FSM SUPREME COURT TRIAL DIVISION

KADALINO DAMARLANE, MARGARET DAMARLANE, and MARY BERMAN, Plaintiffs, vs. BRIAN DAMARLANE and PAULINO DAMARLANE, Defendants.	)	CIVIL ACTION NO. 2011-004

FINDINGS, CONCLUSIONS OF LAW AND DECISION

Martin G. Yinug
Chief Justice

Tried: March 27, 2014
Decided: August 26, 2014

APPEARANCES:

For the Plaintiffs: Mary Berman, Esq.
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HEADNOTES

Civil Procedure – Defaults and Default Judgments

Past precedent holds that a judgment by default shall not be different in kind from that prayed for in the demand for judgment. Damarlane v. Damarlane, 19 FSM R. 519, 523 (Pon. 2014).

Civil Procedure – Defaults and Default Judgments

The court will accept the material allegations against a defaulting defendant as true, but the factual allegations relating to the amount of damages will not be accepted as true. The court thus must consider each of the items sought as damages before determining the amount of damages for which the defaulting defendant will be held liable. Damarlane v. Damarlane, 19 FSM R. 519, 523 (Pon. 2014).

Attorney's Fees – Paid by Client

Rule 1.5(b) of the FSM-adopted Model Rules of Professional Conduct states a preference for written representation agreements. Damarlane v. Damarlane, 19 FSM R. 519, 523 n.2 (Pon. 2014).

Contracts – Interpretation

Whether the term "costs" in a verbal contract between a client and his attorney included attorney's fees is a question of contract interpretation that must be resolved by the court as a matter of law. Damarlane v. Damarlane, 19 FSM R. 519, 523 (Pon. 2014)

Contracts – Interpretation

Since a sophisticated lawyer negotiating against her own client should have reduced the agreement to writing and specified that "costs" included attorney's fees, the court will not reward the attorney's flawed conduct by imposing her interpretation of the term "costs" on her client more than 20 years after they entered into the representation agreement. Damarlane v. Damarlane, 19 FSM R. 519, 524 (Pon. 2014).

Attorney's Fees – Paid by Client

Since, when interpreting the meaning of the ambiguous term "share of the costs," the court will look to the course of performance between the parties and since throughout the course of attorney's representation and for more than a decade since, the client did not offer the attorney any compensation and the attorney did not demand compensation until the clients' unrelated activities raised her ire, the court may infer that, based on this course of performance between the parties, the client's share of the costs under the 1991 verbal contract is zero dollars. Damarlane v. Damarlane, 19 FSM R. 519, 525 (Pon. 2014).

Torts – Trespass

To prevail in an action for trespass, a plaintiff must prove a wrongful interference with a valid possessory interest in land. A plaintiff can demonstrate wrongful interference by showing that a defendant, 1) intentionally and without consent enters land in the plaintiff's possession, or causes a thing or person to do so, or 2) intentionally and without consent remains on the plaintiff's land, or 3) intentionally fails to remove from the land a thing which he is under a duty to remove. Damarlane v. Damarlane, 19 FSM R. 519, 528 (Pon. 2014).

Torts – Trespass

For the purpose of establishing trespass, a plaintiff can demonstrate a valid possessory interest in land by proving that at the time of the alleged trespass he had either actual possession, or the right to immediate possession of the land. Damarlane v. Damarlane, 19 FSM R. 519, 528 (Pon. 2014).

Torts – Trespass

Judgment in a trespass case is for physical possession of the land, and the court's role is to determine which party has the greater possessory right to disputed property. Damarlane v. Damarlane, 19 FSM R. 519, 528 (Pon. 2014).

Property – Public Lands; Property – Tidelands

The Pohnpei Residential Shoreline Act of 2009 outlines procedures to be followed in applying for a residential leasehold from the Chief of the Division of Public Land of the Department of Land and Natural Resources. It mandates that, upon the receipt of an application pursuant to the Act, the Chief of the Division of Public Land shall orchestrate a survey of the filled land for which the application has been submitted, and upon satisfaction that the applicant and the land meet the Act's criteria, the Chief must issue a certificate of eligibility for a residential leasehold to the applicant. Damarlane v. Damarlane, 19 FSM R. 519, 529 (Pon. 2014).

Property – Public Lands; Property – Tidelands

Under Pohnpei state law, submerged public trust lands to a distance of not more than 150 feet extending seaward from a residential shoreline that have been filled for the purpose of constructing all

or a portion of a residence thereon before December 31, 2008 are designated as available for residential lease. Damarlane v. Damarlane, 19 FSM R. 519, 529 (Pon. 2014).

Property – Public Lands; Torts – Trespass

When the court cannot establish that the plaintiffs' pending application under the Pohnpei Residential Shoreline Act of 2009 complies with the Act's requirements, the plaintiffs have not demonstrated an inchoate possessory interest over the landfill by virtue of their pending application for a leasehold interest, and since the plaintiffs do not have title or a leasehold interest in the landfill and cannot demonstrate an inchoate possessory interest under the Act, they cannot demonstrate a legally cognizable property right to exclusive possession of the landfill and therefore their trespass claim must fail. Damarlane v. Damarlane, 19 FSM R. 519, 530 (Pon. 2014).

Torts – Nuisance

A nuisance is generally regarded as a substantial interference with the use and enjoyment of another's land caused by intentional and unreasonable conduct, or caused unintentionally by negligent or reckless conduct, or the performance of an abnormally dangerous activity. A substantial interference is actual, material, physical discomfort, material annoyance, inconvenience, discomfort, or hurt, or significant harm that affects the health, comfort, or property of those who live nearby. Damarlane v. Damarlane, 19 FSM R. 519, 530 (Pon. 2014).

Torts – Nuisance

The first step in evaluating nuisance liability is to determine whether there has been substantial interference with plaintiffs' use and enjoyment of their land and the second step is to determine if the harm caused by Defendants was intentional or unintentional. Damarlane v. Damarlane, 19 FSM R. 519, 530 (Pon. 2014).

Torts – Nuisance

The defendants are not liable for nuisance caused by noisy members of the public when the defendants do not have the lawful right to exercise control over the revelers' behavior on the causeway, or to ask them to leave. Damarlane v. Damarlane, 19 FSM R. 519, 530-31 (Pon. 2014).

Torts – Nuisance

If harm is unintentionally caused, nuisance liability will attach when it is the result of negligent or reckless conduct, or the result of an abnormally dangerous activity. Damarlane v. Damarlane, 19 FSM R. 519, 531 (Pon. 2014).

Torts – Negligence

Under Pohnpei law, negligence is the failure to use such care as a reasonably prudent and careful person would use under the circumstances. To demonstrate actionable negligence, a plaintiff must demonstrate that the defendants breached a duty of care owed to the plaintiffs, and that the breach proximately caused damages to the plaintiffs. Damarlane v. Damarlane, 19 FSM R. 519, 531 (Pon. 2014).

Torts – Negligence; Torts – Nuisance

The focus of a negligence analysis is on the defendants' conduct, while the focus of an intentional nuisance analysis would be on the resulting interference. Damarlane v. Damarlane, 19 FSM R. 519, 531 (Pon. 2014).

Torts – Nuisance

Since the plaintiffs could not prove that the defendants' actions in maintaining huts and a small store on the causeway proximately caused the noise pollution affecting the plaintiffs and since the cost

to the defendants of removing the huts would substantially outweigh the harm caused to the plaintiffs by the huts, nuisance liability has not attached against the defendants. Damarlane v. Damarlane, 19 FSM R. 519, 532 (Pon. 2014).

Torts – Nuisance

Nuisances that affect the public at large are classified as public nuisances, while those that affect an individual or small number of individuals are classified as private nuisances. Damarlane v. Damarlane, 19 FSM R. 519, 532 (Pon. 2014).

Torts – Nuisance

As a general rule, a public nuisance gives no right of action to an individual either for equitable relief, or for damages. A private plaintiff may bring an action for public nuisance only where he can show that he has sustained significant damage or injury which is different in type from the harm suffered by the community at large. Damarlane v. Damarlane, 19 FSM R. 519, 532 (Pon. 2014).

Torts – Nuisance

When the disposal of human waste into the lagoon causes degradation to water quality that harms the community at large, the plaintiffs did not show that they were uniquely affected by this environmental degradation. Therefore the public nuisance cause of action against the defendants for constructing faulty toilet facilities lies with the governmental authorities, and not with the private plaintiffs. Damarlane v. Damarlane, 19 FSM R. 519, 532 (Pon. 2014).

Costs – When Taxable

When the defendants are the prevailing party, they shall be awarded their reasonable costs. Damarlane v. Damarlane, 19 FSM R. 519, 532 (Pon. 2014).

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COURT'S OPINION

MARTIN G. YINUG, Chief Justice:

I. BACKGROUND

The Court granted its own motion to abstain from this matter and dismissed this case on February 9, 2012. Damarlane v. Damarlane, 18 FSM Intrm. 177 (Pon. 2012). Plaintiffs timely appealed, and the Appellate Division reversed and remanded this matter for a decision on the merits. Damarlane v. Damarlane, 19 FSM Intrm. 97, 110 (App. 2013). The appellate decision instructed that these proceedings be limited to Plaintiffs' request for injunctive relief, and common law claims for trespass, nuisance and breach of contract. *Id.* The Court's July 31, 2014 order setting trial instructed that trial in this matter was to be consolidated with a hearing on Plaintiffs' pending motion for injunctive relief.

Trial in this matter was held on March 27, 2014. The Plaintiffs were represented by Mary Berman, Esq. The Defendants were represented by Salomon M. Saimon of the Micronesian Legal Services Corporation (MLSC).

At the conclusion of the trial the parties agreed to the submission of written closing arguments. Plaintiffs' closing argument was filed on April 10, 2014. Defendants' closing arguments were filed on April 11, 2014. Plaintiffs then filed their reply on April 21, 2014.

The Court having reviewed the exhibits that were stipulated to, or otherwise entered into evidence at trial, as well as the arguments of counsel, and having reviewed the parties' closing arguments and other briefs, now finds in favor of Paulino Damarlane in the cause of action for breach of contract, and in favor of Paulino Damarlane and Brian Damarlane in the causes of action for trespass and nuisance. Plaintiffs' motion for injunctive relief is denied. The reasons follow:

II. PRELIMINARY MATTERS

A. *Joint and Several Liability for Default Judgment*

Plaintiffs' Complaint includes a claim against Paulino Damarlane individually for $5,000 in unpaid legal costs. Plaintiffs' post-trial brief states that, "the appellate court found Brian Damarlane 'joint and severally liable' for [the $5,000 claim against Paulino Damarlane]". Pls.' Post Trial Br. at 27 (Apr. 10, 2014). In support of this contention Plaintiffs cite to a page from the appellate court decision that states, "*except for Berman's breach of contract claim against Paulino*, Paulino's liability for a money judgment would seem to be joint and several with Brian Damarlane." Damarlane v. Damarlane, 19 FSM R. at 110 (emphasis added). It is difficult to understand how this language could be read to support Plaintiffs' statement that the appellate court found Brian Damarlane joint and severally liable for the $5,000 claim against Paulino. Indeed, that language supports an opposite conclusion regarding Brian Damarlane's join and several liability.[1] This opposite conclusion would conform to past precedent holding that a judgment by default shall not be different in kind from that prayed for in the demand for judgment. *See* Western Sales Trading Co. v. Billy, 13 FSM Intrm. 273, 277 (Chk. 2005).

For all these reasons the Court must reject Plaintiffs' argument that Brian Damarlane is joint and severally liable with Paulino Damarlane for Berman's breach of contract claim.

B. *Amount of Attorney's Fees in Default Judgment Not Justified*

Mary Berman represented Paulino Damarlane, along with multiple other Plaintiffs, in Damarlane v. United States, FSM Civ. No. 1990-075. The Complaint alleges that the sum of $5,000 reflects Paulino Damarlane's share of unpaid "costs" from that suit. Paulino Damarlane defaulted on this claim for breach of contract, and default was entered against him on March 14, 2011. Therefore the Court will accept the material allegations against Paulino Damarlane as true. Narruhn v. Chuuk, 17 FSM Intrm. 289, 299 (App. 2010). However, the factual allegations relating to the amount of damages will not be accepted as true, and the Court must therefore consider each of the items sought as damages before determining the amount of damages for which Paulino Damarlane will be held liable. Oceanic Lumber, Inc. v. Vincent & Bros. Constr. Co., 16 FSM Intrm. 222, 224-25 (Chk. 2008).

At trial Mary Berman testified that the verbal representation agreement[2]she executed with all the Plaintiffs she represented in Civ. No. 1990-075, including Paulino, required each client to pay his or her share of the costs. Whether the term "costs" in the verbal contract between Paulino and Mary Berman included attorney's fees is a question of contract interpretation that must be resolved by this Court as a matter of law. *See* Pohl v. Chuuk Public Utility Corp., 13 FSM Intrm. 550, 554 (Chk. 2005) (a default judgment's determination of damages may require the court to interpret a contract's terms

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[1] Plaintiffs' misrepresentation of the language in the appellate court decision is sufficiently worrying so as to give rise to suspicion that Plaintiffs intended to mislead this Court.

[2] Rule 1.5(b) of the FSM-adopted Model Rules of Professional Conduct states a preference for written representation agreements.

as a matter of law). At trial Berman testified that her understanding of the term costs in the verbal contract included attorney's fees.[3] However, this interpretation of the term costs is self-serving, and is not plausible under the circumstances.

Mary Berman's Affidavit of Costs of Litigation (April 10, 2014) states that her representation in Civ. No. 1990-075 consumed the majority of her working hours between 1990 and 1997, and required an investment of many hundreds or even thousands of working hours. Despite this tremendous investment of time, Berman did not collect attorney's fees from Paulino during the course of the representation.[4] Instead she waited for more than a decade after the representation concluded to file this claim against Paulino for attorney's fees. Furthermore, Berman's complaint sought only the relatively paltry sum of $5,000 against Paulino, which is but a small fraction of the attorney's fees that would be earned over hundreds or thousands of working hours.

The course of performance of the parties between 1990 and 1997, during which time Paulino did not remunerate Berman for her work, supports an interpretation of the term "costs" that excludes attorney's fees. Given that Berman and Paulino were related by marriage at the time they entered into the verbal representation agreement, Paulino would have reasonably supposed that the costs requested by Berman reflected her desire to be compensated for her out-of-pocket expenses, rather than an agreement to pay her attorney's fees. Berman, as a sophisticated lawyer negotiating against her own client, should have reduced the agreement to writing and specified that "costs" included attorney's fees. The Court will not reward Berman's flawed conduct by imposing her interpretation of the term "costs" on her client more than 20 years after they entered into the representation agreement.

C. *Amount of Damages to be Awarded in Default Judgment*

In addition to attorney's fees, Berman argues that other itemized damages awards are justified in a default judgment against Paulino for failure to pay his share of costs in Damarlane v. United States, FSM Civ. No. 1990-075. Berman provides proof that she paid $3,493.73 to the opposing party under a court order awarding its costs. Berman also submits an affidavit in support of $600 spent towards costs such as filing, mailing and printing. These costs are not supported by invoices, but at the time these expenses were incurred attorneys were not required to keep copies of printing invoices, and were permitted to submit affidavits with their own "expense account sheet." *See e.g.*, Berman v. Kolonia Town, 6 FSM Intrm. 242, 244 (Pon. 1993).

Although Berman provides adequate evidentiary support for the expenses outlined above, her argument that these expenses should be awarded against Paulino in a default judgment must fail. Berman testified at trial that she reached an agreement with Paulino that required him to pay only his share of the costs. However, Paulino's share of the costs is an inherently ambiguous term. How is the Court to determine what the parties intended Paulino's share of the costs to be?

Berman testified that Paulino's share of the costs can be ascertained by first calculating the total

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[3] At the time of trial Paulino was deceased, and so he could not testify on this issue.

[4] Mary Berman's affidavit is silent as to whether Paulino provided her with remuneration. However, the affidavit claims that Paulino is liable for the working hours devoted by Berman throughout the lifetime of the representation agreement. Therefore the Court will infer from the affidavit that Paulino did not provide Berman with remuneration.

costs, and then dividing this figure by the number of clients represented.[5] Implicit in this formula is that Paulino's share is equal to the share of all the other clients. However, it is not clear that the parties intended that each client pay an equal amount. It is possible, given the familial relationship between the parties, that the parties intended that each client would pay a means-tested share of the costs. In other words, a wealthier client would pay a greater share of the costs than a destitute client.

In interpreting the meaning of the ambiguous term "share of the costs," the Court will look to the course of performance between the parties. Throughout the course of Berman's representation, and for more than a decade since, Paulino did not offer Berman any compensation, and there is no evidence that Berman demanded compensation[6] until Defendants' unrelated activities raised her ire. Based on this course of performance between the parties, the Court infers that Paulino's share of the costs under the verbal contract reached in 1991 is zero dollars.

III. Findings of Fact

In 2008 Brian Damarlane ("Brian") and Paulino Damarlane ("Paulino") erected huts for recreational use by the public on an artificial berm or causeway ("causeway") in Masenpal, Awak, U Municipality, Pohnpei. Brian and Paulino would charge a fee from members of the public in order for them to access these huts. Paulino passed away after the onset of this litigation, and Brian now operates the business as a sole-proprietorship.

Paulino is the brother of Kadalino Damarlane. Brian Damarlane is Kadalino Damarlane's nephew and the son of Bensis Damarlane. Bensis Damarlane is the older brother to both Paulino and Kadalino. Bensis Damarlane operated a sakau bar on the causeway between 1997 and 2005.

Brian is married and has six children between the ages of 11 and 21. He supports his family with the income he earns from operating his business.

Kadalino and his wife Mary Berman reside near the causeway, and have resided near the causeway since at least 1991.

Testimony at trial established that Kadalino and Berman have a deeply antagonistic relationship with Kadalino's relatives who live nearby, including Brian and his wife. Berman testified that her relationships with Kadalino's family have deteriorated to the extent that she has been subjected to brazen attempts at theft, and she fears that she will be physically assaulted.

The causeway was constructed at the instigation of the state of Pohnpei, and was the subject of litigation in Civil Action No. 1990-075 (Damarlane v. Pohnpei Transportation Authority), in which Kadalino and Berman sued to halt Pohnpei's dredging construction materials from the lagoon and to require the causeway's removal.

The causeway was constructed to begin at the shoreline and continue farther away into the

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[5] Berman's testimony regarding Paulino's liability is self-serving. Given that Berman misrepresented the holding of the appellate division on Brian's joint and several liability for Paulino's debt (both at trial and in her post-trial brief), the Court will not consider her testimony to be conclusive on this issue.

[6] Unsupported statements in Plaintiffs' Pretrial Statement do not serve as evidence. The Complaint merely states that Berman demanded payment and Paulino refused. The Complaint does not specify when this demand was made.

lagoon.

Bensis and his younger brother Gregorio Damarlane quitclaimed shoreline landfill rights to Lots 88-A-06 and 88-A-069 to Kadalino. These lots are located on the shoreline perpendicular to the causeway. Kadalino filled the seaward area in front of these lots, at some distance from the shoreline. This landfill work was completed at the behest of Kadalino in 1991, pursuant to a permit issued by the Pohnpei State Board of Public Lands. This permit approved Kadalino's "request to create a landfill for construction of a family residence."

Sometime between 1991 and 2009 Kadalino applied for title to the landfill, and this application was denied.

Kadalino then filed a renewed application for title to the landfill in 2009, relying on the Pohnpei Residential Shoreline Act, enacted in 2009. This application is still pending with the Pohnpei State Board of Public Lands. Plaintiffs could not provide an explanation at trial for the Board's lengthy delay in ruling on the renewed application.

At trial, the distance between the shoreline and the landfill area constructed by Kadalino ("landfill area") was not established. Plaintiffs argued that the distance was less than 150 feet, but this was not established.

At trial Kadalino and Berman testified that the landfill was constructed for the purpose of laying the groundwork for the construction of a residence for their daughter, Margaret Damarlane. Defendants contested this assertion, and argued that Plaintiffs' primary purpose in securing possession of the landfill is to allow them to operate a competing business. It is undisputed that to date Plaintiffs have not constructed a residence for Margaret Damarlane on the landfill. As will be explained, *infra*, the testimony from Berman and Kadalino regarding the purpose behind construction of the landfill is self-serving. For these reasons the Court declines to make a finding as to the purpose to which Kadalino and Berman intend for the landfill.

The landfill area was constructed such that it overlays the original causeway, and expands that causeway parallel to the shoreline, such that buildings can be constructed on it. Brian constructed a small hut that functions as a store on this landfill area, to the side of the original causeway. The parties dispute whether this store sells alcoholic beverages, and evidence at trial was insufficient to support a finding that the store sells alcoholic beverages.

Since the landfill was constructed overlaying the original causeway, it is necessary to transverse the landfill to reach the parts of the causeway upon which Brian constructed huts for recreational use and a separate enclosed toilet facility.

Brian imposes a standard fee of $2 per person in exchange for allowing access to the causeway. He also collects a fee for use of huts he erected on the causeway. These fees are collected at a "chokepoint" where the landfill transitions into the causeway.

This toilet facility, constructed on the causeway past the chokepoint, is located less than 50 feet from the high water mark and is not connected to a sewage system. As a result, tides flush the latrine area, and human waste is emptied into the lagoon.

At trial Berman testified that she frequently swims in the lagoon, and that many other members of the public, including children, swim in the lagoon. This testimony is credible.

The causeway continues past the toilet facility. Most of the causeway is sufficiently wide to support vehicular and pedestrian traffic, but too narrow to support recreational huts. At certain areas the causeway widens, such that there are several small artificial islands ("islands") connected by the causeway.

Brian and Paulino constructed huts or covered areas ("huts") on these islands. These huts are not suitable for long-term habitation, but are sufficient to provide shelter on a temporary basis. These huts vary in size, with the smallest hut suitable for use by approximately 2 people and the largest hut suitable for use by approximately 30 people.[7]

The islands upon which Brian constructed these huts are located within 1,000[8] feet of Kadalino and Berman's residence. The residence is located on a slope overlooking the shoreline, such that sound from the islands can carry over the lagoon to the residence, with only a few trees to act as a buffer.

At trial Plaintiffs testified that members of the public have engaged in loud recreational activities on the islands throughout every weekend, holiday, and school break since Brian and Paulino started their business. Plaintiffs further testified that the recreational activities taking place on the islands often involved loud music from portable "boomboxes" or car speakers, was sometimes fueled by heavy drinking, and would frequently continue throughout the night. Testimony at trial also established that influential members of the Pohnpei State Government, including the governor, would occasionally engage in recreational activities on the islands.

Plaintiffs testified that the noise from these activities carries to their residence, and that the noise pollution that enters their residence is frequently of such a volume and character so as to substantially interfere with comfortable enjoyment of their property. Plaintiffs described the noise as so unbearable that if it were to continue they would be forced to relocate.

Plaintiffs' testimony regarding the severity of the noise pollution reaching their residence is not credible because it is self-serving, and because it is contradicted by Brian's testimony and by evidence that the noise has been of substantially similar character since 2008 and Plaintiffs have yet to relocate. Furthermore, the site visit revealed that Plaintiffs' neighbors are similarly situated with regards to their exposure to noise pollution emanating from the islands. The fact that Plaintiffs were unable to produce evidence that similarly situated neighbors were adversely affected by the noise pollution emanating from the islands supports a finding that Plaintiffs testimony regarding the severity and frequency of the noise pollution was exaggerated.

Plaintiffs' testimony regarding the severity of the noise pollution is also undermined by Brian's undisputed testimony that, following Paulino's death, Kadalino approached Brian with an offer to assume control of Defendants' business and pay Brian a salary to continue working. This behavior is not consistent with Plaintiffs' testimony that the noise pollution was so frequent and severe that they could not countenance a continuation of the status quo.

Nevertheless, the Court finds that members of the public have sometimes engaged in noisy recreational activity on the islands during the day, and that loud recreational activities have occasionally persisted throughout the night as well. There is insufficient evidence to make a finding as to the

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[7] These figures are based solely on impressions formed during the site visit conducted by the Court.

[8] The precise distance was not established at trial. This figure is based solely on impressions formed during the site visit conducted by the Court.

number of days or nights since 2008 in which the noise pollution that crossed into Plaintiffs' property was sufficiently severe so as to substantially interfere with their enjoyment of their land. However, the evidence supports a finding that the noise pollution that crossed into Plaintiffs' property has sometimes been sufficiently severe so as to substantially interfere with their enjoyment of their land.

The evidence also suggests that noise pollution that crossed into Plaintiffs' property at night has been more likely to substantially interfere with their enjoyment of their land than noise pollution emanated during the day. Noise pollution at night is more likely to interfere with sleep, and so even short bursts of noise at night can be disruptive.

At trial, Plaintiffs testified that Defendants' business activities have resulted in an increase in the volume of trash strewn about the causeway. Evidence presented at trial supports this claim. However, the claim that the trash strewn around the causeway has caused substantial interference with Plaintiffs' use or enjoyment of their land is not supported by evidence. The trash on the causeway is an eyesore that might upset people walking on the causeway, but the trash is not visible from Plaintiffs' property.

At trial, Plaintiffs testified that Defendants are responsible for an accumulation of trash along the shoreline adjacent to the causeway. Plaintiffs contend that this trash has been a fertile breeding ground for vermin that have crossed over into their property. Brian denied that he or Paulino is responsible for the accumulation of trash, and testified that he had consistently made suitable arrangements for trash disposal.

Based on the evidence adduced at trial, the Court finds that Plaintiffs' claim that Defendants were responsible for the accumulation of trash on the shoreline adjacent to the causeway is not supported by evidence.

IV. Analysis

A. *Trespass*

Plaintiffs seek relief under the common law tort of trespass. To prevail in an action for trespass, a plaintiff must prove a wrongful interference with a valid possessory interest in land. Ambros & Co. v. Board of Trustees, 12 FSM Intrm. 206, 213 (Pon. 2003). A Plaintiff can demonstrate wrongful interference by showing that a defendant, 1) intentionally and without consent enters land in the possession of the plaintiff, or causes a thing or person to do so, or 2) intentionally and without consent remains on the land of plaintiff, or 3) intentionally fails to remove from the land a thing which he is under a duty to remove. Nelper v. Akinaga, Pangelinan & Saita Co., 8 FSM Intrm. 528, 533-34 (Pon. 1998). For the purpose of establishing trespass, a plaintiff can demonstrate a valid possessory interest in land by proving that at the time of the alleged trespass he had either actual possession, or the right to immediate possession of the land. Mailo v. Chuuk, 13 FSM Intrm. 462, 466 (Chk. 2005). Judgment in a trespass case is for physical possession of the land, *see* Ponape Enterprises Co. v. Soumwei, 6 FSM Intrm. 341, 345 (Pon. 1994), and the court's role is to determine which party has the greater possessory right to disputed property. Nelson v. Kosrae, 8 FSM Intrm. 397, 403 (App. 1998).

1. *Plaintiffs Cannot Establish that their Pending Application for Leasehold Interest in Landfill Under Residential Shoreline Leasehold Act of 2009 Establishes a Valid Possessory Interest*

As explained above, Plaintiffs must demonstrate both a valid possessory interest in land as well as wrongful interference with this interest in order to prevail in an action for trespass. Plaintiffs argue that although they do not have title or a leasehold interest in the landfill, the Court should recognize that they nevertheless have a valid possessory interest in the landfill because they have filed a pending

application for title under the Pohnpei Residential Shoreline Act of 2009, 42 Pon. C. §§ 2-110*et seq.* The Pohnpei Residential Shoreline Act of 2009 ("PRSA") outlines procedures to be followed in applying for a residential leasehold from the Chief of the Division of Public Land of the Department of Land and Natural Resources. The PRSA mandates that, "upon the receipt of an application pursuant to the Act, the Chief of the Division of Public Land shall orchestrate a survey of the filled land for which the application has been submitted to be surveyed, and upon satisfaction that the applicant and the land meet the criteria [of the PRSA], the Chief shall issue a certificate of eligibility for a residential leasehold to the applicant."

Some of the criteria an applicant must meet under the PRSA are set out in 42 Pon. C. § 2-112. "Pursuant to 42 PC 2-101, submerged public trust lands to a distance of not more than 150 feet extending seaward from a residential shoreline that have been filled for the purpose of constructing all or a portion of a residence thereon prior to December 31, 2008 are hereby designated as available for residential lease." As stated in the findings of fact, *supra*, Plaintiffs have not established that their application for a leasehold over the landfill complies with the requirements of the PRSA, because they did not establish that the landfill is within 150 feet of the shoreline.

Furthermore, it is an open question whether Plaintiffs can establish that their application complies with the requirement in § 2-112 of the PRSA that submerged land must have been filled for the purpose of constructing all or a portion of a residence thereon prior to December 31, 2008. That § 2-112 can be satisfied by showing that the submerged land was filled for the purpose of constructing all of *or a portion* of a residence prior to December 31, 2008, suggests that to comply with the requirement of the PRSA an applicant must have commenced construction before December 31, 2008. This is because it is not reasonable to suppose that filled land would be created for the ultimate purpose of constructing only a portion of a residence. Rather this language could be interpreted to provide protection for applicants who began construction of a residence before December 31, 2008, but did not complete construction until a later date.

Alternatively, the language in § 2-112 could be designed to provide clarity to an application wherein the applicant filled land abutting the shoreline, for the purpose of constructing a residence that straddles the original land and the filled land. Such an applicant could be said to have filled in land for the purpose of constructing a portion of a residence, because the remainder of the residence would be constructed on pre-existing land. Under such an interpretation of § 2-112 it is an open question whether it is a requirement that actual construction begin before December 31, 2008. Under this latter interpretation of § 2-112, the inquiry into purpose could be supposed to refer to the purpose at the time of constructing the landfill. Therefore, an applicant who filled in land prior to December 31, 2008 for the purpose of constructing a residence, but subsequently had a change of heart or delayed construction of a residence until after 2008, would still satisfy the requirement of § 2-112.

Whether the first or second construction of § 2-112 is adopted could have a determinative impact on Plaintiffs' application for a leasehold interest in the landfill. The permit Kadalino obtained from the Board of Trustees of the Pohnpei State Public Lands Authority in 1990 states that the Board had approved his request to create a landfill *for construction of a family residence* (Pls.' Ex. "H") (emphasis added). This is powerful evidence that, under the second construction of § 2-112 Kadalino filled the land for the purpose of constructing a residence. However, the Court found, *supra*, that Kadalino had not constructed a residence on the landfill before the statutory deadline of December 31, 2008. Therefore, if the first construction of § 2-112 is accepted, then the Chief of the Division of Public Land would determine that Plaintiffs had not begun construction of a residence prior to the statutory deadline and would deny Plaintiffs' application for a leasehold under the PRSA.

The PRSA vests the authority for ruling on an application pursuant to the Act with the Chief of

the Division of Public Land in the first instance. Section 2-118 of the Act mandates that administrative appeals from the Chief's findings or recommendations are to be brought before the Pohnpei Supreme Court. This procedure reflects the strong interest on the part of the state of Pohnpei in interpreting its own statute regulating ownership interests over land in Pohnpei State. For this reason, even if Plaintiffs could establish that the landfill is less than 150 feet from the shoreline, the Court would nevertheless abstain from deciding whether their application for a leasehold interest in the landfill complies with the requirements of the PRSA. *See* Gilmete v. Carlos Etscheit Soap Co., 13 FSM Intrm. 145, 148 (App. 2005); Damarlane v. Damarlane, 19 FSM R. 97, 107 (App. 2013).

Since the Court cannot establish whether Plaintiffs' pending application under the PRSA complies with the requirements of the Act, it follows that Plaintiffs have not demonstrated an inchoate possessory interest over the landfill by virtue of their pending application for a leasehold interest.[9]

Since Plaintiffs do not have title or a leasehold interest in the landfill, and because they cannot demonstrate an inchoate possessory interest under the PRSA, it is clear that they cannot demonstrate a legally cognizable property right to exclusive possession of the landfill. Therefore Plaintiffs' trespass claim must fail. *See* Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 119, 124 (Chk. 2010) (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.

B. *Nuisance*

A nuisance is generally regarded as a substantial interference with the use and enjoyment of another's land caused by intentional and unreasonable conduct, or caused unintentionally by negligent or reckless conduct, or the performance of an abnormally dangerous activity. Ambros & Co. v. Board of Trustees, 11 FSM Intrm. 262a, 262h (Pon. 2002); Nelper, 8 FSM Intrm. at 542. A substantial interference is actual, material, physical discomfort, material annoyance, inconvenience, discomfort, or hurt, or significant harm that affects the health, comfort, or property of those who live nearby. Ambros & Co., 12 FSM Intrm. at 214; Ambros & Co., 11 FSM Intrm. at 262h; Nelper, 8 FSM Intrm. at 534.

1. *Private Nuisance*

The first step in evaluating nuisance liability is to determine whether there has been substantial interference with plaintiffs' use and enjoyment of their land. Damarlane v. Damarlane, 19 FSM R. 97, 109 (App. 2013). The Court found, *supra*, that the noise emanating from revelers on the causeway would sometimes substantially interfere with Plaintiffs' use of and enjoyment of their land, and that this was more likely to occur at night.

The second step in evaluating nuisance liability is to determine if the harm caused by Defendants was intentional or unintentional. *Id.* In this instance it is critical to note that the noise pollution suffered by Plaintiffs was not caused directly by Defendants. No testimony was introduced that would support a conclusion that Paulino or Brian participated in the loud recreational activities that substantially interfered with Plaintiffs' enjoyment of their land. Rather, the noise was generated by members of the public, who made independent decisions regarding noise control. Indeed, a critical fact in this case is that Defendants do not have the lawful right to exercise control over the behavior of the revelers on the causeway, or to ask them to leave. *See* RESTATEMENT (SECOND) OF TORTS § 838 cmt. g (1979) (liability against possessor of land for failure to prevent third parties from creating a nuisance

[9] The question of whether a demonstrably valid application under the PRSA would establish an inchoate property interest in the relevant filled land is not before this Court.

on the land is grounded in his exclusive control over the land and the things done on it).

The sum total of Defendants' contribution to the noise pollution suffered by Plaintiffs is the construction of huts on the causeway, and the maintenance of a small store selling food and drinks. Defendants describe their business on the causeway as a "picnic area," and credibly claim that most of the people who use the area for recreational activities do not emit unreasonable noise pollution. Rather, it seems that a few bad apples will sometimes engage in inappropriately loud behavior that disturbs Plaintiffs. As mentioned above, Defendants have no legal authority to curtail such rowdy behavior. It seems clear that Plaintiffs could maintain an action for nuisance against the specific individuals who emit noise, but this might be difficult or impractical, and so instead Plaintiffs bring a claim against Defendants.

Since Defendants cannot control or predict the behavior of those individuals who emit the offending noise pollution, it follows that their contribution to the nuisance is unintentional. If harm is unintentionally caused, nuisance liability will attach when it is the result of negligent or reckless conduct, or the result of an abnormally dangerous activity. Nelper, 8 FSM Intrm. at 540-41 n.2. Plaintiffs do not argue that Defendants engage in an abnormally dangerous activity on the causeway, and so it must be determined whether Defendants' behavior in maintaining huts and a small store on the causeway was negligent or reckless.

Under Pohnpei law, negligence is the failure to use such care as a reasonably prudent and careful person would use under the circumstances. *Id.* at 535. To demonstrate actionable negligence Plaintiffs must demonstrate that Defendants breached a duty of care owed to Plaintiffs, and that the breach proximately caused damages to Plaintiffs. *Id.* Thus, the focus of a negligence analysis is on Defendants' conduct, while the focus of an intentional nuisance analysis would be on the resulting interference. *Id.*

Based on the totality of the circumstances, it seems that that noise pollution suffered by Plaintiffs was not proximately caused by negligent or reckless behavior on the part of Defendants. Defendants did not produce loud noise, or encourage loud behavior on the part of revelers on the causeway. By charging an entrance fee to users of the causeway,[10] Defendants may have actually discouraged some visitors from socializing on the causeway. The sum total of Defendants' contribution to the noise pollution suffered by Plaintiffs was to erect huts suitable for many types of social gatherings, and supply food and drinks. Testimony at trial established that senior officials in Pohnpei State Government would occasionally socialize on the causeway,[11] and that most of the people who used Defendants' huts did not produce unreasonable noise pollution. Therefore it is clear that Defendants are not bound to anticipate that some members of the public who use the huts on the causeway would cause a nuisance. *See* RESTATEMENT (SECOND) OF TORTS § 838 cmt. e (1979) (the possessor [of land] is not

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[10] It is clear that Defendants do not have a lawful right to charge an access fee to the state-owned causeway. However, a cause of action for this tortious conduct lies with those who paid the fee, and therefore suffered damages, rather than Plaintiffs.

[11] Merely demonstrating that senior government officials utilize Defendants' huts is not sufficient to demonstrate governmental consent to Defendants' conduct. It is clear that Defendants' activities on the causeway qualify as a purpresture under common law, and can be abated at the request of the State of Pohnpei. *See* Sullivan v. Leaf River Forest Prods., Inc., 791 F. Supp. 627, 633 (S.D. Miss. 1991) (purpresture is encroachment upon public rights and easements by appropriation to private use that which belongs to the public; it is not necessarily public nuisance and may exist without putting public to any inconvenience whatsoever).

bound to anticipate that a third person will negligently carry on an activity that does not necessarily involve nuisance, unless the activity involves an undue risk that nuisance will result or the person whom he permits to act is likely to carry on the activity in such a negligent manner as to create one).

It seems that the only practical option at Defendants' disposal for reducing the noise pollution suffered by Plaintiffs is to remove the huts and store from the causeway. Even such a drastic step would not necessarily stop the noise pollution emanating from the causeway, because revelers could still socialize there. In contrast to the uncertain benefit to Plaintiff from dismantling Defendants' business, this step would certainly be extremely costly to Defendants, since it would mean the effective termination of their business. Brian testified that his family relies solely on the income earned from the operation of the business on the causeway.

Since Plaintiffs could not prove that Defendants' actions in maintaining huts and a small store on the causeway proximately caused the noise pollution affecting Plaintiffs, and because the cost to Defendants of removing the huts would substantially outweigh the harm caused to Plaintiffs by the huts, the Court concludes that nuisance liability has not attached against Defendants.

2. *Public Nuisance*

Nuisances that affect the public at large are classified as public nuisances, while those that affect an individual or small number of individuals are classified as private nuisances. Nelper, 8 FSM Intrm. at 534. As a general rule, a public nuisance gives no right of action to an individual either for equitable relief, or for damages. 58 AM. JUR. 2D *Nuisances* § 260 (1989). A private plaintiff may bring an action for public nuisance only where he can show that he has sustained significant damage or injury which is different in type from the harm suffered by the community at large. *Id.* §§ 261, 262.

In this case the Court determined as a finding of fact that Defendants constructed a toilet facility such that human waste would be carried into the lagoon, where many people, including children, submerge their bodies in the water. Disposal of human waste into the lagoon causes degradation to water quality that harms the community at large. Plaintiffs did not show that they were uniquely affected by this environmental degradation. Therefore the cause of action for public nuisance against Defendants for constructing faulty toilet facilities lies with the governmental authorities, and not with Plaintiffs.

C. *Costs*

Defendants, as the prevailing party, shall be awarded their reasonable costs. Damarlane v. United States, 8 FSM Intrm. 45, 54 (App. 1997). Defendants shall submit their costs to the Court within 20 days of service of this decision on them. Plaintiffs shall then have 10 days to respond.

V. CONCLUSION

Accordingly, the clerk shall enter judgment for Paulino Damarlane against Mary Berman on the claim for breach of contract, and shall enter judgment for Paulino Damarlane and Brian Damarlane against Kadalino Damarlane, Mary Berman and Margaret Damarlane on the claims for trespass and nuisance and for injunctive relief. Defendants are awarded costs, which shall be submitted to the Court as directed above.

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