

IN THE  
SUPREME COURT OF THE REPUBLIC OF PALAU  
APPELLATE DIVISION

FILED *Ju*

2018 17-014

**AUGUSTINO BLAILES, et al.,**  
*Appellant,*  
v.  
**OTONG CLAN, et al.,**  
*Appellee.*

Cite as: 2018 Palau 11  
Civil Appeal No. 17-014  
Appeal from Civil Action No. 14-181

Decided: August 6, 2018<sup>1</sup>

Counsel for Appellant ..... Johnson Toribiong  
Counsel for Appellee ..... J. Uduch Sengebau Senior

BEFORE: R. BARRIE MICHELSEN, Associate Justice  
ALEXANDRO C. CASTRO, Associate Justice  
DENNIS K. YAMASE, Associate Justice

Appeal from the Trial Court, the Honorable Lourdes F. Materne, Associate Justice, presiding.

**OPINION**

MICHELSEN, Justice:

[¶ 1] Although this case has a lengthy history, this appeal only concerns the trial court's refusal to accept a pro se notice of dismissal by one plaintiff as binding all plaintiffs, and its subsequent computation of damages against defendants. The damage amount related to expenses associated with repairs to clan property necessitated by defendants' actions. Included in the damage award was the expense of hiring an attorney to obtain an injunction to halt ongoing actions at the site. Because one plaintiff cannot, by notice, dismiss a case without obtaining either leave of court or the signed approval of all the

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<sup>1</sup> Although Appellants request oral argument, the Court determines pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

parties, we affirm the trial court's decision to give no effect to the "notice of dismissal." Because the Appellants failed to object to the court's calculation of damages at the trial level, the issue was not preserved for appeal. We therefore affirm the amount awarded.

### FACTS

[¶ 2] The complaint in this case was filed in December 2014, and the judgment regarding damages was entered September 2017. The case began with three Plaintiffs: Otong Clan, and Beches Evangelisto Ongalibang and Ebil Ra Otong Ereong Remeliik. Mr. Ongalibang and Ms. Remeliik sued "individually and as senior strong members of Otong Clan" and also "on behalf of Otong Clan." The original counsel for all three plaintiffs was Attorney Rachel Dimitruk. The defendants in this case were Augustino Blailes, Ellender Ngirameketii, and Thea Bingkelang. The allegations concerned their intention to bury a deceased individual on a parcel of Otong Clan land.<sup>2</sup> Counsel for all defendants was Moses Uludong, who answered and filed counterclaims on their behalf. An injunction stipulated to by all parties prevented the burial on the subject land, which resolved the core issue of the litigation. The issues of damages and of defendants' counterclaims remained for resolution. Subsequently the defendant's counterclaims were voluntarily dismissed, leaving only the question of damages in dispute.

[¶ 3] In November 2015, Mr. Ongalibang, who the complaint stated held the title of Beches, died.

[¶ 4] A year later, Attorney Dimitruk filed a motion to withdraw as counsel for plaintiffs. Although her motion did not expressly cite the Rule, such a withdrawal as counsel is provided for in ROP R. Civ. P. 81(c). The trial court granted the motion November 29, 2016.

[¶ 5] On January 9, 2017, Plaintiff Remeliik, identified in the complaint as holding the title Ebil Ra Otong, filed a "notice of dismissal" of the plaintiffs' case. The following week, Attorney Senior entered an appearance for both Otong Clan and Paulus Ongalibang, who was identified in the

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<sup>2</sup> Apparently this was a second attempt by Augustino Blailes to use Otong Clan property as a burial site over Clan objections. See *Ongalibang, et al. v. Blailes, et al.* Civ. Action No. 10-160 (Tr. Div. 2010). In that case, the court issued a preliminary injunction preventing the burial.

appearance as the current Beches. The formal substitution of Paulus Ongalibang for the late Evangelisto Ongalibang occurred on May 31, 2017.<sup>3</sup>

[¶ 6] Two weeks before that substitution, defendants filed a Motion to Dismiss or for Summary Judgment, citing Ms. Remeliik's Notice of Dismissal. The trial court denied both of the defendants' motions, noting that this is a multi-party case and that one party may not unilaterally dismiss it. Regarding the summary judgment motion, the court denied the motion because the issue of damages allegedly owed to plaintiffs was still disputed, precluding summary judgment.

[¶ 7] Moses Uludong's suspension from the practice of law became effective September 6, 2017. See, *In re Uludong*, 2017 Palau 26 (Disc. Trib). On September 22, 2017, the court, after a duly-noticed hearing held on September 15, 2017, set damages. The monetary losses caused by defendants' burial efforts were set at \$3,800. The damages included the cost of fill for the hole dug at the direction of the defendants, and the expense of hiring an attorney to obtain injunctive relief to end the burial preparations at the site. No one appeared for the defendants at the hearing on damages.

#### STANDARD OF REVIEW

[¶ 8] The trial court's conclusions of law are reviewed de novo. *ROP v. Terekiu Clan*, 21 ROP 21, 23 (2014). The court's factual findings are reviewed under the clearly erroneous standard. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). Regarding issues not raised in the trial court

[n]o axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue, even if it concerns a matter of constitutional law. We

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<sup>3</sup> Appellants believe that the substitution of Paulus Ongalibang comes too late because it was made more than ninety days after the death of the party. ROP R. Civ. P. 25(a)(1). They misconstrue the rule. See, e.g., *Grandbouche v. Lovell*, 913 F.2d 835, 836 (10th Cir.1990) (holding the 90-day time limitation "is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a party's death"). "Thus, if a party dies, ideally his or her attorney will file a 'suggestion of death' with the court and serve it upon all parties. After the suggestion of death is filed, a 90-day countdown begins." *McKenna v. Pacific Rail Service*, 32 F.3d 820, 836 (3d Cir. 1994).

have repeatedly stated the general rule that parties cannot seek review of alleged errors of the trial court when they made no objection to the court's actions at the time.

*Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) (internal citations and quotations omitted) (also discussing exceptions not pertinent to this appeal). Accord. *Ngarameketii/Rubekul Kldeu v. Koror State Pub. Lands Auth.*, 2016 Palau 19 ¶ 9 (collecting cases).

**A NOTICE OF DISMISSAL BY PLAINTIFFS MUST COMPLY WITH RULE 41.**

[¶ 9] Blailles and the other defendants object to the trial court's refusal to dismiss the plaintiffs' case based upon "notice of dismissal" filed by the co-Plaintiff Remeliik. Although the Appellants argue that the trial court committed error by not giving effect to the "notice of dismissal," they failed to discuss the very Rule of Civil Procedure that addresses dismissals. Rule 41(a) unambiguously provides that a dismissal of an action must be by order of the court, unless the plaintiff has filed a notice of dismissal before the opposing party has filed an answer or motion for summary judgment, or unless the notice is signed "by all parties to the action." ROP R. Civ. P. 41(a)(1)(B). Since none of the defendants in this case signed the notice, it is ineffective even if Ms. Remeliik had obtained the signatures of her co-plaintiffs.

[¶ 10] This case provides a good example of the reason for the Rule. As explained by the trial court,

Ms. Dimitruk, the plaintiffs' former counsel made it clear to the court that Evangelisto Ongalibang and his faction wanted to proceed with the case, Ms. Dimitruk withdrew as counsel for the plaintiff because a dispute arose between Evangelisto Ongalibang and Remeliik. This dispute is now between Paulus Ongalibang and Remeliik.

Order, Civ. Action No. 14-181 (July 4, 2017).

[¶ 11] The purpose of the Rule's requirement that all parties sign a dismissal notice is to assure that all parties are aware of, and agree to, such a dismissal. Here, the Defendants were attempting to terminate the litigation with the assistance of Plaintiff Remeliik over the objection of the Ongalibang

faction.<sup>4</sup> The trial court was correct in giving the "notice of dismissal" no effect.

**OBJECTIONS TO THE CALCULATIONS OF DAMAGES MUST BE  
RAISED IN THE TRIAL COURT**

[¶ 12] Unlike their objection to the trial court's refusal to give effect to the "notice of dismissal," which was preserved for appeal, their objection to the computation of damages was not.

[¶ 13] The hearing on damages was duly-noticed. The Appellants did not appear, and the hearing proceeded on the remaining issue of damages without them.

[¶ 14] On appeal, Mr. Blailes and the other appellants do not raise any issue regarding receipt of notice of that hearing, nor of the propriety of the court holding the hearing without them. They now raise two issues regarding the computation of damages. Neither issue was preserved for appeal. One objection is the failure of the court at the trial on damages to consider two affidavits that Appellants previously submitted as part of their summary judgment motion filed the previous May. Although affidavits are allowed as part of summary judgment motions to show that no genuine issues remain for trial, ROP R. Civ. P. 56(c), contested issues that require hearings are governed by the Rules of Evidence. ROP R. Evid. 1101(a). The affidavits are hearsay and would have been inadmissible if they had been offered as evidence at the hearing. ROP R. Evid. 801-802.

[¶ 15] Their second objection is that the court arrived at its computation of monetary damages by adding to the cost of repair to the real property (\$300) the expense of hiring an attorney to obtain a temporary restraining order and successfully negotiating a stipulated injunction (\$3500) to halt further damages. Appellants consider this result as an award of attorney's

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<sup>4</sup> "What is troubling to the court is the font and style of the Notice of Dismissal is the same font and style found in defendants' filings." Order Denying Motion to Dismiss or for Summary Judgment, Civ. Action No. 14-181, 3 n. 2 (June 26, 2017).

Also, at the July 3 hearing, "[i]t [did] not escape the court's attention that defense counsel spoke on behalf of Plaintiff Remeliik." Order, Civ. Action No. 14-181 (July 4, 2017).

fees. Citing 14 PNC § 402, they argue that the trial court failed to include a finding that the complaint was “groundless, frivolous, or brought in bad faith,” which is a requirement of section 402 for an award of fees pursuant to that section.

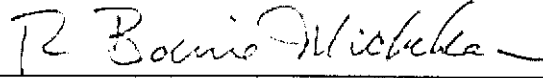
[¶ 16] Although that provision of section 402 has no applicability in this case, since it was the Appellees who were the plaintiffs, and they prevailed, more generally “[c]laims for attorney’s fees and related non-taxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.” ROP R. Civ. P. 54(d)(2)(A).

[¶ 17] In this case, the court’s order did not refer to an award of attorney’s fees. Rather, it heard *evidence of damages, and plaintiffs’ claimed damages* included the cost of retaining Attorney Dimitruk to first obtain a temporary restraining order and then secure an injunction. The court incorporated that expense as part of the computation of damages. The plaintiffs did not seek compensation for the later work of Attorney Senior.

[¶ 18] In the absence of a developed record in the trial court, and a properly preserved objection, we decline to address the issue regarding when and under what circumstances attorney’s fees expended to successfully halt on-going property damage may be classified as part of compensable damages.

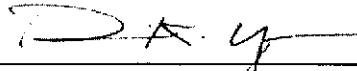
[¶ 19] The trial court’s judgment is **AFFIRMED**.

**SO ORDERED**, this 6th day of August 2018



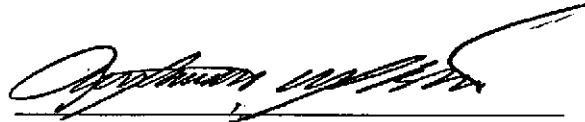
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R. BARRIE MICHELSEN  
Associate Justice



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DENNIS K. YAMASE  
Associate Justice



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ALEXANDRO R. CASTRO  
Associate Justice