EMERITA M. DE GUZMAN, PETITIONER, VS. ANTONIO M. TUMOLVA, RESPONDENT.

G.R. No. 188072. October 19, 2011

Ponente: MENDOZA, J.

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MENDOZA, J.:

This is a petition for review on certiorari under Rule 45 of the Revised Rules of Court assailing the February 24, 2009 Decision[1] of the Court of Appeals (CA) and its May 26, 2009 Resolution[2] in CA-G.R. SP. No. 104945 entitled "Antonio M. Tumolva v. Emerita M. De Guzman."

The Facts

On September 6, 2004, petitioner Emerita M. De Guzman (De Guzman), represented by her attorneys-in-fact, Lourdes Rivera and Dhonna Chan, and respondent Antonio Tumolva, doing business under the name and style A.M. Tumolva Engineering Works (the Contractor), entered into a Construction Agreement[3] (Agreement) for the construction of an orphanage consisting of an administration building, directors/guests house, dining and service building, children's dormitory, male staff house, and covered walkways in Brgy. Pulong Bunga, Purok 4, Silang, Cavite, for a contract price of P15,982,150.39. Incorporated in the Agreement was the plan and specifications of the perimeter fence. The Contractor, however, made deviations from the agreed plan[4] with respect to the perimeter fence of the orphanage.

On September 6, 2005, after the completion of the project, De Guzman issued a Certificate of Acceptance. For his part, the Contractor issued a quitclaim acknowledging the termination of the contract and the full compliance therewith by De Guzman.

In November 2006, during typhoon "Milenyo," a portion of the perimeter fence collapsed and other portions tilted. In her Letter dated December 5, 2006, De Guzman, through counsel, demanded the repair of the fence in accordance with the plan. In response, the Contractor claimed that the destruction of the fence was an act of God and expressed willingness to discuss the matter to avoid unnecessary litigation. De Guzman, however, reiterated her demand for the restoration of the wall without additional cost on her part, or in the alternative, for the Contractor to make an offer of a certain amount by way of compensation for the damages she sustained. Her demand was not heeded.

On February 14, 2008, De Guzman filed a Request for Arbitration[5] of the dispute before the Construction Industry Arbitration Commission (CIAC). She alleged that the Contractor deliberately defrauded her in the construction of the perimeter fence by "under sizing the required column rebars from 12mm. based on the plan to only 10mm., the required concrete hollow blocks from #6 to #5, and the distance between columns from 3.0m to 4.3m."[6] Further, the Contractor neither anchored the lenten beams to the columns nor placed drains or weepholes along the lower walls. She prayed for an award of actual, moral and exemplary damages, as well as attorney's fees and expenses of litigation, and for the inspection and technical assessment of the construction project and the rectification of any defect.

In his Answer with Counterclaim, the Contractor denied liability for the damaged fence claiming, among others, that its destruction was an act of God. He admitted making deviations from the plan, but pointed out that the same were made with the knowledge and consent of De Guzman through her representatives, Architect Quin Baterna and Project Engineer Rodello Santos (Engineer Santos), who were present during the construction of the fence. He further argued that pursuant to the Agreement, the claim for damages was already barred by the 12-month period from the issuance of the Certificate of Acceptance of the project within which to file the claim. He, thus, prayed for the dismissal of the action and interposed a counterclaim for actual and compensatory damages for the additional work/change orders made on the project in the amount of P2,046,500.00, attorney's fees and litigation expenses.

After due proceedings, the CIAC issued the Award dated July 17, 2008 in favor of De Guzman, the dispositive portion of which reads:

> WHEREFORE, judgment is hereby rendered and AWARD is made on the monetary claims of Claimant EMERITA M. DE GUZMAN, directing Respondent Contractor ANTONIO M. TUMOLVA, to pay her the following amounts:
>
> P187,509.00 as actual damages for reconstructing the collapsed and damaged perimeter fence.
>
> Interest is awarded on the foregoing amount at the legal rate of 6% per annum computed from the date of this Award. After finality thereof, interest at the rate of 12% per annum shall be paid thereon until full payment of the awarded amount shall have been made, "this interim period being deemed to be at that time already a forbearance of credit" (Eastern Shipping Lines, Inc. v. Court of Appeals (243 SCRA 78 [1994])
>
> P100,000.00 as moral damages.
> P100,000.00 as exemplary damages.
> P50,000.00 for attorney's fees and expenses of litigation.
> P437,509.00 - TOTAL AMOUNT DUE THE CLAIMANT

The CIAC staff is hereby directed to make the necessary computation of how much has been paid by Claimant as its proportionate share of the arbitration costs totaling P110,910.44, which computed amount shall be reimbursed by Respondent to the Claimant.

SO ORDERED.[7]

Aggrieved, the Contractor filed before the CA a Petition for Review with prayer for the issuance of a temporary restraining order, challenging the CIAC's award of damages in favor of De Guzman.

On February 24, 2009, the CA modified the Award rendered by CIAC. The dispositive portion of the decision states:

> WHEREFORE, the instant petition is partly GRANTED. The assailed Award dated July 17, 2008 rendered by the CIAC in CIAC Case No. 03-2008 is hereby MODIFIED, deleting the award of actual, moral and exemplary damages, but awarding temperate damages in the amount of P100,000.00 for reconstructing the collapsed and damaged perimeter fence. The rest of the Award stands.
>
> SO ORDERED.[8]

The CA held that although the Contractor deviated from the plan, CIAC's award of actual damages was not proper inasmuch as De Guzman failed to establish its extent with reasonable certainty. The CA, however, found it appropriate to award temperate damages considering that De Guzman suffered pecuniary loss as a result of the collapse of the perimeter fence due to the Contractor's negligence and violation of his undertakings in the

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Agreement. It further ruled that there was no basis for awarding moral damages reasoning out that De Guzman's worry for the safety of the children in the orphanage was insufficient to justify the award. Likewise, it could not sustain the award of exemplary damages as there was no showing that the Contractor acted in wanton, reckless, fraudulent, oppressive, or malevolent manner.

De Guzman filed a motion for reconsideration of the said decision, but it was denied for lack of merit by the CA in its Resolution dated May 26, 2009.

Hence, De Guzman interposed the present petition before this Court anchored on the following

> GROUNDS
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> (I)
>
> THE COURT OF APPEALS ERRED IN RULING THAT THE EVIDENCE ON RECORD FAILED TO SUFFICIENTLY ESTABLISH THE AMOUNT OF ACTUAL DAMAGES THAT PETITIONER DE GUZMAN CAN RECOVER FROM THE RESPONDENT.
>
> (II)
>
> THE COURT OF APPEALS ERRED IN RULING THAT PETITIONER DE GUZMAN IS NOT ENTITLED TO AWARDS OF MORAL AND EXEMPLARY DAMAGES.[9]

De Guzman argues inter alia that the Contractor is liable for the actual damages that she suffered from the collapse of the perimeter fence. He failed to put weep holes on the collapsed portion of the said fence, which could have relieved the pressure from the wet soil of the adjoining higher ground.

De Guzman adds that the computation of the cost of rebuilding the collapsed portion of the perimeter fence by Engineer Santos constituted substantial evidence warranting an award of actual damages. His affidavit served as his direct testimony in the case even if he did not appear during the hearing. Having been notarized, it must be admissible in evidence without further proof of authenticity.

Further, De Guzman questions the CA's deletion of the award for moral and exemplary damages. She insists that her anxiety and suffering over the safety of the children in the orphanage entitled her to an award of moral damages. It is likewise her position that the Contractor's wanton acts of deliberately cheating the benefactors of the orphanage by making deviations on the approved plan through the use of construction materials of inferior quality warranted the imposition of exemplary damages against the Contractor.

The Court's ruling

There is no doubt that De Guzman incurred damages as a result of the collapse of the perimeter fence. The Contractor is clearly guilty of negligence and, therefore, liable for the damages caused. As correctly found by the CA:

> Nonetheless, the Court sustains the CIAC's conclusion that the CONTRACTOR was negligent in failing to place weepholes on the collapsed portion of the perimeter fence. Fault or negligence of the obligor consists in his failure to exercise due care and prudence in the performance of the obligation as the nature of the obligation so demands, taking into account the particulars of each case. It should be emphasized that even if not provided for in the plan, the CONTRACTOR himself admitted the necessity of putting weepholes and claimed to have actually placed them in view of the higher ground elevation of the adjacent lot vis-à-vis the level ground of the construction site. Since he was the one who levelled the ground and was, thus, aware that the lowest portion of the adjoining land was nearest the perimeter fence, he should have ensured that sufficient weepholes were placed because water would naturally flow towards the fence.

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> However, the CONTRACTOR failed to refute Mr. Ramos' claim that the collapsed portion of the perimeter fence lacked weepholes. Records also show that the omission of such weepholes and/or their being plastered over resulted from his failure to exercise the requisite degree of supervision over the work, which is the same reason he was unable to discover the deviations from the plan until the fence collapsed. Hence, the CONTRACTOR cannot be relieved from liability therefor.[10]

The Court finds no compelling reason to deviate from this factual finding by the CIAC, as affirmed by the CA. It is settled that findings of fact of quasi-judicial bodies, which have acquired expertise because their jurisdiction is confined to specific matters, are generally accorded not only respect, but also finality, especially when affirmed by the CA. In particular, factual findings of construction arbitrators are final and conclusive and not reviewable by this Court on appeal.[11]

CIAC's award of actual damages, however, is indeed not proper under the circumstances as there is no concrete evidence to support the plea. In determining actual damages, one cannot rely on mere assertions, speculations, conjectures or guesswork, but must depend on competent proof and on the best evidence obtainable regarding specific facts that could afford some basis for measuring compensatory or actual damages.[12] Article 2199 of the New Civil Code defines actual or compensatory damages as follows:

> Art. 2199. Except as provided by law or by stipulation, one is entitled to an adequate compensation only for such pecuniary loss suffered by him as he has duly proved. Such compensation is referred to as actual or compensatory damages.

Unfortunately, De Guzman failed to adduce evidence to satisfactorily prove the amount of actual damage incurred. Contrary to her assertion, the handwritten calculation of reconstruction costs made by Engineer Santos and attached to his affidavit cannot be given any probative value because he never took the witness stand to affirm the veracity of his allegations in his affidavit and be cross-examined on them. In this regard, it is well to quote the ruling of the Court in the case of Tating v. Marcella,[13] to wit:

> There is no issue on the admissibility of the subject sworn statement. However, the admissibility of evidence should not be equated with weight of evidence. The admissibility of evidence depends on its relevance and competence while the weight of evidence pertains to evidence already admitted and its tendency to convince and persuade. Thus, a particular item of evidence may be admissible, but its evidentiary weight depends on judicial evaluation within the guidelines provided by the rules of evidence. It is settled that affidavits are classified as hearsay evidence since they are not generally prepared by the affiant but by another who uses his own language in writing the affiant's statements, which may thus be either omitted or misunderstood by the one writing them. Moreover, the adverse party is deprived of the opportunity to cross-examine the affiant. For this reason, affidavits are generally rejected for being hearsay, unless the affiants themselves are placed on the witness stand to testify thereon.

Neither is there any evidence presented to substantiate Engineer Santos' computation of the reconstruction costs. For such computation to be considered, there must be some other relevant evidence to corroborate the same.[14] Thus, the CA was correct in disregarding the affidavit of Engineer Santos for being hearsay and in not giving probative weight to it. There being no tangible document or concrete evidence to support the award of actual damages, the same cannot be sustained.

Nevertheless, De Guzman is indeed entitled to temperate damages as provided under Article 2224 of the Civil Code for the loss she suffered. When pecuniary loss has been suffered but the amount cannot, from the nature of the case, be proven with certainty, temperate damages may be recovered. Temperate damages may be allowed in cases where from the nature of the case, definite proof of pecuniary loss cannot be adduced, although the court is convinced that the aggrieved party suffered some pecuniary loss.[15] Undoubtedly, De Guzman suffered

pecuniary loss brought about by the collapse of the perimeter fence by reason of the Contractor's negligence and failure to comply with the specifications. As she failed to prove the exact amount of damage with certainty as required by law, the CA was correct in awarding temperate damages, in lieu of actual damages. However, after weighing carefully the attendant circumstances and taking into account the cost of rebuilding the damaged portions of the perimeter fence, the amount of ?100,000.00 awarded to De Guzman should be increased. This Court, in recognition of the pecuniary loss suffered, finds the award of ?150,000.00 by way of temperate damages as reasonable and just under the premises.

As to the CIAC's award of P100,000.00 as moral damages, this Court is one with the CA that De Guzman is not entitled to such an award. The record is bereft of any proof that she actually suffered moral damages as contemplated in Article 2217 of the Code, which provides:

> Art. 2217. Moral damages include physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, social humiliation, and similar injury. Though incapable of pecuniary computation, moral damages may be recovered if they are the proximate result of the defendant's wrongful act or omission.

Certainly, the award of moral damages must be anchored on a clear showing that she actually experienced mental anguish, besmirched reputation, sleepless nights, wounded feelings, or similar injury. There could not have been a better witness to this experience than De Guzman herself.[16] Her testimony, however, did not provide specific details of the suffering she allegedly went through after the fence collapsed while she was miles away in the United States. As the CA aptly observed, "the testimony of the OWNER as to her worry for the safety of the children in the orphanage is insufficient to establish entitlement thereto."[17] Since an award of moral damages is predicated on a categorical showing by the claimant that she actually experienced emotional and mental sufferings, it must be disallowed absent any evidence thereon.[18]

Moreover, under the aforequoted provision, moral damages cannot be recovered as the perimeter fence collapsed in the midst of the strong typhoon "Milenyo." It was not clearly established that the destruction was the proximate result of the Contractor's act of making deviation from the plan. As correctly concluded by the CA, viz:

> However, while it cannot be denied that the Contractor deviated from the plan, there was no clear showing whether the same caused or contributed to the collapse/tilting of the subject perimeter fence. No competent evidence was presented to establish such fact. As the CIAC itself acknowledged, "(t)here is no way by which to accurately resolve this issue by the evidence submitted by the parties." The statement of Edwin B. Ramos, Engineering Aide at the Office of the Municipal Engineer of Silang, Cavite, who conducted an ocular inspection of the collapsed perimeter fence, that the observed deviations from the plan "affected the strength of the fence and made it weaker, such that its chance of withstanding the pressure of water from the other side thereof was greatly diminished or affected" was merely an expression of opinion. As he himself admitted, he is not qualified to render an expert opinion.[19]

Further, De Guzman was not able to show that her situation fell within any of the cases enumerated in Article 2219[20] of the Civil Code upon which to base her demand for the award of moral damages.

Neither does the breach of contract committed by the Contractor, not being fraudulent or made in bad faith, warrant the grant of moral damages under Article 2220 which provides that:

> Art. 2220. Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith.

De Guzman cannot be awarded exemplary damages either, in the absence of any evidence showing that the

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Contractor acted in a wanton, fraudulent, reckless, oppressive, or malevolent manner as provided in Article 2232 of the Civil Code. The ruling in the case of Nakpil and Sons v. Court of Appeals,[21] relied upon by De Guzman, where it was emphasized that the wanton negligence in effecting the plans, designs, specifications, and construction of a building is equivalent to bad faith in the performance of the assigned task, finds no application in the case at bench. As already pointed out, there is negligence on the part of Contractor, but it is neither wanton, fraudulent, reckless, oppressive, nor malevolent.

The award of exemplary damages cannot be made merely on the allegation of De Guzman that the Contractor's deviations from the plans and specifications without her written consent was deplorable and condemnable. The Court regards the deviations as excusable due to the unavailability of the approved construction materials. Besides, these were made known to De Guzman's project manager who was present all the time during the construction. Indeed, no deliberate intent on the part of the Contractor to defraud the orphanage's benefactors was ever shown, much less proved. As may be gleaned from his testimony:

> xxx
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> 2.2.0
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> :
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> What can you say to the claim that the column rebars were reduced in size from 12mm to 10mm?
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> A
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> :
>
> That is untrue.
>
> 2.2.1
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> :
>
> Why did you say that it was untrue?
>
> A
>
> :
>
> Because the column rebars that we used is 12mm and not 10mm contrary to the claim of the claimant. The column rebars that claimant and his engineers claimed to have been undersized [were] those already subjected to stretching. Due to the lateral load on the perimeter fence coming from the water that accumulated thereon, the strength of the column bars was subjected to such kind of force beyond its capacity thereby resulting them to yield or "mapatid." As a result of such stretching, the column rebars were deformed thereby causing it [to] change its width but the length was extended. You can compare it to a candy like "tira-tira" which if you stretch it becomes longer but its width is reduced. The other column rebars on the perimeter fence which [were] not subjected to stretching will prove what I am stating.
>
> 2.2.2
>
> :
>
> Also, in the said request for arbitration, it was claimed that the required hollow blocks (CHB) was reduced also from #6 to #5, how would you explain this?
>
> A

:

It is true but such deviation was known to them in view of the fact that there was no available CHB #6 in Silang, Cavite and so to save on the travel cost in bringing materials from Manila to the site, it was agreed that such CHB #5 shall be used instead.

2.2.3

:

What was the effect of such deviation in using CHB #5 instead of CHB #6?

A

:

No effect, madam.

2.2.4

:

Why did you state so, Mr. Witness?

A

:

Because the entire area of the land which is being secured by the perimeter fence was fully covered with the fence which is made of CHB. This simply implies that even though we used a much lesser size of CHB, but we increased the compressive strength of the mortar and filler used in the premises. This has really no effect because we cover the entire place with fence.

2.2.5

:

It was also claimed that the distance between columns was deviated from 3.0 m. to 4.0 m, will you please explain this matter.

A

:

The computation of the distance between the columns of the perimeter fence as appearing on the plan was 3.0 m inside to inside. However, the computation made by the engineer of the claimant as alleged in their Request for Arbitration was 4.0 m. outside to outside which should be 3.6 m. outside to outside as correct distance.

2.2.6

:

It now appears from your statement that there was a deviation as between the 3.0 m. inside to inside computation in the plan and the actual 3.6 m. outside to outside computation made by the engineers of the claimant. My question Mr. Witness is, what would be the effect of such deviation on the columns?

A

:

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> It is true that there was such a deviation on the distance of the column but it will have no effect because still the factor of safety was well provided for. Even the existing law on building construction supports this matter. I even sought Engineer Rommel Amante on the matter and his report supports my allegation.
>
> 2.2.7
>
> :
>
> Was such deviation approved by the claimant or the representatives of the claimant?
>
> A
>
> :
>
> Yes because during all the time the construction of the perimeter fence was done, the project manager of the claimant was present and observing the works. Further, they have executed a Certificate of Final Acceptance of the project.[22]
>
> xxx

As regards the award of attorney's fees, the Court upholds De Guzman's entitlement to reasonable attorney's fees, although it recognizes that it is a sound policy not to set a premium on the right to litigate.[23] It must be recalled that De Guzman's repeated demands for the repair of the fence or the payment of damages by way of compensation, were not heeded by the Contractor. The latter's unjust refusal to satisfy De Guzman's valid, just and demandable claim constrained her to litigate and incur expenses to protect her interest. Article 2208 of the Civil Code, thus, provides:

> Art. 2208. In the absence of stipulation, attorney's fees and expenses of litigation, other than judicial costs, cannot be recovered, except:
>
> xxx
>
> (2) When the defendant's act or omission has compelled the plaintiff to litigate with third persons or to incur expenses to protect his interest;
>
> xxx

Finally, the dismissal of the Contractor's counterclaim is sustained for lack of merit. In his Comment[24] and Memorandum,[25] the Contractor pleaded that damages should have been awarded to him. This deserves scant consideration. A perusal of the record reveals that the matter as regards the return of what he had donated by reason of De Guzman's ingratitude was not among the issues raised in this petition. Thus, the same cannot be taken cognizance by the Court.

WHEREFORE, the petition is DENIED. The Decision of the Court of Appeals dated February 24, 2009 and its Resolution dated May 26, 2009 are AFFIRMED with the MODIFICATION that the award of ?100,000.00 as temperate damages is increased to ?150,000.00. The award shall earn interest at the rate of 12% per annum reckoned from the finality of this judgment until fully paid.

SO ORDERED.

Velasco, Jr., (Chairperson), Peralta, Bersamin,[*] and Reyes,[**] JJ., concur.

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[*] Designated as additional member in lieu of Associate Justice Roberto A. Abad, per Raffle dated June 19,

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2009.

[**] Designated as additional member in lieu of Associate Justice Estela M. Perlas-Bernabe, per Raffle dated September 26, 2011.

[1] Rollo, pp. 39-46. Penned by Associate Justice Estela M. Perlas-Bernabe (now a member of this Court), with Associate Justice Mario L. Guariña III and Associate Justice Marlene Gonzales-Sison, concurring.

[2] Id. at 49.

[3] Id. at 50-59.

[4] Annex "E" of Petition, id. at 68.

[5] Annex "D" of Petition, id. at 61-66.

[6] Id.

[7] Annex "K" of Petition, id. at 164-165.

[8] Annex "A" of Petition, id. at 46.

[9] Rollo, pp. 25 and 29.

[10] Id. at 44.

[11] Shinryo (Philippines) Company, Inc. v. RRN Incorporated, G.R. No. 172525, October 20, 2010, 634 SCRA 123, 130, citing IBEX International, Inc. v. Government Service Insurance System, G.R. No. 162095, October 12, 2009, 603 SCRA 306.

[12] Soriano v. Marcelo, G.R. No. 163178, January 30, 2009, 577 SCRA 312, 320, citing Ilao-Oreta v. Ronquillo, G.R. No. 172406, October 11, 2007, 535 SCRA 633-642; MCC Industrial Sales Corporation v. Ssangyong Corporation, G. R. No. 170633, October 17, 2007, 536 SCRA 408, 468.

[13] G.R. No. 155208, March 27, 2007, 519 SCRA 79.

[14] Philippine Long Distance Telephone Company, Inc. v. Tiamson, 511 Phil. 384 (2005).

[15] Seguritan v. People of the Philippines, G.R. No. 172896, April 9, 2010, 618 SCRA 406, 420, citing Canada v. All Commodities Marketing Corp., G.R. No. 146141, October 17, 2008, 569 SCRA 321, 329.

[16] Philippine Savings Bank v. Sps. Mañalac, Jr , 496 Phil. 671 (2005), citing Mahinay v. Atty. Velasquez, Jr., 464 Phil. 146 (2004).

[17] Rollo, p. 45.

[18] Metropolitan Bank and Trust Co. v. Perez, G.R. No. 181842, February 5, 2010, 611 SCRA 740, 746, citing Bank of Commerce v. Sps. San Pablo, G.R. No. 167848, April 27, 2007, 522 SCRA 713, 715.

[19] Rollo, p. 44.

[20] Art. 2219. Moral damages may be recovered in the following and analogous cases:

(1) A criminal offense resulting in physical injuries;
(2) Quasi-delicts causing physical injuries;
(3) Seduction, abduction, rape, or other lascivious acts;
(4) Adultery or concubinage;

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(5) Illegal or arbitrary detention or arrest;
(6) Illegal search;
(7) Libel, slander or any other form of defamation;
(8) Malicious prosecution;
(9) Acts mentioned in Article 309;
(10) Acts and actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.

The parents of the female seduced, abducted, raped, or abused, referred to in No. 3 of this article, may also recover moral damages.

The spouse, descendants, ascendants, and brothers and sisters may bring the action mentioned in No. 9 of this article, in the order named.

[21] 243 Phil. 489 (1988).

[22] Rollo, pp. 125-126.

[23] Northwest Airlines, Inc. v. Chiong, G.R. No. 155550, January 31, 2008, 543 SCRA 308, 327, citing BPI Family Savings Bank v. Franco, G.R. No. 123498, November 23, 2007, 538 SCRA 184, 205.

[24] Rollo, pp. 289-323.

[25] Id. at 340-374.

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