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

IN SIK CHANG,
Plaintiff-Appellee,

v.

REMEDIO M. NORITA, PERSONAL REPRESENTATIVE, AND ADMINISTRATOR OF THE ESTATE OF JUAN Q. NORITA (DECEASED),
Defendant-Appellant.

Supreme Court Appeal No. 01-013-GA
Superior Court Case No. 97-0846-D

OPINION

Cite as: *In Sik Chang v. Estate of Norita,* 2006 MP 02

Submitted on October 23, 2003
Saipan, Northern Mariana Islands

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FOR PUBLICATION

BEFORE: VIRGINIA S. ONERHEIM, Justice *Pro Tempore*; F. PHILIP CARBULLIDO, Justice *Pro Tempore*; FRANCES M. TYDINGCO-GATEWOOD, Justice *Pro Tempore*

PER CURIAM:

¶ 1 This is an appeal of the trial court's decision in *Chang v. Norita*, Civ. No. 97-0846D (N.M.I. Super. Ct. Apr. 27, 2001) (Order and Decision Following Trial) ("Order and Decision"), ruling in favor of Plaintiff-Appellee In Sik Chang on his claim of encroachment and awarding damages against Defendant-Appellant Juan Q. Norita. We find that the claim against Norita with respect to the dimensions of the land in dispute is barred by the doctrine of *res judicata*. Claims pertaining to the boundaries, however, are not barred by *res judicata*. All necessary parties were joined. The trial court's damages calculation, however, was incorrect. Therefore, the trial court's Order and Decision is AFFIRMED in part, REVERSED in part, and is REMANDED for further proceedings consistent with this decision.

I.

¶ 2 The issue here is a boundary dispute between two parcels of land, both of which were originally owned by Juan De Castro. The relevant history spans over four decades and involves numerous stages of litigation. The most pertinent are highlighted here.

A. Civil Action 219

¶ 3 Prior to his death in 1941, Juan De Castro transferred land to his children via partida. In or around 1967, Appellant Norita purchased three parcels of that land in three separate transactions, each from a different De Castro heir. From Jose Castro, Juan De Castro's son, Norita bought a tract described in precise terms, using geographic

coordinates and distance measurements to the nearest centimeter. However, the other two parcels were less clearly designated. Rita Castro, daughter of Juan De Castro, sold Norita a plot described simply as 160' x 200'. Similarly, another of De Castro's daughters, Maria Castro, sold Norita, "...my land at Chalan Piao. My neighbor is Lorenza T. Duenas and Herman I. Castro in the West. The size of this land is 80 x 200 in length."

¶ 4 Shortly after purchasing these properties, on September 6, 1967, Norita filed a Petition for Transfer of Ownership in the Trust Territory High Court to have title to these three properties formally transferred into his name. Prior to transferring title, however, the court ordered Norita "to give notice of his petition to all known heirs of Juan De Castro and to post a copy of the notice and a translation thereof in Chamorro in a conspicuous place in the village in which the deceased last dwelt and another copy and translation in some other conspicuous places in Saipan." *In re Petition for Transfer of Ownership from Juan De Castro, Deceased, to Juan Q. Norita, Petitioner*, Civ. No. 219 (Trust Territory High Ct. July 10, 1973) (Judgment Nunc Pro Tunc, p. 1) ("Judgment Nunc Pro Tunc").

¶ 5 The notice, which Norita was required to post and serve on all known heirs, stated, "'[a]ny person objecting to that petition is hereby notified to file a brief written statement of his or her objection with the Clerk of Courts for the Mariana Islands District within 40 days of the date hereof.'" *Id.* at 2 (citation omitted). The record indicates that no objections to the petition were filed, but for reasons not readily apparent, it was not until July 10, 1973 that the court issued its oral judgment. However, this July 10, 1973

judgment was never reduced to writing. As such, title to the land remained recorded in the name of the De Castro heirs.

¶ 6 Then, on January 6, 1977, Micronesian Construction Company moved the court to enforce the minute order of July 10, 1973 which allegedly granted Norita's original Petition for Transfer of Ownership. Although the record is not explicit on this point, it appears that Micronesian Construction Company had by this time acquired some interest in the property described in Norita's petition, and sought court intervention to clear the title. Whatever the reason, the court agreed that judicial intervention was necessary, and on February 2, 1977 the court issued an order to all interested parties to show cause why the land subject to Norita's original Petition for Transfer of Ownership should not be transferred to Norita as previously ordered by the court on July 10, 1973. *In re Petition for Transfer of Ownership from Juan De Castro, Deceased*, Civ. No. 219 (Trust Territory High Court, Trial Division, Feb. 2, 1977) (Order to Show Cause).

¶ 7 This time the De Castro heirs responded. They first filed an objection to Micronesian Construction Company's petition to intervene and give effect to the 1973 minute order. They next filed a separate motion to be relieved from that 1973 minute order. The heirs' argument was premised on jurisdictional grounds (insufficient notice) and the fact that the land contained in Norita's original Petition for Transfer of Ownership was owned collectively by all the heirs. As such, it could not be transferred by any single heir acting in his or her individual capacity.

¶ 8 After the hearing the court denied the De Castro heirs relief from the July 10, 1973 minute order. However, the judgment did not specify the terms of that minute order. Rather, the court simply affirmed the minute order and left its terms to be spelled

out by the victorious parties. In the court's own words, "it is determined that the Order of July 10, 1973, is valid and there is no legal reason to set aside or vacate said Order... If counsel for Juan Q. Norita and Jose C. Tenorio submit a written order formalizing the July 10, 1973, Order, it will be entered nunc pro tunc." *In re Petition for Transfer of Ownership from Juan De Castro, Deceased*, Civ. No. 219 (Trust Territory High Court, Trial Division, Feb. 2, 1977) (Order Denying Motion for Relief from Order). Counsel for Jose C. Tenorio, whose interests appear aligned with those of Micronesian Construction Company, did just that, and counsel for Juan Q. Norita signed his approval.

¶ 9 Although the Judgment Nunc Pro Tunc clearly settled the matter as to the property conveyed by Jose Castro, the order's relevance to the other two parcels is ambiguous. It states:

> This Court...entered its judgment granting the petition herein and ordered counsel for the petitioner to draft a proposed judgment transferring the property herein from Juan De Castro to Juan Q. Norita.
> ...
> It is HEREBY ORDERED, ADUDGED and DECREED that the petition of Juan Q. Norita for the transfer of the land situated in Chalan Kanoa, Saipan, Northern Mariana Islands, identified as EA No. 743-3 of 4 [that parcel conveyed by Jose Castro] is hereby granted and the Bill of Sale dated December 16, 1966 in favor of Juan Q. Norita, executed by Jose C. Castro is hereby declared valid and that the same deed legally transferred to Juan Q. Norita the land identified herein above.

Judgment Nunc Pro Tunc at 2-3. The record does not explain why only one of the three properties described in Norita's petition was expressly mentioned.

B. The Current Action

¶ 10 The current case comes before the court in the form of a boundary dispute. In 1986, Norita built a two-story building on the parcel of land he purchased from Maria

Castro. In 1997, Appellee Chang leased the adjoining property, which was originally part of the De Castro estate as well. According to the lease agreement, the rent for the entire term of fifty-five years was $100,000. Payment was to be made as follows: $60,000 on the date of signing and the remaining $40,000 to be paid after the lessor cleared title to the land against the encroaching landowner (Norita) by means of a court order of eviction. Further, the lease provided that Chang could terminate the agreement if the "[l]essor fails to get a court order evicting the neighboring landowner who has encroached on the leased premises." Norita's alleged encroachment was based on a probate order entered a few years prior to this lease.

¶ 11 Although the 1973 Judgment Nunc Pro Tunc transferred at least one parcel of the De Castro estate to Norita, the majority of the estate remained in the name of the heirs collectively. This situation eventually caused the administratrix for the Juan De Castro estate to petition the court for a partial distribution.[1] A hearing on the matter was held on September 18, 1990 and the court granted the partial distribution. In doing so, the court found "that the heirs have mutually agreed to confirm the distribution of the assets in accordance with the partida distribution effectively made by the decedent during his lifetime..." *In re Estate of Juan De Castro, Deceased*, Civ. No. 88-875, (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution, p. 4). Further, the court found that Maria Castro's share of the estate was "Lot EA 743-1-4 as shown on DLS 2065/86, containing 1,235 square meters, more or less..."[2] *Id.* at 7. All parties agree that this

[1] It should be noted that Norita filed a claim against the Juan De Castro estate to secure his interest in the properties purchased from its heirs. As the court notes, however, "Mr. Juan Narita (sic) has withdrawn his claims against the estate upon oral stipulation that he would file his claims against the separate estates of Rita C. Castro, Maria C. Castro, and Antonio C. Castro." *In re Estate of Juan De Castro, Deceased*, Civ. No. 88-875, (N.M.I. Super. Ct. Sept. 26, 1990) (Decree for Partial Distribution, p. 9-10).

[2] Another parcel was also awarded to Maria Castro, but it is immaterial here.

parcel is what Maria Castro attempted to transfer to Norita in 1967. However, the documents evidencing the sale, as well as Norita's Petition to Transfer Ownership, describe the parcel as 80' x 200'. The discrepancy between these two figures – between the parcel as defined in the Decree for Partial Distribution (1,235 square meters) and the parcel purportedly conveyed by Maria Castro in 1967 (which equals approximately 1,487.2 square meters) – forms the basis for the present appeal.

¶ 12 Chang argued at trial that the parcel described by the Decree for Partial Distribution defined the entire property interest Maria Castro owned. Since it is a basic principle of property law that one can only transfer the interest one owns, Maria Castro was only able to convey to Norita that property described in the Decree for Partial Distribution. Norita, by contrast, argued that the 1973 minute order granted his original 1967 Petition for Transfer of Ownership, which defined the property conveyed by Maria Castro as 80' x 200'. He claims the minute order is *res judicata* as to any further litigation on the parcel transferred to him by Maria Castro.

¶ 13 The trial court agreed with Chang:

> At the time she transferred her property to the Defendant, Maria C. Castro only held an interest in the 1,235 square meters comprising Lot E.A. 743-1-4 as an heir of [Juan] De Castro. This court therefore holds that regardless of the measurements of the property set forth in Maria C. Castro's Statement..., to the extent that the [Norita] acquired any property, he could have only acquired the 1,235 square meters comprising Lot E.A. 743-1-4.
>
> Contrary to the position advanced by the Defendant, principles of *res judicata* are entirely consistent with this result... The doctrine bars a party from re-litigating a matter that the party has already litigated and from re-litigating a matter that the party had the opportunity to litigate in a prior case. Although the minute order in Civil Action 219 apparently granted Defendant's request to transfer, the cardinal feature of *res judicata* is a final judgment disposing of the claim. Accordingly, principles of *res judicata* are of no help to the Defendant here.

> The only final judgment entered in Civil Action 219 is the Judgment *Nunc Pro Tunc*, and it fails to address the parcel in question.

Order and Decision at ¶¶ 22-23. (citations omitted).

II.

¶ 14 This Court has jurisdiction to hear appeals of final judgments entered by the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code.

III.

¶ 15 Norita raises four issues on appeal. First, are Chang's claims against him barred by the doctrine of *res judicata*? Second, was the evidence sufficient as a matter of law to sustain the judgment? Third, did Chang fail to join all necessary parties? And fourth, did the trial court err in granting damages in favor of Chang, and was the trial court's determination and calculation of damages clearly erroneous?

A. Chang's Claim is Barred to the Extent it Seeks to Relitigate the Dimensions of Norita's Property

1. Res Judicata Requires a Valid Final Judgment

¶ 16 *Res judicata*, in its most basic form, stands for the proposition that once a valid judgment has been entered, the parties may not relitigate those claims actually decided or which should have been brought. RESTATMENT [SECOND] TORTS, §§ 18, 19. Additionally, in any subsequent litigation, parties are bound by each issue decided if the determination of that issue was necessary to the previous action's outcome. *Id.* at § 27. Although *res judicata* does not limit a party's ability to appeal, after those appeals have

been exhausted, or after the time to appeal has past, the court's decisions may no longer be challenged on the merits. This doctrine embodies the important policy that recognizes litigation must come to an end, and when that end occurs, the parties are forever bound by the outcome. Of course *res judicata* is not without qualifications. The main one being that the forum's jurisdiction must be proper. This court has adopted as its general rule:

> ...when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.

Santos v. Santos, 3 N.M.I. 39, 48 (1992) (internal citations omitted).

¶ 17 In the current action, the trial court found the Judgment Nunc Pro Tunc to be final. Thus, "absent fraud or some other factor invalidating the judgment," it would be *res judicata* as to those issues brought or which should have been brought in Civil Action 219. Accordingly, the trial court based its finding on its determination that "[t]he only final judgment entered in Civil Action 219 is the Judgment *Nunc Pro Tunc*, and it fails to address the parcel in question." Order and Decision at ¶ 23. Assuming that the Judgment Nunc Pro Tunc was a valid court order, the trial court was correct to confine its analysis to the judgment's terms. However, if the Judgment Nunc Pro Tunc is invalid – if it is void – then it is a nullity with no *res judicata* effect.

¶ 18 Although valid final orders are unassailable by subsequent litigation, void judgments do not enjoy such protections. Rather, they may be collaterally attacked at any time. *Bliss v. De Long*, 81 Cal.App.2d 559, 563 (1947) ("...if the record indicates that the court had no jurisdiction to make the order, then it is void and can be attacked at any

time...") (citation omitted); *see also Valley Nat. Bank of Arizona v. Meneghin*, 634 P.2d 570, 575 (Ariz. 1981) ("Only judgments rendered without subject matter or personal jurisdiction or those the court has no power to make in a particular case before it are subject to collateral attack.") (citations omitted).

¶ 19 The Judgment Nunc Pro Tunc herein is entitled to *res judicata* effect only if it is a valid judgment. Specifically, it must have been rendered with proper jurisdiction. The burden of proof falls on the party attacking the judgment. *Cook v. Cook*, 342 U.S. 126, 128, 72 S.Ct. 157, 159, 96 L.Ed. 146 (1951). This burden is a heavy one. *Id.* When a court of record enters a judgment, a presumption of valid jurisdiction attaches to the proceedings. *Id.* However, this presumption can be defeated by a contrary showing, based on extrinsic evidence or the record itself. *Id.*, *see also Young's Estate Metropolitan Trust Co. v. Young*, 414 Ill. 525, 535 (1953) ("The success of a collateral attack upon a judgment generally depends on a record showing lack of jurisdiction.") (citations omitted). Thus, this court will uphold the trial court's determination that the Judgment Nunc Pro Tunc was the controlling final order in Civil Action 219 unless Norita is able to demonstrate that the Judgment Nunc Pro Tunc was not a valid exercise of judicial authority.

2. Limitations on Nunc Pro Tunc Judgments

¶ 20 Nunc pro tunc judgments conform the record to what was actually ordered. The term is Latin, meaning "now for then." *See Black's Law Dictionary* 1069 (6th ed.1990). Most, if not all, jurisdictions recognize the power of a court to make after the fact modifications in certain instances. However, the authorities are not uniform regarding the exact circumstances justifying the exercise of such power:

> Like many other concepts in law wrongly assumed to have a fixed meaning, nunc pro tunc is a somewhat loose concept...used somewhat differently by different courts in different contexts...[I]t is a phrase typically used by courts to specify that an order entered at a later date should be given effect retroactive to an earlier date – that is, that it should be treated for legal purposes *as if* entered on the earlier date.

Fierro v. Reno, 217 F.3d 1, 4-5 (1st Cir. 2000) (citation omitted) (emphasis in original).

¶ 21 The limited power of a tribunal to alter the record retroactively has been recognized by the United States Supreme Court as early as 1829, *Bank of Hamilton v. Dudley's Lessee*, 27 U.S. 492, and today is widely viewed as an inherent power of the court. *Simmons v. Atlantic Coast Line R. Co.*, 235 F.Supp. 325, 330 (D.C.S.C. 1964) ("The Latin Phrase, 'nunc pro tunc' is merely descriptive of the inherent power of a court to make its records speak the truth, i.e., to record that which is actually, but omitted to be recorded."); *Escobar v. Escobar*, 711 S.W.2d 230, 231 (Tex. 1986) ("...the trial court has plenary power to correct a clerical error made in *entering* final judgment.") (citation omitted) (emphasis in original); *Hobsen v. Dempsey Construction Co.*, 7 N.W.2d 896, 899 (Iowa 1943); ("Ohio courts, in common with courts of other jurisdictions, recognize their inherent common-law power to make entries nunc pro tunc to record judicial action previously and actually taken.")

¶ 22 Nunc pro tunc judgments give the court a mechanism to correct errors in the record. It necessarily follows, then, that an inherent limitation on nunc pro tunc orders is that they may only be used to conform the record to what actually happened. They may not change the record in any other fashion. When acting nunc pro tunc "the court may not do more than make its records correspond to the actual facts; it cannot under the guise of amending a minute entry correct any judicial error it may have made, or cause an order or judgment that was never in fact made to be placed of record." *Rae v. Brunswick Tire*

Corp., 40 P.2d 976, 979 (Ariz. 1935). This concept of limited revision manifests itself in the distinction between clerical mistakes, which can be corrected, and judicial mistakes, which cannot. Clerical mistakes are those where the record does not match the actual proceedings; whereas judicial mistakes refer to misstatements of law or fact which actually occurred. However, this difference is not predicated on the person making the mistake, but rather on the nature of the mistake itself. Indeed, "'the distinction does not depend so much upon the person making the error as upon whether it was the deliberate result of judicial reasoning and determination, regardless of whether it was made by the clerk, by counsel or by the judge.'" *Hubbard v. Hubbard*, 324 P.2d 469, 472 (Or. 1958) (*quoting* 1 FREEMAN ON JUDGMENTS, 5th Ed., 284 § 146).

¶ 23 The Texas Supreme Court has simplified the clerical versus judicial mistake reasoning by focusing on the timing of the alleged error. Specifically, Texas courts look to whether the mistake was made during the rendering or during the entering of the order. "Rendering" refers to the process by which the judge pronounces her decision. "Entering" refers to the process of recording the decision the judge rendered. Thus, "[a] judicial error is an error which occurs in the *rendering* as opposed to the *entering* of a judgment." *Escobar v. Escobar*, 711 S.W.2d at 231. (citations omitted) (emphasis in original). And, "the trial court has plenary power to correct a clerical error made in *entering* final judgment. However, the trial court cannot correct a judicial error made in *rendering* a final judgment." *Id.* (citations omitted) (emphasis in original).

¶ 24 A nunc pro tunc judgment which attempts to alter a judicial decision is void. Since the merits of the case have been decided, and are not before the court, any modification of the judgment would fail for lack of subject matter jurisdiction. *See*

RESTATEMENT [SECOND] OF JUDGMENTS §11 ("A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action."); *see also* cmt. e. ("There is a strong tendency in procedural law to treat various kinds of serious procedural errors as defects in subject matter jurisdiction.")

3. The 1973 Minute Order is the "Final Order"

¶ 25 In reviewing the Judgment Nunc Pro Tunc, we must determine first whether the court was attempting to correct a clerical or a judicial error. Since this is a matter of legal classification, we review it *de novo*. *LaGoye v. Victoria Wood Condominium Association*, 112 S.W.3d 777, 783 (Tex. Ct. App. 2003) ("Whether an error in a judgment is judicial or clerical is a question of law and the trial court's finding in this regard is not binding on a appellate court.") (citation omitted). *See also Hofscheider v. Hofscheider*, 4 N.M.I. 277 (1995) (Legal classification is matter of law reviewable *de novo*; dealing specifically with property classification.) If the trial court was attempting to modify a judicial error, the nunc pro tunc judgment is void. If it modified a clerical error, it is valid so long as other jurisdictional elements are satisfied.

¶ 26 The Judgment Nunc Pro Tunc states in relevant part:

> This Court...entered its judgment granting the petition herein and ordered counsel for the petitioner to draft a proposed judgment transferring the property herein from Juan De Castro to Juan Q. Norita.
>
> ...
>
> It is HEREBY ORDERED, ADUDGED and DECREED that the petition of Juan Q. Norita for the transfer of the land situated in Chalan Kanoa, Saipan, Northern Mariana Islands, identified as EA No. 743-3 of 4 is hereby granted and the Bill of Sale dated December 16, 1966 in favor of Juan Q. Norita, executed by Jose C. Castro is hereby declared valid and that the same deed legally transferred to Juan Q. Norita the land identified herein above.

Judgment Nunc Pro Tunc at 2-3. The quoted text is susceptible to at least two readings. 1) The court granted the petition in full, transferring all three parcels, but for whatever reason only specifically addressed the one parcel. 2) The court granted the petition only as to the single parcel mentioned.

¶ 27 The record clearly indicates that all three properties described in Norita's original 1967 Petition for Transfer of Ownership were before the court in 1973, when the matter was initially decided. Although the transcript of that proceeding was lost, we can determine its broad contours by reference to the later proceedings. In 1977 the trial court was moved to force compliance with the minute order rendered orally in 1973. In response the court issued an order requiring all interested parties to show cause if there was any reason why the transfer should not be ordered. In that Order to Show Cause, the Court specifically notes: "it appears the [1973] trial court entered an oral order approving the sale of certain *parcels* of land subject to the estate of Juan Q. Norita." *In re Petition for Transfer of Ownership from Juan De Castro, Deceased*, Civ. No. 219 (Trust Territory Trial Ct. Feb. 2, 1977) (Order to Show Cause) (emphasis added). By the court's use of the plural "parcels," it is evident that there were multiple properties transferred in 1973. The De Castro heirs also recognized this. In their Objection to Intervene and Compliance with Court Order, filed in response to the court's Order to Show Cause, the heirs reference all three properties using the same language as found in Norita's petition.[3] Also, in their Affidavit in Support of Motion for Relief from Minute Entry Order, the heirs acknowledge that there were "properties" – plural – which formed "the subject

[3] Specifically, the heirs note the action is in reference to: "...the property described in that Bill of Sale dated January 3, 1967 and more particularly... [the land conveyed by Jose Castro] and that 160' x 80' parcel of land conveyed by Rita C. Castro to Juan Q. Norita dated February 5, 1967 and that 80' x 200' parcel of land conveyed by Maria C. Castro to Juan Q. Norita, dated February 5, 1967."

matter of this proceedings." Most importantly, the court implicitly ruled that Norita's petition was granted in full in 1973. The court stated:

> After considering the testimony, the docket in this case and the arguments of counsel, it is concluded that the July 10, 1973, docket entry is in fact a Court Order even though the Petitioner's counsel did not prepare a formal order.
>
> Sufficient notice was given pursuant to the prior Court Order in this matter, and the Court in issuing its July 10, 1973, Order implicitly found that due notice and compliance with the prior Order was sufficient. Therefore, it is determined that the Order of July 10, 1979 is valid and there is no legal reason to set aside or vacate said Order.

In re Petition for Transfer of Ownership from Juan De Castro, Deceased, Civ. No. 219 (Trust Territory Trial Ct. March 9, 1979) (Order Denying Motion for Relief from Order). The De Castro heirs objected to the 1973 minute order due to lack of notice. However, the court found the notice requirements were satisfied. Thus, it follows that Norita's 1967 petition was granted in full, if for no other reason, because it went uncontested. The De Castro heirs did not object at the proper time, the court granted the petition in 1973, and the court upheld that order against jurisdictional objections in 1979. Based on this reasoning, we find that the 1973 minute order granted Norita's Petition to Transfer Ownership in full, thereby transferring each parcel according to its description in the petition. This includes the parcel from Maria Castro defined as 80' x 200'.

¶ 28 Since we have determined Norita's Petition to have been granted in full, we need not address the wording of the Judgment Nunc Pro Tunc. Regardless of whether it purports to transfer all three properties or just one, the result here is the same. If it transferred all three, then the Judgment Nunc Pro Tunc is an accurate reflection of the final order and is *res judicata* as to the dimensions of the property conveyed by Maria Castro. If the judgment attempted to transfer just one parcel, then the Judgment Nunc

Pro Tunc is void for lack of subject matter jurisdiction. The court did not have jurisdiction to relitigate the matter, only to enter the judgment as previously rendered. In this second instance the 1973 Minute Order would be the final order and, again, Civil Action 219 is *res judicata* as to the dimensions of the land conveyed by Maria Castro.

¶ 29 Although we find that Civil Action 219 is *res judicata* as to the dimensions of the property owned by Norita, that does not resolve the dispute here. We are dealing with an issue of boundaries, and that was not addressed in Civil Action 219. As such, we remand this issue for the trial court to determine the boundaries of Norita's 80' x 200' parcel.

¶ 30 We realize that our decision has the unusual effect of abstracting a property's measurements from its location. By leaving the trial court to affix the boundaries of a parcel whose dimensions are set, we have, in essence, divorced meets from bounds. Further, we understand Chang's argument that regardless of the Trust Territory High Court's decision, Maria C. Castro was unable to transfer more property than she owned. Indeed, we agree that if this case presented the simple issue of determining what Maria C. Castro owned prior to transfer, our approach here would be unwarranted. The facts before us, however, do not lend themselves to such an easy disposal. Rather, the key to this case lies in the fact that Maria C. Castro's exact property interest was not adjudicated until many years after she transferred much of that interest to Norita. Equally as important, at the time of that transfer to Norita, no clear boundaries had been set dividing Juan De Casto's land between his heirs. The transfer was originally upheld by the Trust Territory High Court, however, because each of Juan De Castro's heirs, who held the remaining interests in this same property, acquiesced to a specific amount (80 feet by 200 feet) being transferred to Norita. To reduce these dimensions now would provide an

unfair windfall to those heirs. The trial court is in the better position to determine where the parties' intended that 80 feet by 200 feet to lie. As such we decline to do so now.

B. Sufficiency of evidence

¶ 31 Since we reverse the trial court's decision that the parcel conveyed by Maria Castro contained an area of 1,235 square meters, we need not address this issue.

C. Joinder of necessary parties

¶ 32 We review whether a person is an indispensable party to litigation *de novo*. *Aquino v. Tinian Cockfighting Bd.*, 3 N.M.I. 284, 292 (1992). Norita asserts that the trial court's judgment is void because Chang failed to join the heirs of Pangelinan, who claim ownership of the land. To support his contention, Norita relies on *Johnston v. White-Spunner*, 342 So. 2d 754 (Ala. 1977), but the issue in that case is distinctly different from the one before us.

¶ 33 *Johnston* related to a boundary dispute that affected sixteen lots in a subdivision. The *Johnston* court determined that adjusting the boundaries to sixteen lots would affect the owners of all of the lots, and it was error to reapportion the land without having jurisdiction over all parties having an interest in the remaining lots in the subdivision. *Id.* at 759. By moving the boundaries in their decree, the court held that "owners of that property to the North, to the South, and to the West, upon which the newly established boundary lines impinge, are proper and indispensable parties to this action and must be joined if the decree is not to be void." *Id.* Thus, joinder of adjacent property owners is necessary in actions that affect title and ownership of the land at issue.

¶ 34 Here, we are not faced with an action to quiet title, nor do we need to determine a claim of ownership in the heirs of Pangelinan. In this action, Chang, as a lessee, is seeking relief for injury to his possession of the land, caused by the encroachment.

¶ 35 In cases of encroachment and trespass involving leased land, it has long been settled that the lessor and the lessee have different causes of action against the trespasser. Damages for entry and injury to the possessory interest may be recovered only by the tenant, while damages for loss of value to the reversion resulting from injury to the freehold may be recovered from the landlord. *See, e.g., Flowers Lumber Co. v. Bush*, 89 S.E. 344 (1916); *Int'l & Great N. Ry. Co. v. Ragsdale*, 2 S.W. 515, 518 (Tex. 1886) *overruled on other grounds by In re J.T.H.*, 630 S.W.2d 473, 476 (Tex. Ct. App. 1982); *Beakly v. Board of Chosen Freeholders*, 80 A. 457, 458-59 (N.J. 1911) (recovery for injury resulting from deprivation of possession cannot be by the landlord, but must be by the tenant in possession, applicable when trespass commences before lease was made).

¶ 36 The right to recover for the injury to his possessory interest caused by the encroachment rests solely in Chang. Joining the owner of the land is not necessary and certainly failure to do so is not fatal to the lessee's cause of action. In fact, it is a common practice for a lessee to proceed with an action to recover damages to a possessory interest without joining the lessor. J.E. MACY, Annotation, *Remedy of Tenant Against Stranger Wrongfully Interfering with His Possession*, 12 A.L.R. 2d 1192 (1950) (*citing Strohlburg v. Jones*, 20 P. 705 (Cal. 1889)) ("the lessee, usually without joining the lessor, may recover the value of his unexpired term"). *See also, e.g., Petroleum Exploration v. White*, 34 S.W.2d 738 (Ky. 1931) (settlement by landowner and tortfeasor did not affect right of lessee to bring suit against tortfeasor).

¶ 37 For these reasons, we cannot agree with Norita that the judgment must be void because he failed to join the heirs of Pangelinan in this action. On the contrary, Norita and Chang are the only necessary parties for this action seeking to remedy an injury to the possession of the land caused by the encroachment.[4] Thus, the proper parties were joined in this action and the trial court's judgment does not fail on these grounds.

D. Damages

¶ 38 Since it is not clear that there was any encroachment and this issue is remanded for the trial court to determine the issue of encroachment consistent with this opinion, we also reverse at this time the trial court's award of damages. In the interest of judicial expediency, however, the proper method of calculating damages is described *infra* in the event that the trial court finds an encroachment upon remand.

¶ 39 The trial court set forth two different measures of damages. At first, it asserted that the measure of the damages is "the difference in fair market value before and after the occurrence of the trespass, or the value of the land on which the encroaching structure sits." Order and Decision at 15. Then it concluded that the "proper measure of damages in this case is the difference between the value of the property with the encroachment and its value without the encroachment." *Id.* It is unclear how the change in the standard occurred.

¶ 40 The trial court cited *Kratze v. Independent Order of Oddfellows, Garden City Lodge No. 11*, 500 N.W.2d 115 (Mich. 1993), a case similar to the case at bar and useful in this analysis. *Kratze* involves a case of unintentional encroachment. Having balanced

[4] As mentioned *supra*, the landowners/lessors have a different cause of action arising from the injury to their freehold. Since this is not an action to quiet title, we will not address that issue at this time.

the equities in that case, the *Kratze* court ruled that an injunction would be inappropriate and then turned to an award of damages. *Id.* at 122. The discussion of damages in *Kratze* is instructive.

¶ 41 It should first be noted that *Kratze* never mentions "fair market value" in its discussion of damages. Norita correctly points out that there was no evidence of the fair market value presented at trial. Since the trial court used both "fair market value" and then "value" in the same discussion, we believe that the trial court meant to use the terms interchangeably. Thus, although there was no evidence of fair market value of the land, none was needed, as that is an incorrect valuation of the land in an encroachment action. The correct valuation of land in an encroachment action involves many factors including the duration and type of encroachment.

¶ 42 Whether or not the encroachment is continuing or permanent will determine the appropriate award of damages. *See Beck Dev. Co. v. S. Pac. Transp. Co.*, 52 Cal Rptr.2d 518, 556 (Cal. Ct. App. 1996) (permanent injury to property permits recovery for past and prospective damages, whereas prospective damages are unavailable for injury from a continuing trespass). In *Estate of Taisacan*, 4 N.M.I. at 30, we defined an encroachment as a continuing trespass or nuisance. This definition is incomplete as applied to the facts of this case. Where a wrong consists of an unintentional encroachment, "and which is abatable, the law does not presume that such an encroachment will be permanently maintained. The maintenance of such an encroachment is a continuing trespass or nuisance . . . and every continuance thereof amounts to a new nuisance, for which successive actions will lie." *Kafka v. Bozio*, 218 P. 753, 755 (Cal. 1923) (citation omitted). "Where the trespass 'is physically permanent or likely to continue indefinitely,'

it is apt to be deemed permanent." *Kratze*, 500 N.W.2d at 122-23 (citation omitted). This does not mean that the source of the injury must last forever, but that it seems "likely to continue without any clear stopping point." *Id.* at 123 (citation omitted). Furthermore, physical permanence alone does not justify the classification of a trespass as permanent. The trespass must also be "legally permanent, in the sense that courts will not require its removal." *Id.* (citation omitted).

¶ 43 In the present case, the alleged encroaching structure is a building on the land possessed by Chang. Norita built the structure eleven years prior to this suit and there is no evidence that it is in poor condition. Thus, the building is physically permanent in that it is "likely to continue without any clear stopping point." Further, it is legally permanent because the trial court did not require its removal.

¶ 44 The trial court correctly characterized the measure of damages as determined by *Kratze*. For permanent trespass, "the correct measure of damages is the diminution in value of the property itself as represented by the value of the property without the encroachment, minus the value of the property with the encroachment or, alternatively, the value of the strip of land on which the building sits." *Id.*

¶ 45 For the following reasons, the trial court should apply the latter alternative; namely, damages for this alleged encroachment are equal to the value of the strip of land on which the building sits. Chang knew of the alleged encroachment before entering into the lease. The existence of the alleged encroachment was recognized and provided for in the lease. Similarly, in *Kratze*, the plaintiff paid the asking price for the property even after he was made aware of the encroachment. Where there is a pre-existing encroachment and the injured party was aware of the encroachment before entering into a

contract for the property, the encroachment does not devalue the property. *Id.* Thus, the injured party should only recover the value of the strip of land on which the structure is located, rather than the value of the rest of the property that he still has the benefit of using. *Id.*

¶ 46 The trial court determined that the area of the alleged encroachment consisted of 144 square meters, which amounted to 11.673 percent of Chang's leasehold interest. Finding that the rent of the entire term of the lease amounted to one hundred thousand dollars ($100,000.00), the court apparently divided the amount of the lease by the portion of land that was allegedly encroached upon to determine the value of the land after the encroachment. The trial court, therefore, ruled that "$11, 673.00 would be fair and just compensation for the encroachment." Order and Decision at 16.

¶ 47 As explained *supra*, however, the proper determination of damages in this case in which the alleged encroachment is permanent is the value of the land on which the encroachment sits. The aggrieved party has the burden of proving damages in an encroachment action, thus the burden is on Chang to prove damages caused by the alleged encroachment. *See Moyerman v. Glanzberg*, 138 A.2d 681, 685-86 (Pa. 1958). The record before us shows that neither litigant provided any specific evidence regarding the value of the strip of land upon which the building allegedly encroached. Thus, the determination of damages is remanded to the trial court consistent with this opinion.[5]

[5] As explained *supra*, this is only necessary if the trial court finds that the building on Lot E.A. 743-1-4 encroaches on Lot E.A. 743-1-3.

IV.

¶ 48 *Res judicata* bars the parties from relitigating the size of the parcel conveyed by Maria Castro. The boundaries, however, have not been established. Thus, the trial court shall determine the boundaries of this 80' x 200' parcel and, thereby, determine if Norita's building encroaches onto Chang's property. The only necessary parties for this action, were correctly found by the trial court to be Norita and Chang. If on remand the trial court determines that there is an encroachment, the damages shall be calculated by the trial court consistent with this opinion.

¶ 49 Therefore, the trial court's *Order and Decision Following Trial* is AFFIRMED in part and REVERSED in part and is REMANDED for further proceedings consistent with this decision.

¶ 50 DATED THIS _____ DAY OF FEBRUARY 2006.

VIRGINIA S. ONERHEIM
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
Justice *Pro Tempore*

FRANCES M. TYDINGCO-GATEWOOD
Justice *Pro Tempore*

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¶ 49 Therefore, the trial court's *Order and Decision Following Trial* is AFFIRMED in part and REVERSED in part and is REMANDED for further proceedings consistent with this decision.

¶ 50 DATED THIS 3rd DAY OF FEBRUARY 2006.

VIRGINIA S. ONERHEIM
Justice *Pro Tempore*

F. PHILIP CARBULLIDO
Justice *Pro Tempore*

FRANCES M. TYDINGCO-GATEWOOD
Justice *Pro Tempore*

LRC

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

IN SIK CHANG,

Plaintiff-Appellee,

v.

REMEDIO M. NORITA, PERSONAL REPRESENTATIVE, AND ADMINISTRATOR OF THE ESTATE OF JUAN Q. NORITA *(Deceased).*

Defendant-Appellant.

SUPREME COURT APPEAL NO. 01-0013-GA
SUPERIOR COURT CIVIL ACTION NO. 97-0846-D

JUDGMENT

¶ 1 THIS CAUSE came on to be heard from the Commonwealth Superior Court and was duly argued and submitted.

¶ 2 Accordingly, the trial court's Order and Decision Following Trial is AFFIRMED in part; REVERSED in part; and is REMANDED for further proceedings consistent with the decision of this Court.

Entered this 3 day of February 2006.

CRISPIN M. KAIPAT
Clerk of Court