Klsong v. Orak, 7 ROP Intrm. 184 (1999)

REMASCH KLSONG and
PUBLIC UTILITIES CORPORATION
Appellants,

V.

JAMES ORAK,
Appellee.

CIVIL APPEAL NO. 40-97
Civil Action No. 420-96

Supreme Court, Appellate Division
Republic of Palau

Argued: January 13, 1999
Decided: April 15,1999

Counsel for Appellants: Gerald G. Marugg III and Bruce Carlile

Counsel for Appellee: Johnson Toribiong

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice, JEFFREY L. BEATTIE, Associate Justice; and LARRY W. MILLER, Associate Justice.

BEATTIE, Justice:

This appeal arises from the trial and judgment in a car accident case. Appellants assert several grounds for error, many of which were not raised below. We affirm the decision in all respects.

I. BACKGROUND

On November 3, 1995, a car accident occurred in Ngerkebesang in which Appellant Remasch Klsong, an employee of Appellant Public Utilities Corporation ("PUC"), rear -ended a taxi being driven by Appellee. Appellee's taxi was leased from Tadao Trolii, dba City Cab. The truck Klsong was driving was owned by PUC, and was being used by Klsong in the course of his employment.

Police were called to the scene, and arrested Klsong for reckless driving. The police report was offered into evidence by Appellants, and was incorporated verbatim as the Trial Court's findings of fact on the event:

> As they drove up hill [past] Ashibi restaurant and came to a curve on the hill crest, [Klsong] saw the brake lights of [Appellee's] car so he stepped on the brake of his

> car and a roll of electric wire that was at [the] bed of his car slid, so he turned around to look at it. When he turned back again [Appellee's] car [had] already pulled over to the right shoulder of the highway and stopped, [Klsong] tried to brake to avoid the accident but couldn't avoid it and rammed onto the left rear end of (Appellee's) car and pushed it into the ditch.

For several months after the accident, Appellee made numerous attempts to get PUC to pay for the repairs needed on his taxi. He tried several times to contact Klsong, spoke with the PUC office supervisor, visited the PUC office in Malakal, wrote to the Managing Director, and wrote to and met with the Chairman of the Board of Directors. At Appellants' suggestion, Appellee also urged PUC's insurance company to pay for the damage but the claim was denied because it was not timely filed by PUC.

⊥185 Despite Appellee's exhaustive efforts, PUC officials refused to commit to paying for the repairs. Appellee did not have money himself and without the repairs, he could not use the car as a taxi. Appellee did not work for six months after the accident. Moreover, although the car was out of service, Appellee remained liable to City Cab for daily lease payments, and City Cab would not allow him to lease another taxi so long as the repairs and payments on the first one were not made. City Cab eventually repossessed Appellee's taxi and paid for the repairs itself. The cost was $1,469.00.

Appellee claims that PUC's refusal to pay for repairs required him to rent another vehicle, and that PUC agreed to pay for the rental. Appellee's uncontroverted testimony was that Klsong's supervisor said that Klsong was the messenger regarding information about the incident,[1] and that Klsong expressly said that PUC would pay for a rental car. Appellee claims that he relied on Klsong's representation, and rented a truck from GNN Car Rental, on credit, for his transportation needs. Despite Klsong's representation, PUC refused to pay for Appellee's truck rental, and in February 1996, GNN repossessed the truck. GNN then sued Appellee, and obtained a $5,079.53 judgment for unpaid rent, interest, costs and attorneys fees.

PUC ultimately offered Appellee $800 for repairs to the taxi, but refused to pay for the truck rental or his lost income. Appellee rejected the offer, and filed the instant action to recover damages relating to the accident. PUC filed a counter-claim based on a claim not relating to the accident.

Following a trial on the merits, the Trial Court concluded that Klsong was legally responsible for the accident because he was driving too fast on a curve when a vehicle was not far in front of him, and allowed himself to be distracted by the roll in the back of the pickup, which did not leave him enough time to adjust to Appellee's slowing down or stopping. The Trial Court found that the accident occurred after Appellee had slowed down or stopped on the right side of the road to see how work was progressing on one of his nearby construction

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[1] Appellants argue that the Trial Court took Appellee's testimony out of context. The actual testimony was "[Klsong's supervisor] told me that, I will talk to [Klsong] about the situation and then we will inform them and then [Klsong] will carry the message from them to me, what really happen to the accident." Tr. at 23:12-15.

projects.

The Trial Court entered judgment in favor of Appellee as follows: $1,469.00 for car repairs; $4,160.00 for lost income; and $5,079.53 for the GNN car rental judgment ($3,680.00 principal, $862.03 prejudgment interest, $487.50 attorneys fees and $50.00 court costs). The Trial Court issued an Order In Aid Of Judgment requiring Appellants to pay GNN and City Cab directly, and to pay Appellee only for the sum awarded to him for lost profits less the amount awarded on the counterclaim. On the counter-claim, the Trial Court awarded PUC $495.00. The Trial Court denied costs to both parties on the grounds that each largely prevailed on their claims.

Appellants timely filed an appeal, challenging the judgment on several grounds, which can be generally categorized as: (a) the findings regarding contributory negligence; (b) ⊥186 the conclusion that PUC agreed to pay for the GNN truck rental; (c) the propriety of evidentiary admissions; and (d) the calculation of damages. Appellee did not appeal the award on the counter-claim.

II. DISCUSSION

A. CONTRIBUTORY NEGLIGENCE

Appellants claim that Appellee was contributorily negligent in stopping or slowing on the side of the road, and that the Trial Court therefore erred in allowing him any recovery. Section 463 of the Restatement (Second) of Torts defines contributory negligence as:

> . . . conduct on the part of plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiffs harm.

The burden of proving contributory negligence is on the defendant. Restatement (Second) of Torts § 477. Contributory negligence is generally a factual issue, 57A Am. Jur. 2d Negligence " 884, 1001, and is therefore reviewed under the clearly erroneous rule. ROP Rule of Civ. P. 52(a); *Umedib v. Smau*, 4 ROP Intrm. 257, 258-259 (1994).

Appellants contend that Appellee was contributorily negligent because he had stopped on the side of the road, just beyond a curve. They rely largely on the Trial Division's finding that:

> [Appellee] was the contractor for housing being constructed at that point near the road. I reject as unbelievable [Appellee's] (and his employees') testimony that he never stopped or slowed down at the construction site but was simply run down from behind by Klsong while traveling at a normal speed. At a minimum, [Appellee] would be interested enough to slow down, and likely stop, to see how the work was progressing. Decision at 2, fn. 1.

Contrary to Appellants' argument, the Trial Court did consider Appellee's actions. Nonetheless, the Trial Court expressly rejected Appellants' argument that Appellee was contributorily negligent, and found that only Klsong was legally responsible for the accident.

Appellants argue, without reference to legal authority, that the finding that Appellee stopped or slowed on the side of the road necessitates a finding of his negligence. This is incorrect. Negligence is determined by considering all relevant factors. Klsong admits that when he first saw Appellee's brake lights, he diverted his attention from the slowing vehicle in front of him and turned around to check the wire in the back of his truck, and then returned his attention to the road too late to avoid a collision. On these facts, a reasonable trier of fact could have concluded that Appellee was not contributorily negligent. The finding that only Klsong was legally responsible is not clearly erroneous.

⊥187 B. GNN RENTAL

It is undisputed that Klsong told Appellee that PUC would pay for a rental vehicle. Still, Appellants make several arguments regarding the award of the GNN truck rental expenses. First, they claim that the Trial Court erred in awarding Appellee GNN rental expenses because the claim is outside of the pleadings. Contrary to Appellants' assertion, Appellee's complaint did request compensation for the rental car. [2] The Trial Court did find, however, that Klsong's representation to Appellee was outside of the pleadings, but that Appellants failed to object to the evidence at trial, and therefore treated the pleadings as amended to conform to the evidence under ROP R. Civ. P. 15(b). We find no abuse of discretion in the Trial Court's decision to do so.[3]

Next Appellants claim that the Trial Court erred in concluding that PUC agreed to pay for the GNN rental truck. They argue that it was unreasonable for Appellee to rely on Klsong's representation, and that Klsong did not have the authority to bind PUC. As to Appellants' first argument, the Trial Court found that Appellee reasonably relied on Klsong's representation, and rented a truck from GNN. Appellee's uncontroverted testimony was that Klsong's supervisor said that Klsong was the messenger regarding information about the incident, and that Klsong expressly said that PUC would pay for a rental car. Tr. at 22-24. Thus, the Trial Court found that PUC made a representation, through Klsong, that it would pay for a rental vehicle. We find no error in the Trial Court's conclusion:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as

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[2] *See* Complaint at Para. 5, prayer for relief.

[3] This is not a case in which the evidence admitted was relevant to both the cause of action asserted in the pleadings and a new theory not set forth in the pleadings. Thus, there is little danger that the Defendants were unaware that an issue not presented by the pleadings entered the case at trial. *Cf.* Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1493 at p.32.

justice requires.

Restatement (Second) of Contracts § 90(1).

Finally, Appellants claim that Klsong did not have the authority to bind PUC. We reject this argument as well. Klsong was the agent of PUC either on the basis of apparent authority or agency by estoppel. *See* Restatement (Second) of Agency §§ 8, 8B. Klsong's supervisor's statement that Klsong was the messenger was a manifestation that Klsong had the authority to represent PUC regarding the accident, including the authority to commit PUC to paying for a rental car. Appellants' acts and appearances led Appellee to believe that an agency relationship had been created, and the Appellee relied to his detriment on that belief. Accordingly, the Trial Court properly held PUC liable for Klsong's representation.

⊥188 C. EVIDENTIARY ISSUES

Appellants raise three evidentiary issues. First, they claim that the Trial Court improperly admitted evidence relating to lost income and the GNN rental car because it was irrelevant. We reject this argument for the reasons discussed in the Damages section below.

Next, they claim that the Trial Court erred in admitting evidence of Klsong's arrest. This argument fails because Appellants themselves introduced the police report that contained the arrest record, and thereby waived any objection to it.

Finally, Appellants contend that it was improper, under ROP Rule of Evidence 408, for the Trial Court to consider evidence. that Appellee tried to get PUC to pay for the repairs and that Appellants made a settlement offer. Appellants' objection was not raised at trial, and is therefore waived. *Tell v. Rengiil*, 4 ROP Intrm. 224, 225-226 (1994)

D. DAMAGES

Appellants claim that Appellee failed to mitigate his damages, and that certain categories of damages are improper. We address these issues in order.

Under the doctrine of mitigation of damages, "one injured by the tort of another is not entitled to recover damages for any harm that he could have avoided by the use of reasonable effort or expenditure after the commission of the tort." Restatement (Second) of Torts § 918(l); *see Ngiraloi v. Sbal* , 1 ROP Intrm 85 (Tr. Div. 1983). Any alleged failure to mitigate is an affirmative defense upon which the defendant carries the burden of proof. 22 Am. Jur.2d Damages §§ 896, 908.

Appellants claim that Appellee failed to mitigate his damages because: he did not return to work for six months; he did not try to get another taxi; he did not do construction work; and he rented a truck, instead of a car, which precluded commercial use. Appellants failed to present any evidence that there was work available that Appellee was qualified to do, or that there was another taxi available for him to rent. Appellee testified that he could not obtain another taxi. In

the absence of any contrary evidence, the Trial Court chose to believe Appellee, and found that his failure to work for six months was reasonable. We cannot say that this finding was clearly erroneous. *See e.g. Jellum v. Grays Harbour Fuel Co.* , 160 Wash. 585, 295 P. 939 (1931) (in a action for damages to plaintiffs truck, plaintiff was entitled to an allowance for non -use of the truck where defendant offered no testimony to show that plaintiff could have rented a truck from a dealer or from a transfer company, or to show what the cost would have been).

Appellants next claim that the award of lost income was improper as a category of damages, and that it was speculative. We reject both arguments. Lost income, which in this case is only lost profits from the use of the taxi is a permissible category of damages. *See* 8 Am. Jur. 2d Automobiles and Highway Traffic § 1318. Appellants' argument on appeal is curious given that they conceeded the propriety of lost profits of $40 per day in opening and closing arguments below. As to the argument that the amount was speculative, Appellee's uncontroverted testimony was that before the accident he worked "full-time," and earned on average $40 a day from driving a ⊥189 taxi. It is undisputed that Appellee did not work for six months after the accident. On this evidence, the Trial Court's award of lost income at $40 a day for six months (assuming Appellee worked five days a week) is not clearly erroneous.

Finally, Appellants challenge the damages relating to the GNN rental judgment on several basis. Appellants incorrectly assert that there is no authority for awarding damages relating to the GNN rental truck. Rental expenses are recoverable as a measure of damages under the doctrine of promissory estoppel. Restatement (Second) of Contracts § 90 (1) (damages limited as justice requires). The Trial Court properly permitted recovery of damages under this theory, finding that "[Appellee] reasonably relied upon PUC representations that PUC would pay for a car rental while the taxi was being repaired . . . PUC is responsible for those representation[s] and these consequential damages." Decision at 6.

Appellants also argue that the award of interest, attorney's fees and costs relating to the GNN judgment is improper because Appellee did not defend the GNN case properly, and because Appellants did not consent to the contractual terms in the GNN lease. They also challenge the award of interest and costs on additional grounds. During the trial, Appellants merely objected to the evidence on the basis of irrelevancy because the rental occurred long after the accident. Appellants failed to make their other arguments below, and they are improperly before us now. *Tell v. Rengiil*, 4 ROP Intrm. 224, 225-226 (1994).

CONCLUSION

For the foregoing reasons, the Trial Court's judgment is AFFIRMED in all respects.