FSM SUPREME COURT APPELLATE DIVISION

CARLOS ETSCHEIT SOAP COMPANY, Appellant, vs. ERINE McVEY, DO IT BEST HARDWARE, a business organization, and BOARD OF TRUSTEES OF THE POHNPEI STATE PUBLIC LANDS TRUST, Appellees.	APPEAL CASE NOS. P1-2010 & P2-2010 Civil Action No. 2005-007

OPINION

Argued: January 14, 2011
Decided: March 18, 2011

BEFORE:

Hon. Martin G. Yinug, Acting Chief Justice, FSM Supreme Court
Hon. Beauleen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Richard H. Benson, Temporary Associate Justice, FSM Supreme Court*

*retired Associate Justice, FSM Supreme Court

APPEARANCES:

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For the Defendant: (Board of Trustees)	Scott G. Garvey, Esq. (briefed) Ira J. Shiflett, Esq. (argued) Pohnpei Department of Justice P.O. Box 1555 Kolonia, Pohnpei FM 96941

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HEADNOTES

Appellate Review – Standard of Review – Civil Cases

The standard of review appropriate in allegations of abuse of discretion is that an abuse of discretion occurs when 1) the court's decision is clearly unreasonable, arbitrary, or fanciful; 2) the

decision is based on an erroneous conclusion of law; 3) the court's findings are clearly erroneous; or 4) the record contains no evidence upon which the court could rationally have based its decision. This standard implies that the reviewing court must also review the decision below for erroneous conclusions of law and clearly erroneous findings of fact. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 434 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Findings of fact will be reviewed on the clearly erroneous standard. In determining whether a factual finding is clearly erroneous, an appellate court must view the evidence in the light most favorable to the appellee. If, upon reviewing all the evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made, it may then conclude that the trial court's finding was clearly erroneous, but it cannot substitute its judgment for that of the trial court. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 434 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Conclusions of law will be reviewed de novo. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 434 (App. 2011).

Appellate Review – Standard of Review – Civil Cases; Civil Procedure – Summary Judgment – Grounds

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. An appeals court applies the same standard in reviewing a trial court's grant of summary judgment as that applied by the trial court. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 434-35 (App. 2011).

Civil Procedure – Motions; Civil Procedure – Summary Judgment

When a moving party requests certain judgments and argues that it is entitled to them as a matter of law, the motion is one for summary judgment, regardless of the motion's title. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 435 (App. 2011).

Civil Procedure – Summary Judgment

A movant's argument that it had not constructively requested a summary judgment is without merit when it asked the trial court to conclude as a matter of law that the Board decision must be set aside; when it relied on findings of fact made previously in the same trial court by a different judge; and when, by supplying no new facts, it could not claim that it was asking for anything but a summary judgment. Similarly, its request for further hearings on the question of the lessee's identity was a request for conclusions of law that follow logically from the conclusions made as requested. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 436 (App. 2011).

Civil Procedure – Summary Judgment – Procedure

A summary judgment, interlocutory in character, may be rendered on the issues of liability alone although there is a genuine issue as to the amount of damages, which means that, if there is a genuine issue as to the amount of damages but not as to liability, summary judgment may nevertheless be granted on an interlocutory basis, that is, the summary judgment would not be a final disposition of the entire case. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 436-37 (App. 2011).

Torts – Damages

A trial court may award damages only for successful claims. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 437 (App. 2011).

Torts – Damages – Nominal; Torts – Trespass

In a successful trespass claim where no evidence exists of actual damages, the trial court will award nominal damages. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 437 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

A finding of actual damages is a finding of fact, and findings of fact are reviewed on the clearly erroneous standard. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 437 (App. 2011).

Civil Procedure – Summary Judgment – Procedure

The trial court has an obligation to view facts and reasonable inferences that can be made from those facts in the light most favorable to the party against whom summary judgment is sought. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 437 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When the appellant never brought up the issue of actual damages in the civil rights claim at the trial level, that issue is not properly before the appellate court. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 437-38 (App. 2011).

Civil Procedure – Summary Judgment – Procedure; Civil Rights

It would be a gross disservice to the interests of justice not ever to have a hearing on the issue of damages for a successful civil rights claim and when the trial court was silent as to this particular issue, the trial court cannot have foreclosed the claimant's right to a hearing on the actual damages flowing from the civil rights violation, so that the matter will be remanded to the trial court for further determination as to actual damages. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 438 (App. 2011).

Civil Procedure – Summary Judgment – Grounds

When a party concedes a fact against its own legal interest, a trial court's finding of fact incorporating that concession as undisputed is not clearly erroneous. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 438 (App. 2011).

Appellate Review – Standard of Review – Civil Cases

When the plaintiff did not ask the trial court to allow it to use the parcel for an equivalent time period and when this issue was not raised at the trial level, it is not properly before the appellate court, but, given that the case will be remanded for further hearings on damages, this is an issue of damages, to be resolved on remand to the trial court. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 438 (App. 2011).

Civil Rights; Costs

When no "common nucleus of facts" exists between the trespass claims and the civil rights claims, the trial court did not err in assigning liability for trespass only to McVey and Do It Best and liability for the civil rights violation only to the Pohnpei Board of Trustees; thus the trial court's conclusions of law apportioning costs were not in error. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 440-41 (App. 2011).

Costs

The point of awarding costs is to award the prevailing party as a part of the final judgment, aside from reasonable attorney's fees, which may be awarded only by statute. It is a reimbursement to the prevailing party of actual expenses (costs) incurred. An award of fees and costs thus involves the party, not the particular firm. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 441 (App. 2011).

Costs

Photocopying costs are disallowed unless it can be shown that the photocopying was done outside of the law firm. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 441 (App. 2011).

Costs

Service of process expenses are an exception in that they can always be awarded as costs. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 441 (App. 2011).

Costs

The point of a costs award is not to make an attorney or his law firm whole, but to make the prevailing party whole. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 441 (App. 2011).

Costs

A "gross revenue tax" surcharge will be disallowed as costs. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 427, 441 (App. 2011).

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COURT'S OPINION

MARTIN G. YINUG, Acting Chief Justice:

These are appeals from the FSM Supreme Court Trial Division's order granting judgment on April 16, 2010 ("Order") [Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010)] and subsequent order of June 16, 2010 awarding attorney's fees and costs ("Award") [Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148 (Pon. 2010)]. P1-2010 is an appeal of the Order; P2-2010 is an appeal of the Award. For the following reasons, we affirm P2-2010 in its entirety, affirm P1-2010 partially, and remand P1-2010 to the trial court for further hearings on actual damages in the civil rights claim.

I. Posture of the Case and Background

In the Order, the trial court disposed of various motions and claims. Specifically, the trial court granted judgment in favor of the Carlos Etscheit Soap Company ("the Soap Company") and against the Board of Trustees of the Pohnpei State Public Lands Trust ("the Board") on the Soap Company's civil rights and due process claims and dismissed those claims against Erine McVey ("McVey") and Do It Best Hardware ("Do It Best"); vacated the Board's October 28, 2005 decision ("the Board Decision"); vacated the 2004/05 McVey lease; directed the Board to make the subject land available for immediate commercial lease according to Pohnpei state law; granted a $1 judgment for the Soap Company in its trespass claim against McVey and Do It Best; dismissed the Soap Company's trespass claim against the Board; dismissed the counterclaims of McVey and Do It Best against the Soap Company; dismissed Do It Best's cross claims against the Board; and dismissed McVey's indemnification cross-claim against the Board.

In the Award, the trial court disallowed the 3% surcharge for gross revenues taxes, disallowed the photocopying costs, apportioned the service expenses while assessing them in their entirety (less the 3% surcharge), and apportioned the attorney's fees by awarding only that portion which the trial court deemed to be clearly or reasonably related to attorney time spent on the action against the Board. The total Award was $1 in nominal damages and $30 in service expenses for the trespass claims against McVey and Do It Best, and $9,470 in reasonable attorney's fees and $135 in costs (services expenses) for the civil rights claims against the Board.

A. *Factual Background*

The cases revolve around a plot of land, 014-A-08 ("the Parcel"), the lease for which was originally granted to Carlos Etscheit. Discrepancies exist between the trial court's account and the Soap Company's account of the early chronology of the Parcel, but they are in agreement that by early 1995, there was an assignment from a non-litigant to the Soap Company. In either late 1997 (according to the Soap Company) or early 1998 (according to the trial court), the Board approved the assignment and issued the lease to the Soap Company, which lease was then duly recorded on April 13, 1998. On its own terms, the lease was to expire on July 1, 2005. Payment was made mostly regularly: no payments were made in 1998 and 2000, but a large payment in 2001 resolved the outstanding payments. In 2005, a payment was made for $212.70, corresponding to the payments specified in the Soap Company lease; it is unclear if this payment was refunded.

In July 2004, one year ahead of the expiration of the Soap Company lease, the Board advertised to the general public the immediate availability of the Parcel for commercial lease. No notice was given specifically to the Soap Company. In January 2005, the Board executed a lease of the Parcel to McVey for a 25-year term running from October 7, 2004 to October 7, 2029, which lease was duly recorded on February 3, 2005. McVey occupied the lot in March 2005. The Soap Company claims that McVey then proceeded to clear and develop the Parcel, in a different manner than was being developed by the Soap Company. The trial court disagreed, finding that the Soap Company had not developed the Parcel (although it had obtained landfill and earthmoving permits), that McVey had not developed the Parcel in such a way as to prevent or hinder any other person from commercially developing the lot, and that since April 14, 2005, both McVey and the Soap Company had been restrained from further development. Specifically, the trial court had found these facts as items 3 and 6 in its analysis of undisputed material facts. 17 FSM Intrm. at 109. Later, relying on a March 14, 2005 legal opinion from the Pohnpei State Attorney General, the Board deemed the Soap Company lease invalid.

The Soap Company filed Civil Action No. 2005-007 on March 18, 2005, alleging due process and civil rights violations by the Board and alleging trespass by Do It Best and McVey. On the same day, McVey and Do It Best filed PCA 66-05 in state court, alleging interference with property rights and tortuous interference with contract by the Soap Company. PCA 66-05 was removed to national court as Civil Action No. 2005-008. On April 8, 2005, the trial court consolidated the two cases.

On April 14, 2005, the trial court approved a stipulation by the parties to refer the matter to the Board for a fact-finding hearing and to stay further proceedings pending the outcome of the hearing. On October 28, 2005, the Board issued a decision ("Board Decision") that McVey's lease was valid and that the Soap Company's lease was invalid. On November 2, 2005, the Soap Company filed a protest and appeal pursuant to the Board's rules; the Board denied the protest. On November 4, 2005, the Soap Company filed a motion for a temporary restraining order and a preliminary injunction and a "notice of appeal" or, in the alternative, a motion to resume jurisdiction. On November 18, 2005, the trial court granted the temporary restraining order. On March 16, 2006, the trial court denied the various motions by the Board, McVey and Do It Best to dismiss, to abstain, or otherwise in opposition to the Soap Company's November 4, 2005 motion. [Carlos Etscheit Soap Co. v. Do It Best Hardware, 14 FSM Intrm. 152 (Pon. 2006).]

To resolve the confusion caused by these filings, the trial court realigned the parties: the Soap Company was the plaintiff; the Board, McVey and Do It Best were the defendants; all claims previously brought by McVey and Do It Best were restyled as counterclaims; McVey and Do It Best were cross-claimants against the Board. The realignment set up the following claims:

(1) The Soap Company

(a) alleged that
(i) the McVey lease violated its civil rights and due process rights,
(ii) that the defendants trespassed on its leasehold, *i.e.*, the Parcel, and
(iii) that the Board Decision was unlawful, and
(b) sought as relief
(i) a declaratory judgment that its lease was valid and that the McVey lease was invalid,
(ii) a declaratory judgment that the Board's execution of the McVey lease and the Board Decision were unlawful,
(iii) damages for trespass on the Parcel, and
(iv) attorney's fees and costs; and

(2) McVey and Do It Best alleged
(a) breach of contract by the Board in its warranty that it had the authority to lease the Parcel to McVey, and
(b) indemnification in the event the Soap Company lease was held valid.

On October 18, 2006, the trial court ruled that, even if the Board had been correct that the Soap Company lease was invalid, the Board was estopped from asserting that the Soap Company had no interest or right in the Parcel since the lease was duly recorded with the proper signatures and since the Board had accepted the Soap Company's payments up through January 2005. The trial court further ruled that, because the Soap Company had some interest in the Parcel, it was entitled to notice and an opportunity to be heard, and since the Board did not give the Soap Company notice or opportunity to be heard, the McVey lease would be invalid.

The parties did not pursue the matter further until the court held a status conference three years later, in October 2009. On November 17, 2009, the Soap Company filed a "Motion to Determine Appeal and Request Further Proceedings." The defendants did not file any opposition. On Februar 8, 2010, due to the passing of the presiding judge in the trial court, the consolidated cases were reassigned. On March 18, 2010, the trial court held a hearing on all pending matters; all parties made oral presentations.

B. *P1-2010: The Order*

Pursuant to that hearing, the trial court made the following findings of "Undisputed Material Facts": (1) the Board did not give the Soap Company any notice or opportunity to be heard before executing the McVey lease, despite the proper recordation of the Soap Company's lease; (2) the Soap Company's lease did not expire until July 1, 2005; (3) the Soap Company had not developed the Parcel; (4) McVey was the only named lessee in the McVey lease, which was duly recorded on February 3, 2005; (5) McVey and Do It Best occupied the Parcel after receiving the lease; and (6) McVey had not developed the Parcel in such a way as to prevent any others from commercially developing the plot, and since April 14, 2005, all parties had been restrained from further development. 17 FSM Intrm. at 109-10.

The trial court also made, amongst others not implicated in these appeals, the following conclusions of law: (1) the Soap Company is entitled to a declaratory judgment that, even if its lease could have been avoided, it had not been, such that the Board's execution of the McVey lease was improper, 17 FSM Intrm. at 110; (2) McVey and Do It Best did not as a matter of law violate the Soap Company's civil rights, because neither was a state actor, or injured, oppressed, threatened, or intimidated the Soap Company's exercise or enjoyment of its civil rights since neither was responsible for giving the Soap Company notice and opportunity to be heard, 17 FSM Intrm. at 110; (3) the McVey lease is void; (4) the Soap Company prevails on its civil rights claims against the Board; (5) no one holds a valid lease for the Parcel, so no one owes lease payments for time since July 1, 2005; (6) the

Soap Company lease agreement does not have a provision entitling the lessee to automatic renewal, and in fact specifies that holdover by a lessee does not give rise to any right to renewal by the holdover lessee, and no statute or regulation has been cited as authority for the proposition that a lessee has an automatic right of renewal upon request; and (7) the Soap Company had a right superior to McVey and Do It Best to possess or occupy the Parcel, and the Board did not occupy or possess the Parcel, so the Soap Company prevails on its trespass claims against only McVey and Do It Best, but because the Parcel was not altered in such as way as to prevent the Soap Company from commercially developing the land, the Soap Company cannot prove compensatory damages for trespass, and is entitled only to nominal damages.

C. *P2-2010: The Award*

The trial court ordered the Soap Company to file and serve a request for attorney's fees and costs by April 30, 2010. The Soap Company complied, and requested attorney's fees of $23,900.00 for 239 hours of work at $100.00 per hour, and costs of $170.10 for service expenses and $1,416.74 for photocopying. The supporting affidavit further clarified that the service expenses included service of 3 summons and complaints and 8 subpoenas, at $15.00 per service, and 6,871 photocopies for which the client was billed $0.20 per copy, and explained that the costs included a 3% surcharge to reimburse the attorney for gross revenue tax.

In the Award, the trial court disallowed photocopying costs because there was no evidence that the photocopies were outsourced, and photocopying charges are generally disallowed unless they represent payments to others for that service and not for the cost of copying within the law office. Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 148, 151 (Pon. 2010). The trial court also disallowed the 3% surcharges for gross revenue taxes, reasoning that such taxes are the attorney's responsibility and not that of the attorney's client or of an adverse party to whom the fee may be shifted. *Id.* at 152. The trial court apportioned the service expenses, a decision not now appealed. The trial court also apportioned attorney's fees, reasoning that since only the Board was liable for due process and civil rights violations against the Soap Company, only that time spent prosecuting the claims against the Board could qualify for an award pursuant to 11 F.S.M.C. 701(3). After combing through the Soap Company's counsel's affidavit, the trial court found that, of 239 hours claimed, 48.7 hours were clearly spent on matters relating only to McVey or Do It Best, 31 hours were clearly spent on matters directly related only to the Board, and the remaining 159.3 hours were for time clearly spent on matters relating to the combined defendants, or for activities whose relation to the defendants is unclear. The trial court then took the proportion of time spent clearly on one or another of the defendants (79.7 hours), figured the portion of that time clearly spent on matters relating only to the Board (31 hours, or 38.9%), and applied a slightly higher percentage, 40%, to the remaining 159.3 hours, as the proportion attributable to prosecuting the matter against the Board. The amended judgment pursuant to the findings regarding attorney's fees and costs assessed: (1) $1 in nominal damages and $30 in service expenses for the trespass claims against McVey and Do It Best; and (2) $9,470 in reasonable attorney's fees and $135 in costs (services expenses) for the civil rights claims against the Board.

II. Issues Presented

The Soap Company presents the following issues on appeal, as separated by particular appeal.

P1-2010:

1. Was it an erroneous conclusion of law or abuse of discretion not to allow appellant the use of the Parcel, through either law or equity, for a time period equal to the time period from February

3, 2005, to July 1, 2005, when the lot was improperly leased to McVey?

2. Was it an erroneous conclusion of law or abuse of discretion not to hold a hearing on the issues of damages once the McVey lease was set aside, to include, but not to be limited to, the issue of renewal practices of the Board of Trustees, for existing leases held by existing tenants, and to determine damages to appellant as a result of the actions of all defendants?
3. Was it an erroneous factual determination that appellant did not develop the Parcel?
4. Were the holdings of the trial court an abuse of discretion or erroneous conclusions of law?

P2-2010:

5. Was it an erroneous conclusion of law or an abuse of discretion to disallow the full amount of the appellant's claim for attorney's fees and costs against the Board?
6. Was it an abuse of discretion, erroneous conclusion of law, or erroneous determination of fact to apportion the attorney's fees and cost award in the Award Order?
7. Were the holdings of the trial court in the Award Order an abuse of discretion or erroneous conclusions of law?
8. Was it an abuse of discretion to disallow the costs sought in the matter?

III. STANDARDS OF REVIEW

The standard of review appropriate in allegations of abuse of discretion is:

> An abuse of discretion occurs when (1) the court's decision is "clearly unreasonable, arbitrary, or fanciful"; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence upon which the . . . court could rationally have based its decision.

Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992) (quoting Heat & Control, Inc. v. Hestor, Inc., 785 F.2d 1017, 1022 (Fed. Cir. 1986) (citations omitted)).

This standard implies that the reviewing court must also review the decision below for erroneous conclusions of law and clearly erroneous findings of fact.

Findings of fact will be reviewed on the clearly erroneous standard:

> The standard of review of a trial court's factual findings is whether those findings are clearly erroneous. In determining whether a factual finding is clearly erroneous, an appellate court must view the evidence in the light most favorable to the appellee. If, upon reviewing all the evidence in the record, the appellate court is left with the definite and firm conviction that a mistake has been made, it may then conclude that the trial court's finding was clearly erroneous, but it cannot substitute its judgment for that of the trial court.

Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 24 (App. 2006) (citations omitted). Those parts that are conclusions of law will be reviewed *de novo*. Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995).

A trial court may grant summary judgment, viewing facts and inferences drawn from them in the light most favorable to the nonmoving party, only if the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law. Bank of Guam v. Island Hardware, Inc., 2 FSM Intrm. 281, 284 (Pon. 1986). Thus, an appeals court applies the same

standard in reviewing a trial court's grant of summary judgment as that applied by the trial court. Tafunsak v. Kosrae, 7 FSM Intrm. 344, 347 (App. 1995).

IV. ANALYSIS

A. *P1-2010: Appeal from the Order*

Based on the issues as presented by the appellant, we believe the proper order for discussing the issues in this appeal is: (1) characterization of the motion which prompted the trial court to hold the hearing of March 18, 2010, pursuant to which the trial court issued the order; (2) hearings on damages, including findings of fact about development of the Parcel; (3) whether the Soap Company has any remaining right to use of the Parcel; and (4) generally, whether or not the trial court abused its discretion or made erroneous conclusions of law. The Soap Company does not allege that the trial court made erroneous findings of fact other than the determination that the Soap Company did not develop the Parcel.

1. *Characterization of the motion of November 17, 2009*

In the Order, the trial court stated that the Soap Company's November 17, 2009 motion ("the Motion") had asked the trial court to determine the merits of its appeal from the Board Decision[1] based on the papers on file and arguments presented at the March 18, 2010 hearing—in other words, without a trial or further evidentiary hearing. If true, the trial court is correct in characterizing the Motion as a motion for summary judgment. The Soap Company argues in this appeal that it never requested summary judgment, merely certain findings, including the reversal of the Board Decision.[2] The Soap Company thus argues that the trial court made a sua sponte summary judgment motion, and that in conducting the hearing as one on a summary judgment motion without notifying the parties that it was doing so, the trial court erred under the reasoning of FSM Social Security Administration v. Jonas, 13 FSM Intrm. 171 (Kos. 2005).

The Motion itself states in its preamble that the Soap Company was seeking an order to grant the appeal and set aside the Board Decision. Mot. at 2. Further, the Soap Company asked the trial court to review the Board Decision "under general principles of administrative law, and determine if [the Board Decision] was arbitrary and capricious or contrary to law." Mot. at 4. The Soap Company then states that it was incorporating its arguments from the November 4, 2005 motion for preliminary injunction and notice of appeal, *i.e.*, its original appeal of the Board Decision, and that, given the trial court's findings in the order granting that motion,[3] the Board Decision must be set aside. Mot. at 5. Although the fact that this prayer for relief is laid out under the section titled "Relevant Law" is not dispositive, the context strongly implies that the Soap Company's argument was that the trial court was required *as a matter of law* to set aside or reverse the Board Decision. Where a moving party requests certain judgments and argues that it is entitled to them *as a matter of law*, the motion is one for summary judgment, regardless of the title of the motion. *See* Lee v. Han, 13 FSM Intrm. 571, 575 n.1 (Chk. 2005) ("a thing is what it is regardless of what someone chooses to call it . . ." (citing McIlrath v. Amaraich, 11 FSM Intrm. 502, 505 & n.3 (App. 2003))).

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[1] The trial court states that the Board Decision was on October 18, 2006; it was on October 28, 2005.

[2] The Soap Company states that the Board Decision was on September 28, 2005. It was on October 28, 2005.

[3] Published as Carlos Etscheit Soap Co. v. McVey, 14 FSM Intrm. 458 (Pon. 2006).

In the next section of the Motion, "Further Action," the Soap Company argued that "the renewa request for the lease should be reviewed under the Board's procedure for renewals, and if renewal was warranted, the lease should be renewed in favor of [the Soap Company]." Mot. at 6. The Soap Company stated that it had invested substantial amounts of money developing "the area around [the Parcel]," but conceded that "[n]o action ha[d] been taken on [the Parcel]," partly due to the fact that "the initial injunction halted any further filling on [the Parcel]." *Id.* The Soap Company concluded that as a result, it should receive preference in seeking a renewal. In the "Conclusion," the Soap Company argued that if the trial court were to reverse the Board Decision, "then further proceedings should be set to determine the proper lessee of the property." At no point did the Soap Company cite statutory or case law for the proposition that it had an automatic right of renewal of the lease, nor did it specify who would set or conduct such "further proceedings." Nor did the Soap Company clarify whether by "the proper lessee of the property" it meant on the date of the recordation of the McVey lease (February 3, 2005) or on the date of the Board Decision (October 28, 2005), which came after the expiration of the Soap Company lease (July 1, 2005).

In the Order, the trial court found that the Soap Company was entitled as a matter of law to a declaratory judgment that, even if its lease could have been voided, it had not been, and thus the Board Decision was improper, and ruled that, since the Soap Company lease expired on July 1, 2005, there was no need to consider whether the Board Decision could have then revoked that lease agreement. 17 FSM Intrm. at 110. The trial court held that the McVey lease was void, and that before July 2005, the Soap Company had, based on its paid-up and unexpired prior lease, a right superior to McVey and Do It Best to possess or occupy the Parcel. 17 FSM Intrm. at 110, 112. However, the trial court also held that once the Soap Company's lease expired, no one held a valid lease for the Parcel. 17 FSM Intrm. at 111. The trial court characterized these findings as conclusions of law. They are based on findings of fact, including findings of fact made by the previous judge in the same trial court, and not on new evidence, as the Soap Company did not allege new facts on point in the Motion.

We hold that the Soap Company's argument that it had not constructively requested a summary judgment is without merit. In asking the trial court to conclude as a matter of law that the Board Decision must be set aside, relying on findings of fact made previously in the same trial court by a different judge, and by supplying no new facts, the Soap Company cannot claim that it was asking for anything but a summary judgment. Similarly, its request for further hearings on the question of the identity of the lessee was a request for conclusions of law that follow logically from the conclusions made as requested. Thus, the trial court did not make a sua sponte motion for summary judgment.

2. *Hearings on damages*

The Soap Company argues that the trial court erred when it "ruled on damages without allowing [the Soap Company] the opportunity to present evidence of damages."[4] Appellant's Br. at 11. Specifically, the Soap Company argues that this was an abuse of discretion because (a) a trial court may not rule on damages without evidence and (b) the trial court erred in finding that the Soap Company had not developed the Parcel.

a. *Rulings on damages.* The Soap Company correctly points out that, under FSM Civ. R. 56(c), a summary judgment may be rendered on issues of liability alone where there is a genuine issue as to the amount of damages. However, the precise wording of the last sentence of that rule reads: "A

[4] This is part of Issue 2, which also encompasses the question of whether or not the issue of damages should include the issue of renewal practices of the Board of Trustees for existing leases held by existing tenants.

summary judgment, interlocutory in character, may be rendered on the issues of liability alone *although* there is a genuine issue as to the amount of damages." FSM Civ. R. 56(c) (emphasis added). We read this to mean that, if there is a genuine issue as to the amount of damages but not as to liability, summary judgment may nevertheless be granted on an interlocutory basis, *i.e.*, the summary judgment would not be a final disposition of the entire case.[5] The Soap Company's argument that the rules require hearings on damages after a trial court grants summary judgment (1) misstates the law, and (2) substitutes the appropriate rule where "there is a genuine issue as to the amount of damages" for all other situations.

Nevertheless, the Soap Company's position would be correct if there was "a genuine issue as to the amount of damages" at the time the trial court granted summary judgment. A trial court may award damages only for successful claims. Here, the Soap Company prevailed on two claims: the trespass claim against McVey and Do It Best, and the civil rights claim against the Board.

In a successful trespass claim where no evidence exists of actual damages, the trial court will award nominal damages. 75 AM. JUR. 2D *Trespass* § 161, at 121 (rev. ed. 1991). A finding of actual damages is a finding of fact, and findings of fact are reviewed on the clearly erroneous standard. The trial court specifically found that McVey had not developed the Parcel in such a way as to prevent or hinder any other commercial development. This finding is based, as requested, on the Soap Company's November 4, 2005 motion for temporary restraining order and notice of appeal of the Board Decision,[6] in which the Soap Company asserted the following:

> On March 17, 2005, defendants Erine McVey and Do It Best Hardware started to clear [the Parcel]. This action followed on March 18, 2005, and an action was filed by the defendants against plaintiff at the same time. . . .
>
> All of the parties in this matter . . . executed a stipulation . . . halting proceedings . . . . It also bound the parties to halt any further work on this lot. This stipulation was approved by court order on April 14, 2005.

Mot. for T.R.O. & Prelim. Inj. at 3-4 (Nov. 4, 2005). It is unclear how much clearing McVey did based on the language that she "started to clear" the Parcel. Neither McVey nor Do It Best offered evidence to the contrary. Thus, there was no "genuine issue of material fact." The trial court had an obligation to view facts and reasonable inferences that can be made from those facts in the light most favorable to the party against whom summary judgment is sought, *i.e.*, McVey and Do It Best. The reasonable inference from the facts that McVey "started to clear" the Parcel on March 17, 2005, that both sides initiated litigation the day after, and that all sides were restrained from further development of the Parcel on April 14, 2005, is that no significant development occurred. Because the Soap Company had not alleged more facts in either its November 4, 2005 motion or in its November 17, 2009 motion, we cannot say that the trial court has erred. Thus, we agree with the trial court that no further hearings were necessary as to the issue of damages in the trespass claim.

As to the civil rights claims, the question of actual damages is more complicated. While the Soap Company never brought up the issue of actual damages in the civil rights claim at the trial level,

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[5] Compare the current U.S. version of Rule 56(c), which reads: "An interlocutory summary judgment may be rendered on liability alone even if there is a genuine issue on the amount of damages." U.S. Fed. R. Civ. P. 56(c) (2009).

[6] The trial court's opinion granting the motion, Carlos Etscheit Soap Co. v. McVey, 14 FSM Intrm. 458 (Pon. 2006), did not reach the question of damages.

which means that issue is not properly before us, we believe it would be a gross disservice to the interests of justice not ever to have a hearing on that issue. Moreover, the trial court was silent as to this particular issue. Accordingly, we hold that the trial court cannot have foreclosed the Soap Company's right to a hearing on the actual damages flowing from the civil rights violation, and we remand P1-2010 to the trial court for further determination as to actual damages. In remanding, we also note that the trial court has already denied the Soap Company's request for right of first refusal or a right of renewal to the Parcel, ruling that the Soap Company lease agreement did not contain a provision entitling the lessee to an automatic right of renewal. 17 FSM Intrm. at 111. In light of the remand, we do not affirm or reverse the trial court's denial of this remedy, but we do affirm the underlying finding of fact. Further, we recommend that the trial court explore the question whether any lease payment should be refunded.[7]

b. *Findings of fact about development of the Parcel.* The Soap Company also argues that, not only did the trial court misapply the summary judgment standard in finding that McVey and Do It Best did not cause compensable actual damages in their trespass of the Soap Company's superior right to possession of the Parcel, but the trial court also clearly erred in its finding that the Soap Company did not develop the Parcel. However, in its own Motion, the Soap Company had already conceded that "[n]o action ha[d] been taken on [the Parcel]." Mot. at 6. Where a party concedes fact against its own legal interest, a trial court's finding of fact incorporating that concession as undisputed is not clearly erroneous. Further, under our standard of review for summary judgments, we view evidence in the light most favorable to the non-moving parties (McVey and Do It Best), and in doing so, we do not arrive at a conclusion different from that of the trial court. For this reason, we do not find that the trial court committed clear error in its findings of fact about development of the Parcel.

3. *Allowing the Soap Company to use the Parcel for a time period equal to the time period from February 3, 2005 to July 1, 2005*

The Soap Company did not request the trial court to allow the Soap Company to use the Parcel for a time period equivalent to that between the recordation of the McVey lease (February 3, 2005) and the expiration of the Soap Company lease (July 1, 2005). The Soap Company asserts that this is an issue of damages, and that the Soap Company would have requested this relief had it had a chance to do so. Because this issue was not raised at the trial level, it is normally not properly before us. Loch v. FSM, 2 FSM Intrm. 234, 236 (App. 1986). Nonetheless, given our analysis regarding hearings on damages, *supra*, we agree that this is an issue of damages, to be resolved on remand to the trial court.

4. *Conclusion as to P1-2010*

Based on the foregoing, the only error the trial court appears to have made was in neglecting to

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[7] The trial court notes that the Board "took the Soap Company's annual lease payments every year up to and including a January, 2005 lease payment." 17 FSM Intrm. at 106. Lease payments are to be made in advance:

> Article 3. RENTAL
>
> The lessee, in consideration of the foregoing, covenants and agrees to pay to the Authority in the manner prescribed herein, rental at the rate as specified in Item 3 in advance within thirty (30) days after January 1st of every year this Lease Agreement is in effect . . . .

Lease Agreement at 2. However, if the lease agreement expired on July 1, 2005, then the January 1, 2005 payment of $212.70 was twice what was due.

conduct a hearing on actual damages in the civil rights claims.[8] However, the trial court never foreclosed the issue, suggesting that it may in due time have requested briefs on the issue. For this reason, we conclude that there was no abuse of discretion, but remand for further hearings on actual damages.

B. *P2-2010: Appeal from the Award*

The second appeal, P2-2010, stems from the Award. The questions regard the disallowance of fees and costs associated with McVey and Do It Best, the apportionment of the attorney's fees and costs in the civil rights claim, the disallowance of the 3% gross revenues tax surcharge, and the disallowance of photocopying costs.

1. *Disallowance of fees and costs associated with McVey and Do It Best, and apportionment of fees and costs*

The trial court's decision to apportion the fees and costs and to disallow those related to McVey and Do It Best is a question of discretion, which may rest on findings of fact and conclusions of law.

As to the question of law, the Soap Company argues that a passage in Estate of Mori v. Chuuk, 10 FSM Intrm. 123 (Chk. 2001), is the controlling authority, specifically:

> So long as a party has prevailed in a civil rights suit as a whole, that party is entitled to fees for all time reasonably spent on the matter, including the time spent on pendent state law claims that would not otherwise be statutorily entitled to a fee award, *when the pendent claims arise out of a common nucleus of operative fact*.

10 FSM Intrm. at 124 (emphasis added) (citations omitted).

The Soap Company misappreciates Estate of Mori. The cited opinion is an adjudication of attorney's fees and costs based on facts established in an earlier opinion in the same case, Estate of Mori v. Chuuk, 10 FSM Intrm. 6 (Chk. 2001). In the earlier opinion, the Estate of Mori court established that the "common nucleus of operative fact" referred to in the award opinion was a group of facts that, together, formed the elements not only of civil rights violations, but also of the "pendent state claims." In Estate of Mori, Mori was drunk and in the passenger seat of a car. His friend, also drunk, was driving the car, and struck another vehicle. The owner of the other vehicle became angry, and smashed the passenger side window, causing glass to lodge in Mori's right eye. The angry owner of the other vehicle summoned the police, who took Mori to jail. There, the police ignored Mori's repeated complaints about the glass in his eye and declined to take him to the hospital or make a referral call to the hospital. The police failed to adhere to established policy of making visual inspections of the cells every 15 minutes. Mori committed suicide the same night, and when the police found his body, he had been dead for over 30 minutes. The court found that the failure to refer Mori to the hospital was arbitrary and purposeless, and thus constituted punishment against Mori, who had not been convicted of any crime, and was therefore a denial of his right to due process. 10 FSM Intrm. at 13. The failure to refer, in addition to the failure to check on Mori at intervals set by policy (which was a duty), constituted negligence, which negligence was the proximate cause of Mori's death. *Id.*

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[8] We note that the Soap Company did not challenge the trial court's assignment of liabilities in P1-2010 directly—that is, it does not urge us to find that the trial court erred in concluding that the Board was not liable for trespass. Nevertheless, we visit the issue in the discussion on apportionment, an issue appealed in P2-2010.

at 14. This is the "common nucleus of facts." Finally, all of the defendants in Estate of Mori were police officers or other state agents. *Id.* at 11-12.

There are many differences between Estate of Mori and the present appeal. Here, only one defendant, the Board, is a state agent. As the trial court here concluded, neither McVey nor Do It Best could have violated the Soap Company's civil rights as a matter of law because:

> neither defendant was a government agency or was claiming to act under color of law or injured, oppressed, threatened, or intimidated the Soap Company's exercise or enjoyment of its civil rights. Neither was responsible for giving the Soap Company notice and an opportunity to be heard; neither prevented the Soap Company from being given notice; and neither injured, oppressed, threatened, or intimidated the Soap Company to prevent it from having an opportunity to be heard.

Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 (Pon. 2010). Further, the elements that constitute trespass, namely, the coming onto property to which another has a superior right of possession, are not the elements in a civil rights claim stemming from lack of notice or opportunity to be heard. Indeed, where trespass to property requires an affirmative act–entering upon a piece of land–the civil rights and due process violations here require an omission–failure to provide notice and opportunity to be heard.

The Soap Company argues that the "common nucleus of facts" is the issuance by the Board of the Soap Company lease and the subsequent issuance of the McVey lease. These are two separate facts, both attributable only to the Board, and relevant only to the civil rights claim. The Soap Company describes a chain of events and argues it is the "common nucleus of facts"; "[The Soap Company] prevailed on its trespass claim because the Board issued a void lease to McVey. Without the issuance of the McVey lease there would not have been a lawsuit. All of the fees and costs resulted from the issuance of the void lease." Appellant's Br. at 19. This chain of events is a causal chain, and as presented, it is a tenuous chain. The trial court held that the Soap Company prevailed on its trespass claim because it had a right of possession superior to that of McVey and Do It Best, "based on its paid-up and unexpired prior lease." Carlos Etscheit Soap Co., 17 FSM Intrm. at 112. That is, the Soap Company's right was based on the fact that it "held an unexpired, recorded lease to [the Parcel] for which the lease payments were current and up to date," which "entitled [the Soap Company] to notice and an opportunity to be heard." *Id.* at 109. The trial court also held that the McVey lease was void because it was issued without any prior notice to the Soap Company. *Id.* at 110. That is, the fact that the Soap Company had a recorded, unexpired lease, on which payment was current and up to date, was the basis upon which it had a superior right to that of McVey and Do It Best, and the basis upon which the McVey lease was void. Thus there are two causal chains stemming from the recorded, unexpired, paid-up lease: one leads to the Soap Company's superior right; the other leads to the avoidance of the McVey lease. It is not the avoidance of the McVey lease which leads to the superior right upon which the Soap Company prevailed in its trespass claim.

The Soap Company appears to argue that, but for the Board's violation of the Soap Company's civil rights in advertising the Parcel a year before it was supposed to and executing a new lease without providing to the Soap Company notice and an opportunity to be heard, none of this litigation would have occurred. This is not necessarily so. McVey could have entered the Parcel for other reasons, even if the Board had not given her the lease, and it is entirely possible that the Soap Company and McVey may have found other ways to resolve their competing claims; litigation was never preordained or inevitable.

Further, the Soap Company does not allege specific findings of facts to be "clearly erroneous."

The Soap Company alludes to facts only in asserting the causality between the issuance of the McVey lease, and the fact of litigation.

Because no Estate of Mori "common nucleus of facts" exists between the trespass claims and the civil rights claims, the trial court did not err in assigning liability for trespass only to McVey and Do It Best and liability for the civil rights violation only to the Board, and the trial court's conclusions of law were not in error. The assignments of liability amply support the trial court's exercise of discretion in apportioning fees and costs. Accordingly, the Soap Company's argument–that apportionment of total attorney's fees and costs and disallowance of attorney's fees and costs as to McVey and Do It Best was an abuse of discretion or erroneous conclusion of law–cannot stand.

2. *Disallowance of the 3% gross revenue tax surcharge*

The trial court based its disallowance of gross revenue tax surcharges on the holding in Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. 467 (Chk. 2009). That case involved an application for costs in which the law firm claimed a surcharge to offset a "business privilege tax" of 4% assessed by Guam on businesses based in Guam. The court in that case ruled that such a tax was "part of the cost of being in business on Guam and is either overhead, which cannot be taxed as a cost, or an increase in or part of the attorney's hourly rate and thus already considered under the reasonable attorney fee award." 16 FSM Intrm. at 471. The Soap Company argues on appeal that Bank of the FSM was wrongly decided, and relies on the definition of "gross revenue" in 54 F.S.M.C. 112(5) for the proposition that the gross revenue tax, as an expense to the law firm, should be assessed, or else "the law firm would lose money on providing costs with no markup."

The point of awarding costs is to award the prevailing party as a part of the final judgment, aside from reasonable attorney's fees, which may be awarded only by statute. "It is a reimbursement to the prevailing *party* of actual expenses (costs) incurred." Nena v. Kosrae (III), 6 FSM Intrm. 564, 570 (App. 1994) (emphasis added). An award of fees and costs thus involves the party, not the particular firm. Thus, for example, photocopying costs are disallowed unless it can be shown that the photocopying was done outside of the law firm. Bank of the FSM v. Truk Trading Co., 16 FSM Intrm. at 471; Damarlane v. United States, 7 FSM Intrm. 468, 470 (Pon. 1996). Here, there has been no showing that the photocopying was done other than in-house, and the Soap Company concedes that the photocopying was done in-house. Service of process expenses are an exception in that they can always be awarded as costs; nevertheless, the point is not to make an attorney or his law firm whole, but to make the prevailing party whole.

For these reasons, we affirm the disallowances of both photocopying costs and the 3% "gross revenue tax" surcharge.

V. Conclusion

In summary, we hold that the trial court has not abused its discretion, made erroneous conclusions of law, or committed clear error in its findings of fact. We also find that the trial court had not foreclosed the possibility of further hearings on actual damages in the civil rights claims. Accordingly, WE HEREBY AFFIRM the trial court in P2-2010 in its entirety; AFFIRM the trial court's findings of fact in P1-2010; AFFIRM the trial court's conclusion in P1-2010 that no further hearings were necessary as to actual damages in the trespass claims; and REMAND P1-2010 to the trial court for further hearings on the matter of actual damages in the civil rights claims.

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