Usui v. Nishizono, 1 ROP Intrm. 358 (1987)

ETSUO USUI,
Plaintiff/Appellee

v.

MASAO NISHIZONO,
Defendant/Appellant.

CIVIL APPEAL NO. 5-85
Civil Action No. 74-84

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: February 11, 1987

Counsel for Appellee: John Tarkong
Counsel for Appellant: Raymond C. Wagner

BEFORE: ROBERT WARREN GIBSON, Associate Justice;
ARTHUR NGIRAKLSONG, Associate Justice; and
EDWARD C. KING,[1] Associate Justice.

KING, Justice:

Appellant Masao Nishizono asks that we reverse the Trial Court's judgment entered against him and in favor of Plaintiff/Appellee Etsuo Usui.

Mr. Nishizono argues that the evidence was insufficient to support the Trial Court's judgment that he engaged in a conspiracy which culminated in the beating of Mr. Usui during the night of May 18, 1984. The Trial Court awarded compensatory damages of $4,000 and punitive damages of $5,000. In addition to his challenges of these awards on grounds of insufficiency of evidence, Mr. Nishizono also objects to the fact that the $4,000 compensatory damages award was higher than the $1,600 claim made by Usui in his complaint.

⊥359 I. BACKGROUND

There seems no dispute that the chain of events which gave rise to this litigation began with a collision near the KB Bridge in Koror between a dump truck driven by Kaneda, an employee of Hisayuki Kojima, a businessman associated with Mr. Nishizono, and a "trailer truck" then being used by Harima Construction Company. Mr. Usui was a passenger in the trailer truck, which Harima had rented from Palau Transportation Company.

[1] The Honorable Edward C. King is the Chief Justice of the Supreme Court of the Federated States of Micronesia.

The record shows that Mr. Nishizono devoted much of May 18, 1984, to attempts to track down the Harima Construction people involved in the accident. At about 10:30 that morning he went to the Palau Transportation Company, from whom Harima had rented the truck. There, he was told by PTC Manager Yoshiharu Sungino that the driver of the truck was Madris Tulop. Nishizono told Sungino to have Tulop and Usui meet him at the Grace Hotel that evening. Apparently, neither Tulop nor Usui appeared at the Grace Hotel at the appointment hour.

There is also testimony that Nishizono met with Kaneda, Kojima and several other men to discuss the accident. At Nishizono's suggestion seven men, including Nishizono, Kojima and Kaneda, drove to Osel Restaurant in search of Usui. Told that Usui and his colleagues had finished dinner and returned to NACL Hotel where they were staying, Nishizono said they would go to NACL to do something to Usui.[2]

The two vehicles containing the seven men then proceeded to the NACL Hotel. Kojima, Kaneda and Nishizono all rode in the same car. When they arrived at the hotel, the others waited outside while Kojima and Kaneda went inside to locate Usui's room.

The testimony was in radical conflict as to what happened next. Witnesses for the defense testified that Usui pulled Kaneda into the room and thrust his knife at him, forcing Kaneda to defend himself. According to this testimony, Nishizono was the peacemaker who stopped the fight, berating the men for their foolishness and immaturity.

⊥360 Usui, however, testified that Kaneda burst into the room and, without provocation, beat Usui into unconsciousness, breaking his ribs, causing removal of two of his teeth, and forcing him to miss work for several months. Usui further testified that when he regained consciousness Nishizono was in the room with the others, expressing satisfaction with Kaneda's actions.

II. LEGAL ANALYSIS

A. Sufficiency of evidence

Rule 52 of the Palau Rules of Civil Procedure provides that, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

This identical language is in Rule 52(a) of the United States Federal Rules of Civil Procedure. We may therefore look to United States federal court interpretations of that sentence for guidance as to the meaning of our rule. The United States Supreme Court has recently had occasion to speak concerning the meaning of the "clearly erroneous" standard.

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case

[2] The Japanese term said to have been used by Nishizono was variously interpreted to indicate a wish to "kill", "avenge" or "beat" Usui.

> differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court . . . . If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.

Anderson v. City of Bessemer, 460 U.S. 1054, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). The court noted that it is possible for a reviewing court to find clear error even in a fact finding purportedly based on a credibility determination. This may occur when "documents or objective evidence . . . contradict the witness' story" or when the story itself is "so internally inconsistent or implausible on its face that a reasonable fact-finder would not credit it." 105 S.Ct. at 1512-13.

⊥361 But when a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

105 S.Ct. at 1513.

This rule calling for deference to the factual findings and inferences of Trial Court is based in great part on the fact that "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." 105 S.Ct. at 1512. Considerations of judicial efficiency have also been cited as calling for such a rule. *Id*. We find these same factors at work in the Republic of Palau and we therefore adopt the interpretation articulated in *Anderson*.

Mr. Nishizono emphasizes that there was considerable testimony in the record flatly contrary to the factual determinations of the Trial Court. It is obvious however that the trial judge did not regard the contrary evidence as credible.

We confess that our review of the record does leave us with lingering and nagging questions. Nowhere is it explained just why Mr. Nishizono would have been so incensed about a collision involving a vehicle which was neither owned nor being used by him. Our consternation is compounded by the fact that Mr. Usui, the man who was attacked, was merely a passenger in the other vehicle, apparently in no way responsible for the collision.

Yet the testimony referred to does convince us that the Trial Court's findings are based on a "coherent and facially plausible" story told by Plaintiff's witnesses. There is in the record sufficient credible evidence to support a conclusion that Mr. Nishizono and others were engaged in a conspiracy to assault Usui and that Kaneda's attack on Usui was the implementation of that unlawful conspiracy. We therefore affirm the judgment of the Trial Court as to liability.

B. Damages.

Appellant also urges that we reduce or set aside the award of damages. His first objection is that the award of $4,000 for compensatory damages exceeds the $1,600 sought by ⊥362 Usui in his complaint. The law of Palau contains nothing preventing such an award. In a contested case the "final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Palau R. Civ. Pro. 54(c). Our holding is in accord with decisions under rule 54(c) of the United States Federal Rules of Civil Procedure, which is identical with our own rule 54(c). *Bail v. Cunningham Bros. Inc.*, 452 F.2d 182 (7th Cir. 1971).

Mr. Nishizono further argues that the award of damages was excessive and unjustified by the evidence. He predicates his argument on testimony, and a hospital record never introduced into evidence, which he says show that plaintiff was not injured in the fight but in a month-later industrial accident, and that in any event his injuries were "quite negligible." He also tells us that Mr. Usui was paid his salary during his absence from work and his medical expenses were covered by his employer.

These arguments are not persuasive against affirmance of the award. There is testimony in the record to support Mr. Usui's claim of injury and loss of work. The unadmitted hospital record may not be considered. Under the version of facts accepted by the Trial Court, Mr. Usui also suffered pain, anguish, fear for his life, and humiliation in the eyes of his fellow workers. We do not find the compensatory damages award excessive.

The same record which supports the Trial Court's findings as to liability also justifies a conclusion that Mr. Nishizono's wrongful actions were carried out willfully and with malice. Accordingly, the Trial Court's award of punitive damages was proper.

III. CONCLUSION

Finding ample evidence in the record to support the finding of the Trial Court, we affirm the judgment.

So ordered this 11th day of February, 1987.

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DISSENTING OPINION, ASSOCIATE JUSTICE GIBSON.

I find the Trial transcript indecipherable in critical areas; the testimony of certain key witnesses contradictory; a number of the Court's evidentiary rulings questionable; and the effectiveness of counsel reduced to unacceptable levels by an inept, inexact, translator/translation.

In my opinion the record, viewed in its entirety presents too confused and diverse a pattern to underpin a Finding of "Civil Conspiracy".

I would reverse and remand for new trial.