MIKE CHOBAN, a minor, by his parent and natural guardian, MIKE CHOBAN, and MIKE CHOBAN, Plaintiffs-Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, and GOVERNMENT OF THE MARSHALL ISLANDS, Defendants-Appellees

Civil Appeal No. 397

Appellate Division of the High Court

Marshall Islands District

May 17, 1985

Appeal from judgment of the trial division finding defendants free from liability for injuries received by plaintiff in a gasoline vapor explosion on property under the possession and control of the defendants. The Appellate Division of the High Court, per curiam, held that use at trial of deposition of plaintiff which was not properly admitted constituted reversible error, and therefore judgment of the trial court was reversed.

1. **Evidence—Depositions—Admissibility**

   A deposition may only be used under one of the following conditions: 1) the deposition is offered to impeach the deponent as a witness; or 2) the deposition is one of a person authorized to testify on behalf of a public or private corporation; or 3) the deposition is of an unavailable witness. (Rules Civil Proc. 26)

2. **Evidence—Depositions—Admissibility**

   A deposition not offered and admitted into evidence cannot be considered by the trier of fact.

3. **Evidence—Depositions—Admissibility**

   Since a deposition is only secondary evidence, a trial court errs by admitting a deposition without an adequate foundation that the necessary conditions for its admission are satisfied. (Rules Civil Proc. 26)

4. **Evidence—Depositions—Admissibility**

   Counsel at trial cannot argue from a deposition which has not been properly admitted into evidence.

5. **Evidence—Depositions—Admissibility**

   It was error for trial judge to allow counsel to argue from a deposition which had not been properly admitted into evidence, and for the trial judge to state from the bench at trial that he, too, had read the deposition.

6. **Evidence—Depositions—Admissibility**

   At trial, use of deposition of plaintiff which was not properly admitted into evidence constituted reversible error, where trial court relied heavily

on plaintiff's testimony in rendering his verdict for defendants, and the deposition contained prior inconsistent statements of plaintiff, and therefore may have affected the trial court's judgment.

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Counsel for Appellee, Government of the Marshall Islands: GREG DANZ, ESQ., *Office of the Attorney General*, Republic of the Marshall Islands, Majuro, Marshall Islands 96960

Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, and LAURETA*, *Associate Justice*

PER CURIAM

Plaintiff-appellants Mike Choban, Jr. (Mike) and Mike Choban, Sr. appeal the judgment of the trial division which found defendants-appellees free from liability for the injuries received by Mike in a gasoline vapor explosion on property under the possession and control of the defendants. The Chobans set forth several allegations of error on the part of the trial court. Because we find that the trial judge erroneously considered a deposition of Mike which was not in evidence, we reverse.

I.

Mike was injured on October 31, 1979, when he threw a lighted match into the gas tank of an abandoned vehicle

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* United States District Judge, District of the Northern Mariana Islands, designated as Temporary Associate Justice by the United States Secretary of the Interior.

at the Ebeye Dump on Ebeye in the Marshall Islands; he was nine years old at the time. The resulting vapor explosion caused burns to Mike's head and body requiring hospitalization and medical treatment. This action was filed on February 19, 1980, by Mike, through his father Mike Choban, Sr., and by Mike Choban, Sr. himself for monetary damages resulting from Mike's injuries. The Chobans named both the Trust Territory of the Pacific Islands (Trust Territory) and the Government of the Marshall Islands either or both of which had possession and control of the dump at the time of the accident.

Trial of the matter was held at Ebeye on June 1 and 2, 1983, before the Honorable Ernest P. Gianotti, Associate Justice. On July 21, 1983, the trial judge entered his Findings of Fact, Conclusions of Law and Judgment finding no liability on the part of the defendants-appellees.

On this appeal the Chobans set forth several allegations of substantive and procedural errors on the part of the trial judge. Most importantly, they assert that the trial judge, in reaching his findings and conclusions, relied on Mike's deposition which was never received into evidence. Because we find that this error creates grounds for a reversal, we do not address the other arguments raised.

[1] Rule 26 of the Trust Territory Rules of Civil Procedure adopts Federal Rules of Civil Procedure 26–37. Federal Rule 32 provides:

> (a) *Use of Depositions.* At the trial . . . any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition. . . .

A deposition may only be used, however, under one of the following conditions: 1) the deposition is offered to impeach the deponent as a witness; or 2) the deposition is one of a person authorized to testify on behalf of a public

or private corporation; or 3) the deposition is of an unavailable witness. Fed. Rule of Civ. Proc. 32(a)(1)–(3).

[2–4] It is axiomatic that a deposition not offered and admitted into evidence cannot be considered by the trier of fact. *Moore's Federal Practice* ¶ 32.02[2] (1982). Since a deposition is only secondary evidence, a trial court errs by admitting a deposition without an adequate foundation showing that the conditions of Rule 32 are satisfied. *Frechette v. Welch*, 621 F.2d 11 (1st Cir. 1980); see, *e.g.*, *Williamson v. Philadelphia Transportation Company*, 368 A.2d 1292, 1295 (Penn. 1976); *State of Frideaux*, 487 P.2d 541, 543 (Kan. 1971). It follows, as well, that counsel cannot argue from a deposition which has not been properly admitted.

[5] That the counsel for the Trust Territory argued from Mike's deposition is undisputed. Reporter's Transcript of Proceedings (Transcript) at pp. 288–89 (court overruled plaintiff's objection to the argument on the deposition). In its Brief on appeal, the Trust Territory continues to use the deposition in an attempt to impeach Mike's credibility.[1] Moreover, it is clear from the record that the trial judge read the deposition notwithstanding that it was never properly admitted. See Transcript at p. 317 (judge states from the bench that he was reading, or had read, the deposition). The trial court has clearly committed error.

The discovery of error at the trial level, however, does not mandate a reversal in every case. Rule 49 of the Trust Territory Rules of Civil Procedure provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order [or] in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating,

[1] Of course, a deposition which is on file but which was not offered into evidence at the trial is not part of the record and cannot be considered by the reviewing court. 9 *Moore's Federal Practice* ¶ 210.04, citing *Fleming v. Gulf Oil Co.*, 547 F.2d 908 (10th Cir. 1977).

modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Perhaps the best explanation of the harmless error rule is that offered by the late Roger Traynor, former Chief Justice of the Supreme Court of California, in *The Riddle of Harmless Error* at 35 (1970).[2] Traynor writes that, upon the finding of error, the trial court's judgment becomes suspect and that "unless the appellate court believes it *highly probable* that the error did not affect the judgment, it should reverse." (Emphasis added.) Any other test, Traynor suggests, carries with it too great a risk that a judgment influenced by error will be affirmed. "Moreover," he continues, "a less stringent test may fail to deter an appellate judge from focusing his inquiry on the correctness of the result and then holding an error harmless whenever he equated the result with his own predictions." *Id.* Of course, each case of this nature must be decided on appeal from "examination of the proceedings in their entirety, tempered but not governed in any rigid sense of *stare decisis* by what has been done in similar situations." *Kotteakos v. United States*, 328 U.S. 750, 762, 66 S. Ct. 1239, 1246, 90 L. Ed. 1557 (1946). We review, then, the circumstances of this case to determine not whether we would have reached the same result as did the trial judge, but whether the judgment was affected by the judge's error.

To determine whether the consideration of the deposition influenced the trial judge, we must briefly review the Chobans' theory of the case along with the judge's reasons for rejecting it. The Chobans proceeded on a theory of liabil-

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[2] Citation and quotation found in 11 C. Wright and A. Miller, *Federal Practice and Procedure* at § 2883 note 20 (1973).

ity set forth under § 339 of the *Restatement (Second) of Torts* (hereafter "*Restatement*"),[3] which provides:

§ 339. Artificial Conditions Highly Dangerous to Trespassing Children

A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if

(a) the place where the condition exists is one upon which the possessor knows or has reason to know that children are likely to trespass, and

(b) the condition is one of which possessor knows or has reason to know and which he realizes or should realize will involve an unreasonable risk of death or serious bodily harm to such children, and

(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, and

(e) the possessor fails to exercise reasonable care to eliminate the danger or otherwise to protect the children.

The trial court's analysis of this theory of liability as it applies to the facts is confused. The judge apparently applied the "attractive nuisance doctrine" instead of the doctrine as set forth in § 339.[4] Thus, in rejecting to apply § 339

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[3] The rules of the common law as expressed in the *Restatement* are the rules of decision in this Court. 1 T.T.C. § 103.

[4] The "attractive nuisance doctrine" and § 339 set forth different tests of liability. Under the former, to prove liability, a plaintiff must show that the child was attracted onto the premises by the particular condition that injured him. This position, which could once boast wide acceptance, is now generally rejected. *Restatement* § 339, comment b. It is now recognized by most courts that the basis of liability is nothing more than foreseeability of harm to the child "and the considerations of common humanity and social policy which, in other negligence cases, operate to bring about a balance of the conflicting interests." W. Prosser, *Law of Torts*, p. 366 (1971). The result is a limited obligation wherein the trespasser status is merely one fact to be considered and wherein the defendant must show reasonable care as to those conditions against which the child may be expected to be unable to protect himself. *Id.*; *Restatement* § 339, comment b.

here, the judge found "the vehicle or the gas tank [not] to have invited the trespass." Judgment at 7. Continuing on to discuss ordinary principles of negligence, the court again found no liability in that the defendants had not breached their "duty of not wilfully or wantonly injuring" Mike. Judgment at 8. In addition, the judge concluded that "to say that [Mike] could not have appreciated his act or the danger thereof is not believable considering Mike's stated purpose in having the matches and using them on the vehicle." Judgment at 8–9. In other words, the court concluded that defendants were not liable either because they breached no duty owed to Mike or because Mike's contributory negligence superceded their own.

[6] For the purposes of our review here, our focus is not on the soundness of the trial judge's reasoning, but on the evidence on which he apparently relied. Each key finding made by the judge to support his conclusions relies significantly on the testimony of Mike. That Mike was not attracted to the dump by the abandoned vehicle is based on Mike's own statements as to his intent. Judgment at 7. The court's conclusion that no duty was breached was based on Mike's testimony regarding his motives for going to the dump. Judgment at 8. Likewise, the finding that Mike appreciated the nature and the dangers of his act is supported by Mike's own stated purposes. Judgment at 8–9. Of course, when a decision relies so heavily on one person's testimony, that witness' credibility becomes a matter of paramount importance. The deposition apparently contains several prior inconsistent statements which could be used for purposes of impeachment. See *Brief for Appellee TTPI*, at 17–20 (lists examples of contradictions between the deposition and Mike's testimony). In light of this, and in view of the reliance the trial judge placed on Mike's testimony we cannot say with a high degree of certainty that the error in reading the unadmitted deposition did not affect the

judgment of the trial judge. Accordingly, the error was not harmless and the judgment cannot stand.

For these reasons, the judgment of the trial court is reversed and the case remanded for a new trial.