discretion standard when reviewing a district court's grant or denial of equitable relief.").

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IV. DISCUSSION

A. Duty to Provide Storm Drainage

[13] Guam's Subdivision Law, Title 21 GCA, Chapter 62, requires that a subdivider shall provide sufficient drainage of the land to provide reasonable protection against flooding. 21 GCA § 62108(f) (2005). Further, the Guam Administrative Rules relative to the Territorial Planning Commission ("Commission"), found in 18 GAR, Chapter 3, state that "[a]ll streets and other improvements, which in the opinion of the Commission are necessary for the development of any part of the subdivision, will be required." 18 GAR § 3223(a) (1997). With regard to storm drainage, the rules state: "Storm Drain Plan shall include, but not be limited to: sizes, profiles, locations and details of storm pipes, catch basins, surface drains or any other structure required from collection to disposal of storm runoff." 18 GAR § 3223(d)(6). Soil reports are also required when submitting an improvement plan for approval, and the Commission requires that "[u]nderground drainage shall be specifically included in the report analysis. . . ." 18 GAR § 3223(e)(1). Another requirement is calculation sheets showing the engineering calculations to arrive at storm drainage installation. 18 GAR § 3223(e)(2).

[14] Subdivision plans are submitted to the Commission and the Department of Public Works. *See* 18 GAR § 3223(f). The Commission further requires the subdivider to provide information on storm water overflows, the direction of the flow, etc.. 18 GAR § 3215(f) (1997). Mendiola and De Guzman do not dispute that the subdivision plans were approved by the Commission and the Department of Public Works. So while the Commission appears to be the body tasked with establishing the criteria for "sufficient storm drainage" and "reasonable flood protection," the fact that this subdivision was approved when in fact the subdivider did not fulfill its affirmative

duties, as no improvements for storm drainage were in place, does not lend any clarification as to what these terms mean.[3]

B. Guam Consumer Protection Act

[15] Mendiola and De Guzman argue that the lack of sufficient drainage, or the absence of any improvements to the subdivision to protect against flooding, was a misrepresentation that induced them to enter into the land sale contracts with TTI. To this end, they claim that TTI, Terry, Bell, and Beliveau violated provisions of the Guam Consumer Protection Act ("CPA"). The CPA is codified in Title 5, Chapter 32 of the Government Operations Code, Trade Practices and Consumer Protection. The general purpose of the CPA is "to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty, and to provide efficient and economical procedures to secure such protection," and shall be liberally construed in favor of the consumer. 5 GCA § 32108(a) (2005).

[16] Mendiola and De Guzman seek relief specifically pursuant to section 32201(b)(29) of the CPA. That section reads:

> (b) The term *false, misleading*, or *deceptive acts* or *practices* includes, but is not limited to, the following acts by any person or merchant, which acts are hereby prohibited and declared illegal and contrary to public policy if committed by any person or merchant:
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> . . .
>
> (29) Doing any other act which is prohibited by the laws of Guam to mislead a consumer to his detriment or to induce another person to buy or sell goods or services to such person's detriment.

[3] The source of Guam's Subdivision Law in Title 21 is the Government Code, sections 18000-18602, which was added by Guam Public Law 6-134 (1962). There is nothing in this source that further clarifies these terms. Our statutes seem to leave it to the Commission to establish and define what constitutes sufficient storm drainage and adequate flood protection.

5 GCA § 32201(b)(29) (2005) (emphasis in original). Courts interpreting the CPA shall be guided by the interpretations given by the U.S. Federal Trade Commission and the Federal Trade Act, and may consider relevant decisions of federal courts. 5 GCA § 32108(c)(A); *Guam v. Marfega Trading Co., Inc.*, 1998 Guam 4 ¶ 10. In the *Marfega* case, this court employed the three-part test pursuant to the Federal Trade Commission Act to assist in determining whether an act constitutes a deceptive trade practice. The court stated:

> Case law has established a three-part test for determining whether a practice is deceptive pursuant to the Federal Trade Commission Act (FTCA). The FTC must show the following: (1) there is a representation, omission or practice; (2) the representation, omission or practice is likely to mislead consumers acting reasonably under circumstances; and (3) the representation, omission or practice must be material. *FTC v. Patriot Alcohol Testers, Inc.*, 798 F. Supp. 851, 855 (D. Mass. 1992); *FTC v. Wilcox*, 926 F. Supp. 1091, 1098 (S.D. Fla. 1995). *See FTC v. Pantron I. Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994), *cert. denied*, 514 U.S. 1083, 115 S.Ct. 1794, 131 L. Ed. 2d 722 (1995).

Marfega, 1998 Guam 4 ¶ 11. The trial court in this case applied these factors and determined that "although TTI failed to provide adequate drainage as required by Guam law, said failure does not rise to such a level as to constitute a false, misleading, or deceptive act or practice as defined under the CPA." ER at 41 (Finds. Fact & Concl. L.).

[17] The interpretation of a statute is reviewed *de novo*. *Quichocho*, 2008 Guam 9 ¶ 13. A trial judge's findings of facts after a bench trial are reviewed for clear error. *Yang*, 1998 Guam 9 ¶ 4. A trial judge's conclusions of law are reviewed *de novo*. *Craftworld Interior, Inc.*, 2000 Guam 17 ¶ 6. *Compare Lizama v. Dep't of Pub. Works*, 2005 Guam 12 ¶ 12 ("What constitutes an easement or a right thereto is a question of law, but whether the facts necessary to the existence of the right have been proved is a question of fact. . . .") (quotation omitted). In this case, the trial court made a specific factual finding that "[p]rior to selling the lots . . . Terry, Bell, and Beliveau did not realize that the property was susceptible to flooding during storms or

typhoons," a finding that implies a requirement of intent or scienter on the part of the person or merchant whose actions or practices are challenged under this Act. ER at 35 (Finds. Fact & Concl. L.). While we accept that Terry, Bell, and Beliveau had no knowledge of the flooding problem absent clear evidence to the contrary, we must determine whether intent or scienter is a necessary element of finding a CPA violation under 5 GCA § 32201(b)(29).

1. Intent or scienter is not a required element in finding a violation of 5 GCA § 32201(b)(29).

[18] The trial court impliedly ruled that knowledge or intent was a requirement in order to find a violation of the Guam CPA by stating that the CPA's remedies were unavailable here because Terry, Bell, and Beliveau did not know of the flood-prone condition of the land at the time of the sale. However, this court must make a *de novo* review of the statute and reach its own interpretation. *See Quichocho*, 2008 Guam 9 ¶ 13. The pertinent portion of the statute, section 32201(b), states that "[t]he term *false, misleading*, or *deceptive acts* or *practices* includes, but is not limited to, the following acts by any person or merchant, which acts are hereby prohibited and declared illegal and contrary to public policy if committed by any person or merchant," and then enumerates twenty-nine (29) prohibited acts or practices. 5 GCA § 32201(b) (emphasis in original). Many of these enumerated acts or practices specify an element of scienter by using words such as "knowingly," and "knows." *See*, for example, subsections (8), (9), (12), (13), (20), (21), (22), (23), (24), and (25) of section 32201(b).

[19] The specific subsection Mendiola and De Guzman allege was violated is subsection (29), which states: "Doing any other act which is prohibited by the laws of Guam to mislead a consumer to his detriment or to induce another person to buy or sell goods or services to such person's detriment." 5 GCA § 32201(b)(29). Although this subsection does not specifically

state that the act or practice must be done knowingly or with the intent to mislead or induce, that the act prohibited by Guam law is done *to* mislead or *to* induce may imply an element of knowledge or intent. However, within this same section of the CPA, the Legislature was quite capable of inserting these elements to make clear its purpose and its intended proscribed conduct. For example, subsection (22) states that a person or merchant violates the CPA by "[k]nowingly selling or offering to sell goods or services which the seller thereof is not licensed to sell or offer for sale." 5 GCA § 32201(b)(22). The Legislature did not just make it a violation of the CPA to sell goods or services without a license to do so, but only to do this knowingly. On the contrary, subsection (29) does not contain a specific element of knowing or intent.

[20] Therefore, while it may be reasonable to interpret subsection (29), standing alone, as including an intent element by the words "to mislead" and "to induce," when read together with all the subsections of section 32201(b), it is clear that the Legislature could have easily written such words as "with the intent" into subsection (29) if indeed that is what it meant. *Compare Smith v. Baldwin*, 611 S.W.2d 611 (Tex. 1980), which interpreted provisions of the Texas Deceptive Trade Practices Act (DTPA). Regarding the Texas DTPA, that court stated:

> Subdivision (7) contains no requirement of proof of intent. By contrast, this is found in subdivisions (9) and (10), and the words "knowingly" and "fraudulently" appear in subdivisions (13) and (17) respectively. [Footnote omitted]. The Legislature could readily have imposed an intent requirement in subdivision (7) but did not do so. [Citation omitted]. When the Legislature has carefully employed a term in one section of a statute, and has excluded it in another, it should not be implied where excluded.

Id. at 616.

[21] The Guam CPA further provides that:

> In interpreting the definitions and other provisions of this chapter, it is the intent of the Legislature that in construing this chapter, the courts, to the extent possible, will be guided by the interpretations given by the United States Federal

> Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C.A. 45(a)(1)) and the Federal Trade Act.

5 GCA § 32108(c) (A). One such federal court interpreting section 5(a)(1) of the Federal Trade Commission Act recently confirmed that intent to deceive is not a requirement to finding a violation of the Federal Trade Commission Act. In *F.T.C. v. Medical Billers Network, Inc.*, the court stated: "The law is violated if the first contact . . . is secured by deception . . . even though the true facts are made known to the buyer before he enters into the contract of purchase. *It is not required that the deception have been made in bad faith or with intent to deceive*." *Medical Billers*, 543 F. Supp. 2d 283, 304 (S.D.N.Y. 2008) (emphasis added, internal citations and quotations omitted). *See also F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006) ("The deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably.")

2. Violation of the Guam Consumer Protection Act.

[22] We turn next to applying the facts of this case to the factors used by the FTC to determine whether a practice is misleading or deceptive – whether (1) there is a representation, omission or practice; (2) the representation, omission or practice is likely to mislead consumers acting reasonably under circumstances; and (3) the representation, omission or practice is material. *Marfega*, 1998 Guam 4 ¶ 11. Here, prongs (1) and (3) are fairly clear. As to the first prong, there was clearly an omission – failing to provide storm drainage and failing to inform Mendiola and De Guzman that no adequate storm drainage and flood protection had been provided as required by law. As to the third prong, the omission was material, affecting the very quality and soundness of the lots Mendiola and De Guzman sought to purchase to construct their homes. The second prong of the test requires a determination of whether the failure of a subdivider to

provide drainage and to disclose that no drainage had been provided as required by law (the omission) was itself likely to mislead purchasers of land acting reasonably under the circumstances. We believe it was.

[23] Purchasers of land in a subdivision act reasonably in assuming that all relevant subdivision laws have been complied with. Guam law places the onus on the subdivider to ensure that it conveys land compliant with all laws and regulations, and not on the purchasers of land to independently verify that the subdivider is in fact compliant. This comports with the policy expressed in the CPA that its procedures and protections be liberally construed in favor of the consumer. *See* 5 GCA § 32108(a). The failure to abide by Guam law regarding storm drainage for subdivisions, and the failure to disclose this to prospective purchasers, was a deceptive act, practice, or omission which misled or induced Mendiola and De Guzman to buy lots they might not otherwise have bought had they known there was no storm drainage system in place. The specific Guam law allegedly violated, misleading Mendiola and De Guzman into purchasing the lots in question, is Guam's Subdivision Law. The relevant portion of that law states that:

> In all subdivisions presented for recording under this Chapter the subdivider shall:
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> . . . .
>
> (f) Provide sufficient drainage of the land to provide reasonable protection against flooding.

21 GCA § 62108(f). It is undisputed that at the time of the sale, and at least at the time of the typhoons at issue, there was no drainage system put in place, even though Terry signed the subdivision map stating that he was responsible for the subdivision improvements specified in 21 GCA § 62108. There is, therefore, little argument that TTI, through Terry, was not compliant

with the requirements of Guam's Subdivision Law where storm drainage is concerned. In failing to comply with its legal duties and delivering to Mendiola and De Guzman subdivided lots that were not up to the standards required by Guam law, TTI, through Terry, engaged in a false, misleading, or deceptive act or practice that induced Mendiola and De Guzman to purchase the lots in question. We find that these facts meet the requirements for finding a violation of the CPA as alleged, and therefore find that the trial court erred in ruling otherwise.

C. Liability of Bell and Beliveau

1. No vicarious liability.

[24] We turn now to the issue of whether Bell and Beliveau would bear personal responsibility for TTI and/or Terry's violation of 21 GCA § 62108(f), requiring subdividers to install sufficient drainage to provide reasonable flood protection. We address whether Bell and Beliveau, as shareholders and officers of TTI, are personally liable under the CPA because they were shareholders and officers of TTI at the time of the land sales or when they later took over the operations of TTI after Terry's resignation. In this case, the trial court previously found that TTI and Terry were jointly and severally liable to Mendiola and De Guzman for the damages they suffered as a result of the flooding experienced during the two typhoons in 2002, and that Terry was negligent *per se* in failing to provide adequate drainage for the subdivision in question – rulings that are not before this court on review. The parties do not dispute that Bell and Beliveau were not involved with any of the land sale transactions with Mendiola and De Guzman, and that they themselves did not personally participate in, have knowledge of, or consent to Terry's negligence and failure of his statutory duty in failing to ensure adequate flood protection when he subdivided the property.

[25] Moreover, there is no evidence before the court that Bell or Beliveau personally participated in, had knowledge of, or consented to the false, misleading, or deceptive act or practice to induce Mendiola and De Guzman to buy the lots at issue. The Ninth Circuit, addressing the Federal Trade Commission Act, stated: "An individual will be liable for corporate violations of the FTC Act if (1) he participated directly in the deceptive acts *or* had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *F.T.C. v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). The evidence presented in this case does not show that Bell or Beliveau participated directly in TTI's deceptive acts or had the authority to control them, and that Bell or Beliveau had knowledge of TTI's deceptive acts, were recklessly indifferent to the truth or falsity of TTI's misrepresentations, or were aware of a high probability of fraud in the land sale contracts and intentionally avoided the truth.

[26] Further, 7 GCA § 12117 states in relevant part that "[a]ny person, who either as a director, officer, or agent of any . . . corporation or as an agent of any person violating the provisions of . . . 5 GCA Chapter 32, or any other law; knowingly aids or assists, directly or indirectly, in such violation, knowing that the . . . corporation, or person is violating a law, is responsible therefor equally with the . . . corporation or person in any civil case." 7 GCA § 12117 (2005). Section 12117 specifies that directors, agents, and officers of a corporation will be liable equally with the corporation for violations of the law only when that director, agent, or officer knowingly aided or assisted in committing the violation. *Id.* Title 7 GCA § 12117 also specifically applies to when liability may be extended for violations of the CPA, 5 GCA Chapter 32. *Id.* As such, our finding that there was a violation of the CPA will not extend liability for

that violation to Bell and Beliveau absent evidence that Bell and Beliveau knowingly aided or assisted, directly or indirectly, in such violation, knowing that TTI and/or Terry was violating a law. In this case, no such evidence was presented, and no such argument was proffered.

[27] Although "[t]he legal fiction of the corporation as an independent entity was never intended to insulate officers and directors from liability for their own tortious conduct," *PMC, Inc. v. Kadisha*, 93 Cal. Rptr. 2d 663, 671 (Ct. App. 2000), neither is it the case that officers or directors of a corporation should be held vicariously and personally liable for the acts of the corporation absent their personal culpable or tortious conduct.

[28] In general, "[d]irectors or officers of a corporation do not incur personal liability for torts of the corporation merely by reason of their official position, unless they participate in the wrong or authorize or direct that it be done," but "[t]hey may be liable, under the rules of tort and agency, for tortious acts committed on behalf of the corporation." *Michaelis v. Benavides*, 71 Cal. Rptr. 2d 776, 779 (Ct. App. 1998) (quotation omitted) (citing 3 Witkin, Summary of Cal. Law (7th ed. 1960) § 48(c), at 2342-43; 13 Cal. Jur. 2d, § 353; 19 C.J.S., § 845; Knepper, Liabilities of Corporate Officers and Directors (1969)). As the *Kadisha* court explained,

> It is well settled that corporate directors cannot be held *vicariously* liable for the corporation's torts in which they do not participate. Their liability, if any, stems from their own tortious conduct, not from their status as directors or officers of the enterprise. '[A]n officer or director will not be liable for torts in which he does not personally participate, of which he has no knowledge, or to which he has not consented. . . . While the corporation itself may be liable for such acts, the individual officer or director will be immune unless he authorizes, directs, or in some meaningful sense actively participates in the wrongful conduct.' Directors are jointly liable with the corporation and may be joined as defendants if they personally directed or participated in the tortious conduct.

Kadisha, 93 Cal. Rptr. 2d at 670 (emphasis in original, citation and quotation omitted). In this case, the evidence does not support holding Bell and Beliveau vicariously liable for TTI's violation of the Guam CPA.

2. No independent liability.

[29] We now address whether Bell and Beliveau were themselves negligent, independently, in failing to immediately install storm drainage upon becoming personally aware of the flooding problem. Mendiola and De Guzman argue that Bell and Beliveau willfully failed to install storm drainage after they took over TTI's operations and became aware of the lots' propensity for flooding. The prerequisites for a finding of negligence are (1) that Bell and Beliveau owed some recognized duty to Mendiola and De Guzman, (2) that they breached their duty, and (3) that their breach caused the harm to Mendiola and De Guzman. *See Guerrero v. McDonald's Int'l Prop. Co., Ltd.*, 2006 Guam 2 ¶ 9 ("In a case for negligence, the establishment of tort liability requires the existence of a duty, the breach of such duty, causation and damages."). Mendiola and De Guzman allege in their original complaint that TTI and Terry were negligent in that (1) they had a statutory duty as a subdivider to provide sufficient drainage of the land to provide reasonable flood protection, (2) they willfully and knowingly failed to provide sufficient drainage of the land as was their obligation, and (3) their failure in this duty was the proximate cause of the severe flooding of the Mendiola and De Guzman homes during Typhoon Chata'an and Supertyphoon Pongsona. *See* Complaint, July 15, 2004 (Super. Ct. Case No. CV0782-04).

[30] However, because the statutory duty to provide storm drainage at the time of subdivision is a duty of the subdivider – here, TTI and Terry – then this would not give rise to a finding of independent liability for negligence on the part of Bell and Beliveau, even when they later took over the operations of TTI after the subdivision and sale of the lots. Bell and Beliveau did not

have a *personal* duty at the time of subdivision, which is the first requirement to a finding of negligence.[4]

[31] Mendiola and De Guzman also argue that 21 GCA § 62701(a) supports a finding of liability for Bell and Beliveau because it creates a continuing duty to provide sufficient drainage and reasonable flood protection. Title 21 GCA § 62701(a) states that any agent, corporation, or other legal entity who violates any of the provisions of the Subdivision Law shall be guilty of the offense "for each day or portion thereof in which any violation is committed [or] continued [to be] permitted." 21 GCA § 62701(a) (2005). Again, however, we look to 7 GCA § 12117, which specifies that directors, agents, and officers of a corporation will be liable equally with the corporation for violations of the law *only when* that director, agent, or officer knowingly aided or assisted in committing the violation. 7 GCA § 12117. Because the duties and liabilities regarding the installation of storm drainage as expressed in Guam's Subdivision Law relate to the subdivider, and there is no evidence that Bell or Beliveau had any part in violating the Subdivision Law, we find that the provisions of 21 GCA § 62701(a) will not extend liability to any person or entity who would not be liable for violating the Subdivision Law in the first instance.

D. Equitable Remedies of Rescission and Restitution

[32] Rescission of a land sale contract is a remedy available by a court in equity, or by the unilateral acts of one party without the assistance of the court. *See Abalos*, 2006 Guam 7 ¶ 28. Citing *Bank of America Nat'l. Trust & Sav. Ass'n v. Greenback,* 219 P.2d 814, 827 (Cal. Dist.

[4] The trial court found that Bell and Beliveau were negligent in failing to provide storm drainage after becoming aware of the flooding during Typhoon Chata'an, and thus held them liable for damages that Mendiola and De Guzman suffered during the subsequent typhoon. Bell and Beliveau did not cross-appeal on the trial court's finding that they were jointly and severally liable to Mendiola and De Guzman for flooding experienced during Supertyphoon Pongsona. As such, this finding and the related damages award have not been placed at issue before this court.

Ct. App. 1950), this court stated that "we believe that the trial court may, in addition to restitution, award money damages or such other relief justice may require." *Abalos,* 2006 Guam 7 ¶ 54. Moreover, the CPA specifically provides that "[a] violation consisting of any act prohibited by this title is in itself actionable, and may be the basis for *damages, rescission, or equitable relief.*" 5 GCA § 32201(a) (emphasis added). The objective in allowing a contract to be rescinded, as under facts similar to those in this case, would be to restore the plaintiffs to their status quo ante. *See Snelson v. Ondulando Highlands Corp.*, 84 Cal. Rptr. 800, 809 (Ct. App. 1970).[5]

[33] Mendiola and De Guzman assert that their properties are essentially valueless, as they are not able to make the drainage improvements without involving other surrounding properties, and they are thus left with unmarketable lots due to the flooding propensities. In this case, the evidence in the record reveals that no storm drainage whatsoever – adequate or otherwise – had been put in place prior to the sale of the subdivision lots to Mendiola and De Guzman. This was never a point of contention in the proceedings below. Expert testimony at trial revealed that the only way to remedy the flooding problem on the land would be to make large-scale improvements that would involve lots other than those owned by Mendiola and De Guzman – i.e., that this is not a situation these specific land owners can adequately rectify. ER at 36 (Finds. Fact & Concl. L.); Tr., Vol. I at 32-33, 35-36 (Cont'd Bench Trial, Oct. 25, 2009). Terry testified that had he known of the flooding problem, he himself would never have purchased the land he

[5] Guam statutory law further recognizes a "right of rescission for fraud [or] for mistake, where such mistake is a matter essential to the inducement of the contract, and is not capable of exact and entire compensation." 18 GCA § 89203 (2005). In this case, mistake was not developed in the briefs as a ground for rescission, and the trial court found that the claim of fraudulent deceit was not sufficiently established as a ground. However, because we find that an alternative ground exists which entitles Mendiola and De Guzman to rescission of their land sale contracts, namely a violation of the Guam CPA, we need not examine any further the grounds of fraud or mistake.

later subdivided. Tr., Vol. IV at 24-25. Bell also testified that he was unable to sell the remaining lots in the subdivision because of the subdivision's propensity for flooding. Tr., Vol. IV at 68-69.

[34] Other courts have found that where the land purchased is not suitable for the purpose for which it was purchased due to its flooding propensity, this may under certain circumstances justify granting the equitable relief of rescission. *See Smith v. Nat'l Resort Communities, Inc.*, 585 S.W.2d 655, 656, 658 (Tex. 1979) (holding that purchaser could rescind contract where seller failed to disclose a fact, namely the flooding of the subject real estate, that seller knew purchaser would regard as material); *Edmondson v. Coates*, 1992 WL 108717 at *8 (Tenn. Ct. App.) ("Appellants allege that . . . because of the flooding problem . . . use of the property is precluded. We think that their testimony could be sufficient proof of damage to warrant the equitable remedy of rescission, if the jury finds the alleged misrepresentations about flooding were made knowingly or with reckless disregard for the truth.").

[35] Rescission and restitution were only specifically pled against TTI and Terry in the complaint filed, although the trial court, after the bench trial, did consider these claims as applied against Bell and Beliveau. ER at 57 (Dec. & Order, Aug. 20, 2008). In finding that the remedies of rescission and restitution were not available against Bell and Beliveau, the trial court stated that "Bell and Beliveau had nothing to do with the operations of TTI when the properties were sold to Plaintiffs" and therefore, that they "could not have played a role in the failure of TTI to assure that the property had adequate drainage." ER at 58 (Dec. & Order).

[36] "We review for an abuse of discretion the [trial] court's equitable orders. The [trial] court abuses its discretion when its equitable decision is based on an error of law or a clearly erroneous factual finding." *Abalos*, 2006 Guam 7 ¶ 14 (quotation omitted). The trial court made a legal

determination that 7 GCA § 12117, pertaining to liability of officers or agents, is inapplicable in this case. ER at 58 (Dec. & Order). The facts upon which the trial court made its ruling were that Bell and Beliveau had no control over or direct involvement with the operations of TTI prior to Terry's resignation as an officer in July 2000 and as a director in the summer of 2002. *Id.*; *see also* Appellant's Br. at 10 (Jan. 23, 2009). Because neither TTI nor Terry was before the trial court, as proceedings against them were stayed as a result of their filing for bankruptcy, the trial court limited its analysis of whether rescission was available in this case to its determination that *Bell and Beliveau* were not personally liable to Mendiola and De Guzman for the rescission of their contracts and full restitution. A broader, independent analysis of whether rescission was proper (apart from who would be liable) was not conducted. However, this court may still evaluate whether the facts here warrant rescission – regardless of whether or not Bell and Beliveau in particular may be liable for the rescission.

[37] Because there is no evidence in the record to support that Bell and Beliveau *knowingly* aided or assisted Terry in violating the Subdivision Law, the trial court's determination that Bell and Beliveau were not personally liable to Mendiola and De Guzman for rescission of the land sale contract and full restitution, based on 7 GCA § 12117, was not an abuse of discretion. The trial court, therefore, did not err in refusing to hold Bell and Beliveau liable for the equitable remedies of rescission of the sales contract and restitution for the entire amount of Mendiola's and De Guzman's losses.

[38] However, inasmuch as the trial court failed to make any determination as to whether or not rescission was warranted under these facts *generally*, we find that it abused its discretion in this regard, as its failure to make this determination was based on an error of law or a clearly erroneous factual finding. *See Abalos*, 2006 Guam 7 ¶ 14. Because we find on a *de novo* review

of the Guam CPA that the trial court erred in finding no violation of the CPA, we further find that, based on section 32201(a) of the CPA and on the fact that Mendiola and De Guzman are left with essentially unmarketable lots as a result of the CPA violations, the equitable remedy of rescission should have been granted. We do not make a determination on the matter of which party/parties would be liable for rescission of the land sale contracts, other than to uphold the trial court's ruling that Bell and Beliveau were not liable for rescission and resulting restitution damages.

V. CONCLUSION

[39] Mendiola and De Guzman appeal the trial court's findings relative to whether Bell and Beliveau are liable for rescission of the land sale contracts and full restitution, as well as to whether the remedies of the Guam Consumer Protection Act are available under the facts of this case. Bell and Beliveau did not cross-appeal on the trial court's finding of negligence and joint and several liability against them stemming from the flooding of the Mendiola and De Guzman homes during Supertyphoon Pongsona.

[40] On the issues before us on review, we hold that the lower court erred in ruling that there was no violation of the CPA, as the failure of the subdivider to provide storm drainage as required by Guam's Subdivision Law was a material omission reasonably likely to mislead Mendiola and De Guzman into purchasing the lots at issue. We further hold that the trial court did not err in ruling that Bell and Beliveau were not liable to Mendiola and De Guzman for full restitution and rescission of their land sale contracts. However, because we hold that there was a violation of the Guam CPA, we find that the facts of this case coupled with the remedies available through the CPA support granting Mendiola and De Guzman the equitable remedy of rescission. The issue of liability for the rescission of the land sale contracts and full restitution

cannot, however, be properly addressed until the stay of proceedings against Terry and TTI is lifted.

[41] Because the court rests its holding regarding rescission on the CPA, we need not reach the alternative grounds for granting rescission, such as fraud or mistake.

[42] Accordingly, the findings of the trial court are **REVERSED** in part, but its Judgment is **AFFIRMED**. The matter is **REMANDED** to the trial court for determination of liability for rescission of the land sale contracts at such time as the stay of the present civil action against Terry and TTI resulting from their bankruptcy proceedings is vacated.

Original Signed By: **F. Philip Carbullido**
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**
ROBERT J. TORRES
Chief Justice