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

ESTATE OF SOLEDAD T. OGUMORO,
Plaintiff-Appellee,

v.

HAN YOON KO,
Defendant-Appellant/Third Party Plaintiff/Cross-Appellee,

v.

YOUNG BOO JUNG,
Third Party Defendant/Cross-Appellant.

SUPREME COURT NO. CV-06-0015-GA
SUPERIOR COURT NO. 99-0655

Cite as: 2011 MP 11

Decided October 20, 2011

Douglas F. Cushnie, Saipan, MP, for Plaintiff-Appellee.
Joseph E. Horey, O'Connor Berman Dotts & Banes, Saipan, MP, for Defendant-Appellant/Third Party Plaintiff/Cross-Appellee.
Thomas E. Clifford, Saipan, MP, for Third Party Defendant/Cross-Appellant.

BEFORE: MIGUEL S. DEMAPAN,[1] Chief Justice; JOHN A. MANGLONA, Associate Justice; ANITA A. SUKOLA, Justice Pro Tem.

MANGLONA, J.:

¶ 1 Defendant Han Yoon Ko ("Ko") appeals a series of orders from the trial court finding him liable for $62,216.65 in damages arising from termination of a lease agreement plus an additional $36,011.78 in attorney fees. Ko asserts that that the trial court erred in concluding that Soledad T. Ogumoro terminated his leasehold interest, and that the trial court should not have held him liable for various promises in a ground lease that he did not sign. We agree with both of Ko's contentions. We further hold that the Restatement (Second) of Property provides lessors a right of termination in the absence of a lease provision to the contrary.

¶ 2 Third Party Defendant Young Boo Jung also appeals, arguing that: (1) it was error for the trial court to set aside the default judgment taken against Ko; (2) Ko abandoned his interest in the leasehold as a matter of law; and (3) he was entitled to recover attorney fees paid by his insurer. We hold as follows: (1) Jung had standing to challenge the order setting aside the default judgment; (2) the trial court correctly set aside the default judgment; (3) a lack of factual findings prevents us from deciding the abandonment issue as a matter of law; and (4) Jung is not entitled to recover attorney fees paid by his insurer because his insurer paid the entire claim, thereby depriving Jung of the right to recover fees paid by his insurer.

I

¶ 3 The chain of events leading up to the present litigation began in November 1994 when Soledad T. Ogumoro ("Ogumoro"), Suk Kon Jo, and Jun Duk Soon Jo ("the Jos") executed a fifty-five year Ground Lease for Lot No. 2003-4-R3 ("the Lot").[2] The Ground Lease specified that the Jos would make up-front payments of $210,000. This prepayment covered all rents through December 1998. Beginning in December 1998, the rent increased to $2,000, due monthly.

¶ 4 In August 1995, the Jos mortgaged their interest in the Lot, plus their interest in a second lot, as security for a $264,000 loan from Ko. Ko recorded this mortgage. Sometime thereafter, the Jos failed to make their monthly mortgage payment. As a result, Ko foreclosed on the mortgage. In March 1997, Ko obtained a writ of execution from the trial court against the Jos in the amount of $296,736. After a judicial sale several months later, the trial court granted an order authorizing Ko to purchase the Jos' leasehold interest in the Lot for $25,000. Throughout this time, neither Ko nor the Jos informed Ogumoro that the

[1] Former Chief Justice Miguel S. Demapan heard oral argument. Prior to the issuance of this Opinion, he retired from the Commonwealth Judiciary.

[2] The Lot is located at the intersection of Chalan Palé Arnold and Chalan Monsignor Guerrero in San Jose, Saipan.

Jos had mortgaged their leasehold interest or that Ko had acquired the Jos' leasehold interest through the judicial sale.

¶ 5 In April 1999, believing that the Jos were still the lessees, Ogumoro's attorney sent them a notice of default, demanding payment of rent for March and April 1999. In October 1999, Ogumoro's counsel sent the Jos a second letter advising the Jos that Ogumoro was lawfully terminating the lease for failure to pay rent. Shortly thereafter, Ogumoro sued the Jos for breach of contract, seeking termination of the Ground Lease. Ogumoro sought damages in the amount of the unpaid rent as well as attorney fees.

¶ 6 During the proceedings against the Jos, Ogumoro learned that Ko had purchased the Jos' leasehold interest at the 1997 judicial sale. Prior to the lawsuit, the only contact between Ko and Ogumoro occurred in January 1999 when Bernadita Palacios, Ko's agent in Saipan, along with Ko's wife, visited Ogumoro at her residence. Palacios presented Ogumoro with a check from the "Glory Corporation" for $6,000, covering rent from December 1998 to February 1999. Although Ko was the owner of Glory Corporation, the check did not have Ko's name on it. Despite the check from Glory Corporation, Ogumoro continued to believe that the Jos were the legal lessees.

¶ 7 In August 2000, Ogumoro moved to add Ko as a defendant to her lawsuit against the Jos. Ogumoro averred that she was unable to locate and serve Ko using regular service of process and that it was necessary to serve him via publication. In November 2000, the trial court authorized service by publication. The trial court relied on Ogumoro's statement that she did not know Ko's physical or mailing addresses and that she could not obtain them by exercise of reasonable diligence.

¶ 8 The notice of summons was published in the newspaper four times in November and December 2000. Ko did not respond to the published notice of summons. On February 28, 2001, the trial court entered default judgment against Ko and the Jos for breach of contract. The trial court terminated the Ground Lease for failure to pay rent, ordered Ko and the Jos to vacate the Lot, and concluded that Ko and the Jos were jointly and severally liable to Ogumoro for damages totaling $80,200, plus attorney fees.

¶ 9 In reliance on the trial court's order terminating the Ground Lease, Ogumoro began negotiating a new lease for the Lot with Young Boo Jung ("Jung") in early 2001. As part of his due diligence, Jung conducted a preliminary title search on the Lot which revealed a possible defect of title. Jung's and Ogumoro's attorneys resolved the defect. A second preliminary title search by Jung showed that title to the Lot was clear. Jung and Ogumoro signed a lease agreement and Jung recorded the new lease.

¶ 10 During the next year, Jung invested hundreds of thousands of dollars to develop the Lot. Among other things, Jung cleared vegetation, graded the Lot, added pavement, constructed a commercial building, and installed a backup generator. Additionally, Jung executed two subleases: one with D.Y. Corporation ("D.Y.") and another with Pacific Blue Corporation ("Pacific Blue"). Both subtenants made additional improvements to the Lot. Ko became aware of Jung's and the sublessee's improvements on or

around September 2002. He contacted his attorney about the improvements in December 2002; however, he did not notify Jung or Ogumoro, nor did he attempt to make rental payments under the Ground Lease. Ogumoro died in December 2002. Her estate ("the Estate") became the successor in interest to this action.

¶ 11 Ko learned of the default judgment against him in February 2003 and filed a motion to set aside the default judgment in March 2003. To protect his status as the Estate's lessee, Jung filed a motion to intervene after learning of Ko's motion to set aside the default. The trial court found that Ogumoro had access to mailing addresses for both Ko and Ko's attorney when she sought to serve Ko with process. The trial court concluded that Ogumoro should have attempted to serve Ko or Ko's attorney prior to petitioning the trial court for service by publication. As a result, the trial court set aside the February 2001 default judgment against Ko. The set-aside of Ogumoro's default judgment revived Ogumoro's breach of contract action against Ko.

¶ 12 Shortly thereafter, Ko filed a separate action to quiet title against Jung and Jung's sublessees, D.Y. and Pacific Blue. Jung and D.Y. counterclaimed against Ko. Both D.Y. and Pacific Blue cross-claimed against Jung for indemnification pursuant to the terms of their subleases with Jung. Jung impleaded the Estate as a third party defendant, then cross-claimed against the Estate for damages arising from Ko's suit based on an indemnification provision in his lease agreement with Ogumoro. In October 2005, the trial court consolidated Ko's quiet title action into the Estate's revived breach of contract action. After the consolidation, Jung and his sublessees became third party defendants in the breach of contract action against Ko. Ko then filed a motion to dismiss the breach of contract cause of action, which the trial court denied in January 2006.

¶ 13 In March 2006, the trial court granted D.Y.'s cross-motion for summary judgment against Jung and Jung's cross-motion for summary judgment against Ko.[3] First, the trial court determined that paragraph 28 of the Ground Lease made all of the lease provisions applicable to Ko. Next, the trial court concluded that: (1) Ko breached the lease agreement by failing to pay rent; (2) Ogumoro had properly terminated the lease with Ko for his failure to pay rent; and (3) Ko was liable to the Estate for breaching the Ground Lease.

¶ 14 In the months following summary judgment, the trial court awarded attorney fees and damages. Pacific Blue obtained a judgment against Jung for $1,822 in attorney fees. Pacific Blue's fee award was based on an indemnification clause in the sublease agreement between Jung and Pacific Blue. Jung obtained a judgment against the Estate for $7,092 in attorney fees plus Pacific Blue's $1,822 in attorney fees for a combined award of $8,914. Jung passed his and Pacific Blue's attorney fees to the Estate via an indemnification clause in the Jung-Ogumoro lease agreement. The Estate obtained a judgment against Ko

[3] Pacific Blue did not join D.Y.'s cross-motion for summary judgment.

totaling $98,228.43 including: (1) $8,914 for indemnification of Jung and Pacific Blue's attorney fees; (2) $36,011.78 for the Estate's attorney fees;[4] (3) $4,827.16 in unpaid rent; and (4) $48,475.49 in lost rents. The indemnification and attorney fee awards against Ko were based on clauses in the Jo-Ogumoro Ground Lease. Ko timely appealed, and Jung followed with a cross-appeal.

II

¶ 15 We have jurisdiction over this appeal pursuant to 1 CMC § 3102(a).

III

A. Validity of the Default Judgment Under Rule 60(b)(4)

¶ 16 The trial court concluded that the February 2001 default judgment Ogumoro obtained against Ko was void because Ogumoro was not reasonably diligent in her efforts to serve Ko. As a result, the trial court invalidated the default judgment pursuant to NMI Rule of Civil Procedure 60(b)(4). Jung asserts that the trial court committed error because Ogumoro's efforts to serve Ko were reasonably diligent and, even if Ogumoro's efforts to serve Ko were not reasonably diligent, Ko assented to be bound by the default judgment.[5] Ko counters that Jung lacks constitutional standing to appeal the set-aside of the default judgment. We address each argument in turn.

1. Standard of Review

¶ 17 NMI Rule of Civil Procedure Rule 60(b)(4) mandates that the trial court set aside a default judgment "when the judgment is void." *J.C. Tenorio Enters. v. Pedro*, 2006 MP 22 ¶ 10. "There is no question of discretion on the part of the court when a motion is [brought] under Rule 60(b)(4). . . . Either a judgment is void or it is valid." *Thomas P. Gonzalez Corp. v. Consejo Nacional De Produccion De Costa Rica*, 614 F.2d 1247, 1256 (9th Cir. 1980) (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2862 (2d. ed. 1995)). Unlike other Rule 60(b) motions,

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[4] The final judgment states that the $36,011.78 was for "attorneys' fees and costs of suit." *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. July 5, 2007) (Entry of Judgment at 1) (unpublished). Upon review of the documents leading up to the final judgment, we ascertain that the trial court awarded the $36,011.78 only for attorney fees. *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. Jan. 9, 2007) (Order Awarding Attorney's Fees and Consequential Damages at 8) (unpublished) ("Ogumoro requests $36,362.03 in attorney's fees incurred by Manibusan and Newman."). The trial court reduced the $36,362.03 award by $350.25 in a subsequent order. *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. Apr. 11, 2007) (Order Partially Reconsidering Awards of Attorneys' Fees at 6) (unpublished) ("To prevent manifest injustice, Ko shall be liable to the Estate for $36,011.78 (the Estate's claim of 36,362.03 minus $350.25).").

[5] Jung additionally argues that "a notice-effort may comply with Constitutional requirements under the Due Process Clause and yet fail to comply with the requirements of an applicable statute or rule of court." Restatement (Second) of Judgments § 2(3) (1980). Based on this Restatement provision, Jung asserts that while Ogumoro's efforts to serve Ko may not have complied with Commonwealth statutory law, her efforts to locate Ko were constitutionally sufficient, thereby rendering the judgment voidable instead of void. We decline to address this argument because, as set forth below, we hold that Ogumoro's efforts to locate Ko fell below constitutional due process minimums.

which are subject to abuse of discretion review, *J.C. Tenorio Enters.*, 2006 MP 22 ¶ 9, we review de novo a trial court's determination that a default judgment is void for insufficient service of process. *Reyes v. Reyes*, 2001 MP 13 ¶ 24; *Export Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1469 (9th Cir. 1995).

2. Standing

¶ 18 Ko argues that because Jung was merely an intervenor in Ko's action to set aside the February 2001 default judgment, Jung lacks standing to challenge the trial court's decision. The general rule is that an intervenor at the trial level may ride "piggyback" on the constitutional standing of one of the original parties to the litigation if the intervenor is in the same procedural posture (e.g. defendant or plaintiff) as the original party filing the appeal. *Diamond v. Charles*, 476 U.S. 54, 64 (1984); *City of Herriman v. Bell*, 590 F.3d 1176, 1183-84 (10th Cir. 2010). Jung intervened in the default judgment proceedings on the same side as the Estate. Because the Estate did not file an appeal,[6] we hold that Jung may not file a cross-appeal challenging the default judgment based on his status as an intervenor.

¶ 19 Nevertheless, Jung argues that his appeal is supported by independent constitutional standing. *Diamond*, 476 U.S. at 68. "In essence[,] the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute . . . ." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). As articulated by the United States Supreme Court, standing requires that a plaintiff: (1) "'must have suffered an injury in fact—an invasion of a legally protected interest which is a) concrete and particularized, and b) actual or imminent, not conjectural or hypothetical'; (2) 'there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court'; and (3) 'it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision.'" *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1169 (9th Cir. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Courts often restate these requirements as injury-in-fact, causation, and redressability. *See, e.g., W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011); *Chapman v. Pier 1 Imps. (U.S.), Inc.*, 631 F.3d 939, 946 (9th Cir. 2011).

¶ 20 Here, Jung has demonstrated an injury-in-fact flowing from Ko's successful motion to set aside the default judgment. Jung spent hundreds of thousands of dollars developing the Lot. He also incurred liabilities by entering into sublease agreements with D.Y. and Pacific Blue. Jung satisfies the causation requirement because Ko's successful bid to set aside the default judgment created a cloud over title to

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[6] The Estate appealed the trial court's order setting aside the default judgment at the time it was entered. We dismissed the appeal for failure to prosecute under former Commonwealth Rules of Appellate Procedure 31(a). *See Ogumoro v. Jo*, No. 04-0008-GA (NMI Sup. Ct. March 22, 2005) (Order of Dismissal). The Estate's counsel later responded to an order to show cause, explaining that the failure to prosecute occurred because of a misunderstanding between the attorneys on both sides and that the Estate had intended to dismiss the appeal because it was premature. *See* Written Explanation on Order to Show Cause, *Ogumoro v. Jo*, No. 04-0008-GA (NMI Sup. Ct. April 25, 2005).

Jung's leasehold interest. This cloud jeopardizes Jung's possessory interest in the leasehold, his extensive improvements to the leasehold, and his legal relations with his sublessees. Finally, Jung satisfies the redressability requirement because if successful on appeal, Jung would regain his status as the undisputed leaseholder of the Lot, free and clear from Ko's claim of superior title. Thus, we conclude that Jung has independent constitutional standing to challenge the set-aside of the default judgment.

3. Reasonable Diligence

¶ 21 Jung asserts that it was error for the trial court to set aside the default judgment because Ogumoro did not exercise reasonable diligence in searching for Ko prior to effecting service by publication. The requirements for personal service of process are set forth by NMI Rule of Civil Procedure 4(e)(1), which provides that service may be effected "in any manner prescribed or authorized by any law of the Commonwealth." Generally, service of process is complete when "notice of the service and a copy of the summons and complaint are served upon the defendant personally by any person authorized to serve process . . . ; or sent by certified or registered mail, postage prepaid . . . , by the plaintiff or the plaintiff's attorney to the defendant." 7 CMC § 1104(a); *see also* NMI R. Civ. P. 4(e)(2).

¶ 22 When a defendant cannot be personally served in the manner specified by 7 CMC § 1104(a), 7 CMC § 1104(b) authorizes service by publication:

> *[I]f the defendant cannot be personally served by mail the summons and complaint*, and if by affidavit or otherwise the court is satisfied that with *reasonable diligence* the defendant cannot be served, and that a cause of action arises against the party upon whom service is to be made, or he is a necessary and property party to the action, the court may order that service be made by publication of the summons in at least one newspaper published and having a general circulation in the Commonwealth.

Id. (emphasis added).[7] According to the United States Supreme Court, service by publication is permissible "where it is not reasonably possible or practicable to give more adequate warning," because "in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 797-98 (1983).

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[7] In his brief, Jung suggests that posting a notice to "appear or plead" pursuant to 7 CMC § 1302 is a "substantial equivalent" to service under section 1104(b). Appellee's Resp. Br. 12 n.2. Jung makes this argument in a footnote, without any supporting authority or argument. We state time and again that "we will not consider an issue for which the proponent cites no legal authority." *Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 24 (Slip Opinion, Mar. 31, 2011); *In re Estate of Angel Malite*, 2010 MP 20, ¶ 27 n.27 (Slip Opinion, Dec. 28, 2010) (citing *Fitial v. Kim Kyung Duk*, 2001 MP 9 ¶ 18); *Roberto v. De Leon Guerrero*, 4 NMI 295, 297-98 (1995).

Moreover, an argument raised in a footnote is not adequately preserved for our review. *See SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("[A]rguments raised in footnotes are not preserved."); *United States v. Svoboda*, 347 F.3d 471, 480 (2d Cir. 2003) ("It is well-established . . . that we do not consider an argument mentioned only in a footnote to be adequately raised or preserved for appellate review.).

¶ 23 When a plaintiff serves the defendant by publication, the central inquiry into the validity of service is whether the plaintiff exercised reasonable diligence in attempting to locate the defendant. *Mennonite Bd. of Missions*, 462 U.S. at 804-05. It is axiomatic that "if a defendant's name and address are known or may be obtained with reasonable diligence, service by publication will not satisfy the requirements of due process." *SEC v. Tome*, 833 F.2d 1086, 1094 (2d Cir. 1987) (citing *Mennonite Bd. of Missions*, 462 U.S. at 800); *United States v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991). Service by publication does not realistically afford a defendant actual notice of the lawsuit, and thus, should only be used as a last resort, when service by other methods is not reasonably practicable. *Watts v. Crawford*, 896 P.2d 807, 811 n.5 (Cal. 1994).

¶ 24 The trial court rested its decision to set aside the default judgment in part upon Ogumoro's failure to attempt service of process on Ko's attorney. Title 1 CMC § 1104(b) does not specify whether an attorney may be served with process in his or her client's stead; NMI Rule of Civil Procedure 4(e)(2) ("Rule 4(e)(2)") is more helpful. While Rule 4(e)(2) does not explicitly authorize an attorney to receive service of process, it does permit "an agent authorized by appointment . . . to receive service of process." NMI R. Civ. P. 4(e)(2). We must therefore interpret Rule 4(e)(2) to determine whether Ogumoro could have served Ko's attorney as "an agent authorized by appointment." We turn to federal cases for aid in interpreting this Rule.[8]

¶ 25 A defendant may appoint an agent to receive service of process on his or her behalf, but that appointment must be explicit. *See Smith v. W. Offshore, Inc.*, 590 F. Supp. 670, 674 (E.D. La. 1984) (concluding that service on a harbormaster was insufficient service of process when the harbormaster was not explicitly appointed to receive service for his shipping company); *Lamont v. Haig*, 539 F. Supp. 552, 557 (D.S.D. 1982) (requiring that an agent be "actually appointed" in order to receive service of process) *overruled on other grounds by Engleman v. Murray*, 546 F.3d 944, 948 n.3 (8th Cir. 2008). In the absence of a specific appointment, the circumstances of the agency relationship must expressly or impliedly indicate that the alleged agent has authority to receive service of process. *See, e.g.*, *Schultz v. Schultz*, 436 F.2d 635, 637 (7th Cir. 1971) (holding that there was "no reasonable basis" to find that the defendant's execution of an itemized power of attorney made the defendant's attorney an agent "authorized by

[8] "[W]hen interpreting our rules of civil procedure, which are patterned after the federal rules, we will principally look to federal interpretation for guidance." *Commonwealth Dev. Auth. v. Camacho*, 2010 MP 19 ¶ 16 (Slip Opinion, Dec. 21, 2010); *accord Ishimatsu v. Royal Crown Ins. Corp.*, 2010 MP 8 ¶ 60 (Slip Opinion, June 1, 2010).

Federal Rule of Civil Procedure 4 has been amended several times since the Northern Mariana Islands adopted the federal rules. This jurisdiction has not kept pace with the federal amendments. Despite these intervening amendments, Federal Rule of Civil Procedure 4(e)(2)(C) is nearly identical to the current NMI Rule of Civil Procedure 4(e)(2). Most of the federal cases cited in this opinion related to this issue refer to former Federal Rule of Civil Procedure 4(d)(1) which is also substantively similar to NMI Rule of Civil Procedure 4(e)(2).

appointment" to receive service of process); *Franklin Am., Inc. v. Franklin Cast Prods., Inc.*, 94 F.R.D. 645, 647 (E.D. Mich. 1982) (holding that wife's alleged statement that plaintiff's attorney could leave process with the housekeeper was insufficient evidence that the housekeeper was an agent for receipt of process).

¶ 26 Here, there is no suggestion that Ko had an attorney who was "authorized by appointment" to receive service of process on Ko's behalf at the time Ogumoro sought to serve Ko with the summons and complaint. We hold that Ogumoro had no duty to search for the address of an attorney who could not have been legally served in Ko's stead. The trial court erroneously based part of its decision to vacate the February 2001 default judgment on this ground.

¶ 27 We must also address Jung's contention that service of process could not have been mailed to Ko. The trial court found that Ogumoro had "a local business address and phone number for Mr. Ko." *Ogumoro v. Ko*, No. 99-0655 (NMI Super. Ct. March 8, 2004) (Order Granting Defendant's Rule 60(b) Motion for Relief from Judgment at 5) ("Set Aside Order"). Jung disputes the trial court's reliance on this fact, arguing that (1) Ogumoro did not have knowledge of Ko's mailing address, and (2) she was not obligated to serve an address she could not reasonably ascertain. Jung also argues that, even if Ogumoro had a local mailing address for Ko, Ogumoro's other efforts to locate Ko satisfied the reasonable diligence requirement.

¶ 28 As to Jung's first argument, our standard of review is dispositive. We review the trial court's findings of fact for clear error. *Mendiola v. Commonwealth Utils. Corp.*, 2005 MP 2 ¶ 11. While we observe that the trial testimony and trial documents are at times inconsistent, the facts support the trial court's finding that Ogumoro had a local mailing address for Ko. The two-page excerpt of the Ko-Jo mortgage included in the record contains Ko's name and a local Saipan address. In addition, there is evidence that either Ogumoro or her children visited the Commonwealth Recorder's Office after Ko recorded the Jo-Ko mortgage. Based on these facts, we cannot fault the trial court's inference that Ogumoro knew Ko's mailing address. Because we uphold the trial court's factual finding that Ogumoro had Ko's mailing address, we need not address the constitutional sufficiency of the steps Ogumoro undertook to locate that address.

¶ 29 We now turn to Jung's contention that despite Ogumoro's possession of Ko's mailing address, Ogumoro's other efforts to locate and serve Ko satisfied the reasonable diligence requirement. What constitutes reasonable diligence "depend[s] on the facts of each case." *People ex rel. Waller v. Harrison*, 810 N.E.2d 589, 594 (Ill. App. Ct. 2004). A plaintiff may not declare that he or she has conducted a reasonably diligent search while leaving simple, reasonable methods untried. *Price v. Dunn*, 787 P.2d 785, 787 (Nev. 1990) ("Where other reasonable methods exist for locating the whereabouts of a defendant, plaintiff should exercise those methods."); *see also Redfield Invs. v. Vill. of Pinecrest*, 990 So.

2d 1135, 1139 (Fla. Dist. Ct. App. 2008) ("[T]he apparent failure of [the plaintiff] to inquire of the most likely source of potential information concerning the whereabouts of [the defendant] . . . falls short of the statutory and constitutional requirements necessary to satisfy [Florida's] service of process by publication law.").

¶ 30 Here, the trial court concluded that while Ogumoro "offered testimony as to substantial steps taken by various people to personally serve Mr. Ko. . . . , the simple failure to send process to a known mailing address is enough by itself to render the attempted service deficient." Set Aside Order at 5 n.2. We agree with the trial court. Ogumoro cannot claim reasonable diligence while simultaneously leaving an obvious avenue of service untried. We affirm the trial court's decision to set aside the default judgment.

4. Assent to the Default Judgment

¶ 31 Jung's final argument is that a default judgment otherwise void under Rule 60(b)(4) should not be set aside where the defendant manifests intent to be bound by it and another party relies on it. This argument is based on the Restatement (Second) of Judgments § 66 (1982) ("Restatement § 66"), which reads:

> Relief from a default judgment on the ground that the judgment is invalid will be denied if:
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> (1) The party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and
>
> (2) Granting the relief would impair another person's substantial interest of reliance on the judgment.

This argument is a form of judicial estoppel, and we previously acknowledged the applicability of this Restatement rule in *Sullivan v. Tarope*, 2006 MP 11 ¶ 39. Succinctly stated, a litigant may not accept benefits conferred by a default judgment and later attempt to invalidate the judgment to the detriment of the nonmoving party. *Id.* ¶ 37. This rule is not "a form of judicial alchemy;" it cannot "transform a void judgment into a valid one." *Id.* Rather, it imposes an equitable disability on the party challenging the default judgment, thereby estopping the challenger from asserting that the judgment is void. *Adams v. Nationsbank*, 49 S.W.3d 164, 168 (Ark. Ct. App. 2001); *Jennings v. Jennings*, 531 N.E.2d 1204, 1206 (Ind. Ct. App. 1988); *McDougall v. McDougall*, 961 P.2d 382, 384 (Wyo. 1998).

¶ 32 The first prong of Restatement § 66 requires the party seeking relief from the judgment to have had actual notice of the default judgment. Actual notice is defined as "[n]otice given directly to, or received personally by a party." *Khan v. City of Flint*, 800 N.W.2d 600, 600-01 (Mich. 2011) (quoting Black's Law Dictionary 1090 (8th ed. 2004)). The only Commonwealth case interpreting this Restatement provision, *Sullivan*, aligns with this definition of actual notice. We noted in *Sullivan* that "[i]t is undisputed that . . . Jose knew of the divorce and the child support terms he now wishes to avoid. Rather than object to the judgment . . . , he accepted it as valid . . . ." *Sullivan*, 2006 MP 11 ¶ 43. *Sullivan*

illustrates that mere suspicion or circumstantial knowledge of a default judgment does not satisfy the Restatement.

¶ 33 On the record before us, Ko did not receive actual notice of the default judgment until February 2003, when he learned of the default judgment through his attorney.[9] Though Ko admitted that he had seen construction on the Lot by late 2002, we reject Jung's contention that this was legally sufficient to apprise Ko that there was a default judgment entered against him. Neither Ko's failure to inquire into the construction on his property nor the fact that Ko ceased paying rent equates to actual notice. Moreover, nothing in the record before us suggests that Ko was evading knowledge of the default, and Jung does not direct our attention to any contrary evidence. Thus, Jung fails to establish the first element of his claim of estoppel by assent. We need not inquire further.

B. Ko's Liability Under the Jo-Ogumoro Ground Lease

¶ 34 On Jung's and D.Y.'s cross-motions for summary judgment, the trial court concluded that Ko was liable to the Estate based on certain clauses contained in the Ground Lease. Specifically, the trial court determined that the attorney fees, indemnification, forfeiture, and notice clauses in the Ground Lease applied to Ko.[10] Based on this determination, the trial court ruled that Ko's interest in the Lot was terminated and that Ko was liable to the Estate. Ko's liabilities included unpaid rent, lost rent, the Estate's attorney fees, and indemnification of the Estate for Jung's and Pacific Blue's attorney fees.[11] Ko argues that: (1) he cannot be liable for promises contained in the Ground Lease because he did not expressly assume the terms of the Ground Lease; (2) his liabilities are limited to unpaid rent on the Lot; and (3) as the rightful lessee of the Lot, possession of the Lot should be restored to him.

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[9] Mr. Ko: I heard this from my lawyer that Ogumoro is suing me, and I learned that from my attorney.
Mr. Inos: And do you know what month or year that was?
A: This year, February.
Q: So 2003, is that correct?
A: Yes.
Q: So prior to February 2003, you did not know anything about the default judgment?
A: That is correct . . . .

Ko's Supplemental Excerpts of Record at 24. This testimony was taken at the evidentiary hearing prior to the trial court's decision to set aside the default judgment.

[10] *See Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. Jan. 20, 2005) (Order Denying Ko's Rule 12(b)(6) Motion to Dismiss at 8); *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. May 11, 2006) (Order Denying Ko's Motion for Reconsideration and For Entry of Final Judgment at 4 n.7); *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. Oct. 30, 2006) (Order Granting in Part the Estate's Motion for Summary Judgment on the Issue of Damages at 9) (unpublished).

[11] The trial court denied D.Y.'s claim for attorney's fees holding that D.Y., while able to enforce its rights as Jung's sublessee, was obligated to do so at its own expense. *Ogumoro v. Ko*, Civ. No. 99-0655 (NMI Super. Ct. Jan. 9 2007) (unpublished) (Order Awarding Attorney's Fees and Consequential damages at 3).

¶ 35 We review a trial court's grant of summary judgment de novo. *Aplus Co. v. Niizeki Int'l Saipan Co.*, 2006 MP 13 ¶ 9. We must "examine the evidence in the light most favorable to the non-moving party and affirm the trial court if there [are] no genuine issue[s] of material fact . . . . and the trial court correctly applied the substantive law." *Century Ins. Co. v. H.K. Entm't Invs., Ltd.*, 2009 MP 4 ¶ 14 (brackets, citation, and quotations omitted).

1. Ko's Legal Relationship to Ogumoro

¶ 36 To determine which, if any, of the promises in the Ground Lease are applicable against Ko, we must scrutinize the legal relationship that arose between Ogumoro and Ko when Ko acquired the Jos' leasehold interest in the Lot. "Liability between an owner of real property and parties with a leasehold interest is predicated on privity. The common law recognizes three types of privity - privity of contract, privity of estate, and a combination of privity of contract and estate." *Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 495 (D.C. 2005) (quoting 1 Milton R. Friedman, *Friedman on Leases* § 7:5.1[A] (5th ed. 2004)). Privity of contract is premised on the existence of a contractual relationship between two parties, typically in the form of a lease agreement. *Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 417 (Ind. Ct. App. 1999). In contrast, privity of estate is a "[a] mutual or successive relationship to the same right in property, as between grantor and grantee or landlord and tenant." *Hodge v. McGowan*, 50 V.I. 296, 310 (2008) (quoting Black's Law Dictionary 1238 (8th ed. 2004)). A lease is a combination of privity of contract and privity of estate: acquisition of the leasehold interest creates privity of estate, and the lessee's written agreement to observe the leasehold provisions creates privity of contract. *Sarete, Inc.*, 871 A.2d at 495 (citing Friedman on Leases at § 7:5.1[A]); *Davidson v. Minn. Loan & Trust Co.*, 197 N.W. 833, 834 (Minn. 1924) ("A lease is both an executory contract and a present conveyance, and creates a privity of contract and a privity of estate between the lessor and the lessee.").

¶ 37 A lessee may assign the leasehold interest to a third party if the terms of the lease permit. Where the lessee makes such an assignment, the third party, known as the assignee, acquires privity of estate with the lessor. *Vallely Invs. v. Bancamerica Commercial Corp.*, 106 Cal. Rptr. 2d 689, 694 (Cal. Ct. App. 2001); *New Amsterdam Cas. Co. v. Nat'l Union Fire Ins. Co.*, 194 N.E. 745, 747 (N.Y. 1935). If the assignee expressly agrees to be bound by some or all of the promises contained in the lease agreement, the assignee assumes the leasehold promises, thus placing the assignee in privity of contract with the lessor. *Gateway Co. v. DiNoia*, 654 A.2d 342, 348 (Conn. 1995). The lessor may enforce the assumed leasehold promises against the assignee on a theory that the lessor is a third party beneficiary of the agreement between the lessee/assignor and the assignee. *Id.* As explained below, the distinction between privity of contract and privity of estate is important, as differing legal liabilities accrue depending on whether the parties are in privity of contract, privity of estate, or both.

¶ 38 Here, Ko purchased his interest in the Lot at the March 1997 judicial sale of the Jos' leasehold.[12] It is undisputed that Ko did not sign any documents with either the Jos' or Ogumoro purporting to make him liable for the promises in the Ground Lease. Thus, Ko's legal relationship with the estate is governed only by Ko's acquisition at the foreclosure sale.[13]

¶ 39 Although a judicial sale is an involuntary transfer of the leasehold interest, courts treat this as an assignment. The subsequent purchaser at the judicial sale takes as a "naked" assignee of the leasehold interest. *Gorin v. Stroum*, 192 N.E. 90, 92 (Mass. 1934) ("[A] lease may be pledged and . . . the pledge may be foreclosed by a sale of the lease, and . . . the purchaser in such a case becomes an assignee of the lease and term, and takes subject to the obligation to pay rent."). The purchaser takes as an assignee because the judicial sale extinguishes the original lessee's reversionary interest in the premises. *Shreck v. Coates*, 126 P.2d 308, 311 (Ariz. 1942) (citing 32 Am. Jur. *Landlord & Tenant* § 313); *Jack Burton Mgmt. Co. v. Am. Nat'l Ins. Co.*, 77 F. Supp. 2d 1102, 1103-04 (E.D. Mo. 1999), *aff'd without opinion*, 242 F.3d 375 (8th Cir. 2000) (applying Missouri law). Thus, when Ko foreclosed on the Jos' mortgage and acquired their leasehold interest at the judicial sale, Ko became an assignee of the Jos' leasehold interest. This placed Ko in privity of estate with Ogumoro.[14]

¶ 40 Jung contends that the judicial confirmation order affirming the sale of the Jos' leasehold placed Ko in privity of contract with Ogumoro. As a general rule, a contract can only be enforced against parties to the contract. *Barbara's Lighting Ctr., Inc. v. Churchill*, 540 P.2d 1110, 1111 (Colo. Ct. App. 1975); *McIntyre v. Johnson*, 120 P. 92, 94 (Wash. 1912). This rule holds true for leases. The liability of an assignee who did not sign the original lease agreement is limited to provisions in the lease which he or she expressly agreed to assume. *Jack Burton Mgmt. Co.*, 77 F. Supp. 2d at 1103-04; *Kelly v. Tri-Cities Broad., Inc.*, 195 Cal. Rptr. 303, 309 (Cal. Ct. App. 1983). An assignee who acquires a leasehold interest without expressly agreeing to assume any contractual provisions of the original lease acquires privity of estate with the lessor but not privity of contract. *Jack Burton Mgmt. Co.*, 77 F. Supp. at 1103-04; *Realty & Rebuilding Co. v. Rea*, 194 P. 1024, 1026 (Cal. 1920); *Kelly*, 195 Cal. Rptr. at 308; *S. Lakeview Plaza v. Citizens Nat'l Bank of Greater St. Louis*, 703 S.W.2d 84, 86 (Mo. Ct. App. 1985).

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[12] Jung disputes whether the foreclosure and subsequent judicial sale were conducted in accordance with Commonwealth law. Jung raises this argument in a footnote without any supporting facts or authority. *See supra* note 7.

[13] Commonwealth law permits the mortgagee to purchase the foreclosed interest at a judicial sale. 2 CMC § 4537(e) ("Nothing in this chapter shall deny to the mortgagee . . . the right to purchase the mortgaged property at a foreclosure sale . . . .").

[14] There remains a question as to whether privity of contract still existed between the Jos and Ogumoro after the judicial sale. We need not resolve this issue, as the Jos are not a party to the case.

¶ 41 The judicial confirmation order did not place Ko in privity of contract with Ogumoro. The plain language of the trial court's confirmation order acknowledges "sale" of the Jos' "lease" to Ko and nothing more. *Ko v. Jo*, Civ. No. 96-1319 (NMI Super. Ct. Aug 19, 1997) (Order at 1); Excerpts of Record ("ER") at 7. The lack of any express language in the confirmation order requiring Ko to assume the provisions in the Ground Lease indicates that the sale order created no privity of contract between Ogumoro and Ko.

¶ 42 Having disposed of Jung's argument, we now turn to Ko's contention that the trial court erroneously concluded that Ko *implicitly* assumed all of the Ground Lease covenants when he purchased the Jos' leasehold. We agree with Ko on this point. The legal authorities relied on by the trial court, though cited against Ko, are either distinguishable or support our conclusion that assumption of leasehold provisions must typically be explicit.[15] The trial court principally relied on *Bird Hill Farms, Inc. v. U.S. Cargo & Courier Serv., Inc.*, 845 A.2d 900 (Pa. Super. Ct. 2004). Unfortunately for Jung, while *Bird Hill Farms* does involve an implicit assumption of leasehold terms, the outcome in that case is predicated upon principles of corporate successor liability. *Id.* at 905 ("In determining whether a successor corporation implicitly assumed an obligation of its predecessor, the following factors are relevant . . . ."). There are no corporate parties involved with this case. We will not extend the principles of corporate successor liability to non-corporate parties. The trial court's reliance upon *Gillette Bros. v. Aristocrat Rest., Inc*., 145 N.E. 748 (N.Y. 1924) is also inapt. In *Gillette Bros.*, it was undisputed that the defendant implicitly assumed a leasehold interest by taking possession of a rental property. The appellate court acknowledged that the defendant's possession of the leasehold only placed him in privity of estate with the lessor. *Id.* at 749 ("But between [the assignee] and the lessor there was no privity of contract. There was but privity of estate."). The final case relied upon by the trial court, *Mann v. Ferdinand Munch Brewery*, 121 N.E. 746 (N.Y. 1919), is likewise favorable to Ko. *Mann* states that "[i]n order to recover the plaintiff was obliged to prove that the [Defendant] was an assignee of the lease, and *also had assumed the covenants contained therein.*" *Id.* at 747 (emphasis added). The *Mann* court concluded that the defendant "*expressly* agreed and undertook to carry out the terms of the lease." *Id.* at 748 (emphasis added). *Gillette Bros.* and *Mann* reinforce our understanding that assumption of contractual lease provisions must be explicit. Ko acquired privity of estate with Ogumoro when he obtained the Jos' leasehold at the judicial sale and nothing more.

2. Ko's Liability for Specific Promises in the Ground Lease

¶ 43 Next, we determine whether the promises contained in the Ground Lease related to attorney fees, notice, forfeiture, and indemnification are binding on Ko. Whether one or more of these promises binds

[15] We do not foreclose all circumstances in which an assignee might implicitly assume the contractual terms of a lease agreement.

Ko depends on whether they are real covenants or personal covenants.[16] An express promise in a lease is termed a real covenant which "runs with the land" when it "touches and concerns" the leasehold interest. *Columbia Club*, 720 N.E.2d at 418. The obligation to perform a real covenant passes by operation of law when property subject to the real covenant is transferred via an assignment. *Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377, 386 (Okla. 2002). Thus, when a lessee on the original lease assigns his or her leasehold interest to a third party, the assignee becomes liable to perform the real covenants contained in the lease. *Union Trust Co. v. Rosenburg*, 189 A. 421, 424 (Md. 1937). All other express promises in the lease are termed personal covenants, which are "collateral and personal obligation[s]" between the lessor and the lessee that do not run with the land. *Rodruck v. Sand Point Maint. Comm'n*, 295 P.2d 714, 720 (Wash. 1956) (citation omitted); *Summer Oaks Ltd. P'ship v. McGinley*, 55 P.3d 1100, 1105 (Or. Ct. App. 2002); *Raintree Corp. v. Rowe*, 248 S.E.2d 904, 907 (N.C. Ct. App. 1978). The distinction between real and personal covenants is critical, because personal covenants do not bind an assignee when the lessor and assignee are only in privity of estate.

¶ 44 Jung argues that paragraph twenty-eight of the Ground Lease converts all of the promises in the Ground Lease into real covenants running with the land. Paragraph twenty-eight reads: "[a]ll the provisions of this Lease shall be deemed as running with the land." ER at 40. This clause does not aid Jung because "[t]he express intent of the parties . . . cannot make a personal covenant run with the land." *Raintree*, 248 S.E.2d at 908; *see also Eagle Enters., Inc. v. Gross*, 349 N.E.2d 816, 818-19 (N.Y. 1976) ("Even though the parties to the original deed expressly state in the instrument that the covenant will run with the land, such a recital is insufficient to render the covenant enforceable against subsequent grantees if the other requirements for the running of an affirmative covenant are not met."); *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 691 P.2d 970, 972 (Wash. Ct. App. 1984) ("Since it does not touch and concern the land, this covenant cannot run, despite the language in the lease which says it does. Intent is not enough to make a running covenant out of one which is by its nature personal."); *Lingle Water Users Ass'n v. Occidental Bldgs. & Loan Ass'n*, 297 P. 385, 389 (Wyo. 1931) ("[T]he rule seems to be uniform that the intention of the original parties to a contract alone cannot create a covenant running with the land, but that the nature of the covenant and its relation to the estate must . . . be such that the law will permit the intention to be effectual."). Thus, paragraph twenty-eight merely represents the parties' intent

[16] The Restatement (Second) of Property uses the word "promise" rather than "covenant" to describe the obligations created in a lease. The Restatement notes that the word "covenant" is a term of art used to describe formal promises under seal, and that the significance of the seal has decreased in recent years. Restatement (Second) of Property § 16 introductory note (1976). Generally, we agree that "promise" may be substituted for "covenant." However, we cannot deny that the bulk of prior jurisprudence uses "covenant" terminology. For the sake of parity with already-published opinions, we will continue using "real covenant" and "personal covenant" to describe the express promises contained in leasehold agreements, with an understanding that these terms describe promises in the lease agreement and not promises under seal.

that all real covenants run with the land. This paragraph is not a magic talisman that converts personal covenants into real covenants.

¶ 45 The Estate contends that in *Manglona v. Commonwealth*, 2005 MP 15, this Court adopted the modern position that the doctrine of covenants running with the land does not apply to lease agreements. The Estate misinterprets *Manglona*. In *Manglona*, we examined whether we would follow the archaic doctrine of dependent covenants or whether we would adopt the modern trend position of dependent covenants when construing lease provisions. *Id.* ¶ 34. In holding that this jurisdiction would adopt the modern trend, we acknowledged that:

> The expectations and relationships of lessors and lessees [has] so changed from earlier times that it was necessary to recognize that a residential lessee does not realistically receive an estate in land. Rather, the lessee's rights, liabilities, and expectations are more appropriately viewed as governed by contract and general principles of tort law.

Manglona, 2005 MP 15 ¶ 34 (quoting *Richard Barton Enters. v. Tsern*, 928 P.2d 368, 375 (Utah 1996)). The Estate's argument is inapposite because the quoted language from *Manglona* concerns construction of lease provisions when there is both privity of contract and privity of estate between the parties. The instant case asks a related, albeit dissimilar question: which lease provisions apply to an assignee when the assignee receives the leasehold interest whilst only acquiring privity of estate with the lessor? While *Manglona* elaborates on lessor/lessee relationships, it is silent as to lessors and assignees. We conclude that the common law doctrine governing covenants running with the land was not superseded by *Manglona*.[17]

¶ 46 Having dispensed with Jung's and the Estate's arguments, we now consider whether the attorney fees, forfeiture, indemnification, and notice clauses are real covenants or personal covenants. The test for determining whether a promise contained in a lease is a real covenant that runs with the land is the common law test set forth in the Restatement (Second) of Property: Landlord and Tenant § 16.1(2) (1977):

> A transferee of an interest in leased property is obligated to perform an express promise contained in the lease if:
>
> (a) The promise creates a burden that touches and concerns the transferred interest;

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[17] Though Jung did not argue this point, the Restatement (Third) of Property: Servitudes (2000) does away with the touch and concern requirement and replaces it with a contractual regime. We decline to apply the Restatement (Third) of Property: Servitudes approach in this case for three reasons. First, while the Restatement explicates the replacement doctrine for the "touch and concern" requirement in great detail with respect to servitudes, the Restatement provides no guidance for servitudes in the landlord-tenant context. Restatement (Third) of Property: Servitudes § 1 introductory note (2000) ("To the extent that special rules or considerations apply to servitudes [real covenants] used in leases . . . , the[se] servitudes are not within the scope of this Restatement."). Second, the trial court and the parties litigated the Restatement (Second) provisions in the lower court. The parties do not contend that we should apply the Restatement (Third). Lastly, and related to our second point, the question of *which* Restatement (e.g. First, Second, Third) we apply is an open question that is wholly unexplored in this jurisdiction.

(b) The promisor and the promisee intend that the burden is to run with the transferred interest;
(c) The transferee is not relieved of the obligation by the person entitled to enforce it; and
(d) The transfer brings the transferee into privity of estate with the person entitled to enforce the promise.

Applying the test to the disputed clauses, element (b) is satisfied because paragraph twenty-eight states that the Ogumoro and the Jos intended all of the promises in the lease to run with the land. *See, e.g., In re Petition of Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 369 (Minn. 1979) ("The principal evidence of intent in the instant case is this sentence, at the end of the paragraph containing the restriction: 'The above covenant shall run with the land.'"). Moreover, element (c) is satisfied because it is undisputed that Ogumoro and the Estate have at all times attempted to hold Ko to the terms of the Ground Lease. Likewise, element (d) is satisfied because the foreclosure sale brought Ko into privity of estate with Ogumoro and the Estate, as we held above. Thus, element (a), which comprises the touch and concern test, is dispositive in determining which, if any, of the four disputed clauses apply to Ko.

¶ 47 At its heart, the touch and concern test asks a basic question: what is the relationship of the promise in the written lease agreement to the physical property described in that agreement? The answer is that "a covenant touches or concerns the land if it is such as to benefit the grantor or the lessor, or the grantee or lessee . . . . As the term implies, the covenant must concern the *occupation or enjoyment* of the land granted or demised . . . ." *Pelser v. Gingold*, 8 N.W.2d 36, 39 (Minn. 1943) (emphasis added); *Rodruck*, 295 P.2d at 720. The promises in the lease must affect "the nature, quality or value of the property demised, independent of collateral circumstances." *Purvis v. Shuman*, 112 N.E. 679, 682 (Ill. 1916). Put another way, leasehold promises must "attach[] to and operate[] upon" the leasehold estate. *Rhinelander Real Estate Co. v. Cammeyer*, 190 N.Y.S. 518 (N.Y. App. Term 1921).

i. The Attorney Fees Clause

¶ 48 Ko asserts that the attorney fees clause in paragraph thirty-two of the Ground Lease does not run with the land. Paragraph thirty-two provides that:

> If any action at law or in equity shall be brought under this Lease for or on account of any breach of, or to enforce or interpret any of the covenants, terms or conditions of this Lease, the prevailing party shall be entitled to recover from the other party as part of the prevailing party's costs reasonable attorney fees . . . .

ER at 41. The trial court reasoned that because a promise to pay rent touches and concerns real property, the attorney fees provision also touched and concerned the Ground Lease because the obligation to pay attorney fees arose directly from the failure to pay rent. Relying on this logic, the trial court held Ko liable for $36,011.78 in attorney fees.

¶ 49 In finding that the attorney fees clause ran with the land, the trial court principally relied on *Jack Mathis Gen. Contractors, Inc. v. Murphy*, 472 P.2d 820 (Or. 1970). *Mathis*, however, engaged in no

discussion of the touch and concern test and instead, summarily held in a two-sentence paragraph that an attorney fees provision touched and concerned the land. *Id.* at 823. The only case directly cited by *Mathis*, *Abbott v. Bob's U-Drive*, 352 P.2d 598, 604 (Or. 1960), determined that an arbitration clause touched and concerned an assignee's leasehold interest, but makes no mention of attorney fees. We find the trial court's reliance on *Mathis* unpersuasive.

¶ 50 The other cases relied upon by the trial court are distinguishable. In two cases, *Rosenkranz* and *Bank of America Nat'l Trust & Sav. Ass'n*, the assignees assumed all the provisions of the lease via a written assignment, thereby placing the assignees in privity of contract with the lessor. *See Rosenkranz v. Pellin*, 222 P.2d 249, 251 (Cal. 1950) (permitting recovery of attorneys fees); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Moore*, 64 P.2d 460,461, 464 (Cal. Ct. App. 1937) (disallowing recovery of attorney fees because no provision in the written lease provided for such recovery). As we stated above, there is no privity of contract between Ko and the Estate. In *Adjustment Corp.*, the lessor assigned his claim for rents to a third party. *Adjustment Corp. v. Marco*, 279 P. 1006, 1006 (Cal. Ct. App. 1929). Although the third party was allowed to recover attorney fees from the lessee based on the assignment of the right to pay rents, *Adjustment Corp*. relied on contract principles to find that attorney fees were a security interest inhering in the assignment of the lessor's claim. *Id.* at 1007. As we stated above, the rules governing Ko's liability for attorney fees depend upon property law and not contract law. The last two cases bear little relation to Jung's ability to recover fees. In *Heyde*, the court pierced the corporate veil and determined that a corporate lessee who assigned its leasehold interest to its principal and the assignee principal were the same person. *Heyde v. State Sec., Inc.*, 320 P.2d 747, 750 (N.M. 1958). *Heyde* declined to consider covenants running with the land. *Id.* Lastly, *Prairie Hills Water & Dev. Co.* involves a South Dakota statute permitting "incidental covenants" to run with the land. *Prairie Hills Water & Dev. Co. v. Gross*, 653 N.W.2d 745, 756-57 (S.D. 2002). The *Prairie Hills* defendant recovered attorney fees based on statutory interpretation and not Restatement or common law property principles.

¶ 51 In contrast to the cases relied upon by Jung and the trial court, there is sufficient authority that attorney fees clauses do not touch and concern a leasehold interest. In *Paloma Inv. Ltd. P'ship v. Jenkins*, 978 P.2d 110 (Ariz. Ct. App. 1998), the court noted that, "[t]he attorneys' fees provision is a covenant that does not meet the four part test for a covenant running with the land. . . . [I]t does not affect the use, value, or enjoyment of the land itself." *Id.* at 116 (citations and quotations omitted). Similarly, *Latses v. Nick Floor, Inc.*, 104 P.2d 619 (Utah 1940) held that "[the attorney fees clause] was purely a personal covenant as between the parties to the contract. Though appellants purchased the property subject to the tenancy, they did not expressly agree to abide by all the terms of the lease." *Id.* at 624. The most comprehensive treatment of this issue appears in *Keogh v. Peck*, 259 Ill. App. 503 (Ill. App. Ct. 1931):

> The covenant to pay solicitor's [attorney's] fees and other expenses, etc. is only collateral. It in no way concerns the land, the improvements on the land, nor the quality or character of either. It is not "annexed to the land in privity." It does not purport to create any estate in the land at all. It does not create an easement or other hereditament, either corporeal or incorporeal, which might be annexed to the possession of the land. It does not concern any estate of any nature in the land at all. The covenant is purely personal in its nature and brings into existence no estate or interest in the land which renders it capable of attachment thereto.

Id. at 518. We agree with *Paloma*, *Latses*, and *Keogh*. Attorney fees are tangentially related to a lessee's use and enjoyment of real property, and promises to pay attorney fees are purely personal covenants. As such, an attorney fees clause does not run with the land absent express assumption of a leasehold provision granting the right. Ko did not expressly assume this provision of the Ground Lease, and is therefore not liable for the Estate's $36,011.78 in attorney fees. The Estate must bear its own attorney fees.

ii. The Indemnification Clause

¶ 52 Ko also argues that the trial court erred in finding that the indemnification clause applied to him. The portion of the indemnification clause relied upon by the trial court states that the "[l]essee shall, at all times prior to the expiration of this Ground Lease, indemnify Lessor against all liability, loss, cost, damage or expense sustained by Lessor, including attorney fees and other expenses of litigation . . . ." ER at 13. Relying on this language, the trial court shifted liability for Pacific Blue's and Jung's attorney fees from the Estate to Ko. Though there is little case law addressing whether indemnification clauses touch and concern real property, our previous attorney fees analysis is relevant. We have already established that attorney fees clauses do not run with the land. It would be a manifest inconsistency if we were to hold that the Estate could not recover its own attorney fees from Ko, but could still force Ko to pay the attorney fees of parties even further removed from the signing of the Ground Lease. Simply put, Ko cannot be liable to indemnify the Estate for Pacific Blue's or Jung's attorney fees.[18] Consequently, we need not consider Ko's argument that the Estate was not obligated to indemnify Jung for Jung's attorney fees. The Estate must bear Pacific Blue's $1,822 in attorney fees and Jung's $7,092 in attorney fees.

iii. The Forfeiture Clause

¶ 53 Ko next argues that the trial court should not have terminated the Ground Lease pursuant to the forfeiture clause contained in the Ground Lease. Paragraph 20.1 of the Ground Lease provides that if "Lessee shall fail to pay any installments or rent hereby reserved [in the lease], . . . Lessor may terminate

[18] We leave open the question of whether indemnification clauses might run with the land in other contexts. At least one court has held that an indemnification clause does run with the land if the purpose for the indemnification is closely tied to the land. *See Columbia Club, Inc. v. Am. Fletcher Realty Corp.*, 720 N.E.2d 411, 417 (Ind. Ct. App. 1999) (holding that an indemnification clause "touched and concerned" real property "as a matter of law" when the indemnification sought arose from damage caused during construction on the leasehold premises).

this Lease . . . ." ER at 34-35.[19] Ko is correct. We are aware of no cases suggesting that forfeiture clauses run with the land. Although the single case cited by Ko, *Friendly Ctr., Inc. v. Robinson*, 233 F. Supp. 274 (W.D.N.C 1964) is a federal bankruptcy case, we agree with the *Friendly Center, Inc.* court's observation that "[i]t is not established by any weight of authority that a forfeiture provision in a lease extends to a subtenant or even an assignee absent a specific assumption of the covenant." *Id.* at 277. We will not apply the touch and concern test to the forfeiture clause in the absence of any case law doing the same.

¶ 54 Moreover, leasehold provisions providing for forfeiture in the event of nonpayment of rent have historically required privity of contract between the parties. By refusing to enforce forfeitures in the absence of an express lease provisions, courts have implicitly determined that a forfeiture clause should be bargained-for between the parties to a lease agreement. *See, e.g.*, *Lennon v. U.S. Theatre Corp.*, 920 F.2d 996, 998 (D.C. Cir. 1990) ("[A] tenant's breach, no matter how drastic, does not entitle his landlord to terminate the leasehold or reenter the property. The landlord's remedy for non-payment of rent is to sue for it."); *Weissman v. U.S. Postal Serv.*, 19 F. Supp. 2d 254, 262 (D.N.J. 1998) (citing 2 Milton R. Friedman, Friedman on Leases § 16.2 (4th ed. 1997)) (applying New Jersey law) ("[I]n the absence of a provision of the lease providing otherwise, nonpayment of rent does not operate as a forfeiture."); *Adams v. Shoopman*, 316 S.W.2d 840, 840 (Ky. 1958) ("Inasmuch as the lease does not contain a forfeiture clause, the appellee's failure to pay rent when due does not constitute a ground upon which appellant may be granted relief in this action."); *Cont'l Grain Co. v. Afram Bros. Co.*, 151 N.W.2d 685, 687-88 (Wis. 1967) ("[A] lessee does not forfeit his rights in a lease for nonpayment of rent. . . ."). If a court requires privity of contract between lessors and lessees before it is willing to enforce a forfeiture clause, *a fortiori*, that court should be even less willing to enforce such clauses against a lessor and an assignee because the assignee is a step removed from the initial bargaining between the lessor and the original lessee.

¶ 55 As discussed above, Ko and Ogumoro were never in privity of contract. We hold that the absence of affirmative case law coupled with the need for privity of contract between a lessor and a lessee and, by implication, a lessor and an assignee, the Ground Lease provision permitting Ogumoro to terminate the Ground Lease for nonpayment of rent was a personal covenant. The forfeiture clause in the Ground Lease does not grant Ogumoro a right to terminate Ko for nonpayment of rent. Hence, we vacate the trial court's award of $48,475.49 for lost rents which was premised on termination of Ko's interest through the forfeiture clause. Ko is, of course, still liable for unpaid rent.

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[19] Though the trial court and the parties refer to this language a "forfeiture clause," it is more accurate to say that paragraph 20.1 provides for termination in the event that the lessee defaults on the rent.

iv. The Notice Clause

¶ 56 Finally, Ko argues that the notice clause was a personal covenant. Paragraph six of the Ground Lease specifies the manner in which delivery of notices may be made when the parties wish to communicate concerning leasehold matters. It sets out Ogumoro's and the Jos' mailing addresses and specifies a method through which Ogumoro and the Jos could change their mailing addresses. This lease provision, even if it could rightfully be termed a promise, is inherently personal because specifies a mode of communication between two parties. As we stated above, a "covenant must concern the *occupation or enjoyment* of the land granted or demised . . . ." *Pelser*, 8 N.W.2d at 39 (emphasis added). The notice provision does not concern occupation or enjoyment of the Lot. Rather, it specifies relations between the parties that bear no relation to the actual use of the Lot. Courts have not allowed covenants to run with the land when the promise is distantly related to use of the subject property. *See, e.g.*, *Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 621-22 (Tex. App. 2009) (holding that covenants in a deed obliging the defendant to provide copies of documents relating to leasing of mineral rights were "contractual notice requirements" that did not run with the land), *aff'd*, 2011 Tex. LEXIS 635 (Tex. Aug. 26, 2011); *Mrotek Enters.*, 256 A.2d at 559 (holding that a covenant to appoint an agent for service of process did not touch and concern the land because it only pertained to enforcement of the lessor's interest in the event of litigation). It was error for the trial court to find that Ko was obligated to communicate with Ogumoro in the manner specified in the Ground Lease.[20]

C. Termination

¶ 57 We now turn to Jung's contention that the Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1976) grants Ogumoro a right to terminate the Ground Lease independent of any promises in the Ground Lease. As a threshold matter, we acknowledge that Jung raises this issue for the first time on appeal. We find no indication that the trial court addressed the relevant Restatement provision in the appealed-from trial court orders or that Jung otherwise argued the issue below.

¶ 58 The Court will only consider an issue raised for the first time on appeal if: "(1) it is one of law not relying on any factual record; (2) a new theory or issue has arisen because of a change in law while the appeal was pending; or (3) plain error occurred and an injustice might otherwise result unless the Court considers the issue." *Salas v. Mafnas*, 2010 MP 9 ¶ 47 (Slip Opinion, June 8, 2010) (citing *Commonwealth v. Santos*, 4 NMI 348, 350 (1996)). Because Ogumoro's right to terminate the Ground Lease under the Restatement turns on interpretation of 7 CMC § 3401, the existence of that right is purely

[20] Though the results of the foregoing analysis may seem unfair on the surface, in reality, it is Ogumoro's failure to include a provision requiring the lessee to notify the landlord in the event of a mortgage or assignment that is at the heart of this problem. Ogumoro's failure to bargain for contractual provisions protecting her interests, and not the law, is the cause of the Estate's present difficulty. *See, e.g.*, *Kelly*, 195 Cal. Rptr. at 310 (noting that the landlord's failure to draft favorable lease terms caused the problems that led to litigation).

an issue of law. *Guerrero v. Dep't of Pub. Lands*, 2011 MP 3 ¶ 19 (Slip Opinion, Mar. 31, 2011). Thus, we will address Jung's argument.

¶ 59 The dispute between Jung and Ko over application of the Restatement arises from differing interpretations of 7 CMC § 3401. Title 7 CMC § 3401 reads:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . .

Jung argues that 7 CMC § 3401 requires Commonwealth courts to apply Restatement law in the absence of Commonwealth written law, regardless of whether the Restatement contradicts common law principles.[21] Thus, Jung reasons that Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1976) applies, even if it does not track with United States common law. The Restatement provision cited by Jung reads in relevant part:

> Except to the extent the parties to a lease validly agree otherwise, if there is a breach of the tenant's obligation to pay rent reserved in the lease, the landlord may: . . . terminate the lease if the rent that is due is not paid promptly after a demand on the tenant for rent . . . .

Id. Based on this language, Jung concludes that Ogumoro had a right to terminate the Ground Lease in the absence of a contrary lease provision.[22]

¶ 60 Ko counters that 7 CMC § 3401 requires application of "the *rules of the common law*, as expressed in the restatements of the law." (Emphasis added). Ko asserts that the focus of 7 CMC § 3401 is on the common law, and that Commonwealth courts should disregard Restatement provisions that contradict United States common law. Ko provides two bases of support for his argument that Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1976) does not comport with United States common law. First, he cites several cases establishing that, at common law, a lessor cannot terminate a lessee's leasehold for nonpayment of rent unless a provision in a lease agreement permits it. *Lennon*, 920 F.2d at 998; *Weissman*, 19 F. Supp. 2d at 262; *Hyde v. Bains*, 22 So. 2d 324, 324 (Ala. 1945); *Adams v. Shoopman*, 316 S.W.2d 840, 840 (Ky. 1958); *Cont'l Grain Co.*, 151 N.W.2d at 687-88. Ko asserts that he was not subject to any lease provision concerning termination. Second, he cites the

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[21] In the Commonwealth, "'written law' includes the NMI Constitution and NMI statutes, case law, court rules, legislative rules and administrative rules, as well as the Covenant and provisions of the U.S. Constitution, laws and treaties applicable under the Covenant." *Borja v. Goodman*, 1 NMI 225, 242 (1990) (Villagomez, J., concurring). There is no Commonwealth written law applicable in this case, nor is there local customary law related to termination of leases.

[22] There is no contrary lease provision, as we hold above that Ko is not bound by the termination provision in the Ground Lease.

Restatement itself, which provides that section 12.1(2)(b) is based upon "widespread statutory provisions" and the "adoption of the dependence of obligations doctrine" by the fifty states. Restatement (Second) of Property § 12.1 reporter's note 1 (1976). Ko argues that the Restatement is, therefore, based on statutes, and not on United States common law. Having reviewed Ko's arguments, we agree that, at common law, a landlord cannot terminate a lease agreement in the absence of an authorizing lease provision, and further, that the relevant Restatement provision is not based on common law principles.

¶ 61 Thus, Jung and Ko present us squarely with a question as to whether 7 CMC § 3401 permits Commonwealth courts to apply Restatement provisions that do not embody common law principles. Our prior decision in *Borja v. Goodman* makes clear that 7 CMC § 3401 incorporates the entire body of Restatements. *See Borja v. Goodman*, 1 NMI 1990, 226, 234 ("[Title 7 CMC § 3401] does not expressly adopt a specific statute but adopts the Restatement in its entirety.") (Hillblom, Special Judge, concurring). Title 7 CMC § 3401 provides no explicit exceptions to the applicability of particular Restatement provisions, nor does any other section of the Commonwealth Code. Thus, we must consider canons of statutory construction in rendering our decision.

¶ 62 "The basic rule of statutory construction is to first seek the legislative intention, and to effectuate it if possible, and the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression." *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989) (quoting *State ex rel. Stern Bros. & Co. v. Stilley*, 337 S.W.2d 934, 939 (Mo. 1960)); *see also Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 ¶ 35. We base our decision today on the unreasonable and unjust results that would follow if we adopted Ko's proposed rule. *Id.* Put simply, Ko's rule would force Commonwealth courts to determine whether a particular provision of the Restatement comported with United States common law in every case that required application of a Restatement rule. This rule would provide incentive to litigants who, facing an unfavorable Restatement rule, would be motivated to hunt down minutiae in United States common law in hopes of proving that the Restatement did not comport with common law principles. In turn, a settled, stable area of Commonwealth jurisprudence would become a battleground. We will not subvert 7 CMC § 3401, a law seemingly designed to aid jurisdictions without substantial statutory law or common law history, into a legal morass.

¶ 63 Moreover, Ko's rule would disrupt our prior decisional law. We have relied on 7 CMC § 3401 to apply Restatement law in at least thirty of our opinions,[23] none of which examine whether the

[23] *In re Estate of Roberto*, 2010 MP 7 ¶¶ 61-62 (Slip Opinion, May 12, 2010); *Pangelinan v. N. Mariana Islands Ret. Fund*, 2009 MP 12 ¶ 22; *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2008 MP 2 ¶ 5; *Commonwealth Ports Auth. v. Tinian Shipping Co.*, 2007 MP 22 ¶ P16; *Tan v. Younis Art Studio, Inc.*, 2007 MP 11 ¶ 14; *Aplus Co. v. Niizeki Int'l Saipan Co.*, 2006 MP 13 ¶ 12; *Sullivan v. Tarope*, 2006 MP 11 ¶ 38; *Century Ins. Co., Ltd. v. TAC Int'l Constructors, Inc.*, 2006 MP 10 ¶ 22; *Manglona v. Commonwealth*, 2005 MP 15, ¶¶ 19-20; PAC *United Corp. v. Guam Concrete Builders*, 2002 MP 15 ¶ 15; *Furuoka v. Dai-Ichi Hotel (Saipan), Inc.*, 2002 MP 5 ¶ 32 & n.16; *Isla Fin. Servs. v. Sablan*, 2001 MP 21 ¶ 12; *Bank of Saipan v. Superior Court*, 2001 MP 5 ¶ 27; *Estate*

Restatement rule applied in that opinion was based on common law principles. If we accepted Ko's invitation, litigants would be free to research previously issued Supreme Court precedent and relitigate settled issues whenever the parties believed that the Court had relied on Restatements that did not comport with United States common law. We favor finality in our decisions, and we will not interpret 7 CMC § 3401 to allow relitigation of settled law.

¶ 64 Thus, we hold that the Restatements are the operative rules of decision in the Commonwealth, even when the relevant provision does not accord with United States common law. For Jung and Ko, this means that Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1976) provides Ogumoro with a right to terminate Ko for non-payment of rent, even though Ko was not bound by a leasehold promise. We remand this matter for detailed factual findings consistent with the above-cited Restatement provision. On remand, the trial court shall rely upon Restatement (Second) of Property § 12.1 reporter's note 13 (1976) in determining whether Ko received notice of termination and a demand for rent.

D. Abandonment

¶ 65 Jung argues that Ko abandoned his leasehold interest in the Lot as a matter of law. Ko counters that the trial court declined to reach the issue, and that whether he intended to abandon his leasehold interest should be remanded to the trial court for findings of fact. *Estate of Ogumoro v. Ko*, No. 99-0655 (NMI Super. Ct. Oct 30, 2006) (Order Granting in Part the Estate's Motion for Summary Judgment on the Issue of Damages at 7 n.2) ("The Court is not inclined to [rule on abandonment] through summary judgment, as factual issues regarding Ko's intent to abandon are in dispute.").

¶ 66 Although a few jurisdictions have held that intent to abandon is a mixed question of law and fact,[24] the majority common law view is that intent to abandon is an issue of fact. *Bowdoin Square, L.L.C. v. Winn-Dixie Montgomery, Inc.*, 873 So. 2d 1091, 1100 (Ala. 2003); *Great Falls Props., Inc. v. Prof'l*

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of Guerrero v. Quitugua, 2000 MP 1 ¶ 16; *Jasper v. Quitugua*, 1999 MP 4 ¶ 8; *Charfauros v. Bd. of Elections*, 1998 MP 16 ¶ 61; *Sablan Enters. v. New Century, Inc.*, 1997 MP 32 ¶ 7; *Mitchell v. Estate of Hillblom*, 1997 MP 30 ¶¶ 9-10; *In re Estate of Hillblom*, 1996 MP 21 ¶ 10; *Camacho v. L & T Int'l Corp.*, 4 NMI 323, 328 fn.12 (1996); *Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268, 272 n.5 (1995); *Diamond Hotel Co. v. Matsunaga*, 4 NMI 213, 222 n.8 (1995) (Atalig, J., concurring); *Bolalin v. Guam Publ'ns., Inc.*, 4 NMI 176, 182 (1994); *Jung Keon Yoo v. Quitugua*, 4 NMI 120, 122-23 (1994); *Pangelinan v. Itaman*, 4 NMI 114, 118 (1994); *Lucky Dev. Co. v. Tokai*, 3 NMI 79, 93 & n.6 (1992); *Rogolofoi v. Guerrero*, 2 NMI 468, 476 n.3 (1992); *Reyes v. Ebetuer*, 2 NMI 418, 429 & n.5 (1992); *Aldan-Pierce v. Mafnas*, 2 NMI 122, 146-47 n.27 (1991); *Repeki v. MAC Homes (Saipan) Co.*, 2 NMI 33, 46-47 & n.9 (1991); *Marianas Pub. Land Corp. v. Kan Pac. Saipan, Ltd.*, 1 NMI. 431, 437 n.3 (1990); *Borja v. Goodman*, 1 NMI 225, 232 & n.1, 238 n.4 (1990) (Dela Cruz, C.J., concurring); *Id.* at 242 (Villagomez, J., concurring); *Id.* at 245-50 (Hillblom, Special Judge, concurring); *Trinity Ventures, Inc. v. Guerrero*, 1 NMI 54, 61 (1990).

[24] *Ezzell v. Oil Assocs., Inc.*, 22 S.W.2d 1015, 1019 (Ark. 1930) ("The question of abandonment or not is a mixed question of law and fact, and each case must depend upon its own particular facts and circumstances."); *Charleston, S. C. Mining & Mfg. Co. v. American Agric. Chem. Co.*, 150 S.W. 1143, 1146 (Tenn. 1911) ("Abandonment, or waiver, as a rule, is a question of intention, and is generally one of fact, or of mixed law and fact.").

Group, Ltd., 649 P.2d 1082, 1084 (Colo. 1982); *Duncan Dev. Co. v. Duncan Hardware, Inc.*, 112 A.2d 274, 278 (N.J. Super. Ct. App. Div. 1955). Jung's petition asking that we decide the abandonment issue as a matter of law amounts to a request that we stack the facts unfavorable to Ko on one side of the scale and hold that the scale tips so far in Jung's favor so as to warrant a legal conclusion of abandonment. This is a back-door end-run around the standard of review. Jung asks the Court to treat intent to abandon as a sufficiency of the evidence inquiry when in reality, it is an issue of fact. We cannot rule in Jung's favor on a factual issue that the trial court did not consider. 1 CMC § 3103 ("[T]he Supreme Court may not take new or additional evidence [or] consider issues of fact de novo . . . ."). Doing so would undermine the basic nature of appellate review.

¶ 67 We acknowledge that there are a number of undisputed facts in the record potentially relating to the issue of Ko's intent to abandon the Lot. These facts include that Ko paid only three months of rent over a period of several years, Ko never physically occupied the Lot, Ko never assumed the Jos' lease, and Ko never personally contacted Ogumoro to inform her that he was the new lessee. Moreover, Ko's sworn affidavit that he never intended to abandon the Lot cannot insulate him from a finding of abandonment. *Ezzell v. Oil Assocs.*, 22 S.W.2d 1015, 1019 (Ark. 1930) ("The intention of the lessee cannot be gathered from any statement of his alone. It must be determined from his intention, as shown by his acts and conduct."). Even so, the trial court did not make factual findings regarding Ko's intent to abandon. We remand this issue to the trial court for factual findings on this issue.[25]

E. Jung's ability to recover attorney fees paid by his insurer

¶ 68 Jung claims that he is entitled to recover $100,476 in attorney fees paid by his title insurer, First American Title Insurance Company ("First American"). The trial court, relying on NMI Rule of Federal Procedure 17(a),[26] and upon cases interpreting the analogous Federal Rule of Civil Procedure 17(a), rejected Jung's request. The trial court reasoned that because Jung's title insurance had covered all of Jung's liabilities to Jung arising under the title insurance policy, First American was the real party in interest and was obligated to sue for recovery of the attorney fees in its own name. *Estate of Ogumoro v. Ko*, No. 99-0655 (NMI Super. Ct. April 11, 2007) (Order Partially Reconsidering Award of Attorneys' Fees at 15) (citing *United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 380 (1949)).

¶ 69 On appeal, Jung reasserts his claim for the $100,476 in attorney fees, arguing that he was only compensated for a portion of his loss, and therefore, that he is the real party in interest. Whether Jung may recover attorney fees paid by his insurer is an issue of law, which we review de novo. *Isla Fin. Servs. v.*

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[25] We decline to address Jung's contention that he was a bona fide purchaser for value because the issue is unreviewable until the issue of abandonment is resolved.

[26] NMI Rule of Civil Procedure 17(a) reads in relevant part: "Every action shall be prosecuted in the name of the real party in interest." Federal Rule of Civil Procedure 17(a) is nearly identical.

Sablan, 2001 MP 21 ¶ 4. We review the trial court's decision not to award attorney fees for abuse of discretion. *Century Ins. Co. v. Guerrero Bros.*, 2010 MP 13, P17 (Slip Opinion, Sept. 9, 2010).

¶ 70 Although Jung relies on state court precedent to assert that he is entitled to recover attorney fees paid by his insurer, we agree with Ko that the trial court's interpretation of NMI Rule of Civil Procedure 17(a) and of parallel Federal Rule of Civil Procedure 17(a) is persuasive here.[27] Federal courts interpreting Federal Rule of Civil Procedure 17(a) have developed two complementary applications of the real party in interest rule depending on the amount of the insured's claim paid by the insurer.[28] If the insurer covers the entire loss arising from a particular claim, the insurance company, as a subrogee of the insured, becomes the real party in interest and must sue in its own name. *Aetna*, 338 U.S. at 380-81; *Hilbrands v. Far East Trading Co.*, 509 F.2d 1321, 1322 (9th Cir. 1975); *American Fid. & Cas. Co. v. All Am. Bus Lines, Inc.*, 179 F.2d 7, 10 (10th Cir. 1949). Otherwise, if the insurer merely compensates the insured party for a portion of the claimed loss, the insured's claim is only partially subrogated, and the insured may sue in its own name to recover the entire loss, including money paid by the insurer. *Aetna*, 338 U.S. at 380-81; *Travelers Ins. Co. v. Riggs*, 671 F.2d 810, 812-13 (4th Cir. 1982); *Nat'l Garment Co. v. New York, C. & ST. LR. Co.*, 173 F.2d 32, 34 (8th Cir. 1949).

¶ 71 We resolve Jung's contention by applying law to fact. Jung's title insurance policy had a maximum value of $200,000. It was a defensive policy, in that First American's obligations were limited to payment of attorney fees associated with defense of Jung's title to the Lot. On appeal, Jung does not assert that First American's expenditures pursuant to the insurance policy exceeded the policy limit nor does he provide evidence that he paid a deductible to First American. *See, e.g., Ocean Ships, Inc. v. Stiles*, 315 F.3d 111, 117 (2d Cir. 2002) (holding that payment of a $5,000 deductible gave the insured an independent interest sufficient to allow the insured to sue for the entire loss); *Virginia Elec. & Power Co. v. Westinghouse Electric Corp.*, 485 F.2d 78, 83-84 (4th Cir. 1973) (holding that a utility company was a real party in interest and could recover on behalf of the insurance company when the insurance policy contained a deductible paid by the utility company); *Pub. Serv. Co. of Oklahoma v. Black & Veatch*, 467 F.2d 1143, 1143-44 (10th Cir. 1972) (holding that a utility company was a real party in interest and could recover on behalf of the insurance company when the insurance policy contained a deductible paid by the utility company); *accord* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1546 (2d. ed. 1990)). In other words, First American paid all attorney fees associated with defense of Jung from Ko's third party claims. Thus, First American is the real party in interest as to the

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[27] *See supra* note 8.

[28] Jung and the trial court cited these rules as a split of authority.

$100,476 in attorney fees. The trial court did not abuse its discretion when it denied Jung's request for fees paid by First American.

IV

¶ 72 In conclusion, we find that Ko cannot be held liable to the Estate for damages under any clause in the Ground Lease. Accordingly, we VACATE all awards of attorney fees against Ko, including those liabilities premised on the attorney fees clause (paragraph thirty-two) and the indemnification clause (paragraph twelve) of the Ground Lease. The Estate must bear its own attorney fees. The Estate must also bear Jung's and D.Y.'s attorney fees that the trial court had previously concluded were shifted to Ko through various indemnification agreements. Moreover, we VACATE the trial court's determination that Ko's interest in the Lot was terminated. It follows that the award of damages for lost rent based on termination of Ko's interest is also VACATED. We AFFIRM the trial court's conclusion that Jung cannot recover attorney fees paid by his insurer. Finally, we REMAND this case to the trial court for further proceedings on the applicability of Restatement (Second) of Property: Landlord & Tenant § 12.1(2)(b) (1977), and, if necessary, the issues of abandonment and the bona-fide purchaser rule.

SO ORDERED this 20th day of October, 2011.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ANITA A. SUKOLA
Justice Pro Tem