

GREGORIO ESTRADA, PETITIONER, VS. HONORABLE FRANCISCO CONSOLACION, JUDGE OF THE COURT OF FIRST INSTANCE OF DAVAO, BR. II, CORAZON RAMIREZ UY, AND LUCIO GALAURA, RESPONDENTS.

G.R. No. L-40948. June 29, 1976

Ponente: ANTONIO, J.

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ANTONIO, J.:

Certiorari with prohibition to annul the Order, dated May 20, 1975, of the Court of First Instance of Davao in Civil Case No. 8739, which "decreed that defendants have judgment summarily against the plaintiff for such amount as may be found due them for damages, to be ascertained by trial upon that issue alone on June 9, 1975 at 8:30 a.m."

On February 14, 1975, petitioner Gregorio Estrada filed a complaint for damages against private respondents Corazon Ramirez Uy and Lucio Galaura, owner and driver, respectively, of an AC Jeep, with Plate No. ZE-501, for breach of their obligations as a common carrier, in view of the death of his wife while she was a passenger of the vehicle.

The complaint alleges that: on January 1, 1975, plaintiff's wife, Simeona Estrada, was a passenger of the AC Jeep, with Plate No. ZE-501, owned and operated by defendant Corazon Ramirez Uy and driven by defendant Lucio Galaura; while said jeep was cruising along Claro M. Recto Avenue, heading towards the direction of the Jones Circle, Davao City, the driver (Lucio Galaura) "without regard for the safety of plaintiff's wife who was among his passengers and without taking the necessary precaution" in accordance with the situation, bumped a Ford pick-up truck; as a consequence of the incident, plaintiff's wife sustained a fractured left humerus, fat (pulmonary) embolism and shock due to respiratory failure; she was brought to the San Pedro Hospital where she died.

Plaintiff further alleged in his complaint that defendant Corazon Ramirez Uy, as owner of the AC jeep and a common carrier, in violation of the contract of carriage, failed to safely conduct the plaintiff's wife to her place of destination by reason of her "failure to exercise even the diligence of a good father of a family" and her "gross and evident bad faith, malevolence and wantonness" in discharging her obligation as a common carrier. Plaintiff, therefore, asked for actual damages, indemnification for the death of his wife, moral damages and attorney's fees in specified amounts.

Defendants, in their answer, while admitting that plaintiff's wife was a passenger and that she died as a result of the accident, alleged that the proximate and only cause of the accident was the negligence of third persons (the drivers, Danilo Ang and Rodolfo D. Endino, of a Toyota pick-up truck bearing Plate No. T-RU-221, and a Ford pick-up truck with Plate No. T-RU-420, respectively) over whom defendant Corazon Ramirez Uy had no supervision and control, and who were then driving their respective vehicles at a fast rate of speed and from different directions, as a result of which said vehicles collided, and because of that collision the Ford pick-up truck was deviated from its lane and hit the jeep of defendants. Defendants likewise set up a counterclaim for

damages by reason of plaintiff's institution of the clearly unfounded suit against them.

On April 16, 1975, respondents filed a motion for summary judgment against plaintiff on the ground that there is no genuine issue as to any material fact in the case except as to the amount of damages defendants are seeking from plaintiff by way of counterclaim. In support of their motion for summary judgment, certain annexes to the answer were incorporated therein, as follows:

(a) The sketch of the accident made by Traffic Investigator J.S. Formeloza of the Davao City Police Department, marked as Annex '3' of the defendants' answer'

(b) Said investigator's affidavit detailing his findings upon investigation stating that the pick-up with plate No. T-RU-420 upon reaching the intersection of Recto and Bonifacio Streets collided with the pick-up with plate No. T-RU-221, and that upon impact, the latter pick-up collided with the jeep driven by Lucio Galaura that was coming from the opposite direction. (Annex '4' of defendants' answer')

(c) The respective sworn statements of the drivers of the two pick-ups (Danilo Ang and Rodolfo Endino) taken by the Traffic Division of the Davao City Police Department after the accident, marked as Annexes '5' and of the defendant's answer wherein each driver respectively claimed that he exercised due care but attributed to the other negligence as the cause of the collision; and

(d) The sworn statement of defendant driver, (Lucio Galaura) of said A.C. Jeep, likewise taken by the Traffic Division of the Davao City Police Department detailing what he did in order to prevent or minimize damages to his vehicle and his passengers, marked as Annex '7' of defendants' answer.

By means of the foregoing annexes, respondents sought to prove that they were relieved of any liability to petitioner inasmuch as the accident which caused the death of petitioner's wife "resulted from the negligence of third persons over whom defendants had no supervision or control, namely, the drivers of the two pick-up trucks which collided at the intersection of C.M. Recto Ave. and Bonifacio St., Davao City, as a result of which collision, one of them was deviated from course to the lane where defendants' A.C.-Jeep was then travelling, where it also collided with the latter."

Petitioner opposed the above motion, relying heavily on the presumption that in case of death of the passenger, the common carrier is presumed "to have been at fault or to have acted negligently,"[1] unless the carrier proves that he has observed extraordinary diligence with due regard to all the circumstances, which movants failed to do.

Notwithstanding the opposition filed by the plaintiffs, respondent Judge issued the order of May 20, 1975, stating, in part, as follows:

"The Court has considered at length and thoroughly the pleadings in the action, the affidavits and other pertinent annexes (Annexes 1 to 6), of the movants and has found that there is no genuine issue as to any material fact and no controversial question of fact to be submitted to the trial court, and has concluded that defendants are entitled to a judgment as a matter of law except as to the amount of damages recoverable.

"It is therefore ordered and decreed that defendants have judgment summarily against the plaintiff for such amount as may be found due them for damages, to be ascertained by trial upon that issue alone on June 9, 1975 at 8:30 a.m."

A motion for reconsideration of the afore-quoted Order, on the ground that said Order, having failed to state clearly and distinctly the facts and the law on which it is based, violated the Constitution and the Rules of Court, was denied "for lack of merit" on June 9, 1975, hence the present petition for certiorari with prohibition.

Pursuant to Section 2, Rule 34, of the Revised Rules, "A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory relief is sought may, at any time, move with supporting affidavits for a summary

judgment in his favor as to all or any part thereof." [2] The defendant who believes that he is entitled to a judgment either on the pleadings or on the basis of extrinsic facts established by affidavits or depositions may move for summary judgment in his favor. [3] In other words, when the moving party is a defending party, his pleadings, depositions or affidavits must show that his defenses or denials are sufficient to defeat the claimant's claim. The affidavit submitted by the party moving for summary judgment shall be by persons having personal knowledge of the facts; it shall recite all material facts and show that there is no defense to the cause of action or that the cause of action has no merits. [4] This motion shall be served on the adverse party at least ten (10) days prior to the time specified in the hearing. The adverse party may also, prior to said date, serve opposing affidavits. The opposing papers, including pleadings, depositions, and affidavits must establish a genuine issue of fact in order to defeat a motion for summary judgment. After hearing, the motion for summary judgment shall be granted if, on the basis of all the papers and proofs submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact other than an issue as to the amount or extent of the damages. [5] This Summary Judgment or Accelerated Judgment is a device for weeding out sham claims or defenses at an early stage of the litigation, thereby avoiding the expense and loss of time involved in a trial. [6] The very object is "to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. [7] In conducting the hearing, the purpose of the judge is not to try the issue, but merely to determine whether there is a meritorious issue to be tried. Where a motion is made for summary judgment, such motion is not directed to the pleadings and deals only with the question of whether there are triable issues of facts and where such issues exist summary judgment must be denied. [8] Summary judgment should not be granted where it fairly appears that there is a triable issue to be tried. [9] "The Court should not pass, on questions of credibility or weight of evidence, and that the summary judgment procedure 'should not be perverted to the trial of disputed questions of fact upon affidavits'". [10] The test, therefore, of a motion for summary judgment is - whether the pleadings, affidavits and exhibits in support of the motions are sufficient to overcome the opposing papers and to justify a finding as a matter of law that there is no defense to the action or the claim is clearly meritorious. [11]

In proceedings for summary judgment, the burden of proof is upon the plaintiff to prove the cause of action, and to show that the defense is interposed solely for the purpose of delay. [12] After plaintiff's burden has been discharged, defendant has the burden to show facts sufficient to entitle him to defend. [13]

Under the contract of carriage, private respondents assumed the express obligation to transport the wife of petitioner to her destination safely and to observe extraordinary diligence with due regard for all the circumstances, and that any injury suffered by her in the course thereof, is immediately attributable to the negligence of the carrier. [14] To overcome such presumption, it must be shown that the carrier had observed the required extraordinary diligence, [15] which means that the carrier must show the "utmost diligence of very cautious persons * * * as far as human care and foresight can provide", [16] or that the accident was caused by a fortuitous event. [17] In order to constitute a case fortuito that would exempt a person from responsibility, it is necessary that (1) the event must be independent of the human will; (2) the occurrence must render it impossible for the obligor to fulfill his obligation in a normal manner; and (3) the obligor must be free of a concurrent or contributory fault or negligence. [18] It was precisely because of the legal presumption that once a passenger in the course of travel is injured or does not reach his destination safely, the carrier and the driver are presumed to be at fault, that private respondents submitted affidavits to prove that the accident which resulted in the death of petitioner's wife was due to the fault or negligence of the drivers of the two pick-up trucks over whom the carrier had no supervision or control. Having, therefore, shown prima facie that the accident was due to a caso fortuito and that the driver of the respondent was free of concurrent or contributory fault or negligence, it was incumbent

upon petitioner to rebut such proof. Having failed to do so, the defense of the carrier that the proximate cause of the accident was a *caso fortuito* remains un rebutted. We are not unmindful that the issue as to whether a carrier used such reasonable precautions to avoid the accident as would ordinarily be used by careful, prudent persons under like circumstances is a question essentially one of fact and, therefore, ordinarily such issue must be decided at the trial.[19] But where, as in the case at bar, petitioner has not submitted opposing affidavits to controvert private respondents' evidence that the driver of the passenger jeepney was free of contributory fault as he stopped the jeepney to avoid the accident, but in spite of such precaution the accident occurred, respondent Judge did not, therefore, act arbitrarily in declaring in his Order of May 20, 1975, that "there is no genuine issue to any material fact and no controversial question of fact to be submitted to the trial court." This was, however, a mere interlocutory order directing that a hearing be conducted for the purpose of ascertaining the amount or the assessment of damages which may be adjudged in favor of the prevailing party. It is a determination of the court of a preliminary point or directing some steps in the proceedings, but not a disposition of the merits.[20] "Upon the rendering of the assessment, the Court shall direct the entry forthwith of the appropriate summary judgment." [21]

In the absence of any findings of fact and conclusions of law, the aforesaid order of respondent Judge cannot be considered a judgment. It has been held that "a trial court in granting summary judgment should file findings of fact and conclusion of law or a memorandum opinion so as to disclose grounds upon which the trial court reached its determination." [22] In this jurisdiction, pursuant to Section 9 of Article X of the Constitution and the procedural rules, all judgments determining the merits of cases should state clearly and distinctly the facts and the law on which it is based. [23]

There being no judgment, the present petition is, therefore, premature. Certainly, petitioner could move for the setting aside of the aforesaid Order of May 20, 1975 by the presentation of opposing affidavits showing that, other than the issue as to the amount or extent of damages, there is a genuine issue of fact on the carrier's liability.

ACCORDINGLY, the petition for certiorari with prohibition is dismissed, without special pronouncement as to costs.

Fernando, (Chairman), and Martin, JJ., concur.

Barredo and Aquino, JJ., concur in a separate opinion.

Concepcion, Jr., J., is on leave.

Martin, J., was designated to sit in the Second Division.

[1] Articles 1755 and 1756, Civil Code.

[2] Cf. Rule 56[b], Federal Rules of Procedure.

[3] *Johnson v. Johnson & Johnson Co., Inc.*, 6 Fed. Rules Service, p. 593, U.S. Dist. Ct. N.D. Ga., Feb. 13, 1942.

[4] Section 5, Rule 34, Revised Rules of Court; 10 Civil Practice Law and Rules, p. 2, Rule 3212.

[5] Section 3, Rule 34, Revised Rules of Court; *Gantz v. Investors' Syndicate*, 148 Misc. 274, 265 NYS, 749.

[6] 1 Moore's Federal Practice, p. 817.

[7] *Richerd v. Credit Suisse*, 152 NE. 110.

[8] *Lane v. Benedict*, 6 MIS 2d 954, 160 BTS 2d 655.

- [9] 10 Civil Practice Law and Rules, p. 17, Rule 3212.
- [10] 3 Moore's Federal Practice, p. 72.
- [11] Tidewater Oil Sales Corp. v. Pierce, 213 AD 796, 210 NYS 759.
- [12] State Bank v. Mackstein, 123 Misc. 466, 20 NYS 290.
- [13] McAnsh v. Blauner, 222 AD 381, 116 NYS 379, affd. 248 NY 537, 161 NE 515.
- [14] Article 1756, Civil Code.
- [15] Article 1756, *Ibid.*; Brito Sy v. Malate Taxicab and Garage, Inc., 102 Phil. 483.
- [16] Necesito, et al. v. Paras, 104 Phil. 75.
- [17] Article 1174, Civil Code; Lasam v. Smith, 45 Phil. 657; Austria v. Court of Appeals, 39 SCRA 527.
- [18] Austria v. Court of Appeals, *Ibid.*; Article 1170, Civil Code, Brito Sy v. Malate Taxicab and Garage, Inc., *supra*, p. 489, Tolentino, Civil Code of the Philippines, Vol. IV, p. 119, citing Lasam v. Smith, *supra*; Tan Chiong v. Inchausti, 22 Phil. 152; dissent of Justice Moreland, pp. 175-183.
- [19] Gerard v. Inglese, 206 NYS 2d 879, 881.

[20] 33 C.J. 1053.

- [21] 10 Civil Practice Law and Rules, p. 2, Rule 3212.
- [22] Oosterwyk v. Corrigan, 120 N.W. 2d 620.
- [23] Section 1, Rule 36, Revised Rules of Court.

CONCURRING OPINION

BARREDO, J.:

I concur in the judgment dismissing the instant petition, but I believe it is necessary to emphasize that this decision does not mean that the Court is upholding the questioned order as the summary judgment prayed for by private respondents. Actually, the said order must be construed, despite its seemingly inaccurate tenor, as nothing but an interlocutory one holding that respondents have sufficiently established the bases for a summary judgment which will be rendered after the court has received and duly evaluated the evidence as to the amount of damages that should be awarded to them for their counterclaim.

Indeed, it is opportune for the Court to clear up in this case some points in summary judgment procedure which by all means should be encouraged whenever appropriate, regardless of the nature of the cause of action involved, if summary judgment procedure which has been purposely designed to abbreviate proceedings in cases where the issues are not genuine is to continue to have any place at all in the Rules of Court. The trouble is that there is such a lamentable dearth of knowledge not only of the concept but also of the procedure contemplated that in actual practice, in the few instances it has been resorted to, the results have been rather disappointing, almost frustrating.

To start with, there is the usual error of equating summary judgment with judgment on the pleadings. Very often, it is contended that because the allegations in the pleadings give rise to triable issues of fact, summary judgment is not proper. In other words, it is assumed that just because there is a joining of the factual issues in the pleadings

which, by the way, are not under oath, necessarily a trial with presentation of evidence by both parties is called for. But such criterion is true only for denying a motion for judgment on the pleadings, certainly not for summary judgment. For the basic reason for judgment on the pleadings is that the allegations in the pleadings of the contending parties show that there is no controversy at all between them as to the facts, which is not the reason behind summary judgments. In summary judgment procedure, it is assumed precisely that in their pleadings, the parties have joined issues on the ultimate facts, at least, but just the same, trial is foreclosed because the factual issues thus joined do not appear to be genuine, meaning to say, they are not real but sham. And a factual issue raised by a party is considered as sham when by its nature it is evident that it cannot be proven or it is such that the party tendering the same has neither any sincere intention nor adequate evidence to prove it. This usually happens in denials made by defendants merely for the sake of having an issue and thereby gaining delay, taking advantage of the fact that their answers are not under oath anyway.

On that score, the problem that is apparently troubling the trial courts and the practitioners and which has brought about the confusion underlying the seeming reluctance, if not inability, of some courts to resort to summary judgment procedure is how to determine that the factual issues in a given case and referred to in the motion for summary judgment are genuine or not. It is my impression after forty years in the bar that it is not yet clear to everyone concerned that such determination is not supposed to be based on the tenor or contents of the pleadings. It is only from the consideration and appraisal of the facts alleged under oath by the parties and/or their witnesses in their affidavits submitted with the motion and the corresponding opposition that such genuineness may and should be determined. Of course, the function of examining and weighing the said affidavits for the purpose just indicated can be properly performed only by one who is thoroughly prepared, both in theory and in practice, more particularly the latter. The precise objective in such undertaking is to find out, from a general consideration of all the detailed facts stated in the affidavits taken together whether or not the denial by one party of the truth of the allegations of the adversary is such that it would be safe to conclude from the face of said affidavits that ultimately, one of them will necessarily prevail. In this connection, it goes without saying that the facts that should be stated in the affidavits must be specific and categorical, and not merely general and equivocal. Should the court feel that in the light of such facts, assuming their veracity, the actual reception of evidence would be superfluous because even the general thrust alone is definitely in favor of the moving party, then it is obvious that a summary judgment may be rendered.

In the main, whether or not the court should decide in favor of either a summary judgment or a full-blown trial lies in the sound discretion of the trial judge, it being understood that he has fully imbibed the basic objective of the remedy, namely, to do away with unnecessary trial as long as this can be done without causing injustice to any of the parties. He must not avoid trial just because it involves more work and time, but, on the other hand, he must not waste time and effort in receiving evidence, where, on the basis of the affidavits and counter-affidavits before him, the result is already a foregone conclusion or indubitably predictable. In case of doubt, it is, of course, preferable to hold a trial, in which event, he and the parties, under his guidance, may as far as practicable make use of such portions of the affidavits and counter-affidavits as would conduce to the abbreviation of the proceedings. And this may be best accomplished at the pre-trial, which, to my mind, is not indispensable before summary judgment procedure may be started. In other words, a motion for summary judgment, particularly that of a defendant before filing his answer, precludes the necessity of a prior pre-trial; it is after an attempt to secure summary judgment fails that a pre-trial is not only mandatory but more appropriate.

The foregoing discussion should make it plain that when the party against whom a summary judgment is asked fails to submit counter-affidavits to support the opposition and, on the other hand, the facts alleged by the moving party, confirmed in the sworn statements submitted with the motion, do not appear to be by their very nature false or not susceptible to proof, a summary judgment is reasonably, if not undeniably, proper. And such is the situation

in the case at bar. The fundamental theory of petitioner's complaint is that as common carriers, the respondents were by contract and law obliged to conduct his wife safely to her destination, and having failed to do so, because as a result of the collision of the vehicle, owned by respondents, in which she was a passenger, with another vehicle, she suffered injuries which caused her death, the legal presumption is that they failed to exercise the degree of extraordinary diligence the law requires in the premises. Such presumption invoked is, however, one of fact that is subject to rebuttal by actual proof to the contrary. Now, petitioner's invocation of the presumption was countered in respondents' motion for summary judgment thru ("the affidavits and other pertinent annexes, Annexes 1 to 6)", which on their face tend to show that respondents' vehicle carrying petitioner's wife was travelling with due care on its proper side of the road and it was because of the collision of two vehicles at the intersection of C. M. Recto and Bonifacio streets that one of them was suddenly and unexpectedly diverted to the lane of respondents' vehicle, thus hitting the same without any fault at all of their driver. This factual rebuttal of the factual presumption of the law in favor of the petitioner was not met by any counter-affidavit indicating that there was in actual fact some degree of negligence on the part of respondents' driver. Under these circumstances, it would appear that contrary to the presumption aforementioned, respondents have succeeded in proving by means of the above-mentioned six annexes that the cause of the injuries suffered by petitioner's wife was not any kind or degree of negligence on the part of respondents or their driver, but the negligence of a third-party which was unforeseen and inevitable, hence a force majeure or an act of God. Such being the case, it would also appear that respondents are entitled as a matter of law to be absolved from any obligation to pay damages to petitioner.

While such seems to be the present situation of the case below, I hasten to add that, considering that petitioner's wife was an innocent passenger who could not have contributed in any way to the cause of the tragedy that befell her, it still lies in the hands of respondent court to do justice to petitioner, her widowed husband. Indeed, fortunately for petitioner, respondent court's order of May 20, 1975 he is impugning that is not in reality and in law a final judgment yet. It is merely an interlocutory order which does not preclude further procedural measures which will enable petitioner to secure relief. The main opinion spells this matter out quite clearly.

To be more precise, it is still within the sound discretion of the trial court, in the light of the peculiar circumstances of this case where counsel for petitioner might have overly relied on the factual presumption of negligence of common carriers, apparently equating the same with a legal pre-sumption, and for this reason omitted to file counter-affidavits, and, what is more probable, counsel happens to be among those who have not resorted to summary judgment procedure and hence is not very proficient relative thereto, to consider the possibility of allowing petitioner to file the corresponding counter affidavit or affidavits needed to compel a trial and the corresponding setting aside of the order in question. If this should not be feasible because there might not be adequate means of showing that respondents or their driver failed to exercise extraordinary diligence in the face of the unexpected swerving into the lane of their vehicle of the pick-up truck that hit it, it would not yet be too late to allow the petitioner to amend his complaint in order to implead alternatively the owners and drivers of the other two vehicles that featured in the incident in question, thereby insuring as the facts may warrant relief to petitioner, if not from respondents, from the other parties whom the court may find to have been at fault. And with particular reference to the respondents' counterclaim, it may not be out of place for respondent judge to take into account that the peculiar and unique relationship between a common carrier and its passengers is such that in case of injury to the latter, to claim against the former is reasonably the first recourse, and it is only where the common carrier proves exercise of extra-ordinary diligence that he is relieved of liability, and, accordingly, an award for damages to the carrier for supposed filing of a totally unfounded suit can hardly be fair and just, unless actual malice on the part of the passenger or his or her heirs is clearly evident.

Summarizing, I hold that, as explained above, the questioned order is not entirely erroneous but only improperly worded and therefore certiorari does not lie against respondent court on the basis thereof. I also hold that said

order is merely an interlocutory one and is not a final appealable judgment. As an order declaring the propriety of a summary judgment, it should not have been worded as "decreeing that defendants have judgment summarily against plaintiff", for the real summary judgment is not only supposed to be rendered after the proof of damages shall have been presented, but it should also state clearly and distinctly the facts and the law on which it is based, a constitutional requirement which a court of record is not relieved from complying even when the judgment it renders is a summary one pursuant to Rule 34. Upon these premises, I vote to dismiss the petition.

In addition, I hold that upon the resumption of the proceedings in the court below, respondent court should look into the procedural possibilities discussed above to the end that the loss suffered by petitioner as a result of the tragic death of his wife may not be left without relief from the party at fault merely because of the procedural missteps that have taken place in the past proceedings before it. The main objective of the rules of procedure is to provide the steps by which a party suffering a legal wrong may secure relief from the courts, and in the instances where the particular pertinent rules are themselves rather indefinite and the possibility of miscomprehending the same is not remote, it would be a travesty of justice to allow said rules to be successfully invoked to prevent redress altogether. Worse, in the instant case, the order in controversy, inaccurate in its tenor as it is, because it is based on an inadequate comprehension of the pertinent rules, which to be sure are not themselves clearly definite, would even augment petitioner's loss by making him liable for damages to respondents, just because his lawyer has misapprehended the situation as well as the applicable rules. Such a result cannot be but shocking to the conscience.

CONCURRING

AQUINO, J.:

I concur in the result. Gregorio Estrada acted on the assumption that the lower court's order of May 20, 1975 is either a summary judgment or an order of dismissal. He appealed from that order under Republic Act No. 5440.

Since it is clearly pointed out in the decision that the said interlocutory order is not appealable and that Estrada could still move to have it set aside, I agree that the petition for review herein is not in order. The said order is erroneous and unjust. Summary judgment is not warranted in Civil Case No. 8739. It is ironical that Estrada, as plaintiff, would, by reason of that order, be the one held liable for damages to the defendants whom he (plaintiff) had sued for damages in utmost good faith.

The trial judge acted rather hastily in rendering summary judgment. The defendants filed an answer with counterclaim dated March 12, 1975. On April 16, 1975 or a few weeks later, the defendants filed a motion for summary judgment. The record does not show whether the case was set for pre-trial. Pre-trial is mandatory (Sec. 1, Rule 20, Rules of Court).

It is true that during the pre-trial the court may explore the advisability of rendering summary judgment (Ibid, Sec.3). But the fact remains that in the proceedings below the trial court without holding a pre-trial immediately proceeded to consider the rendition of a summary judgment. The amendment of the complaint for the purpose of impleading the drivers and owners of the two pick-up trucks and to enable Estrada to rely alternatively on a cause of action for delict or quasi-delict was never considered.

Also not considered in the pre-trial (for there was no pretrial) nor in the said order, which in effect dismissed the complaint, was the possibility that the petitioner's remedy is to intervene in Criminal Case No. 8099-B of the City Court, Davao City and to claim civil liability for the death of his wife.

The order in question was not proper because there us a genuine triable issue in the pleadings. That factual issue is whether Coracon Ramirez Uy, the owner of the jeepney, as a common carrier, complied with her obligation of carrying the deceased passenger, Simeona Estrada, "safely as far as human case and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."

The trial of that ussue was not foreclosed by the sketch made by the traffic investigator and by his affidavit, the sworn statements of the drivers of the pickup trucks and the sworn statement of the carrier's driver, all of which are hearsy as far as Estrada is concerned.

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