FOR PUBLICATION

Appeal No. 99-034

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

YOUNG JO CHO,
Plaintiff/Appellee,

v.

MIN WA CHO, MIN BO CHO, et al.,
Defendants/Appellants.

OPINION and ORDER

Cite as: *Cho v. Cho*, 2002 MP 24

Civil Action No. 98-0524B
Argued and Submitted November 11, 2001
Decided November 20, 2002

Counsel for Appellants:
Reynaldo O. Yana, Esq.
P.O. Box 500052
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For Appellee:
None

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

DEMAPAN, Chief Justice:

¶1 Appellants, Min Wan Cho and Min Bo Cho ("the Chos" or "Appellants"), appeal the decision of the trial court granting Appellee, Young Jo Cho ("Young Jo"), punitive damages. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands and 1 CMC § 3102(a). We affirm the granting of punitive damages. Due to serious deficiencies in the Appellants' brief we also order appellant attorney to show cause as to why monetary sanctions should not be imposed.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1989, Young Jo leased Lot 008 H 19 ("Lot 19") from fee simple owner Francisco Q. Guerrero ("Guerrero"). On May 14, 1998, Young Jo filed a complaint for trespass and conversion against the Chos who leased a lot ("Lot 16") adjacent to his. Young Jo claimed that a two-story building constructed by the Chos sometime in 1993 extended approximately six square meters over the boundary of Lot 16 and onto Lot 19.

¶3 In his complaint Young Jo made the following claims:

> 25. Guerrero complained and objected to the encroachment during the initial stages of construction and warned [Joseph A. Reyes ("Reyes"), owner in fee simple of Lot 16] on a number of occasions that he needed to inform his tenant that the structure might be encroaching and if so that [the encroaching portion of the building] needed to be moved.
>
> 26. [Reyes] told to Guerrero that he told his tenant to remedy the problem. [sic]
>
> 27. Despite these repeated warnings construction on the building continued and the encroaching structure was completed.

> 28. Young Jo did not know of the existence of the encroachment until 1996 when he went to erect a second story to the building that was located on his property—Lot 19. At that time a surveyor's report performed in conjunction with [the building of the second story] confirmed that an encroachment existed

Excerpts of Record ("ER") at 10. In their answer to Young Jo's complaint, the Chos admitted some allegations, denied others (including Nos. 25-27), and claimed to have no knowledge of the rest (including No. 28).

¶4 The Chos' answer also included their assertion of an affirmative defense of promissory estoppel. The Chos' claimed that both Guerrero and Young Jo were present during the construction of the building on Lot 16 but that neither complained of an encroachment at that time. According to the Chos, even if their building was in fact encroaching on Lot 19, they had detrimentally relied on Young Jo's silence and therefore Young Jo should be estopped from making his claim.

¶5 On July 13, 1998, Young Jo filed a request for admissions. Included in this filing was the request that the Chos deny or admit:

> 1. That [they] entered [Lot 19] without permission in 1993.
>
> 3. That [they] built a portion of your building on [Lot 19].
>
> 4. That [they] intended to enter [Lot 19] in 1993.
>
> 7. That [they] entered [Lot 19] willfully, intentionally, and with wanton disregard for the plaintiff's rights.

ER at 20.

¶6 Young Jo's request for admissions went unanswered and on October 6, 1998, he filed a motion for partial summary judgment. The motion rested on the constructive admissions made by the Chos for its sole factual basis. On November 25, 1998, the court

granted Young Jo's motion for partial summary judgment leaving the fact finder to decide the remaining issue of damages.

¶7 The Chos failed to appear at the hearing on damages held on November 17, 1999.[1] At the hearing the court heard testimony from two witnesses, Young Jo and an expert on appraising damages. On November 22, 1999, the court issued an order allowing Young Jo to collect $58,000 in general damages and $50,000 in punitive damages. The Chos now timely appeal the trial court's order.

ISSUE AND STANDARD OF REVIEW

¶8 The sole issue before us is whether the trial court erred in awarding punitive damages based on facts deemed admitted when the Chos failed to respond to Young Jo's request for admission.[2] On appeal, a trial court's award of punitive damages is reviewed under the abuse of discretion standard.[3] *Pangelinan v. Itaman*, 4 N.M.I. 114, 117 (1994).

[1] While not specifically mentioned by the Chos, it appears from the record that the hearing on damages was rescheduled at least once, if not several times, based on their request:

> **Mr. Wiseman** [attorney for Young Jo during the hearing on damages]: Your Honor, we're here today, if the court recalls, one of the defendants showed up last time about three months ago.
> **The Court**: Uh-huh.
> **Mr. Wiseman**: And wanted a continuance? A continuance was granted and they have yet to retain the services of an attorney or otherwise granting notice or anything to myself or to the court, so we're ready to proceed to trial today. And the trial today is only on the issue with respect to damages.

ER at 40.

[2] The Chos do not contest the grant of partial summary judgment or the amount of punitive damages assessed. The record before this court does not include the lower court's summary judgment order.

[3] In their brief, Appellants fail to state a standard of review. Instead, Appellants lead with the somewhat cryptic statement:

> Standard of review: The standard of review for issues of whether the court erred in granting the plaintiff's motion for punitive damages without any evidence of willful and wanton disregard of plaintiff's right. *La Bruno v. Lawrence*, 166 A2d 822 (NJ 1960). [sic]

Brief of Appellants at 1.

We find this omission disturbing. A failure to state a standard of review is a clear violation of Rule 28(a)(2) of the Commonwealth Rules of Appellate Procedure. While such a mistake might be tolerated if made by a pro se appellant, it will not be tolerated when made by a licensed attorney. We note the Commonwealth Rules of Appellate Procedure requirement, that attorneys include a standard of review for each issue presented in their briefs, is not an aesthetic one. To a large extent the standard of review determines the nature of both the arguments and evidence an attorney presents on appeal, and, in some

ANALYSIS

¶9 The RESTATEMENT (SECOND) OF TORTS states that punitive damages are only awarded when the trier of fact determines that a defendant's conduct was "outrageous because of defendant's evil motive or his reckless indifference for the rights of others." RESTATEMENT (SECOND) OF TORTS § 908(2) (1979). Without a showing of evil motive or reckless indifference, an award of punitive damages would be inappropriate. *Id.* at cmt. b. The Chos argue that there was no evidence before the trial court to support a finding that they acted with reckless indifference to Young Jo's rights. They also claim that the facts alleged in their affirmative defense demonstrate that their actions were not recklessly indifferent to Young Jo's rights.

1. Evidence supporting a finding that the Chos acted with reckless indifference was properly before the trial court.

¶10 According to the Commonwealth Rules of Civil Procedure, once a party is served with a written request for admissions, that party has thirty days to respond to each individually stated matter. Com. R. Civ. P. 36(a). Should the party fail to respond within thirty days, each matter is deemed admitted and considered conclusively established "for the purpose of the pending action only." *Id.*

¶11 From the record before us it appears that the only possible evidence relating to the character of the Chos' actions was their deemed admission that they "entered [Lot 19] willfully, intentionally, and with wanton disregard for [Young Jo's] rights." The Chos do not deny that they failed to answer Young Jo's requests for admissions. However, the Chos argue that the specific request that they admit or deny entering Lot 19 "willfully,

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cases, will determine whether an attorney chooses to bring an appeal at all. An attorney's failure to appreciate the applicable standard of review is a recipe for bringing frivolous appeals, which is what appears to have occurred in this instance. *See infra* at ¶ 18.

intentionally, and with wanton disregard for the Young Jo's rights" was improper, since it was conclusory, and therefore could not be considered as evidence by the court.[4] To support their contention the Chos cite *Hansen v. U.S.*, 7 F.3d 137 (9th Cir. 1993), as standing for the proposition that, "a party 'cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact.' 7 3d at 138." [sic]. Br. of Appellants.

¶12 The Chos' citation is taken out of context. The actual language of the *Hansen* decision reads, "[w]hen the **nonmoving party** relies only on its **own affidavits** to **oppose summary judgment**, it cannot rely on conclusory allegations unsupported by factual data to create an issue of material fact." *Hansen v. U.S.*, 7 F.3d at 137-38 (emphasis added). Setting aside the fact that Young Jo was the **moving party** who relied on **materials outside his own affidavits**, and that the Chos are **not contesting a grant of summary judgment**, we find the fatal flaw in the Chos' argument rests with their understanding of their own admissions as being "conclusory."

¶13 That the Chos behaved in a willful or wanton manner is a conclusion which must be based on certain underlying facts. *See Cortner v. National Cash Register Co.*, 262 N.E.2d 586, 588 (Ohio Ct. C.P. 1970) (Even statements "which would be considered [] statement[s] of fact in everyday conversation might, nevertheless, be considered [] legal conclusion[s] when used in connection with a legal proceeding if the truth of the fact stated is one of the ultimate issues to be determined in such proceeding."); *see also Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974) (mere conclusory allegations regarding discriminatory admissions not sufficient to defeat

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[4] The Chos do not contest that, if properly admitted, their deemed admissions are evidence that they acted either with evil intent or with reckless disregard.

motion for summary judgment). If Young Jo merely stated that the Chos behaved in this manner, it is not evidence supporting the allegation. Obliviously, Young Jo cannot say what went on inside the Chos' heads. *See Blegen v. Superior Ct.*, 178 Cal. Rptr. 470, 472 (Cal. Ct. App. 1981) ("The terms 'willful,' 'fraudulent,' 'malicious' and 'oppressive' are the statutory description of the type of conduct which can sustain a cause of action for punitive damages [under CAL. CIVIL CODE]. Pleading in the language of the statute is acceptable provided that sufficient facts are pleaded to support the allegations. The terms themselves are conclusory, however." (citations omitted)). However, Young Jo can attempt to present the facts that allowed him to draw his conclusion.

¶14 That the Chos made an admission, by failing to reply to the request for admissions, is a fact. The admission itself is not necessarily conclusive proof of the matter admitted, after all, it is the responsibility of the trier of fact, and not the Chos to determine whether their actions were willful and wanton. However their admission, that their conduct was willful and wanton, is a fact which may support the conclusion that they acted with an evil motive or with reckless disregard. *See Heinrich v. Sweet*, 62 F. Supp. 2d 282, 306 (D. Mass. 1999)("Testimony concerning conclusory admissions by a malpractice defendant may suffice to sustain a jury's finding of negligence if, from the admission, the jury 'could infer an acknowledgment of all the necessary elements of legal liability'." (citation omitted)).

¶15 The Chos have also argued that the facts alleged in their affirmative defense should have been considered by the trial court as evidence that they did not act with reckless disregard for the rights of the plaintiff. Again there is a misunderstanding over the nature of evidence. It is among the most basic principles of jurisprudence that the

mere assertion of a fact does not establish the existence of a fact. *See Mukhtar v. California State University*, 299 F.3d 1053 (9th Cir. 2002) (allegations are not evidence). *Also see Fed. Life Ins. Co. v. Roberts*, 216 P. 426 (Okla. 1923) (mere allegations of fraud are not evidence of fraud, instead, they raise issues of fact, which must then be proven). In their answer the Chos claimed that both Young Jo and Guerrero were present during the construction of the allegedly encroaching building but that both remained silent. The answer was not verified, nor did the Chos submit sworn affidavits supporting their claims. *United States v. 34.60 Acres of Land*, 642 F.2d 788, 790 (5th Cir. 1981) (an unverified answer is not evidence). In short, there is nothing in the record that could have transmuted the Chos assertions of facts into actual facts.

2. The trial court did not err in granting Young Jo's request for punitive damages based on the available evidence.

¶16 The standard of review in this case is quite steep. "A reviewing court must uphold an award of damages whenever possible and all presumptions are in favor of the judgment." *Bouman v. Block*, 940 F.2d 1211, 1234 (9th Cir. 1991). To successfully challenge the award, the Chos would have to show that it was unreasonable for the trial court to have found that their admission to acting recklessly, in the absence of any evidence to the contrary, proved their act was reckless.

¶17 Since the only evidence available to the court could reasonably be seen to suggest that the Chos acted willfully, intentionally and wantonly, and because there was no contradictory evidence presented to the trial court, it was not clearly an abuse of discretion for the court to reach its conclusion.

3. Prosecution of this Appeal

¶18 We once again find ourselves in the unpleasant position of publicly admonishing Appellants' counsel for his apparent arms length relationship with the rules of this Court.[5] The appellate advocacy evidenced in the brief submitted by counsel can, at best, be described as poor. Appellants' counsel has violated Com. R. App. P. 28(a)(2) (*See supra* n.3); misquoted case law so as to benefit his legal arguments (*See supra* ¶¶ 11, 12); and alternatively argued for the existence of evidence supporting his clients and the nonexistence of evidence weighing against his clients based on a faulty concept of what constitutes evidence. (*See supra* ¶¶ 13-15.) In addition to these more egregious errors counsel's appeal includes numerous spelling, grammatical, and formatting mistakes which, taken together, suggest a lack of any sort of precursory proofreading, on counsel's part, prior to filing. While it is possible that there may have been some issue presented in this case meriting appeal, it is our opinion that those brought forth by Appellants' counsel are entirely frivolous and his appeal sanctionable.

CONCLUSION

¶19 For the foregoing reasons, we hereby **AFFIRM** the trial court's award of punitive damages.

¶20 Furthermore, counsel for the Appellants is hereby ORDERED to show cause within thirty (30) days of the filing of this opinion, as to why he should not be sanctioned for violating Com. R. App. P. 38(b).[6]

[5] Appellants' counsel was also counsel of record in *Reyes v. Ebetuer*, 2 N.M.I. 421(1992), *Cabrera v. Ahn Yeong Mi*, 1997 MP 19, 5 N.M.I. 106, and *Sablan v. Blake*, 1998 MP 9, 5 N.M.I. 167. In *Reyes*, counsel was singled out by this Court and told that he "is expected to know all Commonwealth court rules." *Reyes*, 2 N.M.I. at 436 n.12. Counsel was also found to have filed frivolous appeals in both *Cabrera,* 1997 MP 19 and *Sablan*, 1998 MP 9.

[6] Appellants' counsel, not Appellants themselves, shall be liable for any sanction imposed.

SO ORDERED this 20th day of November 2002.

/s/ Miguel S. Demapan
MIGUEL S. DEMAPAN, Chief Justice

/s/ Alexandro C. Castro
ALEXANDRO C. CASTRO, Associate Justice

/s/ John A. Manglona
JOHN A. MANGLONA, Associate Justice