

IN THE SUPREME COURT OF GUAM

**RAYMOND LEON GUERRERO and,
ERLINDA LEON GUERRERO**

Plaintiffs-Appellees

vs.

**DLB CONSTRUCTION CO., a Guam Corporation, MR. BEN C. TAN,
an individual doing business in Guam, TJT ENTERPRISES, a Guam
Corporation, GREEN ISLAND DEVELOPMENT, INC., a Guam
Corporation, MR. JOHNNY M. AQUINO, an individual resident of
Guam, PACIFIC ECONOMIC DEVELOPMENT, INC., DOE
INSURANCE COMPANIES, I through X, and DOE DEFENDANTS,
I through XX.**

Defendants-Appellants

OPINION

Supreme Court Case No. CVA97-051

Superior Court Case No. CV1355-94

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Appeal from the Superior Court of Guam
Submitted for oral argument on 5 October, 1998
Hagåtña, Guam

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BEFORE: JANET HEALY WEEKS, HOWARD TRAPP¹, and JOAQUIN C. ARRIOLA, SR., Associate Justices.

WEEKS, J:

[1] Appellants Ben C. Tan and Green Island Development appeal this civil case, in which a jury awarded damages for negligence, trespass, and negligent infliction of emotional distress to Appellees Raymond Leon Guerrero and Erlinda Leon Guerrero. Appellants seek a reversal of the jury's determination of economic damages, punitive damages, and damages for negligent infliction of emotional distress citing that the awards are unsupported by the evidence. Appellants also claim error in the trial court's failure to reduce the awards as a result of any amounts paid by one of the settling parties. Based upon our review of the record, we affirm in part, reverse as to the liability of Ben C. Tan, and remand in part for a recalculation of damages.

I.

[2] The following facts are undisputed. Appellees Raymond and Erlinda Leon Guerrero owned and lived in a house located at 210 W. Cesario Street in Toto, Guam. In 1991, bulldozers began clearing the adjoining property and construction started on large footings along the property line. In early 1992, construction of a retaining wall on top of the footings began. The retaining wall consisted of poured concrete with rebar. This retaining wall eventually reached the height of sixteen feet.

¹Justice Howard Trapp resigned from the court after hearing oral arguments in this matter.

[3] After Typhoon Omar, visible hairline cracks appeared in the retaining wall. In addition, flooding occurred on the Appellees' property, but the source of the water and the cause for the flooding were unknown. Workers from the ongoing construction project sought permission to enter Appellees' property to assess the damage to the wall, but Appellees refused to allow workers on their property to examine the wall. After the 1993 earthquake occurred, more cracks were noticed on the wall along with the cracks that were discovered after Typhoon Omar becoming wider and the flooding on the property becoming even worse.

[4] On or about 1 October 1993, at approximately 6:45 a.m., the retaining wall collapsed and fell on the home of the Appellees causing substantial damage to the house. The damage was severe enough to prevent the Appellees from living in the house because the service drop for electrical power line was broken, the bathrooms were unusable, and a number of cracks appeared on the walls of the house. Appellees went to Standard Plytrade to speak with Mr. Bansil and Appellant Ben C. Tan (hereinafter "Tan") regarding the collapse of the wall. After the damage was examined by Tan and Bansil, a discussion occurred regarding removal of the wall and demolition of the house. Tan offered to have the Appellees stay in a condominium owned by Tan, but Appellees declined the offer. No one from the project went to the Appellees to offer to remove the wall from the property.

[5] In June 1995, an injunction was issued by the Superior Court against the Appellants ordering the wall removed from Appellees' property. In removing the wall, additional damage to the house was done, including a broken window and broken water lines. However, after the wall was removed, Appellees did not make any repairs to their home.

[6] Appellees filed suit against several parties involved in the construction project under multiple causes of action which included negligence, trespass, nuisance, and infliction of emotional distress. A jury trial was held on 7 May 1997 to 13 May 1997. At the close of Appellees' case in chief, defendants TJT Enterprises, Inc., Ben C. Tan, and Pacific Economic Development, Inc. moved for a directed verdict in their favor. The trial court granted the motion for a directed verdict with regards to TJT Enterprises, Inc. and Pacific Economic Development, Inc., but denied the motion as to Ben C. Tan.

[7] The case was sent to the jury, which returned verdicts finding DLB Construction, Co. (hereinafter "DLB"), Green Island Development, Inc. (hereinafter "Green Island"), and Tan liable to Appellees for negligence, trespass, nuisance, and negligent infliction of emotional distress. The jury also found DLB liable for intentional infliction of emotional distress.² The jury also awarded damages as follows; economic damages for negligence \$500,000.00; economic damages for trespass, \$25,000.00 and non-economic damages for trespass, \$125,000.00; economic damages for nuisance, \$100,000.00 and non-economic damages for nuisance, \$50,000.00³. In addition, the jury awarded punitive damages in the amount of \$125,000.00. Although the jury returned verdicts finding DLB liable for intentional infliction of emotional distress and all remaining defendants liable for negligent infliction of emotional distress for the trespass cause of action, no damages were awarded. The jury's various awards for damages equaled \$925,000.00, but the trial court entered a judgment

²Defendant DLB Construction Inc. filed a voluntary petition for bankruptcy prior to trial and was discharged in bankruptcy court. Defendant Johnny M. Aquino settled with plaintiff-Appellees prior to trial. Judgment was entered against Ben C. Tan and Green Island Development, Inc.

³The jury returned verdicts finding DLB, Green Island and Tan liable for negligent infliction of emotional distress as to the private nuisance cause of action, however the award for that tort was already included as a part of the non-economic damages for nuisance.

awarding Appellees' \$850,000.00 against Appellants Green Island and Tan..

[8] Appellants filed motions for judgment notwithstanding the verdict and an alternative motion for new trial. After hearing arguments, the trial court denied both motions. Appellants timely filed this appeal.

II.

[9] Appellants raise three issues for this court's consideration. First, Appellants argue that the damages award against Tan and Green Island are duplicative because only one injury occurred, to wit, the collapse of the wall on the home of the Appellees. Second, Appellants assert that the jury's award of damages is not supported by the evidence. And third, the trial court's failure to reduce the judgment by the settlement of defendant Johnny Aquino was erroneous.

III.

[10] This court has jurisdiction pursuant to 7 GCA §§ 3107 and 3108 (1994).

IV.

[11] The first issue raised by the Appellants is the trial court's denial of their motion for judgment notwithstanding the verdicts arguing that the jury's award of damages for the various causes of action is duplicative because only one injury occurred, and that was the falling of the wall upon the Appellee's property. A motion for judgment notwithstanding the verdict is the same as a motion for judgment as a matter of law and is reviewed *de novo*. *Acosta v. City & County of San Francisco*, 83 F.3d 1142, 1145 (9th Cir. 1996). A judgment as a matter of law is proper if the evidence,

construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to that of the jury. *Id.*

[12] Appellants argue that the verdicts against them and the jury awards for economic damages were improper because the Appellees are entitled to recover for only the one injury that occurred. In response, Appellees point out the elements for the various causes of action of negligence, trespass, and private nuisance insisting that a number of different incidents occurred which could have led to the jury's finding that Appellants committed these acts. Appellees note that the causes of action stated in their complaint do not only cite the falling of the wall upon the property, but also the conduct or omissions of the Appellants or their respective employees.

[13] Even if liability is characterized as joint, several, or independent, a party wronged by a tort is entitled only to be made whole and that party may not recover more than once for the same wrong. *Convoy Corporation v. Sperry Rand Corporation*, 601 F.2d 385 (9th Cir. 1979). Regardless of the number of the nature or number of legal theories advanced by a plaintiff, he or she is not entitled to more than a single recovery for each distinct item of compensable damages supported by the evidence. *Finch v. Brenda Raceway Corporation*, 27 Cal.Rptr.2d 531 (Cal.Ct.App. 1994). We will examine each of the causes of action to determine whether the jury's verdicts were duplicative in light of the injury or injuries suffered by Appellees.

Negligence

[14] Under a cause of action for negligence, an injured party must prove the following elements to prevail: a) that the tortfeasor had a duty to act in a manner that does not place others in an unreasonable risk of harm; b) that duty was breached; c) as a result of that breach it is the cause; d) of harm or damages suffered by a party. *See* RESTATEMENT (SECOND) TORTS §§ 281 AND 282 (1988).

In this case, Appellees alleged that by Appellants' failure to prevent the falling of the wall upon their home, they were injured. The injury or damages claimed for negligence is the damage to the home from the fallen wall.⁴

Nuisance

[15] Guam law provides the elements to recover under a nuisance theory. The party must show the acts of tortfeasor were either; a) injurious to health; b) indecent or offensive to the senses; c) obstructive the comfortable enjoyment of life or property; d) unlawfully obstructive the free passage or use, in the customary manner, of any river, bay, stream, canal, or basin, or any public park, square, street, or highway. *See* 20 GCA § 10101. Appellees argue that they have suffered a nuisance because the retaining wall that remained on the property interfered with their reasonable use of their property. The injury claimed is not the damage to the house, but rather, the fact that the Appellants failure to remove the remnants of the wall and all the debris from the collapse prevented Appellees from using their property.⁵

Trespass

[16] A party claiming trespass must prove the following elements: a) the tortfeasor intentionally; b) enters land in possession of another, or causes a thing or a third person to do so; or c) remains on the land; or d) fails to remove from the land a thing which he is under a duty to remove. *See* RESTATEMENT (SECOND) TORTS § 158 (1988) In this case, Appellees alleged multiple acts of intrusion upon their property. Although the allegation of trespass includes the intrusion of the

⁴*See* Designation of Record at 1 (Complaint), pages 10-11.

⁵*See* Designation of Record at 1 (Complaint), pages 9-10.

retaining wall when it collapsed, Appellees also allege trespass in the use of Appellees' property by construction workers from the adjoining property to build the retaining wall and failure to remove the debris left by these workers during the construction of the wall.⁶

Negligent Infliction of Emotional Distress

[17] To recover for negligent infliction of emotional distress, a complainant must show; a) the tortfeasor acts in a manner that is extreme and outrageous; and b) that the tortfeasor should have realized that his conduct posed an unreasonable risk of causing distress that might result in illness or bodily harm. RESTATEMENT (SECOND) TORTS §§ 46 AND 313 (1988). Appellees argue that the injury that was inflicted was mental suffering which in turn forced Appellee Erlinda Leon Guerrero to seek medical and psychiatric treatment. Appellees believe that these injuries stem from the outrageous conduct of the Appellants during the construction of the wall and their handling of the matter after the collapse of the wall.

[18] It is apparent to the court that the injury suffered by the Appellees is not simply the collapse of the retaining wall upon the property.. The Appellees alleged in their complaint that the basis for the different causes of action were based upon other acts or omissions by the Appellants before and the after the collapse of the wall. The damages suffered by the Appellees are distinct from one another and the basis for recovery for these damages do not all stem from the collapse of the wall itself.

⁶See Designation of Record at 1 (Complaint), pages 7-9.

[19] Based upon our review of the case law cited by Appellants and the record below, we find no error in the trial court's entry of judgment reflecting the jury's verdicts and the separate awards for negligence, trespass, and nuisance. Each cause of action alleged different injuries and it was within the jury's purview to determine whether the factual support for Appellants liability for those injuries. In this case, the court is satisfied that the facts adduced at trial provided evidentiary support for the jury to find that the Appellants committed certain acts that resulted in distinct injuries suffered by the Appellees for each cause of action.⁷ In this regard, we find that the jury's verdicts are not duplicative

VI.

[20] The second issue raised by Appellants is whether the trial court erred in denying their motion for judgment notwithstanding the verdict because the jury's award of damages against the Appellants was not supported by the evidence at trial. Although a denial of a motion for judgment notwithstanding a verdict is reviewed *de novo*, the standard of review for a jury verdict is whether it is supported by substantial evidence. *Murray v. Laborers Union, Local No. 324*, 55 F.3d 1445, 1452 (9th Cir. 1995). Substantial evidence is such relevant evidence which reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the evidence. *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994).

⁷We point out that our finding here is solely for the purpose of examining Appellants' arguments of duplicity of recovery. We will address merits of the jury's verdicts and awards, *infra*.

[21] We note that in *J.J. Moving Service, Inc. v. Sanko Bussan Co. Ltd.*, 1998 Guam 19 at ¶28, we considered the standard of review for disturbing a jury verdict in the context of a motion for a new trial. We established the standard that in order for this court to disturb a jury verdict, we must find that the jury's decision to have been against the clear weight, overwhelming weight, or great weight of the evidence. *Id.* We find that the substantial evidence standard is essentially the same as the standard we articulated in *J.J. Moving*. Thus, in this case, we will examine whether the verdict is either supported by substantial evidence or whether the jury's decision is against the clear weight of the evidence.

[22] The jury returned verdicts finding the Appellants liable for the following torts: negligence, trespass, nuisance, and negligent infliction of emotional distress. Based upon these findings, the jury awarded damages to the Appellees for each cause of action and also awarded punitive damages. Appellants Green Island and Tan, in his individual capacity, are jointly and severally liable for these damage awards. As a result of the multiple verdicts finding liability and awarding damages, we will address the merits of the jury's verdicts and awards as to each of the Appellants separately.

Liability of Ben C. Tan

[23] In Appellees' complaint, it was first alleged that Appellant Tan was negligent because he failed to exercise ordinary care and skill in the construction of the retaining wall. By virtue of the wall falling on the Appellees' home, Tan, along with the other co-defendants in the suit was negligent. Second, the failure of the defendants, which includes Tan, in failing to remove the wall, interfered with Appellees' use of the property, thus constituting a nuisance. Third, that the failure of Tan and the other defendants to prevent construction workers who were building the wall from entering the property, as well as the collapse of the wall, constituted trespass.

[24] After reviewing the evidence presented at trial, we find no substantial evidence that Appellant Tan committed any of the acts complained of by Appellees, except for the negligent infliction of emotional distress. Our review shows that the relationship of Appellant Tan to the other co-defendants was never fully established at trial. The focus of the inquiry is what evidence could the jury have relied upon to find that Tan had committed trespass, nuisance, or that his behavior was negligent.

[25] During the trial, evidence was presented that connected Appellant Green Island and DLB to the injuries suffered by the Appellees. Those defendants were shown to either have had a role in designing the retaining wall, controlling the construction of the wall, or directly supervising those involved in the construction of the wall.

[26] However, the evidence does not show that same kind of connection for Appellant Tan. Appellees refer to Appellant Tan collectively with Green Island Development, Inc. and DLB Construction as having caused the injuries, but no evidence was ever presented to show what role Tan had in either the design and construction of the wall or the control of employees of the two corporate defendants. Appellees alluded to Tan's ownership of these companies as a basis for liability, but no evidence was presented to prove this fact at trial. Even if such evidence were presented, Appellees did not attempt to pierce the corporate veil of the corporate defendants and without such a preliminary finding, Tan's ownership in these corporate entities cannot provide a legal basis for liability. *See generally, Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 969 F.2d 764, 769 (9th Cir. 1992).

[27] The only verdict that we find to be supported by substantial evidence as to Tan, is the jury's determination that Appellant Tan had negligently inflicted emotional distress upon the Appellees. The testimony of the Appellees describing the conduct of Appellant Tan is adequate to support a conclusion by the jury that Appellant Tan's conduct was so outrageous that the Appellees had suffered emotional distress as a result. Appellees testified about their various encounters and conversations with Tan before and after the collapse of the retaining wall. Appellees also described Tan's attitude and actions relating to these encounters. In one instance, Appellees testified that Tan had threatened not to do anything for them if they consulted a lawyer.⁸ This evidence provided more than enough of a basis for the jury to evaluate the conduct of Tan to make the proper determination whether Tan's conduct was so outrageous that it constituted negligent infliction of emotional distress.

[28] In light of the foregoing examination of the evidence, accordingly we reverse the trial court's denial of the Motion Notwithstanding the Verdict, vacate the judgment, and remand the matter for entry of a new judgment consistent with the findings of this opinion with regards to Appellant Tan.

Liability of Green Island Development, Inc.

[29] The only point of contention raised as to Green Island is that the jury's award of damages, which Appellants argue is not supported by substantial evidence. Appellants point out that the amounts awarded by the jury have no basis in the evidence presented during the trial and imply that some of the awards were speculative. They cite *Harmsen v. Smith*, 693 F.2d 932 (9th Cir. 1982) for the proposition that in order for an award of damages to be made, sufficient facts must be introduced

⁸See Transcript, vol. I, p. 51 (Trial 7 May 1997).

to allow the finder of fact to arrive an intelligent estimate without speculation or conjecture. Appellants also argue that the damage awards were improper in light of the Appellees' failure to mitigate damages.

[30] In reviewing the evidence, we find that substantial evidence was presented by Appellees to allow the jury to make a determination of damages for all of the causes of action. Although the primary injury claimed by the Appellees was the economic damage caused to the Appellees' home, other evidence regarding the various costs associated with the building and collapse of the wall were presented to the jury. This evidence included testimony regarding the cost of maintaining a separate apartment, mortgage payments for the house that the Appellees could not use, and the value of other personal items that were lost or damaged as a result of the wall's collapse. In fact, actions by Appellees in incurring certain costs after the collapse of the wall could support a conclusion that Appellees had taken reasonable steps to mitigate their damages.

[31] Appellees also testified about the considerable inconvenience caused not only by the collapse of the wall, but also by the other acts of trespass by the construction workers and the efforts by the Appellees to resolve the problems caused by it's construction. Based upon this testimony, the jury could have made an approximate determination of damages, although it would not have been to a mathematical certainty. Despite the assertions of Appellants that the jury's awards were speculative, we find that the awards for the negligence, trespass, nuisance, and negligent infliction of emotional distress, were proper and supported by the evidence.

[32] Appellants also contend that the award of punitive damages was improper because no evidence regarding the net worth of any of the Appellants was presented during trial. Further, they argue that the evidence at trial did not show that the conduct of any of the Appellants was in any way

“reprehensible”. We disagree.

[33] Under Guam law, exemplary damages or punitive damages, are allowed “where the defendant has been guilty of oppression, fraud, or malice, express, or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.” 20 GCA § 2120 (1992). In reviewing the record of the trial, we find that substantial evidence was presented to allow the jury to make the findings required under the statute. Appellees testified about the overall conduct of the Appellants and the difficulty of finding solutions for the problems they had suffered when they met with representatives of or the Appellants before and after the collapse of the wall. Based upon this evidence, the jury could have reached a reasonable conclusion that the conduct of the Appellants had reached the threshold allowing an award for such damages.

[34] Even if we imposed the additional inquiry advanced by Appellants to consider the new worth of the Appellants, the testimony of Jesus Ninete from Public Works, about the value of the construction project undertaken by Appellant Green Island, next to the home of Appellees, would be sufficient to help the jury make its determination. Mr. Ninete stated that the value of the project noted in the building permit, as provided by the owner and contractor, was approximately \$10,615,000.00. The evidence as presented, leads us to believe that the jury had a sufficient basis for determining a minimum net worth of Appellant Green Island. Although the figure is not a complete representation of Appellant Green Island’s net worth, the jury had evidence of Appellant’s financial ability to pay ten million dollars for the construction project. Therefore, we affirm the jury’s verdict and award of damages as to Appellant Green Island.

VII.

[35] The final issue raised by Appellants is whether the judgment rendered by the trial court, which did not account for the amount of the settlement with former co-defendant Johnny Aquino, was improper. Appellees argue that Appellants did not raise this matter as an objection to the judgment and thus precludes this court from reviewing the issue. However, we deem this issue to be a matter of law that should be reviewed *de novo*. *Camacho v. Camacho*, 1997 Guam 5, ¶24.

[36] The statutory provision governing the effect of release among joint tortfeasors is found in 7 GCA § 24605, provides in part:

§24605. Release or Covenant Not to Sue. When a release or covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:

1. It does not discharge any of the other tortfeasors from liability from the injury or wrongful death unless its terms so provide, but it reduces the claim against the other to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is greater; . . .

7 GCA § 24605 (1993)(Emphasis added).

This statute makes it clear that the settlement of former co-defendant, Johnny C. Aquino, should have been taken into account by the trial court in formulating its judgment. The result would have reduced the amount of the judgment against the Appellants. Accordingly, we vacate the judgment of the trial court and remand the matter for entry of a new judgment reducing the damages awarded to Appellees by the amount paid by Johnny Aquino.

VIII.

[37] Based upon our review of the record below, we find that the jury verdicts and award for damages against Appellant Ben C. Tan was unsupported by substantial evidence at trial. However, the damage awards against Appellant Green Island were supported by evidence to allow the jury to make a reasonable calculation for damages. We also find that the trial court should have accounted for the settlement amounts paid by former defendant Johnny Aquino and reduced the damage awards accordingly. The trial court's denial of Appellants' motion for judgment notwithstanding the verdict is **AFFIRMED IN PART** as to Green Island Development, Inc.; **REVERSED IN PART** as to Ben C. Tan. The judgment of the trial court is **VACATED** and the matter is remanded for entry of a new judgment consistent with the findings of this opinion.

JANET HEALY WEEKS
Associate Justice

JOAQUIN C. ARRIOLA, SR.
Associate Justice