IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

MARIO PEDRO and
SATURNINA MARIO

Appellants,

v.

GEORGE RECHUCHER,

Appellee.

GEORGE RECHUCHER,

Cross-Appellant,

v.

MARIO PEDRO,
SATURNINA MARIO,
EDWIN MARIO, FRANK PEDRO,
FRAULEIN RENGIIL,
ESTATE OF BARBARA TELLEI, and
KOROR STATE PUBLIC LANDS
AUTHORITY,

Cross-Appellees,

CIVIL APPEAL NO. 15-015
(Civil Action No. 12-030 &
CP/CA 12-050)

OPINION

Decided: February 9, 2017

Counsel for Mario Pedro, Saturnina Mario, Edwin Mario, and Frank Pedro: Mariano W. Carlos
Counsel for George Rechucher: Siegfried B. Nakamura
Counsel for Fraulein Rengiil: Ronald Ledgerwood
Counsel for KSPLA: Natalie Durflinger

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN K. RECHUCHER, Associate Justice
R. BARRIE MICHELSEN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Associate Justice, presiding.

PER CURIAM:

This appeal involves a dispute over the right to occupy and use a parcel of land in Meketii Hamlet, Koror State. The land is owned by the Koror State Public Lands Authority ("KSPLA") and purportedly leased to Appellants Mario Pedro and Saturnina Mario.[1] Appellee George Rechucher maintains a warehouse on the parcel.

Pedro and Mario sued to eject Rechucher from the leased land and sought damages. Rechucher contended that he had been granted the right to construct the warehouse by a former lessee and sought restitution for the costs of construction. The Trial Division concluded that Pedro and Mario could eject Rechucher but that they had not proven damages. The Trial Division also concluded that neither Pedro and Mario nor KSPLA owed Rechucher restitution for his construction of the warehouse. For the reasons below, we **AFFIRM**.

BACKGROUND

KSPLA owns Lot Number 41347 (the "Lot") in Meketii Hamlet, Koror State. On February 28, 2000, KSPLA entered into a "Commercial Lease" for the Lot with Barbara Tellei (the "2000 Lease"). That lease was made for an initial term of twenty-five years. The lease provided that the Lot "shall be used only as commercial building" and that "[n]o other ventures, commercial, professional, or other business enterprises or activities shall, at any time, be conducted, allowed, or maintained by anyone on the premises unless KSPLA consents in writing." The lease required KSPLA's written consent prior to construction of any

[1] The Court understands from the briefing that Appellant Mario Pedro has passed away. It appears that his interests in this appeal are co-extensive with those of co-Appellant Saturnina Mario. No party has indicated any concern with resolving the appeal as if brought solely by Saturnina Mario. Accordingly, unless noted, this opinion proceeds as if she alone is prosecuting the appeal originally filed on both her and Pedro's behalf.

improvements on the Lot. The lease further prohibited Tellei from giving any license or easement on the Lot without KSPLA's "express prior written consent."

The lease did, however, specifically allow Tellei to assign her interests in the lease as security for a loan. On August 8, 2000, Tellei assigned her interests in the lease to the National Development Bank of Palau ("NDBP") to secure a $70,000 home loan. The loan documents, including the mortgage and promissory note, were signed by both Tellei and her daughter, Fraulein Rengiil. Tellei used the loan funds to build a house on the Lot.

At least initially, Tellei did little to utilize the Lot for any commercial purpose. Other than her new house, the Lot contained only an old concrete structure that had been severely damaged by a fire. At some point, Tellei began discussing uses for the structure with Eusebio Rechucher. Tellei was also in debt to Eusebio, having taken several personal loans from him over a period of time. The two eventually reached an understanding.

On October 4, 2001, Tellei and Eusebio signed an "Agreement Re: Grant of Use Right" (the "Use Agreement"). Under the Use Agreement, Tellei purported to grant Eusebio "the exclusive right . . . [to] use" the portion of the Lot with the concrete structure "for any purposes, commercial or otherwise" for a term of fifty years. In return, Eusebio agreed to pay Tellei rent once he had completed repairs to the concrete structure for some commercial use. Tellei entered the "Use Agreement" notwithstanding the fact that she had previously assigned her lease interest in the Lot to NDBP. Tellei also never obtained consent from KSPLA for the Use Agreement.

Eusebio died in December 2002, without having repaired the concrete structure. His son, Appellee George Rechucher, took over Eusebio's business affairs. Rechucher was initially unaware of the existence of the Use Agreement. At some point in 2004 or 2005, Tellei obtained

a KSPLA building permit in her name and arranged for Rechucher's company, PIDC, to renovate the concrete structure on the Lot. During this time, Rechucher became aware of the Use Agreement. Although Tellei also provided him with a copy of her lease with KSPLA, Rechucher apparently did not read it and was unaware that Tellei had not obtained KSPLA's consent to the Use Agreement. Rechucher also learned of the various loans that his father had extended to Tellei. Tellei continued to borrow money from Rechucher, as she had from his father, primarily to cover medical bills.

In 2006, Rechucher finished renovating the concrete structure to serve as a warehouse. He also placed a 40-foot container on the Lot. Rather than pay Tellei the rent envisioned by the Use Agreement, Rechucher instead periodically credited an amount equal to the rent against Tellei's outstanding debts to him and his company. For a few years, Rechucher used the warehouse and container on the Lot for commercial purposes.

Tellei died in May 2008. At the time, she was married to Ernest Skilang. Skilang and Tellei's daughter, Rengiil, were apparently unable to reach an agreement concerning the mortgage on the house on the Lot. Rengiil was unable to maintain payments to NDBP and in January 2009, NDBP issued a Notice of Default. Rengiil did not cure the default and on July 6, 2009, NDBP initiated a lawsuit to foreclose on the mortgage. Neither Rengiil nor Skilang responded to the foreclosure lawsuit; as a result, on August 31, 2009, the court entered a default judgment in favor of NDBP. The judgment authorized NDBP to foreclose on the mortgage if the judgment was not paid off within three months. *See* Default Judgment, Civ. Action No. 09-167 (August 31, 2009).

Several things happened in late 2009. On August 18, 2009, Rechucher wrote a letter to KSPLA. Rechucher explained the Use Agreement, noting that he understood the agreement

"ha[d] never been brought to the KSPLA's attention." Rechucher explained that he "currently use[d] a portion of the property as a warehouse that includes a 40' aluminum container alongside it." Rechucher proposed that KSPLA subdivide the Lot and lease the portion with the warehouse to him. KSPLA responded, informing Rechucher that Tellei's interest in the lease had been assigned to NDBP in August 2000. KSPLA stated that it could not unilaterally lease Rechucher a portion of the Lot because NDBP currently held the lease interest in the Lot; KSPLA encouraged Rechucher to speak to the bank.

Around this same time, Appellant Saturnina Mario, Edwin Mario, and Frank Pedro (the "Marios") learned of the foreclosure and began investigating an acquisition of the house. The Marios spoke to NDBP about buying out the bank's interests in the house and lease. After speaking with NDBP, Edwin Mario wrote to KSPLA. In a September 16, 2009 letter, Edwin indicated his willingness to buy out the bank's interest in the house and lease if KSPLA would thereafter be willing to transfer the lease to him or his family. KSPLA apparently informed the Marios that it would be willing to do so.

On November 30, 2009—three months after entry of default judgment in NDBP's foreclosure action—the Marios paid NDBP approximately $54,000 to pay off the loan on the house. NDBP subsequently released its mortgage interests in the house and lease. Also on November 30, the Marios signed an agreement with Rengiil; in exchange for the Marios paying off the amounts due on the home loan and lease, Rengiil "waive[d] all claims to the KSPLA lease and the original house situated thereon." Edwin Mario subsequently paid KSPLA the unpaid back rent on the 2000 Lease for the Lot. On December 22, 2009, KSPLA entered into a "Residential Lease" for the Lot with Mario Pedro and Saturnina Mario (the "2009 Lease").

On December 30, 2009, Frank Pedro wrote to George Rechucher. Frank Pedro informed Rechucher that his parents had "purchased Barbara Tellei's house from NDBP" and that KSPLA "had leased the [Lot]" to them. Frank Pedro noted that Rechucher was continuing to use the warehouse on the Lot and that they should "get together and make a rental contract for the use of the [warehouse]." The parties had a number of discussions and exchanged further letters, but never reached an agreement concerning Rechucher's use of the warehouse.

In February 2012, Mario Pedro and Saturnina Mario sued to eject Rechucher from the Lot. Pedro and Mario sought a declaratory judgment that Rechucher had no legal right to be on the Lot; they also sought compensatory and punitive damages from Rechucher for his alleged trespassing. Rechucher answered and filed counter-claims against a number of parties, including KSPLA and Rengiil. Rechucher took the general position that the Use Agreement continued to operate so as to give him the right to use and occupy the warehouse on the Lot. Rechucher also argued that if he did not have the right to use the Lot, then he was owed some form of restitution for the money and time he spent constructing the warehouse.[2]

A trial was held beginning in August 2014, after which the Trial Division issued factual findings and legal conclusions. The court concluded that Rechucher had no right to use the Lot or warehouse and that Mario Pedro and Saturnina Mario, as valid lessees, could eject Rechucher from the Lot. The court accordingly ordered Rechucher to "remove the 40-foot container and vacate the structure he is currently using as a warehouse." Regarding damages, the court concluded that KSPLA was the owner of the warehouse as an improvement to the

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[2] In May 2012, while Pedro's and Mario's suit was pending in the Trial Division, Rengiil petitioned the Court of Common Pleas to settle the estate of her mother, Tellei. In July 2012, Rechucher filed a notice of claim in the estate for approximately $68,000, although the notice did not specify the nature of that claim. The estate action was ultimately transferred to the Trial Division and consolidated with the ejectment action.

property it owned; the court further concluded that the Marios had failed to establish a basis for an award of any damages to them arising from Rechucher's occupation of the warehouse. As to Rechucher's claims for restitution, the court found that KSPLA was not at fault for Rechucher's decision to construct an improvement on the Lot in the form of the warehouse; finding also that Rechucher had not relied on any representation from KSPLA that he could construct the warehouse, the court concluded that Rechucher was not entitled to restitution from KSPLA. The court also rejected Rechucher's argument that restitution was required to prevent unjust enrichment of either KSPLA or the Marios. Finally, in settling Tellei's estate, the Trial Division allowed Rechucher's claim for approximately $40,000, representing the outstanding balance of Tellei's personal loans from Eusebio and PIDC. Both sides timely appealed.

STANDARD OF REVIEW

We review a lower court's conclusions of law de novo. *ROP v. Terekiu Clan*, 21 ROP 21, 23 (2014). We review findings of fact for clear error. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). Under the clear error standard, we will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id.*

DISCUSSION

Broadly speaking, the dispute here can be divided in two. The first dispute is about possession rights: who has rights to possess the Lot. Rechucher appeals the Trial Division's determination that he does not have a right to possess a portion of the Lot. The second dispute is about damages: who owes whom for what out of the dispute over the Lot. Mario appeals the Trial Division's determination that Rechucher does not owe her damages for his occupation of the warehouse. Rechucher appeals the determination that neither Mario nor KSPLA owe him restitution for his work constructing the warehouse.

I. The Right to Possess the Lot

No party disputes that KSPLA owns the Lot. KSPLA purported to lease the Lot to Mario Pedro and Saturnina Mario on December 22, 2009. The Trial Division found that Pedro and Mario had established the validity of the lease. By its terms, the lease gives Pedro and Mario the exclusive right to posses the Lot during the term of the lease. The Trial Division concluded that that right of possession was sufficient to allow Pedro and Mario to eject Rechucher from the Lot.

On appeal, Rechucher does not seriously challenge the trial court's conclusion that a valid lease granting exclusive possession entitles the possessor to eject trespassers. *Cf., e.g., Anastacio v. Palau Pub. Utils. Corp.*, 17 ROP 75, 77 (2010) ("The right to sue for trespass and ejectment is inherent in the exclusive right to possess real property.") (citing Restatement (Second) of Torts § 158). Instead, Rechucher argues that the trial court erred in determining that the 2009 Lease was valid. We disagree.

The premise of Rechucher's argument is that "at all relevant times" "Barbara Tellei was the sole lessee" of the Lot. Rechucher asserts that "no representative of either party to the [2000 Lease] took any action to terminate it" and accordingly "the KSPLA lease with Tellei still stands to this day." As a result, Rechucher argues, "KSPLA could not have lawfully transferred Tellei's interests in the lease to Pedro and Mario."

The flaw in this argument is that Tellei assigned all of her rights, title and interest in the lease to NDBP in August 2000. From that day forward up through the bank's foreclosure on the mortgage, NDBP—not Tellei—controlled the possessory interest in the lease. The assignment agreement allowed Tellei to remain "in actual possession of the [Lot]," but only so long as Tellei "[was] not in default of [her] loan or any other obligation or responsibility to

[NDBP]."[3] The assignment agreement specifically permitted NDBP to dispose of the lease interest in the event Tellei defaulted on the home loan. The agreement states: "It is specifically understood and agreed that [NDBP] may, with the consent of [KSPLA] . . . sell, transfer, sub-let, or otherwise dispose of [Tellei's] interest in [the 2000 Lease] in the event of default." The record indicates that this is precisely what happened; Tellei defaulted, and NDBP released the interest in the 2000 Lease in exchange for Pedro and Mario paying off the defaulted balance on Tellei's loan. Rechucher's contention that Tellei controlled the possessory interest in the lease at the time of her death, and his contention that affirmative action by Tellei was required to transfer the possessory interest in the Lot, are both incorrect. For the same reasons, Rechucher's argument that no one "could legally act on Tellei's behalf" until her estate was probated is beside the point. NDBP did not dispose of the interest in the 2000 Lease on Tellei's behalf; it disposed of the interest on NDBP's behalf.

In late 2009, the entities with the authority to dispose of possessory interests in the Lot were NDBP and KSPLA. It is undisputed that those two entities consented to an acquisition of the possessory interest by Pedro and Mario. Accordingly, we see no error in the Trial Division's conclusion that the 2009 Lease is valid and provides a legal basis for Mario to eject Rechucher from the Lot. *Cf., e.g., Anastacio*, 17 ROP at 77.

Rechucher's remaining arguments that he can continue to occupy the Lot against the current lessee's wishes are unpersuasive. He briefly argues for the continuing validity of the Use Agreement between Tellei and his father, Eusebio. Rechucher asserts that that agreement "[was] not expressly prohibited anywhere in Tellei's lease with KSPLA." This assertion is

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[3] In certain respects, the assignment agreement resembles a "Deed of Trust" envisioned in 39 PNC §701 *et seq*. However, no party has argued that that statute applies here and accordingly we do not address it.

untenable in light of the terms of the 2000 Lease. For example, Section 14.1 provides that "[Tellei] shall not sublease, assign, or transfer, nor give or allow any license or easement at or on, all or any part of its interest in this Lease, in or to the premises, in or to any improvement thereon, or in or to any portion thereof without KSPLA's express prior written consent . . . ." The trial court concluded that Tellei's entry into the Use Agreement clearly violated the terms of the lease; after reviewing the terms of the 2000 Lease and the record, we reach the same conclusion.

Rechucher suggests that even if KSPLA never consented in writing to the Use Agreement, KSPLA was aware of the agreement such that it should not be allowed to disclaim it now. However, the Trial Division found that KSPLA was unaware of the agreement until 2009. Rechucher has not shown that this finding was clearly erroneous, and we will not disturb it. In his appellate briefing, Rechucher also notes that the 2000 Lease allowed to Tellei to use the Lot for her commercial purposes; he suggests that the Use Agreement represents Tellei hiring Eusebio to operate as her commercial agent. This theory was not pressed below, and it is not clear we should consider it. *See, e.g., Rudimch v. Rebluud*, 21 ROP 44, 45 (2014). Regardless, this theory cannot be squared with the terms of the Use Agreement, which go far beyond any sort of commercial work agreement.

However, even assuming the 2000 Lease did not prohibit Tellei transferring or sub-letting her interests, Rechucher must still contend with Tellei's assignment of her interests to NDBP. At the time Tellei purported to enter the Use Agreement with Eusebio, she had already assigned all of her interests in the Lot to NDBP. In other words, the interests she purported to grant to Eusebio were not hers to grant. *Cf., e.g., Ngirakesau v. Ongelakel Lineage*, 19 ROP 30,

36 (2011) (explaining that one cannot convey what one does not own) (citing *Aguon v. Aguon*, 5 ROP Intrm. 122, 126 (1995)).

Rechucher also makes a number of arguments concerning the ownership of the house on the Lot. Among other things, he argues that Rengiil lacked authority to sell the house to Pedro and Mario. Even assuming that is true—and we are skeptical—Rechucher has not explained why ownership of the house affects his right to occupy the warehouse.[4] Mario's legal basis for ejecting Rechucher from the Lot is that she is the valid lessee of the Lot, not that she is the valid owner of the house.

The Trial Division determined that Rechucher did not have a possessory interest in any portion of the Lot and that Pedro and Mario could eject him. On appeal, Rechucher bears the burden of establishing error in the trial court's decision. *See, e.g.*, *Suzuky v. Gulibert*, 20 ROP 19, 22 (2012). We conclude that he has not met this burden and accordingly affirm the Trial Division's determinations regarding possessory interests in the Lot.

II. Damages

The Trial Division determined that Pedro and Mario had not established a basis for compensatory damages from Rechucher. The Trial Division further determined that Rechucher was not liable for punitive damages. Mario appeals both of these determinations.

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[4] Rechucher does not claim that he owns the house and the legal basis for him to contest ownership is unclear. Assuming he can contest it, his argument appears to be that the house was an asset of the estate that should have been sold with "proceeds [applied] to Tellei's debt to [him]." But it does not appear that any allowable debt remains. The Trial Division allowed Rechucher's claim for unpaid loans in the amount of $41,335.85, to be satisfied from stock dividends that were part of Tellei's estate. Rechucher has not appealed the trial court's finding regarding the outstanding loan amount. Any claim Rechucher had as a creditor of the estate is thus resolved. If the house was an estate asset, Rechucher has not shown he has any claim in it.

A. Compensatory Damages

Mario's argument on appeal regarding compensatory damages is somewhat hard to follow as it tends to focus on whether the trial court misunderstood her argument rather than whether the trial court's decision was based on factual or legal error. Mario appears to argue that it is legal error to find a trespass and not award compensatory damages. Mario also suggests that the proper measure of compensatory damages here is the rental value of the warehouse, which Mario argues is $1,200 per month.

In support of her argument that a trespass must be accompanied by compensatory damages, Mario cites to 75 Am. Jur. 2d, *Trespass*, section 93, which states in part that a "finding that there was a trespass but no damages, either nominal or compensatory, is invalid and incomplete." Mario does not call notice to the next sentences of section 93, which state the "modern view" that damages need not always be awarded. *See* 75 Am. Jur. 2d, *Trespass*, § 93 (noting that even nominal damages need not be awarded "where no actual loss has occurred").[5] Mario cites to no precedent establishing a per se rule that every finding of trespass must include an award of compensatory damages. We decline to adopt such a rule here. *Accord, e.g.*, *Asanuma v. Golden Pacific Ventures, Ltd.*, 20 ROP 29, 32, 36 (2012) (affirming trial court decision that found a trespass but declined to award compensatory damages); *cf., e.g., Iyar v. Masami*, 9 ROP 255, 261 (Tr. Div. 2001) (rightful possessor bears burden to present sufficient evidence to support an award of compensatory damages).

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[5] The Restatement (Second) of Torts, § 907, suggests that nominal damages should be awarded where a trespass has been established but compensatory damages have not. Nominal damages "are a trivial sum of money" awarded in such circumstances. *Id.*; *cf., e.g., April v. Palau Pub. Utils. Corp.*, 17 ROP 247, 249 (2010) (reviewing award of nominal damages in the amount of one dollar). Mario does not point to this provision or advance any other clear argument concerning nominal damages. As such, Mario has not met her burden to show that a remand for nominal damages is warranted here. *Cf., e.g., Suzuky*, 20 ROP at 22 (explaining that the appellant bears the burden of demonstrating an error by the trial court).

The Trial Division found that Mario had not established the existence of compensable harm resulting from Rechucher's trespass. We review this finding only for clear error.[6] *See, e.g., PPLA v. Emesiochel*, 22 ROP 126, 135 (2015) (reviewing trial court finding as to the existence of damages for clear error); *Ngirarsaol v. Hanpa Indus. Dev. Corp.*, 18 ROP 213, 215 (2011) ("The trial court's finding of fact concerning whether a party has proven damages to a reasonable degree of certainty is reviewed under the clearly erroneous standard.") (citing *Palau Marine Indus. Corp. v. Seid*, 11 ROP 79, 81 (2004)).[7]

Importantly, the burden of demonstrating an error by the trial court falls on the appellant. *See, e.g., Suzuky*, 20 ROP at 22; *see also, e.g., Bechab v. Anastacio*, 20 ROP 56, 62 (2013). In the absence of clarity and precision in an appellant's argument, "this Court will not trawl the entire record for unspecified error." *Suzuky*, 20 ROP at 22. Although it is a close question, we ultimately conclude that Mario has not met her burden to establish that the trial court clearly erred.

Broadly speaking, Mario makes an argument by inspection: Rechucher trespassed for an extended period by occupying the warehouse on the Lot; therefore, there must have been compensable harm to Mario. This argument has surface appeal, but it is not grounded in legal principles.[8] Mario's appellate brief largely assumes the existence of a compensable harm and

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[6] The existence of an appellate standard of review for trial findings on the existence of compensable harm is an implicit rejection of a rule requiring compensatory damages. If such damages were mandatory, there would be no need for considered review of trial findings regarding their existence.

[7] Once a plaintiff meets their burden to establish the existence of compensable harm, some uncertainty over the precise amount of the damages need not bar recovery. *See, e.g., Emesiochel*, 22 ROP at 135; *cf. e.g.*, Restatement (Second) of Torts § 912; 75 Am. Jur. 2d, *Trespass*, § 92 (explaining that a trial court "has much discretion, based upon all the facts and circumstances, in the assessment of damages arising out of trespass").

[8] One apparent problem with Mario's argument is that, if accepted, it would result in exactly the sort of per se rule we have previously rejected. If Rechucher's trespass, by itself, consti-

focuses on various ways the amount of compensatory damages might be calculated. But it is a plaintiff's burden to establish a compensable harm—*i.e.*, the existence of damages. *See, e.g.*, *Emesiochel*, 22 ROP at 134. In other words, even where it seems like there *should* be compensable harm, the law still requires the plaintiff to establish such harm via competent evidence. The Trial Division found that Mario had not presented evidence sufficient to meet this burden. On appeal, Mario bears the burden to show that this finding was clearly erroneous. *See, e.g.*, *Ngirarsaol*, 18 ROP at 215.

Mario's appellate brief presents two concrete contentions of compensable harm. Mario argues that she was "seriously hindered by [Rechucher's] trespass by not [being] able to convert the warehouse to [a] dwelling house or to remove it and build a suitable house there for themselves or their children as they originally planned to do." Mario also argues that she "lost the use of one half of their lease and the warehouse they thought was part of their lease due to [Rechucher's] unlawful occupancy."

Absent from Mario's brief, however, is any contention that Mario attempted to, or could have, "convert[ed]" or "removed" the warehouse. The 2009 Lease provides that "[Mario] agrees not to alter, damage or remove any part of the Property or its improvements without the KSPLA's prior written permission." Other provisions require KSPLA's prior written consent "[b]efore starting work" on any construction project. Mario cites to no evidence in the record that she or Pedro ever took any steps to obtain the required consent to convert or remove the warehouse. Even if they had, the 2009 Lease apparently gives KSPLA the right to deny any construction requests. In other words, Mario did not possess an enforceable legal right to

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tuted compensable harm, there would never be a need for courts to make a finding as to whether the trespass caused harm. The argument also conflicts with the Restatement's recognition that some trespass cases only result in nominal damages. *See, e.g.*, Restatement (Second) of Torts § 907 cmt. a-b (1979).

convert or remove the warehouse; her right to do so was at best contingent. Mario has pointed to no record evidence establishing what value—if any—such a contingent right might have. Any harm Mario asserts to construction projects from Rechucher's occupation is therefore hypothetical, as the projects themselves were speculative.

It is also not clear that Mario possessed the right to use the warehouse as a warehouse. The 2009 Lease provided that the Lot "shall be used by [Mario] exclusively as [her] primary residence." The lease further provided that "[a]ll non-residential pursuits or activities, including commercial and professional enterprises, are prohibited and shall not be conducted on the property by anyone without the KSPLA's prior express written consent." As before, Mario cites to no record evidence that she or Pedro ever took any steps to obtain the required consent to operate the warehouse as a commercial enterprise. In this regard, Mario's argument that the rental value of the warehouse is a proper measure of damages is inapt. The argument implies that Rechucher's occupation of the warehouse prevented Mario from renting the warehouse to someone else to use. But the terms of her lease appear to prevent her from doing so. It is thus not clear that Mario has lost any reasonably expected commercial rental income as a result of Rechucher's actions.

Mario's remaining contention of harm is that she "lost the use of one half of [the Lot]." Again, Mario cites to no record evidence that Rechucher's occupation of the warehouse prevented her from using the portion of the Lot that is outside the warehouse. As to the portion of the Lot physically blocked by the warehouse itself, the warehouse already existed at the time Mario signed the 2009 Lease. Mario does not articulate a legal basis under which Rechucher could be liable to her for events that took place before she acquired a legal interest in the Lot.

Additionally, the Trial Division determined that Mario had only leased "the land and the house on the land" from KSPLA, with "no mention" of the warehouse in the lease. The Trial Division credited testimony from KSPLA's Executive Director that KSPLA retains the interests in improvements on public lands—such as the warehouse—"unless expressly stated otherwise in the lease." On appeal, Mario argues that it was "simply erroneous" for the trial court to hold that KSPLA had not leased her and Pedro the warehouse. Mario does not explain how accepting her argument affects her burden to prove compensable harm; regardless, it is not clear her argument is correct.

The 2009 Lease is not a model of clarity. However, upon review of its terms, we cannot say that Mario has met her burden to show the Trial Division erred in interpreting the lease. Section 1 of the lease provides: "KSPLA hereby leases to [Mario] the . . . property . . . particularly described as Property Lot 003 . . . as set forth . . . [in] Exhibit A . . . consisting of [988] square meters." Exhibit A is a sketch of the Lot. Conspicuously absent from the sketch is any outline or other figure indicating the warehouse. In contrast, the 2000 Lease to Tellei included a labeled, black square indicating the concrete structure that would become the warehouse. The lack of explicit reference to the warehouse in the description of the leased property might not, by itself, resolve the question. But the economic terms of the lease strongly suggest that the omission of the warehouse was not accidental. Mario argues that the record indicates that the warehouse is worth $1,200 a month in rental income—or $14,400 annually. But under the 2009 Lease, Mario only has to pay KSPLA $494 in annual rent. Mario offers no explanation why KSPLA would have agreed to lease a warehouse worth over $14,000 for only $494.

In short, Mario has not pointed to any record evidence that she possessed any enforceable legal right to remove, convert, or use the warehouse. Mario has also not pointed to any record evidence that Rechucher prevented the exercise of her lease rights on the Lot outside the warehouse. Mario has accordingly not shown how she was harmed by Rechucher's occupation of the warehouse. As such, she has not met her burden to show that the Trial Division's findings denying compensatory damages were clearly erroneous.

B. Punitive Damages

We similarly conclude that Mario has not met her burden to show that the trial court erred in denying her request for punitive damages from Rechucher. Mario acknowledges that "punitive damages are not usually awarded" in trespass cases. She argues, however, that punitive damages can be awarded where the trespass was in bad faith or was otherwise outrageous; Mario asserts that "[Rechucher's] conduct can only be described as outrageously calculated to injure [her and Pedro]."

We disagree. The Trial Division noted that many of Mario's assertions of misconduct were more properly directed at Tellei or KSPLA than Rechucher. The Trial Division ultimately found that Rechucher's conduct was not outrageous or in bad faith. Mario has not shown that this finding was clearly erroneous. Accordingly, we will not disturb it.

In support of her argument for punitive damages, Mario also cites to *Johnson v. Gibbons*, 11 ROP 271 (Tr. Div. 2004). In *Johnson*, the court awarded punitive damages for "outrageous conduct." *Id.* at 276. We find *Johnson* readily distinguishable. *Johnson* involved intentional battery, not trespass. *Id.* at 274. More importantly, the conduct the court found outrageous in *Johnson* was "striking and injuring an unarmed person with a baseball bat." *Id.* at 276. We think it apparent that Rechucher's conduct here does not come close.

III. Restitution

In the trial court, Rechucher sought restitution from Pedro, Mario, and KSPLA for the expense he incurred in constructing the warehouse. The gist of Rechucher's argument was that he reasonably believed he had a right to construct the warehouse on the Lot and therefore should be compensated for the expense of construction. The Trial Division ultimately determined that any claim Rechucher had for restitution should have been brought against Tellei or her estate, not Mario or KSPLA. The trial court observed that Rechucher built the warehouse several years before Pedro and Mario obtained any interest in the Lot, and as such Rechucher had failed to establish any legal basis by which Pedro and Mario would be liable to him. As to his claim against KSPLA, the trial court found "that there is absolutely no evidence that KSPLA knew that [Rechucher] was a sub-lessee at any time prior to 2009" or that Rechucher "relied on some representation by KSPLA" that he could construct the warehouse. The trial court concluded that "[w]ithout a showing of any fault on the part of KSPLA," Rechucher was not entitled to restitution from KSPLA.

On appeal, Rechucher argues that the trial court erred because it "neglected to find that he was a 'mistaken improver.'" Rechucher cites to *Giraked v. Estate of Rechucher*, in which we explained that a mistaken improver is "a person who, in the mistaken belief that he . . . is the owner, has caused improvements to be made upon the land of another." 12 ROP 133, 139 (2005) (quoting Restatement of Restitution § 42 (1937)). As a mistaken improver, Rechucher argues, he is entitled to restitution from either Mario or KSPLA and it was error for the Trial Division to deny him that.

We disagree. Rechucher did not make any improvement "upon the land of" Pedro or Mario. Rechucher's improvement—construction of the warehouse—was completed around 2006, several years before Pedro and Mario obtained an interest in the Lot. Rechucher has not

advanced any plausible argument as to why Pedro or Mario would be liable to him for construction that occurred years before they obtained an interest in the Lot.

In 2006, the new warehouse was "upon the land of" KSPLA.[9] "[T]he general rule is that one who improves the property of another does so at his own peril, and only under certain exceptional circumstances will a mistaken improver be entitled to restitution for the value of improvements." *Asanuma*, 20 ROP at 34; *see also, e.g.*, *Giraked*, 12 ROP at 139 (explaining that a mistaken improver "is not [necessarily] entitled to restitution from the owner for the value of such improvements") (quoting Restatement of Restitution § 42).[10] The archetypal case for restitution is that of the "landowner who had notice of the error and of the work being done and stands by and does not use care to prevent the error from continuing." *See Asanuma*, 20 ROP at 34 (citation omitted). Here, the Trial Division found "that KSPLA first became aware of . . . the existence of [Rechucher's] warehouse" in "late 2009." In other words, KSPLA did not stand by and allow Rechucher to construct the warehouse; KSPLA did not know of Rechucher's construction until years later and was not at fault for his mistaken beliefs. Rechucher has not shown that this finding is clearly erroneous.

As we explained in *Giraked*, "[i]f an owner does not know of another's improvements to the land, then as a general rule, the owner need not pay restitution." 12 ROP at 139.[11]

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[9] The warehouse might also be considered "upon the land of" the lessee for purposes of adjudicating restitution due a mistaken improver. However, the lessee in 2006 was Tellei, and Rechucher did not bring a claim for restitution against Tellei or her estate.

[10] Because it does not appear to affect the result, we assume, without deciding, that Rechucher qualifies as a mistaken improver.

[11] Both *Asanuma* and *Giraked* noted that this rule is "harsh." *See* 20 ROP at 34; 12 ROP at 139-40. The most recent Restatement of Restitution and Unjust Enrichment (Third) articulates a rule that is less harsh: "A person who improves the real or personal property of another, acting by mistake, has a claim in restitution to prevent unjust enrichment." § 10 (2011). This Court was aware of the Restatement (Third) at the time we affirmed the general rule against restitution to mistaken improvers in *Asanuma*. *Cf.* 20 ROP at 34-35. Rechucher

Rechucher has not shown that the circumstances here warrant otherwise. Accordingly, the trial court correctly concluded that KSPLA need not pay restitution to Rechucher.

CONCLUSION

For the foregoing reasons, the judgment of the Trial Division is **AFFIRMED.**

SO ORDERED, this 7th day of February, 2017.

ARTHUR NGIRAKLSONG
Chief Justice

JOHN K. RECHUCHER
Associate Justice

R. BARRIE MICHELSEN
Associate Justice

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cites to the Restatement (Third), but does not present any developed argument that *Asanuma* and *Giraked* are no longer good law. Even assuming that the Restatement (Third) could trump those cases, however, Rechucher has not shown that the Restatement (Third) principle applies here. He has made no showing that Pedro and Mario were *unjustly* enriched by leasing a Lot that Rechucher had improved several years earlier, or that KSPLA was *unjustly* enriched where the Trial Division found there was no showing of any fault on its part.