

FSM SUPREME COURT TRIAL DIVISION

VAI FRIO NAKAMURA and TOROPIO NAKAMURA,	)	CIVIL ACTION NO. 2007-1009
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
FEDERATED STATES OF MICRONESIA	)	
TELECOMMUNICATIONS CORPORATION,	)	
	)	
Defendant/Third-Party Plaintiff,	)	
	)	
vs.	)	
	)	
STATE OF CHUUK,	)	
	)	
Third-Party Defendant.	)	
	)	

---

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ready E. Johnny  
Associate Justice

Trial: September 29-30, October 1, 2009, January 6-7, April 12-15, 2010  
Decided: May 3, 2010

APPEARANCES:

For the Plaintiffs: Bethwell O'Sonis, Esq.  
Salomon Saimon, Esq.  
Micronesia Legal Services Corporation  
P.O. Box D  
Weno, Chuuk FM 96942

For the Defendants: Stephen V. Finnen, Esq.  
P.O. Box 1450  
Kolonias, Pohnpei FM 96941

For the Third-Party Defendant: Joses Gallen, Esq.  
Office of the Chuuk Attorney General  
P.O. Box 1050  
Weno, Chuuk FM 96942

\* \* \* \*

HEADNOTES

Civil Procedure - Dismissal - After Plaintiff's Evidence; Evidence - Burden of Proof

The findings of fact made at the end of trial may differ somewhat from those the court made

after the close of the plaintiffs' case-in-chief for the purpose of the defense Rule 41(b) motion since then it still awaited the presentations of the defendant and third-party defendant; since nothing contained in the court's Rule 41(b) memorandum was intended to foreclose the defendant and the third-party defendant of their opportunity to be heard; and since what may then have been reasonable and logical inferences from the evidence might later be shown to be something entirely different. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 121 & n.1 (Chk. 2010).

#### Civil Procedure; Evidence – Burden of Proof

In a civil case, the plaintiff has the burden of proving each element of the plaintiff's cause of action by a preponderance of the evidence, and if the plaintiff fails to prove any one element, judgment will be entered against the plaintiff. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123 (Chk. 2010).

#### Torts – Negligence

Under Chuuk law, the elements of actionable negligence are the breach of a duty on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed, which may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123 (Chk. 2010).

#### Torts – Negligence

The plaintiffs' negligence claims fail when they failed to prove by a preponderance of the evidence that their homes would not have flooded with mud if the partially-blocked entrance to the Mt. Tonachau road culvert had remained partially blocked and when they also did not prove that the defendant's contractor, by restoring the Mt. Tonachau road and drainage system to its designed (and previous) state, breached its duty not to cause injury to residents and landowners downhill from the Mt. Tonachau roadwork. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123 (Chk. 2010).

#### Torts – Damages; Torts – Negligence

When a plaintiff did not submit any evidence about his damages and therefore could not have proven damages, his negligence claim fails. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123 (Chk. 2010).

#### Torts – Nuisance

Nuisance is a cause of action involving a substantial interference with one's use and enjoyment of one's land caused by another's intentional and unreasonable conduct, or another's unintentional negligent or reckless conduct, or another's performance of abnormally dangerous conduct. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123 (Chk. 2010).

#### Torts – Nuisance

The plaintiffs' nuisance claims fail when there was no evidence supporting a claim that the defendant's contractor's conduct was intentional and unreasonable; when road and drainage maintenance and clearing is not an inherently abnormally dangerous conduct; and when the plaintiffs have failed to prove that the defendant was negligent. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 123-24 (Chk. 2010).

#### Torts – Trespass

An action for trespass has been broadly defined in the FSM as a wrongful interference with another's possessory interest in property, and a trespass cause of action accrues when there is an intrusion upon another's land which invades the possessor's interest in the exclusive possession of his land. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 124 (Chk. 2010).

Torts – Trespass

To prevail in a trespass action, a plaintiff must prove a wrongful interference with his possessory interest in the property. When the intrusion is the result of reckless or negligent conduct, trespass liability attaches only where harm is caused to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 124 (Chk. 2010).

Torts – Trespass to Chattels

The tort of trespass to chattels, or personal property, is the intentional use of or interference with a chattel which is in the possession of another without justification, so that when there was no evidence that the defendant intentionally interfered with the plaintiffs' personal property (inside their homes), the plaintiffs fail to prove their trespass to chattels claim. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 124 (Chk. 2010).

\* \* \* \*

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

Trial was held in this matter on September 29-30, October 1, 2009, January 6-7, 2010, after which the plaintiffs rested. On January 25, 2010, the court issued its written ruling on the Rule 41(b) motion to dismiss made by the defendant, the Federated States of Micronesia Telecommunications Corporation ("Telecom") and joined by the third-party defendant, the State of Chuuk, and dismissed the plaintiffs' emotional distress and punitive damages claims. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41 (Chk. 2010). The rest of the trial was held on April 12-15, 2010.

The court, with the parties and counsel in attendance, first viewed the relevant sites. Then Valerio Nakamura, Peter Sangaw, Minoru R. Mori, Kotaro Bualuay, Jack Sham, Ismael H. Mikel, Soichy Inos, Johannes Berdon, Johannes Risin, Edward Destor, Aka Fanuech, and Sepes Moses testified.

Based on the evidence and testimony presented, the court makes the following

FINDINGS OF FACT.<sup>1</sup>

1. 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. Most other homes in the vicinity are built a little higher off the ground.

2. The plaintiffs' homes often flooded with clear water after a heavy or prolonged rain.

---

<sup>1</sup> These findings of fact will differ somewhat from those the court made after the close of the plaintiffs' case-in-chief for the purpose of the defense Rule 41(b) motion because, as the court noted then, it still awaited the presentations of the defendant and third-party defendant. The court also noted that nothing contained in its Rule 41(b) memorandum was intended to foreclose the defendant and the third-party defendant of their opportunity to be heard and that what may then have been reasonable and logical inferences from the evidence might later "be shown to be something entirely different." Nakamura, 17 FSM Intrm. at 50.

3. It had been raining heavily for much of the week preceding September 15, 2005. September was the wettest month that year; 21.85 inches (9.78 more than normal) fell on Weno.

4. On the morning of September 15, 2005, the area surrounding the plaintiffs' homes were both flooded with mud. The other homes in the area did not flood.

5. The mud was of a reddish color and type common on the upper part of Mt. Tonachau.

6. 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.

7. On the morning of September 15, 2005, Valerio Nakamura went up the road from the Pacific Garden 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 small 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 general direction.

8. The upper entrance to the culvert had recently been cleaned out by a contractor working for Telecom. That contractor had, with the necessary permits and permissions, been repairing a road, and clearing its drainage system, that ran from the CAT team road up Mt. Tonachau to Telecom's cellular telephone tower. This project was still underway on September 15, 2005.

9. Both the CAT team road and the Mt. Tonachau road are public roads. It is the State of Chuuk's duty to maintain the public roads.

10. The Mt. Tonachau road was fairly steep in places. It leads to Telecom's cellular telephone tower.

11. By 2003, the Mt. Tonachau road had become overgrown and part of it was used as a trash dump. When Telecom sought to use the road to place a cellular tower on the upper slope of Mt. Tonachau, the road was impassable. It needed clearing. The State did not have available the heavy equipment to do the job. The CAT team, on the State's behalf, cleared and reopened the Mt. Tonachau road and cleared and reopened that road's existing drainage system. The Mt. Tonachau road drainage system consisted of a drainage ditch on the right side (headed downhill) of the road until it met the CAT team road where it entered the culvert under that road. The CAT team road also had a drainage ditch on its right side (headed downhill) which went all the way down to Pacific Garden where it joined drainage into the Lagoon. Between the Mt. Tonachau road and Pacific Garden there were several other culverts under the CAT team road that branched off the CAT team road drainage ditch and drained toward the flat area below Mt. Tonachau where the plaintiffs resided.

12. Telecom continued using the Mt. Tonachau road to service its cellular tower and to refuel the generator that powered the cellular tower. By 2005, the road and drainage system were in need of maintenance. The CAT team had left Chuuk by then. The State was still unable to do the job. Telecom, with the State's consent, therefore hired a contractor and obtained the necessary permits for the work.

13. Telecom's contractor did not alter the design or layout of either the Mt. Tonachau road or the CAT team road. It did, however, try to restore the Mt. Tonachau road and drainage system to the way it had been in 2003 when the CAT team had reopened the Mt. Tonachau road.

14. In 2005, the culvert entrance was partially blocked by debris. Telecom's contractor cleared

of the debris. If it had not, the water and mud draining down the side of the Mt. Tonachau road on September 15, 2005, would have flowed across the CAT team road and down the hillside instead of through the culvert and then down the hillside. The September 15, 2005 flow was of such force that it could not have been able to make the right angle turn into the drainage ditch alongside the CAT team road. It would have had to have flowed over the CAT team road and down the hillside much the same way it had gone through the culvert.

15. Neither Telecom nor its contractor intended to flood other real property or chattels by clearing out the partially-blocked culvert and the Mt. Tonachau road drainage system.

Based upon these findings, the court makes the following

#### CONCLUSIONS OF LAW.

The plaintiffs' remaining causes of action are for negligence, nuisance, trespass, and trespass to chattels. They seek to hold Telecom liable on these claims through a vicarious liability theory – that Telecom is liable for the actions and torts committed by the contractor it hired to do the work on the Mt. Tonachau road and drainage system. Telecom admits that it would be liable if its contractor, while performing the Mt. Tonachau road contract, had committed any torts. Telecom, however, contends that its contractor did not engage in any wrongful acts. The plaintiffs' theory of their case is that their homes would not have been flooded by mud on September 15, 2005, if Telecom's contractor had not reopened the culvert connected to the Mt. Tonachau road drainage system.

In a civil case, the plaintiff has the burden of proving each element of the plaintiff's cause of action by a preponderance of the evidence, and if the plaintiff fails to prove any one element, judgment will be entered against the plaintiff. Ehsa v. Kinkatsukyo, 16 FSM Intrm. 450, 456 (Pon. 2009); Jano v. Tajiita, 16 FSM Intrm. 323, 327 (Pon. 2009).

Under Chuuk law, the elements of actionable negligence are the breach of a duty on the part of one person to protect another from injury, and that breach is the proximate cause of an injury to the person to whom the duty is owed, which may be summarized as: a duty of care, a breach of that duty, which breach proximately causes damages. *E.g.*, Kileto v. Chuuk, 15 FSM Intrm. 16, 17 (Chk. S. Ct. App. 2007); Hauk v. Lokopwe, 14 FSM Intrm. 61, 65 (Chk. 2006); Rudolph v. Louis Family, Inc., 13 FSM Intrm. 118, 127 (Chk. 2005); Fabian v. Ting Hong Oceanic Enterprises, 8 FSM Intrm. 63, 65 (Chk. 1997). The plaintiffs failed to prove by a preponderance of the evidence that their homes would not have flooded with mud if the partially-blocked entrance to the Mt. Tonachau road culvert had remained partially blocked. They also did not prove that Telecom's contractor, by restoring the Mt. Tonachau road and drainage system to its designed (and previous) state, breached its duty not to cause injury to residents and landowners downhill from the Mt. Tonachau roadwork. Furthermore, Toropio Nakamura did not submit any evidence about his damages and therefore could not have proven damages. Valerio Nakamura's evidence about his damage claims was sketchy and speculative. Accordingly, the plaintiffs' negligence claims fail.

Nuisance is a cause of action involving a substantial interference with one's use and enjoyment of one's land caused by another's intentional and unreasonable conduct, or another's unintentional negligent or reckless conduct, or another's performance of abnormally dangerous conduct. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262h (Pon. 2002). There was no evidence supporting the claim that the Telecom's contractor's conduct was intentional and unreasonable. The court has already determined that road and drainage maintenance and clearing is not an inherently abnormally dangerous conduct. Nakamura v. Mori, 16 FSM Intrm. 262, 269 (Chk. 2009). And, as stated in the previous paragraph, the plaintiffs have failed to prove that Telecom was negligent. The plaintiffs'

nuisance claims thus fail

An action for trespass has been broadly defined in the FSM as a wrongful interference with another's possessory interest in property, and a trespass cause of action accrues when there is an intrusion upon another's land which invades the possessor's interest in the exclusive possession of his land. Mailo v. Chuuk, 13 FSM Intrm. 462, 466 (Chk. 2005); Nahnken of Nett v. Pohnpei, 7 FSM Intrm. 171, 177 (Pon. 1995); Jonah v. Kosrae, 9 FSM Intrm. 335, 343 (Kos. S. Ct. Tr. 2000). To prevail in a trespass action, a plaintiff must prove a wrongful interference with his possessory interest in the property. Jonah, 9 FSM Intrm. at 343. When the intrusion is the result of reckless or negligent conduct, trespass liability attaches only where harm is caused to the land, to the possessor, or to a thing or a third person in whose security the possessor has a legally protected interest. Nelpei v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528, 534 (Pon. 1998). Since the plaintiffs failed to prove that Telecom was vicariously negligent or reckless, they failed to prove that Telecom wrongfully interfered with the plaintiffs' possessory interest in their homes and land. Their trespass claims accordingly fail.

The tort of trespass to chattels, or personal property, is the intentional use of or interference with a chattel which is in the possession of another without justification. Talley v. Lelu Town Council, 10 FSM Intrm. 226, 234 (Kos. S. Ct. Tr. 2001). Since there was no evidence that Telecom intentionally interfered with the plaintiffs' personal property (inside their homes), the plaintiffs also fail to prove their trespass to chattels claim.

#### CONCLUSION

The plaintiffs having failed to prove by a preponderance of the evidence all of the elements of any of their remaining causes of action, shall take nothing from defendant Telecom. The plaintiffs not having prevailed on any claim against Telecom, the issue of whether and to what extent the third-party defendant State would be liable to defendant Telecom is moot. Let the clerk enter judgment accordingly.

\* \* \* \*