TRUST TERRITORY OF THE PACIFIC ISLANDS,
Defendant-Appellant

v.

PETRUS EDWIN, PEINA HAREY, and ERMES PAUL,
Plaintiffs-Appellees

Civil Appeal No. 221

Appellate Division of the High Court

Truk District

February 9, 1979

Defendant government appealed from judgment against it. The Appellate Division of the High Court, Laureta, Temporary Justice, held that in action for compensation for damages to taro and soil, wherein defendant claimed court's view of the taro patches was objectionable in that a certain finding could be derived only from the view and a view is never permissible for the purpose of admission of substantive evidence, it was unnecessary for court on appeal to select the precise line of authority, among conflicting lines, as to the purpose of a view and whether it constitutes evidence; the evidence sufficiently supported the judgment for plaintiffs.

1. Appeal and Error—Evidence—Sufficiency

Record and transcript on appeal showed ample grounds for trial court's determination that sufficient evidence was introduced to justify denying motions to dismiss as against individual plaintiffs.

2. **Evidence—View—Purpose**

In action for compensation for damages to taro and soil, wherein defendant claimed court's view of the taro patches was objectionable in that a certain finding could be derived only from the view and a view is never permissible for the purpose of admission of substantive evidence, it was unnecessary for court on appeal to select the precise line of authority among conflicting lines, as to the purpose of a view and whether it constitutes evidence; the evidence sufficiently supported the judgment for plaintiffs.

3. **Evidence—Weight**

In action for compensation for damages to taro and soil the trial court was not compelled to accept either in whole or in part any one of the various conflicting statements made by witnesses as to the extent, nature or value of the damage.

4. **Evidence—View—Purpose**

One of the purposes of a view of the evidence out of court is to assist in gauging and estimating the reliability of the testimony given.

5. **Appeal and Error—Waiver and Estoppel—Matters Considered**

Party which acquiesced in out-of-court view by the court could not come forth on appeal and allege error in regard to the view.

6. **Appeal and Error—Scope of Review—Weight of Evidence**

Appellate Division may not reweigh the evidence and decide whether it should reach the same conclusion as the lower court as to the facts.

7. **Real Property—Negligence—Damage Shown**

Judgment that oil spill from gas station and power plant damaged plaintiffs' fields was supported by evidence that plant and station were in the vicinity of, and on higher ground than, the fields, and that in the operation of the facilities diesel fuel spilled onto the ground and into ditches and was carried to plaintiffs' fields.

8. **Judgments—Damages—Limitation by Pleadings**

Where plaintiff suing for damages for loss of taro plants due to oil spill caused by defendants' negligence pled the loss of 500 plants the court was not limited to finding he lost 500 plants and could grant judgment for the loss of 950 plants.

9. **Real Property—Damages—Loss of Use**

Loss of use of taro lands due to oil spilled upon them because of negligence of defendants could be awarded by the court in damages action.

10. **Contracts—Construction—Parol Evidence**

A fully integrated agreement of a contractual nature may not be varied by extrinsic evidence, written or oral, so as to add to, subtract from, or contradict its provisions.

11. **Release—Construction—Construction Against Drafter**

A release should be strictly construed against the party drafting it.

12. Release—Construction—Error in Preparation

Where government prepared release form signed by person whose land was damaged by government's oil spill, the government, absent justifiable excuse, could not later claim it erred in its creation.

Counsel for Appellant: *District Attorney's Office,* Truk District
PHILLIP W. JOHNSON, ESQ.

Counsel for Appellees: Micronesian Legal Services Corporation
MICHAEL DE ANGELO, ESQ.
DANIEL MACMEEKIN

Before BURNETT, *Chief Justice,* GIANOTTI, *Associate Justice,* LAURETA, *Temporary Justice*

LAURETA, *Temporary Justice*

In February 1975, appellees Petrus Edwin and Peina Harey filed individual complaints against the Trust Territory of the Pacific Islands and Mobil Oil Micronesia, Inc., seeking compensation for damages to their taro and soil. The damages occurred as a result of defendant's alleged negligence in allowing oil to spill from the Public Works Gas Station and the Power Plant, sometime in 1972. In April 1977, appellee Ermes Paul filed a similar complaint alleging damages since 1973. The three cases were consolidated for trial, and trial without a jury was had from June 2–3, 1977. Judgment was entered on June 7, 1977, awarding damages for loss of taro and loss of use of taro paddies in the amount of $1,496.00 to Petrus Edwin, $1,625.00 to Peina Harey and $1,308.30 to Ermes Paul. The Court assessed liability against Mobil Oil Micronesia, Inc., for one-twentieth ($^1/_{20}$) and against the Trust Territory of the Pacific Islands for nineteen-twentieths ($^{19}/_{20}$) of the judgment. On July 5, 1977, appellant filed a Notice of Appeal; Mobil Oil Micronesia, Inc., has not appealed the judgment.

Appellant raises several grounds for appeal, all of which we consider separately.

Failure To Grant Motion To Dismiss

At the close of plaintiffs' case, appellant moved to dismiss all three cases on the grounds of insufficient evidence, the Court stating that: ". . . The court notes that under Rule 30, at this junction of the trial, that the question is whether the plaintiff has failed to introduce sufficient evidence to warrant any relief against the defendant."

Defendants made their motions pursuant to Rule 30d(4) of the Rules of Civil Procedure, which outlines the procedure to be followed in trial. The section notes the propriety of consideration by the Court at the close of plaintiffs' case, the question whether the plaintiff has failed to introduce sufficient evidence to warrant any relief against a defendant.

The foundation in this action is Rule 33b which partially states:

> After the plaintiff, in an action tried by the Court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the grounds that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of fact may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

This provision is substantially similar, indeed identical to Rule 41(b) of the Federal Rules of Civil Procedure. In cases decided under Rule 41(b), Federal courts have ruled that on a defendant's motion for dismissal at the close of plaintiff's case in an action tried without a jury, the Court is authorized to evaluate and weigh all of the evidence presented by plaintiff, draw such inferences therefrom as it considers reasonable in light of the record and determine whether plaintiff has sustained his or her burden of proof

necessary to establish the right to relief were the case to end there and if the Court undertakes to make such a determination and concludes that plaintiff has not met his or her burden, defendant is entitled to judgment on the merits. *United States v. Continental Can Co.*, 217 F. Supp. 761 (D.C.N.Y. 63), reversed on other grounds 378 U.S. 441; *Blount v. Xerox Corp.*, 405 F. Supp. 849 (N.D. Cal. 75).

[1] A review of the transcript and record reveals ample grounds for the Trial Court's determination that sufficient evidence had been introduced to justify denying motions to dismiss as against the individual plaintiffs. This will become evident in the course of the Court's discussion of the remaining grounds for appeal.

View of Scene by Court

Appellant raises the issue of the Court's view of the taro patches as being objectionable. Appellant contends that Finding of Fact Number 7, which states that, "all of the taro paddies are within one large swamp area" can be derived only from the Court's view of the scene in question, and in contravention to the proposition that a view of the scene is never permissible for the purpose of admission of substantive evidence.

A perusal of the states within the Pacific Reporter system as well as others scattered throughout the country reveals two distinct lines of authority as to the purpose of a view. One holds a view as not being part of a trial; that knowledge acquired by the view may aid in understanding the testimony of witnesses and determining the relative weight of conflicting testimony but that it may not be given the force of substantive evidence. *Jack v. Hunt*, 265 P.2d 251 (Ore. 1954), *Weber Basin Water Conservancy v. Moore*, 272 P.2d 176, 177 (Utah 1954), *Henderson v. Bobst*, 497 P.2d 957 (Wash. 1972), *Vickridge First and Second Addition Homeowners Ass'n. Inc. v. Catholic Diocese of*

Wichita, 510 P.2d 1296 (Kan. 1973). The other holds that the information obtained upon a view is evidence received in the trial and may be acted upon. *Lobdell v. State*, 407 P.2d 135 (Idaho 1965), *Dotson v. Farmer's Inc.*, 398 P.2d 54 (N.M. 1965), *Wade v. Cambell*, 200 Cal. App. 2d 54, 19 Cal. Rptr. 173, 92 A.L.R.2d 966 (Cal. 1962), *Davis-Robinson v. Patee*, 57 P.2d 681 (Wyo. 1936).

In any case, there is some unanimity of opinion that where the judge does view the subject of controversy, his findings are entitled to great weight and will seldom be disputed. *Casper Lodge v. Cambridge*, 286 P.2d 1947 (Wyo. 1955), *Cannon v. Neuberger*, 268 P.2d 425 (Utah 1954).

[2, 3] In this case, it is unnecessary for this Court to select the precise line of authority as to the purpose of a view. The evidence sufficiently supports the judgment. The Court was not compelled to accept either in whole or in part any one of the various conflicting statements made by witnesses as to the extent, nature or value of the damage. In *Lauder v. Wright Inv. Co.*, 271 P.2d 970, 972 (Cal. 1954), it was said:

> . . . the trial judge was not required to accept it (the testimony) rather than the on-the-spot factual picture his own personal inspection of the area revealed. It was his responsibility also to draw any reasonable inferences from the situation thus disclosed, and to make a proper deduction from the facts. In practical effect the Court simply resolved the conflict between what he saw and the testimony he heard. This, of course, is binding on a reviewing Court. (Parentheses supplied.)

[4] There the judge viewed the subjects of controversy and his reaction makes it obvious that because of what he saw he accepted in part and rejected in part some of the testimony given in behalf of each litigant. This exemplified at least one of the purposes of a view, which is to assist in gauging and estimating the reliability of the testimony given.

Here, the transcript of the proceedings indicates that appellant acquiesced in the view by the Court. Of consequence is *Union Oil Co. of California v. Reconstruction Oil Co.*, 66 P.2d 1215 (Cal. 1936). This involved an injunction proceeding in the trial of which the Court went into another county to inspect apparatus used in making a survey of a well and to take the testimony of several witnesses who had operated the apparatus in the survey. After judgment, defendants contended that the irregularity was jurisdictional. The appellate court based its decision on *People v. Pompa*, 221 P. 198 (Cal. 1923) and said that:

> This acquiescence and concurrence in such claimed irregularities, in our opinion, constituted a waiver of the right now to raise objection to them. It may further be observed with respect to the evidence which was received in Fullerton that it stands uncontradicted and, so far as appears, no prejudice resulted to appellants from its reception.

In *People v. Pompa*, supra, the Court and some of the jurors, during a view, asked questions of the person appointed by the Court to point out particular things at the scene of the offense. Defendant was aware of this but made no objection until the view had been completed. His counsel also participated in the questioning. After conviction he unsuccessfully moved for a new trial because of the claimed irregularity of the testimony given by the shower. On appeal, it was held that any irregularity in connection with the view had been waived.

[5] The transcript clearly indicates that defendant Trust Territory acquiesced in the Court's view of the taro patches. It cannot now come forth and allege error.

Sufficiency of Evidence

Appellant alleges error grounded in the theory that the evidence was insufficient to sustain the judgment.

Pursuant to 6 TTC § 355(2) this Court may not set aside the judgment of the trial decision unless clearly erroneous. This Court has stated that where there is any evidence from which the trial court might properly have drawn its conclusion as to the facts that conclusion will not be disturbed. *Ladore v. Rais*, 4 T.T.R. 169, 170.

To the same effect it was said in *Calvo v. Trust Territory*, 4 T.T.R. 506, 516:

> It is the function of this Court to ascertain whether there is any probative evidence in support of the trial court's findings and conclusion. If there is any evidence in support, the finding of the trial court will not be disturbed.

[6] In appellant's argument it was urged that there was no reason for the trial court to find that the Government Gas Station and Power Plant negligence caused damage to the taro in question. Appellant further alleges that whatever spillage occurred was patently de minimus. Appellant, in effect, asks us to reweigh the evidence. This is not the function of an appellate court. The rule was succinctly stated in *Arriola v. Arriola*, 4 T.T.R. 486, wherein this Court noted that an appellate court may not reweigh the evidence and "decide whether in its opinion it should reach the same or different conclusion as did the trial judge as to the facts." At 487.

[7] The Trial Court specifically found that both power plant and gas station are in the vicinity of and are located above the level of plaintiffs' taro paddies, that in the operation of its facilities diesel fuel spilled onto the ground and into ditches where it was carried into the area where plaintiffs' taro paddies were located. Testimony by Sikaret Lorin, Tataua Fitim and Risauo Alifios of the Sanitation Department, and as well as by Ermes Paul, amply supported these findings; and we will not disturb the trial court's findings herein.

Sufficiency of Evidence of the Number of Ermes Paul's Plants

[8] Appellant further contends that there was insufficient evidence to sustain a judgment for Ermes Paul for loss of 950 plants. Likewise this Court is of the opinion that the trial court did not err in that finding. Appellant's argument to the effect that the Court could not hold that the appellee, Paul, lost more than the 500 plants claimed in his complaint is without merit. Modern rules and outlooks emphasize that the merits of a case depend on the facts, and not what the lawyers in pleadings say the facts are, or, they hope, will be. In *Burton v. State Farm Mutual Automobile Insurance Co.*, 335 F.2d 317 (5th Cir. 1964), the court stated:

> The district judge apparently thought that the pleadings limited the scope of available relief, and if that formally sought was not allowable none could be granted. This is not the law. As we have many times said, except in the case of a default judgment, the court is bound to grant whatever relief the facts show is necessary or appropriate.

This Court will not insist upon the trial division making determinations based on the matters raised within the precise issues of the pleadings from a technical standpoint, but by the evidence actually received. It was well within the trial court's discretion to find that approximately 950 taro plants were found on Ermes Paul's patch and we will not disturb that finding.

Damages for Loss of Use of Taro Lands

[9] Likewise, it was within the discretion of the trial judge to award loss of use of taro lands as stated in its judgment. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 61 S. Ct. 379, reh. den. 312 U.S. 713, 61 S. Ct. 609 (1941), the United States Supreme Court stated:

Present market value of property is best the resultant of the prediction of many minds as to the usability of the property and probable financial returns from that use, projected into the future as far as reasonable, intelligent men can foresee the future.

We believe there existed sufficient basis for the Court to compute the figures as stated, contrary to appellant's contention that no such basis existed.

Settlement Letters as Extrinsic Evidence

Appellant contends that the trial court committed reversible error in refusing to allow into evidence letters between counsel for Paul and the Government. The letters ostensibly show that the release signed by Paul in 1973 mistakenly excluded terms which would have compensated Paul for oil damage to his taro.

We start with the proposition that the decision to set aside the judgment depends on the effect of the procedural error on the ultimate holding. Error in receipt or rejection of evidence or other procedural irregularity is not a ground for disturbing a judgment by virtue of 6 TTC § 351 "unless refusal to take such action appears to the court inconsistent with substantial justice." *Bina v. Lajoun*, 5 T.T.R. 366, 369.

[10] It is well settled that a fully integrated agreement of a contractual nature may not be varied by extrinsic evidence, written or oral, so as to add to, subtract from, or contradict its provisions. *Truck-Trailer Equip. Co. v. S. Birch & Sons Contr. Co.*, 231 P.2d 304 (Wash. 1951). See generally, Restatement of Contracts, §§ 228–229, 237–240, 242. Whether an agreement of a contractual nature is one fully integrated has been much discussed. One line of cases, said to apply a "mechanical test," holds that if a contract appears or purports to be complete on its face, parol evidence is inadmissible to add to, vary or contradict the agreement. Other cases, said to apply the "intent test," hold that

parol evidence is admissible to show whether the contract is in fact a fully integrated or partially integrated agreement, or to show in fact whether the agreement, purporting to be fully integrated, nevertheless was actually executed as part of a transaction of which a collateral agreement, oral or written, was also intended to be a part.

In ascertaining whether a written contract is ambiguous, courts have tended to move away from the traditional and mechanical "four corners" approach and to accept evidence of the parties' negotiations and of other relevant and external circumstances in order to ascertain whether a written contract is ambiguous. See *Lynch v. Higley*, 510 P.2d 663 (Wash. 1973), 40 A.L.R.3d 1384, 1392. Thus in *Masterson v. Sine*, 436 P.2d 561 (Cal. 1968), the court noted that when a written contract has been agreed upon by the parties as an "integration"—a complete and final embodiment of the terms of an agreement—and therefore precludes the admission of parol evidence to add to or vary its terms, it may be necessary to examine the alleged collateral agreement before concluding that proof of it is barred by the writing alone.

In view of a dispute between the owner of a shopping center and a tenant as to the rental that would be paid by the latter for the use of certain areas in the premises, the court in *Garden State Plaza Corp. v. S. S. Kresge Co.*, 189 A.2d 448, cert. den. 191 A.2d 63 (N.J. 1963), 40 A.L.R.3d 1394, held that extrinsic evidence was admissible to resolve the ambiguity. Specifically, this evidence referred to an exchange of correspondence during the negotiations for the execution of the lease agreement. The court said that in the course of interpreting and construing an agreement, in order to discover the intention of the parties, all relevant evidence pointing to meaning is admissible. The lower court had found that the contract was not ambiguous and had excluded the extrinsic evidence offered by the parties. The

appellate court said that construing a contract of debatable meaning by resort to surrounding and antecedent circumstances and negotiations for light as to the meaning of the words used is never a violation of the parol evidence rule. The court observed that debatability of meaning is not always discernible at the first reading of a contract by a new mind; that more often, it becomes manifest upon exposure of the specific disputed interpretations in the light of the attendant circumstances. Thus notwithstanding the general provision that settlement discussions which are a part of compromise negotiations are generally inadmissible, we hold that they are, nevertheless, admissible to ascertain the existence of ambiguities in a written contract.

We need not make the determination here, whether parol evidence may be used to vary or merely to clarify a written contract, for a review of the exhibits which defendant has attempted to introduce into evidence and the transcript of the case lead to the conclusion that the release signed by Paul is not ambiguous. Indeed, the two documents offer little assistance if any in the resolution of this issue.

[11, 12] Furthermore we are of the belief that a release should be strictly construed against the party drafting the release, and the Government, who prepared the form release that Paul signed, absent justifiable excuse cannot now complain that it erred in its creation. Appellant's cases citing mistake as circumventing the application of the parol evidence rule all involved the concept of mutual mistake, clearly inapplicable to the case at hand. Indeed, *Ed Sparks & Sons v. Joe Cambell Construction Co.*, 530 P.2d 938 (Idaho 1974), to which appellant cites with approval, stated that: "Sparks as the party alleging the mistake has the burden of proving it by clear and satisfactory evidence." At 940. This plaintiff has failed to do, and thus we find no reversible error.

Apportionment of Damages

Appellant argues that the court improperly apportioned damages in assessing $^{19}/_{20}$ of the damages to the Government and $^{1}/_{20}$ to Mobil Oil. We will not intrude into the province of this trial court and reweigh the evidence concerning the apportionment, especially in light of the fact that sufficient reason appears in the record to support such an apportionment. In passing, we observe that Restatement of Torts 2d, § 433A, which appellant cites as authority, is tempered by the application of the following section, § 433B Burden of Proof (2) : "Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon such actor." Appellant not having met such burden, the apportionment of the trial court stands.

Accordingly the decision of the trial court is hereby AFFIRMED.