IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MELCHOR A. MENDIOLA and MARIA M. ATALIG,
Plaintiffs/Appellees,

v.

COMMONWEALTH UTILITIES CORPORATION,
Defendant/Appellant.

Supreme Court Appeal No. 02-032-GA
Civil Action No. 99-0051(R)

OPINION

Cite as: ***Mendiola v. Commonwealth Utils. Corp.*****, 2005 MP 2**

Argued and submitted on February 19, 2004
Rota, Northern Mariana Islands
Decided March 2, 2005

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BEFORE: MIGUEL S. DEMAPAN, *Chief Justice*; TIMOTHY H. BELLAS, *Justice Pro Tempore*; JESUS C. BORJA, *Justice Pro Tempore*

DEMAPAN, Chief Justice:

¶1 The Superior Court found that the roadway on Lot T.D. 237 in Rota is not subject to a public right of way and therefore that the entirety of Lot T.D. 237, including the roadway, is owned by the Mendiolas. The jury rendered a verdict in favor of the Mendiolas, finding that the Commonwealth Utilities Corporation committed a trespass when it constructed a waterline under the roadway on Lot T.D. 237 and a conversion when it permanently removed topsoil, rocks, and vegetation during the construction. The Commonwealth Utilities Corporation appeals.

¶2 We AFFIRM the Superior Court's judgment.

I.

¶3 On October 27, 1958, the Rota District Land Office of the Trust Territory of the Pacific Islands issued a Determination of Ownership document bearing Melchor S. Mendiola's name as the owner of Lot T.D. 237. Under this document, Mendiola's ownership was limited by "any existing roadway, right of way or easement upon [the] land."

¶4 In 1987, Mendiola subdivided Lot T.D. 237 and distributed it among his children; Mendiola died two years later, in 1989. In 1998, the Commonwealth Utilities Corporation ("CUC") began building a waterline in the island of Rota. When the waterline entered the roadway on Lot T.D. 237, two of Melchor S. Mendiola's heirs--Melchor A. Mendiola and Maria M. Atalig ("the Mendiolas")--requested CUC to refrain from engaging in further construction work, claiming that CUC was committing a trespass; CUC did not cease its construction work, arguing that the roadway under which the waterline was being built belonged to the public.

¶5 In 1999, the Mendiolas brought a suit against CUC claiming that CUC trespassed onto Lot T.D. 237 and that CUC's permanent removal of topsoil, rocks, and vegetation during the construction of the waterline constituted a conversion.

¶6 After hearing the evidence presented by the parties, the Superior Court made the following findings of fact at the trial: (1) none of the maps prepared under the direction of the Department of Resources and Development of the Trust Territory Government proved that at the time of their creation there existed any roadway, right of way, or easement on Lot T.D. 237. (Trial Tr. at 200); (2) there was no evidence showing that the Mendiolas had ever conveyed an easement to CUC (Trial Tr. 200); and (3) no evidence indicated when it was that the roadway currently on Lot T.D. 237 first appeared prior to Lot T.D. 237's first land survey in 1989 (Trial Tr. at 202, 210-12). And the court made the following conclusions of law: (1) the Mendiolas successfully established that they owned Lot T.D. 237 including the roadway (Trial Tr. at 199-200, 208); and (2) when the Mendiolas established that they owned Lot T.D. 237 and the burden of proof shifted to CUC, CUC failed to establish that its construction of the waterline was warranted under a prescriptive easement (Trial Tr. at 200-01, 203-04, 206-07).

¶7 The jury rendered a verdict in favor of the Mendiolas in the amount of $15,146.66 for trespass and in the amount of $61,816.83 for conversion. On October 29, 2002, the Superior Court issued its Findings of Fact and Conclusions of Law, stating that the Mendiolas owned Lot T.D. 237 in its entirety and that CUC had failed to prove a public right of way on Lot T.D. 237. On the same day, the Superior Court entered its judgment in favor of the Mendiolas.

¶8 CUC appeals the Superior Court's October 29, 2002 judgment.

II.

¶9 This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code.

III.

¶10 The following are the issues on appeal.

1. Did the Superior Court err in finding that Lot T.D. 237 includes the roadway?

2. Did the Superior Court err as a matter of law in awarding damages for conversion?
3. Did the Superior Court err when it let the jury calculate the damages based on the jury instructions as they were given?
4. Was the damage award grossly excessive?
5. Was there sufficient evidence to support the jury's verdict?

A. Lot T.D. 237 Includes the Roadway.

¶11 The first issue on appeal is whether the Superior Court erred in concluding that Lot T.D. 237 includes the roadway. This issue presents a question of fact and is reviewed under the clearly erroneous standard. *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 325 (1996).

¶12 CUC argues that the Superior Court erred in finding that Lot T.D. 237 includes the roadway because: (1) in deciding this, the court considered Mendiola's own self-serving testimony that the roadway ran through his private property, and also based its decision solely on one piece of documentary evidence, while ignoring other pertinent evidence; (2) the roadway on Lot T.D. 237 was never a part of Lot T.D. 237 because the late Melchor S. Mendiola's ownership was limited by "any existing roadway," and the various maps presented at the trial depicted that the roadway had always existed on Lot T.D. 237, e.g., according to the witness Connie C. Togawa's trial testimony, the roadway existed even during the time of the Japanese Administration;[1] and (3) the map that Vincente Songsong prepared in 1989, after the very first land survey of Lot T.D. 237, depicted the roadway currently on Lot T.D. 237.

¶13 In response, the Mendiolas argue that CUC submitted no documentary evidence to prove its ownership of the roadway, and that the Superior Court's determination of Mendiolas' ownership was based on all of the evidence, not just on one piece of documentary evidence as CUC claims.

[1] In the early 1900s, the Japanese took over the islands of the Marianas from the Germans. The Japanese period continued for three decades, from 1914 to 1944.

¶14 A trial court's finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. *Comm'r of Internal Revenue v. Duberstein*, 363 U.S. 278, 291, 80 S. Ct. 1190, 1200, 4 L. Ed. 2d 1218, 1229 (1960). Here, we are not left with such definite and firm conviction that a mistake was committed. It was only after the parties had finished presenting all their testimonial and documentary evidence at the trial that the Superior Court made its findings of fact and stated that there was no evidence indicating when it was that the currently existing roadway appeared for the first time on Lot T.D. 237 prior to 1989.[2]

¶15 We find that it is undisputed that on October 27, 1958, the Rota District Land Office of the Trust Territory of the Pacific Islands issued a Determination of Ownership document bearing Melchor S. Mendiola's name as the owner of Lot T.D. 237. Under this document, Mendiola's ownership of Lot T.D. 237 was limited by "any existing roadway, right of way or easement upon [the] land." Although CUC's witness Connie C. Togawa, who is the Assistant Chief of the Division of Land Registration and Survey, referred to an old Japanese map of Rota depicting roadways and implied that the roadway currently on Lot T.D. 237 must have existed since the Japanese Administration, even she had to admit that Lot T.D. 237 was surveyed for the first time only in 1989. And no evidence was proffered by CUC to establish that the roadway currently on Lot T.D. 237 existed continuously from the time of the Japanese Administration to the time when the Determination of Ownership document issued in 1959.

¶16 Having found no evidence in the record to support CUC's claim that the roadway currently on Lot T.D. 237 existed in 1959 at the time the Determination of Ownership document issued, it was not clearly erroneous for the Superior Court to determine that Lot T.D. 237 was owned in its entirety by the Mendiolas.

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[2] It is noted that the Superior Court also found that CUC had failed to establish either an easement by conveyance or an easement by prescription; however, the possession of an easement was not an argument proffered by CUC at any time and CUC accordingly had made no attempts to prove such possession.

B. Damages for Conversion Was Proper

¶17 The second issue on appeal is whether the Superior Court erred as a matter of law in awarding damages for conversion. This question presents an issue of law and is reviewed *de novo*. *Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

¶18 CUC argues that conversion is a tort which cannot be committed with respect to real property and thus, no conversion was committed when CUC permanently removed topsoil, rocks and vegetation from the Mendiolas' property. In response, the Mendiolas argue that topsoil, trees and vegetation are subject to conversion.

¶19 The Superior Court did not err as a matter of law in awarding damages for conversion because topsoil, trees and vegetation removed from the land are subject to conversion. Conversion is the act of willfully interfering with any chattel without lawful justification, whereby any person entitled to the chattel is deprived of the possession of it. *Reliance Ins. Co. v. U.S. Bank of Wash., N.A.*, 143 F.3d 502, 506 (9th Cir. 1998). Whether an article attached to the realty is real property or personal property is dependent upon the article's character, the manner of its attachment, and to some extent upon agreements, if any, relating to its status. *Pepin v. North Bend*, 198 F. Supp. 644, 646-48 (D. Or. 1961). For instance, although timber, while standing in soil constitutes a part of the realty, its character is changed when it is severed from the soil; upon severance, timber becomes personalty of the owner of the land and subject to conversion. *Stone v. United States*, 167 U.S. 178, 182-83, 17 S. Ct. 778, 780, 42 L. Ed. 127, 129 (1897). In fact, any growth of the soil becomes personalty after its actual severance from the soil.[3] *Elmonte Inv. Co. v. Schafer Bros. Logging Co.*, 72 P.2d 311, 316 (Wash. 1937). Finally, an honest mistake of the defendant as to his title in the severed property, though it would be a defense to an indictment, is not a defense to a civil action. *Stone*, 167 U.S. at 189, 17 S. Ct. at 782, 42 L. Ed. at 131.

[3] It is noted that constructive severance from the soil is also possible in some cases.

¶20 Here, CUC, though allegedly acted under its honest belief that it owned the roadway on Lot T.D. 237, unlawfully trespassed upon the Mendiolas' land and permanently removed, *inter alia*, topsoil, trees and vegetation from it. Upon their severance from the soil, even those that used to grow on the soil unquestionably became personalties subject to conversion. Accordingly, we find that no error was committed when the Superior Court awarded damages for conversion.

C. CUC is Barred From Assigning as Error the Jury Instructions on Damages.

¶21 The third issue on appeal is whether the Superior Court erred when it let the jury calculate the damages based on the jury instructions as they were given.[4] The standard of review on appeal for an alleged error regarding jury instructions depends on the nature of the claimed error. *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606 (9th Cir. 1993). "When an appellant alleges an error in the formulation of the jury instructions, the instructions are considered as a whole and an abuse of discretion standard is applied to determine if they are misleading or inadequate." *Id*. Here, the third issue would be reviewed for abuse of discretion, only we do not reach the issue because CUC failed to timely object and is now barred from claiming that an error occurred.

¶22 Under Rule 51 of the Commonwealth Rules of Civil Procedure, a party may not assign as error the court's giving or failure to give an instruction unless that party makes an objection before the jury retires to consider its verdict, stating distinctly the matter objected to and the

[4] It is noted that CUC frames the third and fourth issues on appeal (whether the Superior Court erred when it let the jury calculate the damages based on the jury instructions as they were given, and whether the damage award was grossly excessive) as ones somehow related to its Motion for a Judgment Notwithstanding the Verdict ("JNOV"), i.e., CUC argues that denying its Motion for a JNOV was an error because: (1) the Superior Court decided to let the jury determine the damages rather than instructing the jury on the proper measure of damages for trespass and conversion; and (2) the Mendiolas failed to present substantial evidence to support the damages awarded. However, the jury instructions regarding the damages were not presented as the bases for CUC's Motion for a JNOV when the motion was made, nor was the amount of damages as calculated by the jury presented as the basis. Rather, the reason for CUC's motion was that the evidence presented by the Mendiolas was "not sufficient enough to support [their] trespass and conversion [claims]." (Trial Tr. at 249.) Finding baseless CUC's decision to frame the third and fourth issues in terms of its Motion for a JNOV, we treat those issues on appeal as independent arguments instead, unrelated to CUC's Motion for a JNOV.

grounds of the objection. Com. R. Civ. P. 51. Here, CUC made no objection at the trial regarding the instructions given by the Superior Court on the issues of damages and damages calculation. Under Rule 51, CUC is barred from assigning as error the Superior Court's giving the jury instructions as they were given or failure to give different jury instructions.

D. The Jury's Award of Damages Will Not Be Disturbed.

¶23 The fourth issue on appeal is whether the damage award was grossly excessive. In a case where damages have been fixed by the verdict of a jury, the appellate court cannot take notice of an assignment of error and disturb the judgment upon the ground that the damages found by the jury were excessive. *Wabash Ry. Co. v. McDaniels*, 107 U.S. 454, 456, 2 S. Ct. 932, 934, 27 L. Ed. 605, 606 (1883); *Lincoln v. Power*, 151 U.S. 436, 437, 14 S. Ct. 387, 388, 38 L. Ed. 224, 225 (1894). An error of the jury in allowing an unreasonable amount of damages must be presented to the trial court in a motion for a new trial before the issue can be raised on appeal. *Lincoln*, 151 U.S. at 438, 14 S. Ct. at 388, 38 L. Ed. at 225; *Schroeder v. Auto Driveaway Co.*, 523 P.2d 662, 668-69 (Cal. 1974). Here, the record does not indicate that CUC moved for a new trial to redress the alleged, excessive damages.

¶24 Additionally, the general rule in our jurisdiction is that the appellate court does not consider arguments raised for the first time on appeal unless: (1) a new theory or issue has arisen due to a change in the law while the appeal was pending; (2) the issue is only one of law not relying on any factual record; or (3) plain error occurred and an injustice might otherwise result if the appellate court does not consider the case. *Camacho v. Northern Marianas Ret. Fund*, 1 N.M.I. 362, 372 (1990). Here, CUC did not raise the issue of excessive damages in the Superior Court. No opportunity was provided to the trial court to rule on the issue of whether the award of damages by the jury was excessive. And we do not find that any of the three exceptions is applicable in this case.

¶25 Accordingly, CUC cannot now contend that the jury's award of damages was excessive.

E. Sufficient Evidence Supports the Jury's Verdict.

¶26 The last issue on appeal is whether sufficient evidence exists to support the jury's verdict. In reviewing the lower court's denial of a motion for a judgment notwithstanding the verdict ("JNOV"), the appellate court's inquiry is identical to that of the lower court's and it views the evidence as a whole and in the light most favorable to the nonmoving party and determines whether there is substantial evidence supporting the jury's verdict or, on the contrary, whether the only reasonable conclusion that could be drawn from the evidence is that the moving party is entitled to a judgment as a matter of law. *Del Monte Dunes at Monterey, Ltd. v. Monterey*, 95 F.3d 1422, 1430 (9th Cir. 1996); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 791 F.2d 1356, 1360 (9th Cir. 1986). The appellate court, however, may not weigh the evidence and impose a result that it finds to be preferable where the jury's verdict is supported by substantial evidence. *Nat'l Football League*, 791 F.2d at 1360.

¶27 Here, viewing the evidence in the light most favorable to the Mendiolas, the following are assumed to be true: (1) in 1958, the Rota District Land Office of the Trust Territory of the Pacific Islands issued a Determination of Ownership document bearing Melchor S. Mendiola's name as the owner of Lot T.D. 237; (2) in 1987, Mendiola subdivided Lot T.D. 237 and distributed it among his children; (3) in 1989, Lot T.D. 237 was surveyed for the first time by Vincente Songsong, and according to Songsong, the roadway on Lot T.D. 237 is owned solely by Melchor S. Mendiola; and (4) according to the Deputy Commissioner for Public Land, no public land interest exists in the general area wherein Lot T.D. 237 is located on the island of Rota.

¶28 Having considered the evidence in the light most favorable to the Mendiolas, we find that sufficient evidence exists to support the jury's verdict in favor of the Mendiolas.

IV.

¶29 For the foregoing reasons, the Superior Court's judgment is hereby **AFFIRMED**.

¶30 **SO ORDERED** THIS 2nd DAY OF MARCH 2005.

/s/_____
MIGUEL S. DEMAPAN
Chief Justice

/s/_____
TIMOTHY H. BELLAS
Justice *Pro Tempore*

/s/_____
JESUS C. BORJA
Justice *Pro Tempore*

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ERRATA

¶1 On March 2, 2005, this Court issued its Opinion in the above captioned appeal. It incorrectly listed the citation as *Mendiola v. Commonwealth Util. Corp.*, 2005 MP 01.

¶2 The correct citation is *Mendiola v. Commonwealth Util. Corp.*, 2005 MP 02.

SO ORDERED this 10 day of March 2005.

[signature]
MIGUEL S. DEMAPAN, Chief Justice