

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

MIGUEL B. EVANGELISTA, as Personal Representative of the ESTATE OF ALICIA B. EVANGELISTA, MIGUEL B. EVANGELISTA, an individual, MIGUEL B. EVANGELISTA, as Personal Representative of CHERYL BORJA EVANGELISTA, EVITA BORJA EVANGELISTA, BECKY ANN BORJA EVANGELISTA, KEMMY BORJA EVANGELISTA, JANNY BORJA EVANGELISTA, MICHAEL BORJA EVANGELISTA, JUSTO EVANGELISTA CASTRO, JR., and PETER EVANGELISTA VILLAGOMEZ, JR.; and JOSE REYES EVANGELISTA, an individual, and MARIA BOKI EVANGELISTA, an individual,

Plaintiffs,

vs.

MOBIL OIL MARIANA ISLANDS, INC., ROLLY JOSE B. BUGARIN and DOES 1 THROUGH 50, inclusive,

Defendants.

CIVIL ACTION NO. 97-0652(T)

ORDER

I. INTRODUCTION

Plaintiffs Miguel B. Evangelista et al. (“Evangelista”) bring five motions in limine. Defendants Mobil Oil Mariana Islands, Inc. et al. (“Mobil”) bring two motions: one for partial summary judgment and the other for partial judgment on the pleadings. The court, having reviewed the briefs, exhibits, affidavits, and having heard and considered the arguments of counsel, now renders its written decision. [p. 2]

II. FACTS

FOR PUBLICATION

On February 23, 1997, decedent Alicia B. Evangelista, plaintiff Jose Reyes Evangelista and plaintiff Maria Boki Evangelista were struck by defendant Jose B. Bugarin ("Bugarin"), who was driving a 1988 Mazda pickup truck ("Vehicle") owned by his employer, defendant Mobil Oil Mariana Islands, Inc. Plaintiffs Jose and Maria Evangelista were injured and did not see Alicia Evangelista when she was hit or at the accident scene. Police took photographs of the Vehicle at the site of the accident.

In or about August or September of 1997, the Vehicle was repaired and the tint was stripped from the windshield. In November of 1997, Evangelista made a request for production of documents and informed Mobil that it considered the tint issue important. During the November 5, 1997 deposition of Jose Evangelista, Mobil's counsel was asked about the windshield and replied that he did not know where the windshield or tint was.

Mobil did not respond to further inquiries about the condition of the windshield and tint until a May 7, 1998 letter, in which Mobil's counsel stated, "as best I can tell, the tinting on the windows was removed at the time of the repairs in or about August of last year." (Exh. B, Mobil opp.) However, Mobil provided its entire file concerning the Vehicle to opposing counsel and also cooperated in an accident reconstruction on Tinian.

On March 19, 1998, the Superior Court following a trial by jury, issued its order finding Bugarin guilty of the charge of failure to exercise due care in violation of 9 CMC §5408 in Traffic Case No. 97-2527.

III. ANALYSIS

The Plaintiffs' filed several motions which were unopposed and are therefore GRANTED. These motions are: (1.) Plaintiffs' motion in limine to exclude evidence of collateral source payment of medical bills; (2.) Plaintiffs' motion in limine to exclude evidence of collateral source disbursement of decedent's life insurance policy; and (3.) Plaintiffs' motion in limine for summary adjudication that Bugarin struck plaintiffs during the course and scope of his employment with Mobil.

[p. 3] The Plaintiffs' filed other motions which were opposed. The court hereby orders as follows:

1. Plaintiffs' motion in limine to instruct the jury on spoliation of evidence.

Evangelista requests a jury instruction that the jury make an adverse inference that evidence

destroyed or rendered unavailable was unfavorable to the party who failed to produce it. Evangelista argues that because the original tint on the Vehicle was removed without full documentation, Mobil has intentionally suppressed material evidence. Mobil admits that the original tint on the Vehicle was removed in the course of repairs. However, Mobil argues that it produced its entire file on the Vehicle in November of 1997. Evangelista has taken no interrogatories or depositions which questioned what occurred to the Vehicle's windshield after the accident. The police took photographs of the Vehicle at the scene to which Evangelista has access.

To instruct a jury on spoliation of evidence, there must be a showing of fraudulent suppression. *Cf.*, People v. Herrera, 340 P.2d 690 (1959). A jury instruction is only warranted where there is evidence to support it. *See*, McKain v. Bisson, 12 F.3d 692 (C.A.2 1993). Whether Mobil intentionally suppressed material evidence is a factual question. If appropriate at the conclusion of the trial, a jury may be left with the question of whether Mobil suppressed material evidence, but at this time, the motion is premature based on the facts before the court. *See*, West v. Johnson & Johnson, 174 Cal.App.3d at 874.

Plaintiffs' motion in limine to instruct the jury on spoliation of evidence is therefore DENIED.

2. Plaintiffs' motion in limine to preclude Defendant Bugarin from contesting his failure to exercise due care.

Evangelista requests that Mobil be precluded from introducing any evidence concerning Bugarin's negligence because the issue of failure to exercise due care has already been fully litigated. Restatement, Second, Judgments §85(2) provides "A judgment in favor of the prosecuting authority is preclusive in favor of the third person in a civil action: (a) against the defendant in the criminal prosecution...." In addition, collateral estoppel, or issue preclusion, is appropriate where there was a full and fair opportunity to litigate an issue in a prior proceeding. Restatement, Second, Judgments §27, §29; Speaker Sortation Systems, Division of A-T-O, Inc. v. United States Postal Service, 568 [p. 4] F.2d 46 (7th Cir. 1978).

However, where application of the doctrine of collateral estoppel would create complex problems in identifying the exact issues resolved by the prior judgment as well as difficulties in drafting reasonable jury instructions, the court may decline to apply it. O'Connor v. O'Leary, 247 Cal.App.2d 646 (1967). Where a party had a heavier burden of persuasion in the former action or there is a different type of procedure

followed in the subsequent court, a party may be excepted from issue preclusion. Restatement, Second, Judgments §28(3), (4); §85 Illustration 5. In the criminal traffic case, Bugarin had no chance to introduce evidence of contributory negligence and assumption of risk because these theories were not applicable to the criminal charge. As a result, Bugarin did not fully litigate all of the negligence issues that will be involved in the civil trial. In addition, invoking collateral estoppel under the criminal conviction while presenting many related negligence issues before the jury will cause numerous time consuming rulings over what exactly falls within the estoppel and is likely to cause jury confusion.

Accordingly, Evangelista's motion in limine to preclude Defendant Bugarin from contesting his failure to exercise due care is DENIED.¹

3. Defendants' motion for partial summary judgment on the third cause of action of the second amended complaint for emotional distress from witnessing the fatal injuries suffered by a third party.

Negligent infliction of emotional distress will occur only "where the bodily harm to the other results from his shock or fright at harm or peril to a member of his immediate family occurring in his presence." Restatement of Torts, Second, §436(3). The witness or "other" must not only be in the "zone of danger," as Evangelista was, but must see the event that injures the family member. [p. 5] Malstrom v. Mackey, 583 N.Y.S.2d 28, 29 (N.Y.App. 1992). The Evangelistas did not actually see the decedent injured. Although they were injured by the same Vehicle, they did not see the Vehicle strike the decedent, nor did they see the decedent at the site of the accident. Because the Evangelistas did not witness the fatal injury to the decedent, under the law there is no claim for negligent infliction of emotional distress. Accordingly, Mobil's motion for partial summary judgment on the third cause of action of the second amended complaint is GRANTED.

4. Defendant Bugarin's motion for partial judgment on the pleadings striking plaintiffs' claim

¹ Mobil's argument that the prior judgment may not be introduced at trial because it does not meet the requirements of the Commonwealth Rules of Evidence 803(22), which provides a limited exception to the hearsay rule for judgments of conviction, is without merit. Rule 803(22) states that judgments of previous convictions may only be admitted where the judgment involves a crime punishable by death or imprisonment for more than one year. However, a conviction for a misdemeanor is admissible under 801(d)(2)(A) as an admission against a party. Hancock v. Dodson, 958 F.2d 1367, 1371 (6th Cir. 1992). Furthermore, "[a] prior judgment of conviction may be used as prima facie evidence in a subsequent civil suit...for matters of fact or law necessarily decided by the conviction and the verdict on which it was based." New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1081 (2nd Cir.), cert denied, 109 S.Ct. 128 (1988) (citing in part Emich Motors Corp. v. General Motors, Corp., 71 S.Ct. 408, 414 (1951)). Accordingly, the prior conviction may be presented at trial.

for pre-death pain and suffering and loss of consortium.

At common law, there was no claim for pain and suffering once a person died. Restatement of Torts, 2d §900 states: "A cause of action in tort may be discharged by (a) the death of either party, in the absence of a statute providing for the survival of the cause of action." Although wrongful death statutes are now common in the United States, the CNMI statute makes no such provision.

Evangelista puts forth Whitlatch v. CNMI, Civ. Action No. 90-926, for the proposition that a plaintiff may recover after death. However, this case is a Superior Court case and diametrically opposed to controlling CNMI law. The CNMI statute "does not provide a right to relief for derivative injuries, such as loss of consortium, to the adult decedent's surviving spouse or children." Ito v. Macro Energy, Inc., 4 N.M.I. 46, 63 (1993). 7 CMC §2601 provides for survival of tort claims after the tortfeasor is dead. However, the legislature did not provide for a claim of pain and suffering to survive after the victim was dead. Therefore, the common law, as expressed by the Restatement and the Supreme Court of the CNMI binds this court.

Accordingly, Defendant Bugarin's motion for partial judgment on the pleadings striking plaintiffs' claim for pre-death pain and suffering and loss of consortium is GRANTED.

SO ORDERED this 19 day of May, 1999.

/s/ Edward Manibusan
EDWARD MANIBUSAN, Presiding Judge