Ongalk ra Teblak v. Santos, 6 ROP Intrm. 98 (1997)

ONGALK RA TEBLAK, represented by RIMAT SEBAL,
Appellant,

v.

BENJAMIN SANTOS,
Appellee.

CIVIL APPEAL NO. 35-95
Civil Action No. 204-91

Supreme Court, Appellate Division
Republic of Palau

Decision and order
Decided: March 19, 1997

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice

BEATTIE, Justice:

Appellant Ongalk ra Teblak seeks to complete the trial record because, due to a tape recorder failure, part of the testimony provided by witness Masako Kumangai was not recorded and, accordingly, could not be transcribed. Despite this equipment malfunction, the trial court -- by referring to its notes taken while Kumangai testified -- found that Kumangai was aware of a prior deed in connection with the land at issue in favor of Appellee Benjamin Santos. Appellant thereafter filed with the trial court an ROP Rules of Appellate Procedure Rule 10(e) motion to complete the record with new deposition testimony to be provided by Kumangai. The trial court concluded that Rule 10(e) did not authorize taking additional testimony of Kumangai at that late date; however, in light of Kumangai's failing health and grave illness, the trial court agreed to allow a deposition of Kumangai in order to preserve her testimony in the event that this Court should disagree with the trial court's interpretation of Rule 10(e) or should find that Appellant is entitled to a new trial. The trial court found that its contemporaneous notes taken during Kumangai's testimony were the best available evidence of the content of the missing testimony. Accordingly, the trial court included those trial notes in the record rather than Kumangai's new ⊥99 deposition testimony. Appellant appeals this action by the trial court, seeking to complete the trial record with the new deposition testimony provided by Kumangai.

Rule 10(e) states, in relevant part:

> Correction of Record . If any party considers that the record . . . is . . . incomplete . . . he or she shall notify the other parties of the alleged . . . omission and endeavor to secure written agreement as to what . . . addition should be made in the record. If the parties cannot agree upon such . . . addition, the party claiming the error shall arrange with the trial judge for a hearing . . . . After giving all parties an opportunity to be heard, the trial judge will . . . add to the record as the facts warrant . . . . If any party still feels that the record . . . as amended . . . is . . . incomplete in any important aspect, he or she may by written motion . . . request the Appellate Division to make further change, specifying particularly the change desired. ROP Rules of Appellate Procedure, Rule 10(e).

> It is clear that the purpose of . . . Rule 75 [of the Federal Rules of Civil Procedure, subsequently superseded by Rule 10(e) of the Federal Rules of Appellate Procedure][1] was to ⊥100 provide a simple method of adding to the record on appeal any matter properly a part thereof which had been omitted therefrom by error or accident, and that such addition would be made even after the record had been transmitted to the Court of Appeals. *Dempsey v. Guaranty Trust Co. of New York*, 131 F.2d 103, 104 (7th Cir. 1942).

> Accordingly, Rule 10(e) gives the trial court and the appellate court, if applicable,

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[1] Rule 75 of the Federal Rules of Civil Procedure, later superseded by Rule 10(e) of the Federal Rules of Appellate Procedure, stated, in relevant part:

> If anything material to either party is omitted from the record on appeal by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the appellate court, or the appellate court, on a proper suggestion or of its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary that a supplemental record shall be certified and transmitted by the clerk of the district court . . .

Rule 10(e) of the Federal Rules of Appellate Procedure, which was derived from Rule 75, states, in relevant part:

> If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted.

Accordingly, the language of Rule 75 of the Federal Rules of Civil Procedure and Rule 10(e) of the Federal Rules of Appellate Procedure is substantially similar to the language of Rule 10(e) of the ROP Rules of Appellate Procedure, and, consequently, analysis of the federal rules by courts in the United States is instructive in interpreting Rule 10(e) of the ROP Rules of Appellate Procedure.

authorization to correct the record under limited circumstances. This power, however, is circumscribed. "[The trial court] may not use [its Rule 10(e) power] to add to the record on appeal matters that did not occur there in the course of proceedings leading to the judgment under review." 9 J. Moore, *Moore's Federal Practice* , ¶ 210.08[1] (1983). "The rule . . . was never intended to permit the addition of matter not before the District Court when [it] entered [its] order." *Dempsey v. Guaranty Trust Co. of New York*, 131 F.2d 103, 104 (7th Cir. 1942).

In light of Rule 10(e) and its purpose and its limits, this Court denies Appellant's motion to amend the record to include the deposition testimony provided by Kumangai. Due to the equipment malfunction, a portion of Kumangai's testimony was not recorded. Accordingly, a portion of the record had indeed been omitted and, as a result, the record was incomplete. Inclusion of new evidence, however, that was not introduced during the trial -- *i.e.*, the deposition testimony of Kumangai -- is beyond the power granted to this Court in Rule 10(e). The testimony provided in the deposition of Kumangai was not presented to the court below in the course of the proceedings leading to the judgment under review; thus, inclusion in the record of such testimony is not authorized by Rule 10(e). Such inclusion would add to the record evidence not before the court when it entered its judgment.

An abundance of case law supports both this interpretation of Rule 10(e) and this conclusion. In *Munich v. United States* , 330 F.2d 774 (9th Cir. 1964), the appellant sought to include in the ⊥101 record a probation report that the trial court declined to consider below. The facts of *Munich* differ from the facts of the present appeal since the testimony which Appellant seeks to include in the record in the present appeal is, according to Appellant, essentially the same as that which was set forth at trial. The conclusion of the *Munich* court, however, denying inclusion of the probation report in the record "because that document was not in the district court record," *id.* at 776, is consistent with a ruling by this Court denying inclusion in the record of the new testimony of Kumangai. *See also, United States v. Maryland Cas. Co.* , 204 F.2d 912 (5th Cir. 1953) (trial court error when after conclusion of trial, trial court allowed amendment of record to include transcript and exhibits from another case which were not introduced below); *Dempsey v. Guaranty Trust Co. of New York* , 131 F.2d 103 (7th Cir. 1942) (appellate court denied request to amend record to include amended and supplemental complaint filed by party after conclusion of proceedings below).

Shew v. Brownell , 219 F.2d 301 (9th Cir. 1955), also supports denying inclusion in the record of the deposition testimony of Kumangai. The *Shew* trial court required an excessive burden of proof and set forth this erroneous requirement in the trial record. After the appeal was filed, the trial court attempted to amend its finding of the required burden of proof. Since the record correctly stated what happened below -- *i.e.*, issuance of an erroneous statement of the burden of proof -- the appellate court refused the request to include the amended finding in the record. "Rule 75[] gives to the district court and to this [appellate] court power to correct the record only as to 'what occurred in the district court' . . . *Id.* at 302 (citing *Kennedy v. United States*, 115 F.2d 624, 625 (9th Cir. 1940)). "[Rule 75] confines the District Court to correct the record on appeal where that record erroneously states what happened in the course of trial. Here the record correctly states what happened, *i.e.*, an erroneous statement of the burden of proof." *Shew v. Brownell* , 219 F.2d 301, 302 (9th Cir. 1955). As *Shew* strictly requires only that which

occurred at trial to be reflected in the record, *Shew* is in accord with the conclusion of this Court that the trial record should not be amended to include deposition testimony of Kumangai taken subsequent to the trial.

Appellant relies upon *Marron v. Atlantic Refining Co.* , 176 F.2d 313 (3d Cir. 1949), in which a portion of the closing argument at issue on appeal was not recorded by the court stenographer.[2] ⊥102 For the purposes of appeal, the *Marron* appellant requested inclusion in the trial record of the missing portion of the record as provided by the trial judge from his "distinct recollection" of what was stated in closing arguments. *Id.* at 315. Pursuant to Rule 75, the *Marron* appellate court upheld inclusion of the recollections of the trial judge in the record.

Marron differs from the present appeal in an essential respect. In the present appeal, Appellant requests inclusion of new evidence in the record and specifically rejects inclusion in the record of the recollections of the trial judge in connection with the testimony actually given at trial. Unlike Appellant, the *Marron* appellant did not request an opportunity to include in the record new evidence; instead, the *Marron* appellant requested inclusion in the record of the judge's recollections of what occurred below. *Marron* supports the appropriateness of amending the record to include recollections of a trial judge in the record, but indicates nothing in connection with whether new evidence should be included in the record.

Accordingly, Appellant's motion to amend the record is DENIED.

[2] Such an error is analogous to the equipment malfunction in the present appeal.