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HEADNOTES

Evidence – Burden of Proof

In a prima facie case, a party has produced enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 45 n.2 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

A defendant may, under Rule 41(b), move to dismiss the plaintiff's case after the plaintiff has completed his case-in-chief. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 45 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

When a defendant has moved for dismissal after the plaintiff has completed its evidence, the court, in determining whether the plaintiff has shown a right to relief, is not required to view the facts in the light most favorable to the plaintiff but can draw permissible inferences. If the court determines that the plaintiff has not made out a prima facie case, the defendant is entitled to have the plaintiff's case dismissed. But even if the plaintiff has made out a prima facie case, the court, as the trier of fact, may weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance of the evidence lies and grant a Rule 41(b) motion to dismiss. That is, the court must view the evidence with an unbiased eye, without any attendant favorable inferences. The evidence must be sifted and balanced and given such weight as the court deems fit. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 46 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

When a Rule 41(b) motion is made at the close of the plaintiffs' case, the court then determines the facts and, if the court concludes that the plaintiffs have not made out a case, renders judgment against the plaintiffs or the court may decline to render any judgment at all until the close of all evidence. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 46 (Chk. 2010).

Civil Procedure

When an FSM court has not previously construed an FSM civil procedure rule that is similar to

a U.S. rule, the court may look to U.S. sources for guidance in interpreting the FSM rule. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 46 n.4 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff’s Evidence

The trial court, when ruling on a Rule 41(b) motion to dismiss after the close of the plaintiff’s case, can find facts and grant dismissal for less than the whole case and continue trial on the remaining claims. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 46-47 (Chk. 2010).

Torts – Infliction of Emotional Distress

Physical injury to the plaintiff or the plaintiff’s physical manifestation of emotional distress is a necessary element that must be proven for an award for infliction of emotional distress. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Statutes of Limitation; Torts – Infliction of Emotional Distress

When a statute of limitations provides a two-year limitation period for actions for injury to one caused by the wrongful act or neglect of another, the applicable statute of limitations for a negligent infliction of emotional distress claim is two years negligent infliction of emotional distress requires a physical injury or manifestation. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Infliction of Emotional Distress

Recovery for intentional infliction of emotional distress requires conduct that is extreme and outrageous. The tort of intentional infliction of emotional distress is sharply limited and only applies in the most egregious circumstances. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Statutes of Limitation; Torts – Infliction of Emotional Distress

When a two-year limitations period applies to injuries caused by the wrongful act or neglect of another, it applies to intentional infliction of emotional distress because intentional infliction of emotional distress is caused by a wrongful act – conduct that is extreme and outrageous. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Statutes of Limitation; Torts – Infliction of Emotional Distress

An emotional distress claim, whether inflicted intentionally or negligently, is barred by the two-year statute of limitations. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Infliction of Emotional Distress

When, weighing the evidence before the court, the defendant’s alleged wrongful act – unblocking a culvert – was not extreme and outrageous conduct, the plaintiffs have not proven an element of the intentional infliction of emotional distress tort. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Respondeat Superior

Vicarious liability is not a cause of action but a means by which a defendant is held liable for the act of another, such as a principal being held liable for the torts or contracts of its agent. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Damages – Punitive

The purpose of punitive damages is not to compensate the plaintiff (since they are not a matter of right and are a windfall to the plaintiff), but to punish the tortfeasor. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Damages – Punitive

Punitive damages may be recoverable for tortious acts when the tortfeasor's act is accompanied by fraud, or involves ill will, actual malice, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 48 (Chk. 2010).

Torts – Damages – Punitive; Torts – Negligence – Gross

Punitive damages are not recoverable for ordinary negligence. For punitive damages to be awarded, there must be evidence of gross negligence. Gross negligence is the intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence; Torts – Damages – Punitive

When there was no evidence before the court from which it could find that the defendant's contractor intentionally failed to perform a manifest duty in reckless disregard of the consequences or that its act was accompanied by fraud, ill will, actual malice, recklessness, wantonness, oppressiveness, or willful disregard of the plaintiffs' rights, a motion to dismiss the plaintiffs' punitive damages claim will be granted. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

The court, when declining to render judgment on a Rule 41(b) motion to dismiss, may indicate its legal reasoning and highlight the evidence which supports it. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Torts – Comparative Negligence

Chuuk is a comparative negligence or comparative fault jurisdiction. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Judgments

The court renders judgment and grants relief based on what has been proven, not on what was pled. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Torts – Comparative Negligence

The "pure system" of comparative negligence is applicable in Chuuk; that is, a defendant is liable only for the portion of the harm attributable to the defendant's wrongdoing. To illustrate, if the damage caused by a defendant was 12% greater than what the damage would have been, the defendant would be liable for no more than 12% of whatever actual monetary damages the plaintiffs could prove. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 49 (Chk. 2010).

Torts – Damages – Nominal; Torts – Trespass

If a defendant's acts caused trespass on a plaintiff's land and chattels but no actual damages are proven, the plaintiff would be entitled to no more than nominal damages (\$1). Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 50 (Chk. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

When, after the presentation of the plaintiffs' evidence, the court partially denied a motion to dismiss and when, on the record as it now stands, the plaintiffs may be entitled to some relief, the court awaits the defense and third-party defenses presentations and nothing contained in the court's memorandum is intended to foreclose the defendant of its opportunity to be heard because what may now be reasonable and logical inferences from the evidence may be shown to be something entirely

different. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 50 (Chk. 2010).

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COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On September 28, 2009, this came before the court for trial on the plaintiffs' first amended complaint. Trial continued on the September 29, 30, and October 1, 2009. The trial was then recessed. It resumed on January 6, 2010, at which time the plaintiffs finished their case-in-chief and rested. On January 7, 2007, the defendant (joined orally by the third-party defendant) moved to dismiss the case under Civil Procedure Rule 41(b), asserting that the plaintiffs had not shown any right to relief on any of their amended complaint's causes of action. The parties then argued the motion and asked that the trial resume in April if the motion was not granted in its entirety.

The court having carefully considered the motion to dismiss, grants the motion for the plaintiffs' emotional distress and punitive damages claims. The court's reasoning follows.

I. CAUSES OF ACTION AND MOVANTS' CONTENTIONS

The plaintiffs, in their First Amended Complaint,¹ filed April 13, 2009, pled as causes of action, negligence, punitive damages, vicarious liability of the defendant for the acts of its contractor, trespass to land and to chattels, nuisance, and emotional distress. The movants seeks dismissal of all these claims.

The movants contend that plaintiff Toropio Nakamura's claims must be dismissed because he did not testify and no evidence was put forward about damages to his house or property. They assert that, even assuming the plaintiffs could make out a prima facie case² for another cause of action, the plaintiffs have not shown the malice element necessary for a derivative punitive damages claim. They contend that the emotional distress claims are barred by the two-year statute of limitations. They further contend that the plaintiffs have proven neither causation nor damages elements for any of the other causes of action.

II. RULE 41(b) PROCEDURE

A defendant may, under Rule 41(b), move to dismiss the plaintiff's case after the plaintiff has completed his case-in-chief.

After the plaintiff has completed the presentation of plaintiff's evidence, the defendant, without waiving defendant's right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and

¹This amended complaint was filed after leave of court was granted on March 23, 2009. The plaintiffs' first motion to amend their complaint was denied January 27, 2009. *See Nakamura v. Mori*, 16 FSM Intrm. 262 (Chk. 2009).

²In a prima facie case, a party has produced "enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor." BLACK'S LAW DICTIONARY 1209 (7th ed. 1999).

render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

FSM Civ. R. 41(b). In determining whether the plaintiff has shown a right to relief, the court is not required to view the facts in the light most favorable to the plaintiff but can draw permissible inferences. Hauk v. Lokopwe, 14 FSM Intrm. 61, 64 (Chk. 2006) (citing Olsen v. Progressive Music Supply Co., 703 F.2d 432, 436 (10th Cir.), *cert. denied*, 464 U.S. 866 (1983)). If the court determines that the plaintiff has not made out a prima facie case, that is, has shown no right to relief, the defendant is entitled to have the plaintiff's case dismissed. But "[e]ven if the plaintiff has made out a prima facie case, the court, as the trier of fact, may 'weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance [of the evidence] lies' and grant a Rule 41(b) motion to dismiss." Hauk, 14 FSM Intrm. at 64 (quoting Sanders v. General Servs. Admin., 707 F.2d 969, 971 (7th Cir. 1983)). That is, "[t]he court must view the evidence with an unbiased eye, without any attendant favorable inferences. The evidence must be sifted and balanced and given such weight as the court deems fit." United States v. General Dynamics Corp., 246 F. Supp. 156, 159 (S.D.N.Y. 1965). When a Rule 41(b) motion is made at the close of the plaintiffs' case, the court then determines the facts and, if the court concludes that the plaintiffs have not made out a case, renders judgment against the plaintiffs or the court may decline to render any judgment at all until the close of all evidence. Hauk, 14 FSM Intrm. at 64 (citing Lang v. Cone, 542 F.2d 751, 754 (8th Cir. 1976)).

The movants, wrongly presuming that on a Rule 41(b) motion the court would only determine whether the movants were entitled to judgment as a matter of law, did not address whether the court could weigh the evidence, find the facts, and render judgment on and dismiss only some, but not all, of the plaintiffs' claims when to do so requires the court to make factual findings before it has heard any of the defendant's and third-party defendant's evidence. Rule 41(b)'s first sentence – "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." – seems to indicate that Rule 41(b) dismissals can apply to all or part of a plaintiff's case although that sentence deals with dismissals for lack of prosecution. Rule 41(b)'s next three sentences all deal with defense motions to dismiss "[a]fter the plaintiff has completed the presentation of plaintiff's evidence." There is no indication that the motion must be granted on either all of or none of the plaintiff's claims. The pertinent provisions of Rule 41(b) are similar to those provisions in the pre-1991 U.S. Federal Rules of Civil Procedure Rule 41(b)³ for motions to dismiss after the close of the plaintiff's evidence. A number of U.S. cases⁴ indicate that the trial court, when ruling on a Rule 41(b) motion to dismiss after the close of the plaintiff's case, can find facts and grant dismissal for less than the whole case and continue trial on the remaining claims. *See, e.g., duPont v. Southern Nat'l Bank of Houston*, 771 F.2d 874, 880 (5th Cir. 1985) (trial court "should have granted a partial dismissal and continued trial"); Mitchell v. Baldrige, 759 F.2d 80, 83 (D.C. Cir. 1985) (trial court should have granted Rule 41(b) dismissal only for plaintiff's reprisal claim, not his discrimination claim); Defenders of Wildlife v. Endangered Species Scientific Auth., 659 F.2d 168, 176 (D.C. Cir. 1981) (Rule 41(b) partial dismissal reversed because trial court failed to make Rule 52(a) findings).

³In 1991, those provisions were relocated to a new U.S. Rule 52(c).

⁴When an FSM court has not previously construed an FSM civil procedure rule that is similar to a U.S. rule, the court may look to U.S. sources for guidance in interpreting the FSM rule. *Berman v. College of Micronesia-FSM*, 15 FSM Intrm. 582, 589 n.1 (App. 2008); *Arthur v. FSM Dev. Bank*, 14 FSM Intrm. 390, 394 n.1 (App. 2006); *Senda v. Mid-Pacific Constr. Co.*, 6 FSM Intrm. 440, 444 (App. 1994). No FSM court has previously considered this aspect of a Rule 41(b) motion.

Accordingly, the court concludes that it may render judgment on and dismiss parts of the plaintiffs' case instead of only all or none.

III. NECESSARY FINDINGS OF FACT

The court therefore makes the following findings of fact necessary to render judgment on the claims being dismissed.

1. This lawsuit was filed September 19, 2007.
2. The event for which the plaintiffs seek relief from the court took place during the night preceding and morning of September 15, 2005.
3. It had been raining for much of the preceding week.
4. The plaintiffs' homes are built several inches above the ground in a flat area in Iras below Mount Tonachau. The plaintiffs' two homes are adjacent to each other.
5. The plaintiffs' homes often flooded with clear water after a heavy or prolonged rain.
6. On the morning of September 15, 2005, the area surrounding the plaintiffs' homes was flooded with mud.
7. The mud was of a color and type that the dirt has near the top of Mt. Tonachau, not that of dirt near the base or on the lower slopes.
8. The plaintiffs' homes had not been flooded with mud before although there had once been mudslides in the area during Typhoon Chata'an some years before.
9. On the morning of September 15, 2005, Valerio Nakamura went up the road up toward the former Civic Action Team ("CAT") camp and discovered that mud the color and type of mud that had flooded his house was flowing through a culvert under the CAT team road and then down the slope toward his house. He followed the mudflow down the slope until he could see his house and that the mud flowed in that direction.
10. The culvert had recently been reopened by a contractor working for defendant Federated States of Micronesia Telecommunications Corporation ("Telecom"). That contractor had, with the necessary permits and permissions, been reopening and repairing a road, and clearing its drainage system, that ran from the CAT team road up the side of Mt. Tonachau to Telecom's cellular telephone tower. This project was still under construction on September 15, 2005.
11. The CAT team had many years before purposely blocked that culvert and diverted the drainage elsewhere due to complaints from the residents below the culvert's outfall.

IV. DISCUSSION AND CONCLUSIONS OF LAW

A. *Infliction of Emotional Distress*

The plaintiffs' first amended complaint alleges that the defendant breached its duty of care and caused damage to the plaintiffs' residential properties by unblocking the culvert and that the resulting flooding caused the plaintiffs emotional distress. The movants contend that the plaintiffs have pled a

negligent infliction of emotional distress cause of action and that, as an emotional distress claim requires the existence of a physical injury or manifestation, the plaintiffs' emotional distress claim is barred by the two-year statute of limitations.

Physical injury to the plaintiff or the plaintiff's physical manifestation of emotional distress is a necessary element that must be proven for an award for infliction of emotional distress. Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004). The statute of limitations cited by the movants provides a two-year limitation period for: "[a]ctions for injury to or for the death of one caused by the wrongful act or neglect of another" 6 TTC 303(4). The court concludes that since negligent infliction of emotional distress requires a physical injury or manifestation, Tomy v. Walter, 12 FSM Intrm. 266, 272 (Chk. S. Ct. Tr. 2003); Eram v. Masaichy, 7 FSM Intrm. 223, 227 (Chk. S. Ct. Tr. 1995), the applicable statute of limitations for a negligent infliction of emotional distress claim is two years. The plaintiffs' claim arose on September 15, 2005. This lawsuit was filed September 19, 2007. It was thus filed over two years after the negligent infliction of emotional distress claim arose.

During argument on the motion, the plaintiffs asserted that they had presented sufficient evidence to make out a claim for intentional infliction of emotional distress, and, they asserted, intentional infliction of emotional distress is not subject to the two-year statute of limitations applicable to injuries caused by negligence. "Recovery for the intentional infliction of emotional distress requires conduct that is extreme and outrageous. The tort of intentional infliction of emotional distress is sharply limited and only applies in the most egregious circumstances." 38 AM. JUR. 2D *Fright, Shock, and Mental Disturbance* § 15, at 21-22 (rev. ed. 1999) (footnotes omitted).

A two-year limitations period applies to injuries "caused by the wrongful act or neglect of another." 6 TTC 303(4). It therefore applies to intentional infliction of emotional distress because intentional infliction of emotional distress is caused by a wrongful act – conduct that is extreme and outrageous. The plaintiffs' emotional distress claim, whether inflicted intentionally or negligently, is thus barred by the two-year statute of limitations. Furthermore, weighing the evidence before the court, Telecom's alleged wrongful act – unblocking the culvert – is not extreme and outrageous conduct. The plaintiffs thus have also not proven an element of the intentional infliction of emotional distress tort.

Accordingly, the plaintiffs' emotional distress claims are time-barred and are dismissed.

B. *Vicarious Liability*

Vicarious liability is not a cause of action but a means by which a defendant is held liable for the act of another, such as a principal being held liable for the torts or contracts of its agent. See BLACK'S LAW DICTIONARY 1404 (5th ed. 1979). Telecom does not assert that it is not liable for any torts the road contractor may have committed. It asserts only that the plaintiffs have not proved that any torts were committed. Thus, this "claim" will be dismissed only if all of the plaintiffs' substantive claims are dismissed.

C. *Punitive Damages*

The purpose of punitive damages is not to compensate the plaintiff (since they are not a matter of right and are a windfall to the plaintiff), but to punish the tortfeasor. Elymore v. Walter, 10 FSM Intrm. 166, 168 (Pon. 2001). Punitive damages may be recoverable for tortious acts when the tortfeasor's act is accompanied by fraud, or involves ill will, actual malice, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury. Elymore v. Walter, 9 FSM Intrm. 251, 254 (Pon. 1999); Bank of Hawaii v. Air Nauru, 7 FSM

Intrm. 651, 653 (Chk. 1996) (mere failure to respond to an inquiry, or to answer a complaint is not a circumstance warranting punitive damages for conversion).

Punitive damages are not recoverable for ordinary negligence. Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 67 (Chk. 1997). As the court has previously stated, "for punitive damages to be awarded, there must be evidence of gross negligence." Nakamura v. Mori, 16 FSM Intrm. 262, 268 (Chk. 2009) (not necessary for such proof to be set forth in the complaint). Such evidence must be presented at trial. It was not.

Gross negligence is "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." BLACK'S LAW DICTIONARY 931 (5th ed. 1979). There is no evidence before the court from which it could find that Telecom's contractor intentionally failed to perform a manifest duty in reckless disregard of the consequences. Nor is there any evidence before the court from which it could find that Telecom's contractor act was accompanied by fraud, ill will, actual malice, recklessness, wantonness, oppressiveness, or willful disregard of the plaintiffs' rights. Accordingly, the motion to dismiss the plaintiffs' punitive damages claim is granted.

D. *Negligence, Nuisance, Trespass, and Trespass to Chattels*

The court declines to render any judgment on the plaintiffs' negligence, nuisance, trespass, and trespass to chattels claims until the close of all the evidence. The court, when declining to render judgment on a Rule 41(b) motion to dismiss, "may indicate its legal reasoning and . . . highlight the evidence which supports it." General Dynamics Corp., 246 F. Supp. at 159.

The movants contend that the plaintiffs have shown no right to relief because they have not shown that the damages they claim were caused solely by the actions of Telecom's agent. They contend that since the plaintiffs, in their view, pled that all their damages were caused by Telecom's acts or omissions, but that the evidence proves otherwise, the plaintiffs' claims must all be dismissed.

What the movants overlook is that Chuuk is a comparative negligence⁵ or comparative fault jurisdiction, Kileto v. Chuuk, 15 FSM Intrm. 16, 18 (Chk. S. Ct. App. 2007); Epiti v. Chuuk, 5 FSM Intrm. 162, 167-68 (Chk. S. Ct. Tr. 1991), and that the court renders judgment and grants relief based on what has been proven, not on what was pled, FSM Civ. R. 54(c); see also Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 26 (App. 2006). The "pure system" of comparative negligence is applicable in Chuuk; that is, a defendant is liable only for the portion of the harm attributable to the defendant's wrongdoing. Kileto, 15 FSM Intrm. 16, at 18; Epiti, 5 FSM Intrm. at 168. To illustrate, if the damage caused by the mud was 12% greater than the damage would have been if the plaintiffs had only suffered their usual water flood and if all of the mud flood were attributable to Telecom's road construction and unblocking the culvert, Telecom would be liable for no more than 12% of whatever actual monetary damages the plaintiffs could prove.

From the record as it now stands, the court could reasonably infer that but for Telecom's road construction and unblocking the culvert the plaintiffs would have suffered only water damage and not mud damage, and that therefore the added mud damage is attributable to Telecom.

⁵Telecom did plead comparative negligence as an affirmative defense. Answer, Third-Party Compl. ¶ 21 (Feb. 19, 2008).

E. *Toropio Nakamura's Claims*

The movants contend that Toropio Nakamura's claims must all be dismissed because he did not testify and because there was, in their view, no evidence that Toropio Nakamura suffered any damage to his land or his chattels. The court, however, notes that there was some eyewitness testimony that the mud had reached Toropio Nakamura's house and that some muddy household goods had been taken outside. The court further notes that if Telecom's acts caused mud to trespass on Toropio Nakamura's land and chattels but no actual damages are proven, he would be entitled to no more than nominal damages (\$1). See 75 AM. JUR. 2D *Trespass* § 161, at 121 (rev. ed. 1991) ("Because from every unlawful entry or direct invasion of the person or property of another, the law infers some damage, the prevailing plaintiff is ordinarily entitled, in an action for trespass, to at least nominal damages."). Since, in order to adjudicate Toropio Nakamura's remaining claims, the court would have to make factual findings that would bear on Valerio Nakamura's remaining claims, the court will decline to render judgment on Toropio Nakamura's remaining claims until the evidence is closed.

V. CONCLUSION

Accordingly, judgment will be entered for the defendant (and third-party defendant) on the plaintiffs' claims for emotional distress and punitive damages. On the record as it now stands, the plaintiffs may be entitled to some relief. At this time, the court awaits the defense and third-party defenses presentations. "Nothing contained in this memorandum is intended to foreclose the defendant of its opportunity to be heard. What may now be reasonable and logical inferences from the evidence may be shown to be something entirely different." General Dynamics Corp., 246 F. Supp. at 168.

Trial on the plaintiffs' remaining claims will therefore resume on Monday, April 12, 2010, at 1:30 p.m.

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