

*Tkel v. Hanpa Indus. Dev. Corp.*, 14 ROP 74 (2007)  
**ARIBUK and HILARIA RENGUUL TKEL,**  
**Appellants,**

v.

**HANPA INDUSTRIAL DEVELOPMENT CORPORATION,**  
**Appellee.**

CIVIL APPEAL NO. 05-032  
Civil Action No. 03-223

Supreme Court, Appellate Division  
Republic of Palau

Decided: April 17, 2007<sup>1</sup>

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Counsel for Appellant: Carlos H. Salii

Counsel for Appellee: Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

MATERNE, Justice:

This is an appeal from a Trial Division decision and judgment in favor of the plaintiffs, Aribuk and Hilaria Renguul Tkel (“the Tkels”), and against Hanpa Industrial Development Corporation (“Hanpa”). Both parties appealed, arguing that the trial court’s factual determinations are unsupported and/or did not justify the legal conclusions drawn. The trial court’s decision is affirmed in all respects.

## **I. BACKGROUND**

This negligence case involves two lots abutting the main road into Ngermid. In 1994, the Tkels began constructing a two-story house on a lot on the downhill side of the road. The second story of the house and a hollow block retaining wall near the road were built at that time. In October 1998, Hanpa began to level the lot directly across the street and uphill from the Tkels’ house. After consulting with an engineer and the Environmental Quality Protection Board (“EQPB”), Hanpa installed a drainage ditch and sedimentation pond. At approximately the same time, the Tkels built the first floor of their house. Both projects were completed in early 1999.

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<sup>1</sup>The parties have waived oral argument and the Court agrees that this matter can be decided on the papers submitted by the parties.

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Starting in August 1999, the Tkels' tenant began writing letters complaining that water was seeping into the lower floor of the house. When Tropical Storm Utor struck Palau in late June and early July 2001, flooding caused significant damage to the house and the tenant moved out. At trial, the Tkels submitted evidence of damages in the form of lost rents and repair costs amounting to \$43,236.83.

The trial court found that Hanpa's conduct in leveling the land and altering the natural flow of water was negligent and a substantial cause of the Tkels' damages. Nevertheless, the court concluded that the Tkels could not recover all of their losses from Hanpa because other innocent causes, over which Hanpa had no control, contributed to the damage. After considering the various causes of the flooding, the trial court apportioned the loss, allocating 40% to Hanpa's conduct and, by inference, 60% to other factors.

Both parties filed timely appeals. The Tkels argue that the trial court abused its discretion when it awarded them only 40% of their damages. In particular, the Tkels argue that there was insufficient evidence to support **¶76** an apportionment of damages and/or that the trial court failed to make a specific allocation of negligence as required by RPPL No. 6-27. Hanpa argues that the trial court's negligence and causation findings were clearly erroneous and that it should have found that the Tkels were contributorily [sic] negligent and/or that they failed to mitigate their damages.

## II. STANDARD OF REVIEW

We review the trial court's findings of fact for clear error. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002). Under this standard, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Dilubech Clan v. Ngaremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). Conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

## III. ANALYSIS

### A. Findings Related to Negligence and Causation

Hanpa argues that the trial court's negligence and causation findings were erroneous because (1) Hanpa had no duty to stop the natural flow of water from high ground to low ground, (2) Hanpa took all necessary and reasonable precautions to protect the Tkels' interests given the limited foreseeability of the harm, and (3) there was insufficient evidence to support the conclusion that Hanpa's earthworks "substantially caused" the underground waterflow that damaged the house. It is undisputed that Hanpa back-filled the lot above the Tkels' house and created a standing body of water, thereby interfering with the water drainage routes that had previously existed in the area. Two experts testified that Hanpa's activities created new dangers for the downhill property owners and concluded that when the heavy rains of Tropical Storm Utor came, the soil in the back-filled area became saturated, causing an increase in underground

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waterflow that damaged the neighboring road and the Tkels' house. Neither the testifying experts nor the trial court blamed Hanpa for the tendency of water to flow from high ground to low ground. Rather, it was Hanpa's alteration of the natural topography of its lot which justified a finding of negligence: those alterations, combined with the physical principles of gravity and hydrostatics, gave rise to an unreasonable risk of injury to the Tkels' property.

Nor was the trial court required to find that Hanpa's consultation with an engineer and compliance with the EQPB's requirements constituted reasonable care. The engineer was asked to determine how the property could be developed: he was not asked, and apparently did not consider, how the earthworks might impact the property on the other side of the road. The EQPB, for its part, seems to have been primarily concerned with surface runoff onto the road, not with groundwater or the risks it posed to downhill property owners. Based upon the evidence before it, the trial court could reasonably conclude that Hanpa sought only that advice which would allow its project to proceed and did not attempt to evaluate the impact its earthworks would have on neighboring properties. The fact that Hanpa never asked the appropriate questions does not mean that the risk was not foreseeable.

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With regards to the causation issue raised by Hanpa, at least one expert, Kione Isechal, testified that the rainfall associated with Storm Utor probably would not have caused the damage to the road or the Tkel's house had Hanpa not altered the topography of its site. Isechal ultimately concluded that Hanpa's fill and excavation activities, when combined with the precipitation, was a substantial cause of the damages at issue in this litigation. Trial Transcript ("T.T.") Vol. 1 at 145. Although Hanpa's expert disagreed with this evaluation, determining what weight to give to competing testimony is well within the trial court's discretion.<sup>2</sup> The trial court's negligence and causation findings are adequately supported and will not be disturbed on appeal.

## **B. Findings Related to the Apportionment of Damages**

The Tkels argue that the trial court, having found that Hanpa was negligent and that its negligence was a substantial cause of the damages to the house, had no authority to apportion damages. "A tortfeasor is liable only for the damages caused by his or her negligent or intentional act, and not for damages by separate or intervening causes . . . ." *Johnson v. Gibbons*, 11 ROP 271, 275 (Tr. Div. 2004) (quoting 22 Am. Jur.2d *Damages* § 324 (2003)). Where there are two or more causes of a harm, damages are to be apportioned among them if "there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965).<sup>3</sup> This rule applies where one or more of the causes is

<sup>2</sup> It should also be noted that Isechal is from the Ngermid area and his causal analysis was initially performed as part of a highway repair project, not for purposes of this litigation. Hanpa's expert, on the other hand, developed his opinions in the context of this litigation, had almost no familiarity with Ngermid (or Palau in general), and could say little more than that further tests would be needed to determine whether Hanpa's earthworks were a substantial cause of the damage.

<sup>3</sup>In the absence of applicable Palauan statutory or customary law, the "rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . . ." 1 PNC § 303.

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“innocent,” such as an act of nature or the existence of a pre-existing condition which the defendant did not cause. Restatement § 433A cmt. a.

As discussed above, the record supports the trial court’s finding that Hanpa’s earthworks were a substantial factor in bringing about the damage to plaintiff’s house. But it is also clear that there were a number of “innocent” causes (*i.e.*, causes for which Hanpa was in no way responsible) which contributed to the damage. The heavy rains of Storm Utor, while not unprecedented, were at least remarkable and caused damage to properties not affected by Hanpa’s earthworks. In addition, the Tkel’s construction choices (particularly the design and construction of a retaining wall without a means of redirecting underground water flow) contributed to the damages they suffered. Taking all of the evidence into consideration, 178 the trial court found that Hanpa’s conduct was directly responsible for 40% of the Tkel’s damages. The trial court had both the authority and a sufficient factual basis to apportion the damages as it did.<sup>4</sup>

### **C. Findings Regarding Contributory Negligence and Mitigation**

Negligence is the failure to exercise reasonable care. *Sakaziro v. ROP*, 7 ROP Intrm. 279, 281 (Tr. Div. 1999). The trial court expressly declined to find the Tkels contributorily negligent despite the fact that there were steps they could have taken to protect their home from the damages it ultimately suffered.<sup>5</sup> The trial court essentially found that the Tkels took reasonable steps when developing their property, a finding that was amply supported in the record. The Tkels built on footers that had withstood numerous storms and installed a retaining wall to protect against the natural groundwater flow. The subsequent failure of the wall and tipping of the house did not necessarily mean that the Tkels had acted unreasonably or failed to exercise ordinary care in the first instance. If, as appears to be the case, Hanpa’s earthworks altered the amount and course of the underground waterflow four years after the house was constructed, the trial court could reasonably conclude that the Tkels could not have foreseen and/or guarded against these waterflow alterations at the time they built their house. The trial court’s refusal to find the Tkels contributorily negligent is adequately supported by the record.

The fact that the Tkels exercised reasonable care when building their house does not, however, mean that their conduct was blameless throughout the events giving rise to this litigation. Hanpa argues that the Tkels failed to mitigate their losses: the trial court agreed. The apportionment of damages includes a reduction based on the Tkels’ failure to take steps to protect their property once the hazards posed by Hanpa’s earthmoving activities became apparent. After noting that the extension and strengthening of the retaining wall in front of the Tkels house coincided with the cessation of the water seepage problem, the trial court concluded

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<sup>4</sup>Contrary to the Tkels’ argument, the trial court was not obligated to make specific findings regarding the degree of negligence of each party pursuant to RPPL No. 6-27, 14 PNC Chapter 34. The comparative negligence statute applies in cases where plaintiff has been found contributorily negligent, a finding which the trial court expressly did not make in this case. The apportionment of damages made by the trial court was between defendant and a number of innocent causes, not between defendant and plaintiffs. Because the Tkels were not found negligent, the specific allocation of negligence required by 14 PNC § 3402(b) is not required in this case.

<sup>5</sup>Hanpa asserted contributory negligence as an affirmative defense in its Answer dated August 4, 2003.

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that “to the extent the damages were partially preventable by plaintiffs, defendant’s liability should be reduced accordingly.” Although the exact percentage reduction was not stated, it is clear that the damages apportioned to defendant were, in fact, reduced to some extent because the Tkels, having seen the earthworks being conducted on the lot above their house, could have avoided some portion of the harm by the use of reasonable effort or expenditure. ¶179 *See* Restatement (Second) of Damages § 918 (1979); *Klsong v. Orak*, 7 ROP Intrm. 184, 188 (1999). To the extent Hanpa is challenging the trial court’s alleged failure to reduce the damages under a mitigation theory, its argument fails.

#### IV. CONCLUSION

The trial court’s findings regarding negligence, causation, apportionment, contributory negligence, and mitigation are affirmed.