

People of Tomil *ex rel.* Mar v. M/C Jumbo Rock Carrier III  
17 FSM Intrm. 198 (Yap 2010)

2 FSM Intrm. 21, 26 (App. 1985). This is a sound principle which should also be followed in awarding class action expenses. In their application, the plaintiffs' attorneys have not even tried to make a showing that there were no qualified attorneys available on Yap to handle this matter. Ordinarily, this would leave the court unable to award the Yap travel expenses. However, it appears that counsel's failure may have been inadvertent. Plaintiffs' counsel in this case were also plaintiffs' counsel in a different admiralty reef damage class action (also involving with a plaintiff class on the Yap main island), for which trial proceedings were held during the same Yap sitting as the this case's fairness hearing and in which counsel were careful to make a strong showing that there were no qualified attorneys available on Yap for that class action. The court will therefore take judicial notice of that showing. Accordingly, except for those items specifically disallowed above, the attorneys' Yap travel expenses are allowed as reasonable and appropriate.

The court has reviewed the other expense items (including travel to Manila) and they all appear to be adequately documented and reasonably and appropriately incurred in the prosecution of this class action. Accordingly, of the \$11,649.44 sought in expenses, \$1,796.86 are disallowed, leaving \$9,852.58 in adequately documented and reasonably and appropriately incurred expenses for which plaintiffs' counsel are entitled to reimbursement from the common fund generated by the settlement in this class action.

IV. TOTAL AWARD

NOW THEREFORE IT IS HEREBY ORDERED that plaintiffs' counsel are granted \$41,666.67 (33 1/3% of \$125,000) as their reasonable attorneys' fees, IT IS FURTHER ORDERED that the plaintiffs' attorneys are awarded their reasonable and appropriate expenses of \$9,852.58, AND IT IS FURTHER ORDERED that the interest those sums [\$51,519.25 total] have earned while on deposit in the court's registry shall also be remitted to plaintiffs' counsel.

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FSM SUPREME COURT TRIAL DIVISION

MANUELA ROOSEVELT,	)	CIVIL ACTION NO. 2008-1112
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TRUK ISLAND DEVELOPERS and MYRON	)	
HASIGUCHI,	)	
	)	
Defendants.	)	
	)	

ORDER DENYING RULE 41(b) DISMISSAL

Ready E. Johnny  
Associate Justice

Trial: June 22-23, 2010  
Decided: August 4, 2010

APPEARANCES:

For the Plaintiff: Sabino Asor, Esq.  
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Weno, Chuuk FM 96942

For the Defendants: Stephen V. Finnen, Esq.  
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HEADNOTES

Civil Procedure – Dismissal – After Plaintiff’s Evidence

Once a plaintiff has finished presenting evidence during her case-in-chief, a defendant may, without waiving its right to present evidence if the motion is not granted, 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 the factfinder, may then determine the facts and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 210 (Chk. 2010).

Torts – Wrongful Death

Every wrongful death action is for the exclusive benefit of the surviving spouse, the children, and other next of kin, if any, of the decedent as the court may direct. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 210 (Chk. 2010).

Torts – Wrongful Death

The Trust Territory wrongful death statute is valid as Chuuk state law through the Chuuk Constitution’s transition clause. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 210 & n.1 (Chk. 2010).

Statutes – Construction; Torts – Wrongful Death

The Chuuk wrongful death statute phrases the class of persons entitled to recovery in the conjunctive ("and"), not the disjunctive ("or"). Generally the use of the conjunctive "and" instead of the disjunctive "or" would mean that all three named beneficiaries – surviving spouse, children, and next of kin – are within the class of persons for whose benefit a wrongful death action may be brought and construing "and" according to its common and approved English usage would mean that all three groups, spouse, children, and next of kin, compose a single class of beneficiaries in a wrongful death action. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 211 (Chk. 2010).

Statutes – Construction

Words and phrases as used in the Trust Territory Code must be read with their context and must be construed according to the common and approved usage of the English language. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 211 (Chk. 2010).

Statutes – Construction; Torts – Wrongful Death

There is no evidence that the Trust Territory Congress of Micronesia’s legislative intent in the wrongful death statute was that "other next of kin" meant only those who would inherit under intestate succession acts, especially since, at the time the Trust Territory wrongful death statute was enacted, there were no intestate succession acts. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 211

Roosevelt v. Truk Island Developers  
17 FSM Intrm. 207 (Chk. 2010)

(Chk. 2010).

Torts – Wrongful Death

The Pohnpei Intestate Succession Act cannot be used to restrict the operation of the Trust Territory wrongful death statute now applied as Chuuk state law. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 211 (Chk. 2010).

Custom and Tradition – Chuuk Torts – Wrongful Death

Under Chuukese custom, children are expected to and do in fact contribute to support of their parents. If they are not married and are employed they give larger amounts than when they have a family of their own, but their support in some amount will continue, in a normal relationship, as long as the parents live. Whether there is an obligation under the custom to support parents or other members of the family, largely dependent on their need, does not affect the next of kin's entitlement to damages for pecuniary loss. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 211 (Chk. 2010).

Custom and Tradition – Chuuk Torts – Wrongful Death

If a decedent had been married, this would not eliminate parental support under custom, nor would it relieve the wrongdoer under the wrongful death statute. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 212 (Chk. 2010).

Judgments; Transition of Authority

Trust Territory High Court decisions are not stare decisis in the Federated States of Micronesia, but their rationale may be adopted when persuasive. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 212 (Chk. 2010).

Statutes – Construction

Trust Territory Code provisions must be construed according to the fair construction of their terms, with a view to effecting their object and to promote justice. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 212 (Chk. 2010).

Torts – Wrongful Death

In determining the class of persons entitled to recovery the better cases favor an extended operation of the wrongful death statutes for the purpose of maximizing their remedial objectives. A remedial objective of the Chuuk wrongful death statute is to compensate those persons who had the right to rely on the decedent for pecuniary support had the decedent lived. Under Chuukese custom, these include, in addition to the decedent's spouse and children, the decedent's parents. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 212 (Chk. 2010).

Custom and Tradition – Chuuk Torts – Wrongful Death

Since there is no indication that parental support has ceased to be the custom in Chuuk and since parents are undoubtedly "next of kin" under the Chuuk wrongful death statute, parents of adult children, consistent with custom, are included within the single class of persons entitled to recover in a wrongful death action even when there are other members (surviving spouse and children) of the class present. But even when a plaintiff is within the class of persons who may benefit from a wrongful death action, that plaintiff must prove pecuniary damages in order for a money judgment to be awarded, and, of course, the plaintiff must also prove the other elements of a wrongful death cause of action. Roosevelt v. Truk Island Developers, 17 FSM Intrm. 207, 212 (Chk. 2010).

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

On June 23, 2010, after the plaintiff concluded the presentation of her case-in-chief, the defendants orally moved for what they called a "directed verdict." The defendants seek dismissal of plaintiff Manuela Roosevelt's claims on the ground that she has not shown any right to relief. The motion is denied. The court's reasons follow.

I.

Once a plaintiff has finished presenting evidence during her case-in-chief, a defendant may, without waiving its right to present evidence if the motion is not granted, "move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief." FSM Civ. R. 41(b). The court, as the factfinder, may then determine the facts "and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence." *Id.*

The only facts the court need determine to decide this motion are undisputed: 1) the plaintiff is the decedent's mother; 2) the decedent, Tekson Ludwig, was a thirty-year old male; 3) he was married, had children, and was, at the time of his death, residing with his wife and children at her family's residence; and 4) there was testimony that, when he was employed, he would give his mother \$20 every pay period.

As the defendants correctly note, this action, although styled as a negligence claim, is actually a wrongful death claim. Tekson Ludwig died while working for the defendants on a construction site. The defendants' alleged negligence is the basis for the assertion that Tekson Ludwig's death was wrongful. Plaintiff Manuela Roosevelt is his mother. The defendants moved at the close of her trial evidence to dismiss on the ground that the evidence showed that Manuela Roosevelt is not a proper beneficiary within the wrongful death statute.

The defendants assert that under the wrongful death statute (wrongful death being a statutory cause of action) the mother of an adult married child does not have a cause of action for the adult child's wrongful death when, as here, the decedent leaves a surviving spouse and children. The wrongful death statute provides that: "Every action for wrongful death . . . shall be for the exclusive benefit of the surviving spouse, the children and other next of kin, if any, of the decedent as the court may direct." 6 TTC 202.<sup>1</sup>

The defendants contend that since the decedent has a surviving spouse and children and since he, at the time of his death, no longer lived with his mother but with his wife and children at her family's residence, the mother (or "other next of kin") should not be included in the class of persons who have the statutory right to benefit from a wrongful death action. They read the statute to mean that wrongful death actions are for the exclusive benefit of the surviving spouse and the children, but not for the other next of kin unless there are no children or a surviving spouse since, in their view, the class of persons entitled to recover in a wrongful death action is limited to those who would be the decedent's heirs if the decedent were to die intestate. And for this argument, since there is no intestate succession statute in Chuuk, they rely on the Pohnpei Intestate Succession Act of 1977, 49 Pon. C. §§ 1-101 to 1-106, which provides that when there is a surviving spouse and children the surviving

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<sup>1</sup> This Trust Territory statute is valid as Chuuk state law through the Chuuk Constitution's transition clause, Chk. Const. art. XV, § 9. *Herman v. Municipality of Patta*, 12 FSM Intrm. 130, 136 (Chk. 2003).

spouse gets one-third of the decedent's personal property, a life estate in the decedent's real property, and the children get all the rest, 49 Pon. C. §§ 1-103(1), 1-105, and only if there are no children do the parents inherit, 49 Pon. C. § 1-103(2). In other words, in the defendants' view, the parents of adult children are not part of the class of persons entitled to recovery in a wrongful death action when there are children and a surviving spouse.

II.

As the plaintiff correctly pointed out, the Chuuk wrongful death statute phrases the class of persons entitled to recovery in the conjunctive ("and"), not the disjunctive ("or"). Generally the use of the conjunctive "and" instead of the disjunctive "or" would mean that all three named beneficiaries – surviving spouse, children, and next of kin – are within the class of persons for whose benefit a wrongful death action may be brought. "Words and phrases as used in [the Trust Territory] Code . . . shall be read with their context and shall be construed according to the common and approved usage of the English language." 1 TTC 153. Construing "and" according to its common and approved English usage would mean that all three groups, spouse, children, and next of kin, compose a single class of beneficiaries in a wrongful death action.

There is no evidence that the Trust Territory Congress of Micronesia's legislative intent was that "other next of kin" meant only those who would inherit under intestate succession acts, especially since, at the time the Trust Territory wrongful death statute was enacted,<sup>2</sup> there were no intestate succession acts. Furthermore, the defendants have not provided any authority that even the Pohnpei courts would subject the operation of the identically-worded Pohnpei wrongful death statute beneficiary provision, 58 Pon. C. § 6-112 ("[e]very action for wrongful death . . . shall be for the exclusive benefit of the surviving spouse, the children and other next of kin, if any, of the decedent as the court may direct"), to the restrictions of the Pohnpei Intestate Succession Act. But even if the defendants had provided such authority, the court would still not be persuaded of that authority's application to Chuuk state law.

The Pohnpei Intestate Succession Act, thus, cannot be used to restrict the operation of the Trust Territory wrongful death statute now applied as Chuuk state law. In Sepeti v. Fitek, 5 TTR 613 (Truk 1972), the Trust Territory High Court, in considering whether a twenty-year-old decedent's parents and five older siblings were entitled to damages and the measure of those damages under the Trust Territory wrongful death statute, noted that:

Under Trukese custom, children are expected to and do in fact contribute to support of their parents. If they are not married and are employed they give larger amounts than when they have a family of their own, but the support in some amount will continue, in a normal relationship, as long as the parents live. Whether there is an obligation under the custom to support parents or other members of the family, largely depending on their need, does not affect the next of kin's entitlement to damages for pecuniary loss.

*Id.* at 617. Although the decedent was unmarried at the time of his death, the Sepeti court considered the possibility that the decedent would have married if he had lived and ruled that "[t]his, however, would not eliminate parental support under custom, nor would it relieve the wrongdoer under the wrongful death statute." *Id.* at 618. The Trust Territory court considered damages on the basis of the

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<sup>2</sup> Since the wrongful death provision was a part of the 1966 Trust Territory Code, it was enacted then or earlier.

mother's life expectancy – the time during which she would have continued to receive support from her adult son, *id.* at 617 – and, because there was evidence of the decedent's "specific contributions to the next of kin," *id.* at 618, found that those elements permitted "the calculation of substantial damages for the pecuniary loss," *id.* Thus, under the Sepeti court's rationale, the decedent's parents would, even if the decedent had had a spouse and children (which in Sepeti he did not), recover under the Trust Territory wrongful death statute.

The court is aware that Trust Territory High Court decisions are not *stare decisis* in the Federated States of Micronesia, but that their rationale may be adopted when persuasive. Nakamura v. Moen Municipality, 15 FSM Intrm. 213, 218 (Chk. S. Ct. App. 2007); *see also* Etscheit v. Nahnken of Nett, 7 FSM Intrm. 390, 396 (Pon. 1996) (although FSM courts are not bound to accept the Trust Territory courts' rulings, they may consider their rationale and elect to adopt their reasoning). The Sepeti rationale is persuasive.

The court will adopt the Sepeti construction of the Trust Territory wrongful death statute (which is the current Chuuk wrongful death statute) as the proper operation of the Chuuk wrongful death statute since it is a fair construction of 6 TTC 202's terms and effects that statute's object. "The provisions of [the Trust Territory] Code . . . shall be construed according to the fair construction of their terms, with a view to effect its object and to promote justice." 1 TTC 156. "In determining the class of persons entitled to recovery . . . the better cases favor an extended operation of the [wrongful death] statutes for the purpose of maximizing their remedial objectives." 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 71.05, at 272 (5th ed. 1992). A remedial objective of the Chuuk wrongful death statute is to compensate those persons who had the right to rely on the decedent for pecuniary support had the decedent lived. Under Chuukese custom, these include, in addition to the decedent's spouse and children, the decedent's parents. Sepeti, 5 TTR at 617-18. The court's decisions must be consistent with Micronesian customs and traditions. FSM Const. art. XI, § 11. There is no indication that parental support, as described in Sepeti, has ceased to be the custom in Chuuk.

Since they are undoubtedly "other next of kin" under 6 TTC 202, the court therefore concludes that, consistent with custom, parents of adult children are included within the single class of persons entitled to recover in a wrongful death action even when there are other members (surviving spouse and children) of the class present. But even when a plaintiff is within the class of persons who may benefit from a wrongful death action, that plaintiff still must prove pecuniary damages in order for a money judgment to be awarded. And, of course, the plaintiff must also prove the other elements of a wrongful death cause of action.

III.

Accordingly, the defendants' motion to dismiss is denied. Trial shall resume on September 28, 2010, at 9:30 a.m. with the defendants' case.

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