JARCO MARKETING CORPORATION, LEONARDO KONG, JOSE TIOPE AND ELISA PANELO, PETITIONERS, VS. HONORABLE COURT OF APPEALS, CONRADO C. AGUILAR AND CRISELDA R. AGUILAR, RESPONDENTS.

G.R. No. 129792. December 21, 1999

Ponente: DAVIDE, JR., C.J.

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DAVIDE, JR., C.J.:

In this petition for review on certiorari under Rule 45 of the Rules of Court, petitioners seek the reversal of the 17 June 1996 decision[1] of the Court of Appeals in C.A. G.R. No. CV 37937 and the resolution[2]denying their motion for reconsideration. The assailed decision set aside the 15 January 1992 judgment of the Regional Trial Court (RTC), Makati City, Branch 60 in Civil Case No. 7119 and ordered petitioners to pay damages and attorney's fees to private respondents Conrado and Criselda (CRISELDA) Aguilar.

Petitioner Jarco Marketing Corporation is the owner of Syvel's Department Store, Makati City. Petitioners Leonardo Kong, Jose Tiope and Elisa Panelo are the store's branch manager, operations manager, and supervisor, respectively. Private respondents are spouses and the parents of Zhieneth Aguilar (ZHIENETH).

In the afternoon of 9 May 1983, CRISELDA and ZHIENETH were at the 2nd floor of Syvel's Department Store, Makati City. CRISELDA was signing her credit card slip at the payment and verification counter when she felt a sudden gust of wind and heard a loud thud. She looked behind her. She then beheld her daughter ZHIENETH on the floor, her young body pinned by the bulk of the store's gift-wrapping counter/structure. ZHIENETH was crying and screaming for help. Although shocked, CRISELDA was quick to ask the assistance of the people around in lifting the counter and retrieving ZHIENETH from the floor.[3]

ZHIENETH was quickly rushed to the Makati Medical Center where she was operated on. The next day ZHIENETH lost her speech and thereafter communicated with CRISELDA by writing on a magic slate. The injuries she sustained took their toil on her young body. She died fourteen (14) days after the accident or on 22 May 1983, on the hospital bed. She was six years old.[4]

The cause of her death was attributed to the injuries she sustained. The provisional medical certificate[5] issued by ZHIENETH's attending doctor described the extent of her injuries:

> Diagnoses:
>
> 1. Shock, severe, sec. to intra-abdominal injuries due to blunt injury
> 2. Hemorrhage, massive, intraperitoneal sec. to laceration, (L) lobe liver
> 3. Rupture, stomach, anterior & posterior walls
> 4. Complete transection, 4th position, duodenum
> 5. Hematoma, extensive, retroperitoneal
> 6. Contusion, lungs, severe

CRITICAL

After the burial of their daughter, private respondents demanded upon petitioners the reimbursement of the hospitalization, medical bills and wake and funeral expenses[6] which they had incurred. Petitioners refused to pay. Consequently, private respondents filed a complaint for damages, docketed as Civil Case No. 7119 wherein they sought the payment of P157,522.86 for actual damages, P300,000 for moral damages, P20,000 for attorney's fees and an unspecified amount for loss of income and exemplary damages.

In their answer with counterclaim, petitioners denied any liability for the injuries and consequent death of ZHIENETH. They claimed that CRISELDA was negligent in exercising care and diligence over her daughter by allowing her to freely roam around in a store filled with glassware and appliances. ZHIENETH too, was guilty of contributory negligence since she climbed the counter, triggering its eventual collapse on her. Petitioners also emphasized that the counter was made of sturdy wood with a strong support; it never fell nor collapsed for the past fifteen years since its construction.

Additionally, petitioner Jarco Marketing Corporation maintained that it observed the diligence of a good father of a family in the selection, supervision and control of its employees. The other petitioners likewise raised due care and diligence in the performance of their duties and countered that the complaint was malicious for which they suffered besmirched reputation and mental anguish. They sought the dismissal of the complaint and an award of moral and exemplary damages and attorney's fees in their favor.

In its decision[7] the trial court dismissed the complaint and counterclaim after finding that the preponderance of the evidence favored petitioners. It ruled that the proximate cause of the fall of the counter on ZHIENETH was her act of clinging to it. It believed petitioners' witnesses who testified that ZHIENETH clung to the counter, afterwhich the structure and the girl fell with the structure falling on top of her, pinning her stomach. In contrast, none of private respondents' witnesses testified on how the counter fell. The trial court also held that CRISELDA's negligence contributed to ZHIENETH's accident.

In absolving petitioners from any liability, the trial court reasoned that the counter was situated at the end or corner of the 2nd floor as a precautionary measure hence, it could not be considered as an attractive nuisance.[8] The counter was higher than ZHIENETH. It has been in existence for fifteen years. Its structure was safe and well-balanced. ZHIENETH, therefore, had no business climbing on and clinging to it.

Private respondents appealed the decision, attributing as errors of the trial court its findings that: (1) the proximate cause of the fall of the counter was ZHIENETH's misbehavior; (2) CRISELDA was negligent in her care of ZHIENETH; (3) petitioners were not negligent in the maintenance of the counter; and (4) petitioners were not liable for the death of ZHIENETH.

Further, private respondents asserted that ZHIENETH should be entitled to the conclusive presumption that a child below nine (9) years is incapable of contributory negligence. And even if ZHIENETH, at six (6) years old, was already capable of contributory negligence, still it was physically impossible for her to have propped herself on the counter. She had a small frame (four feet high and seventy pounds) and the counter was much higher and heavier than she was. Also, the testimony of one of the store's former employees, Gerardo Gonzales, who accompanied ZHIENETH when she was brought to the emergency room of the Makati Medical Center belied petitioners' theory that ZHIENETH climbed the counter. Gonzales claimed that when ZHIENETH was asked by the doctor what she did, ZHIENETH replied, "[N]othing, I did not come near the counter and the counter just fell on me."[9] Accordingly, Gonzales' testimony on ZHIENETH's spontaneous declaration should not only be considered as part of res gestae but also accorded credit.

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Moreover, negligence could not be imputed to CRISELDA for it was reasonable for her to have let go of ZHIENETH at the precise moment that she was signing the credit card slip.

Finally, private respondents vigorously maintained that the proximate cause of ZHIENETH's death, was petitioners' negligence in failing to institute measures to have the counter permanently nailed.

On the other hand, petitioners argued that private respondents raised purely factual issues which could no longer be disturbed. They explained that ZHIENETH's death while unfortunate and tragic, was an accident for which neither CRISELDA nor even ZHIENETH could entirely be held faultless and blameless. Further, petitioners adverted to the trial court's rejection of Gonzales' testimony as unworthy of credence.

As to private respondent's claim that the counter should have been nailed to the ground, petitioners justified that it was not necessary. The counter had been in existence for several years without any prior accident and was deliberately placed at a corner to avoid such accidents. Truth to tell, they acted without fault or negligence for they had exercised due diligence on the matter. In fact, the criminal case[10] for homicide through simple negligence filed by private respondents against the individual petitioners was dismissed; a verdict of acquittal was rendered in their favor.

The Court of Appeals, however, decided in favor of private respondents and reversed the appealed judgment. It found that petitioners were negligent in maintaining a structurally dangerous counter. The counter was shaped like an inverted "L"[11] with a top wider than the base. It was top heavy and the weight of the upper portion was neither evenly distributed nor supported by its narrow base. Thus, the counter was defective, unstable and dangerous; a downward pressure on the overhanging portion or a push from the front could cause the counter to fall. Two former employees of petitioners had already previously brought to the attention of the management the danger the counter could cause. But the latter ignored their concern. The Court of Appeals faulted the petitioners for this omission, and concluded that the incident that befell ZHIENETH could have been avoided had petitioners repaired the defective counter. It was inconsequential that the counter had been in use for some time without a prior incident.

The Court of Appeals declared that ZHIENETH, who was below seven (7) years old at the time of the incident, was absolutely incapable of negligence or other tort. It reasoned that since a child under nine (9) years could not be held liable even for an intentional wrong, then the six-year old ZHIENETH could not be made to account for a mere mischief or reckless act. It also absolved CRISELDA of any negligence, finding nothing wrong or out of the ordinary in momentarily allowing ZHIENETH to walk while she signed the document at the nearby counter.

The Court of Appeals also rejected the testimonies of the witnesses of petitioners. It found them biased and prejudiced. It instead gave credit to the testimony of disinterested witness Gonzales. The Court of Appeals then awarded P99,420.86 as actual damages, the amount representing the hospitalization expenses incurred by private respondents as evidenced by the hospital's statement of account.[12] It denied an award for funeral expenses for lack of proof to substantiate the same. Instead, a compensatory damage of P50,000 was awarded for the death of ZHIENETH.

We quote the dispositive portion of the assailed decision,[13] thus:

> WHEREFORE, premises considered, the judgment of the lower court is SET ASIDE and another one is entered against [petitioners], ordering them to pay jointly and severally unto [private respondents] the following:
>
> 1. P50,000.00 by way of compensatory damages for the death of Zhieneth Aguilar, with legal interest (6% p.a.) from 27 April 1984;

2. P99,420.86 as reimbursement for hospitalization expenses incurred; with legal interest (6% p.a.) from 27 April 1984;
3. P100,000.00 as moral and exemplary damages;
4. P20,000.00 in the concept of attorney's fees; and
5. Costs.

Private respondents sought a reconsideration of the decision but the same was denied in the Court of Appeals' resolution[14] of 16 July 1997.

Petitioners now seek the reversal of the Court of Appeals' decision and the reinstatement of the judgment of the trial court. Petitioners primarily argue that the Court of Appeals erred in disregarding the factual findings and conclusions of the trial court. They stress that since the action was based on tort, any finding of negligence on the part of the private respondents would necessarily negate their claim for damages, where said negligence was the proximate cause of the injury sustained. The injury in the instant case was the death of ZHIENETH. The proximate cause was ZHIENETH's act of clinging to the counter. This act in turn caused the counter to fall on her. This and CRISELDA's contributory negligence, through her failure to provide the proper care and attention to her child while inside the store, nullified private respondents' claim for damages. It is also for these reasons that parents are made accountable for the damage or injury inflicted on others by their minor children. Under these circumstances, petitioners could not be held responsible for the accident that befell ZHIENETH.

Petitioners also assail the credibility of Gonzales who was already separated from Syvel's at the time he testified; hence, his testimony might have been tarnished by ill-feelings against them.

For their part, private respondents principally reiterated their arguments that neither ZHIENETH nor CRISELDA was negligent at any time while inside the store; the findings and conclusions of the Court of Appeals are substantiated by the evidence on record; the testimony of Gonzales, who heard ZHIENETH comment on the incident while she was in the hospital's emergency room should receive credence; and finally, ZHIENETH's part of the res gestae declaration "that she did nothing to cause the heavy structure to fall on her" should be considered as the correct version of the gruesome events.

We deny the petition.

The two issues to be resolved are: (1) whether the death of ZHIENETH was accidental or attributable to negligence; and (2) in case of a finding of negligence, whether the same was attributable to private respondents for maintaining a defective counter or to CRISELDA and ZHIENETH for failing to exercise due and reasonable care while inside the store premises.

An accident pertains to an unforeseen event in which no fault or negligence attaches to the defendant.[15] It is "a fortuitous circumstance, event or happening; an event happening without any human agency, or if happening wholly or partly through human agency, an event which under the circumstances is unusual or unexpected by the person to whom it happens."[16]

On the other hand, negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a prudent and reasonable man would not do.[17] Negligence is "the failure to observe, for the protection of the interest of another person, that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury."[18]

Accident and negligence are intrinsically contradictory; one cannot exist with the other. Accident occurs when the person concerned is exercising ordinary care, which is not caused by fault of any person and which could not have

been prevented by any means suggested by common prudence.[19]

The test in determining the existence of negligence is enunciated in the landmark case of Picart v. Smith,[20] thus: Did the defendant in doing the alleged negligent act use that reasonable care and caution which an ordinarily prudent person would have used in the same situation? If not, then he is guilty of negligence.[21]

We rule that the tragedy which befell ZHIENETH was no accident and that ZHIENETH's death could only be attributed to negligence.

We quote the testimony of Gerardo Gonzales who was at the scene of the incident and accompanied CRISELDA and ZHIENETH to the hospital:

> Q
>
> While at the Makati Medical Center, did you hear or notice anything while the child was being treated?
>
> A
>
> At the emergency room we were all surrounding the child. And when the doctor asked the child "what did you do," the child said "nothing, I did not come near the counter and the counter just fell on me."
>
> Q
>
> (COURT TO ATTY. BELTRAN)
>
> You want the words in Tagalog to be translated?
>
> ATTY. BELTRAN
>
> Yes, your Honor.
>
> COURT
>
> Granted. Intercalate "wala po, hindi po ako lumapit doon. Basta bumagsak."[22]

This testimony of Gonzales pertaining to ZHIENETH's statement formed (and should be admitted as) part of the res gestae under Section 42, Rule 130 of the Rules of Court, thus:

Part of res gestae. Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof, may be given in evidence as part of the res gestae. So, also, statements accompanying an equivocal act material to the issue, and giving it a legal significance, may be received as part of the res gestae.

It is axiomatic that matters relating to declarations of pain or suffering and statements made to a physician are generally considered declarations and admissions.[23] All that is required for their admissibility as part of the res gestae is that they be made or uttered under the influence of a startling event before the declarant had the time to think and concoct a falsehood as witnessed by the person who testified in court. Under the circumstances thus described, it is unthinkable for ZHIENETH, a child of such tender age and in extreme pain, to have lied to a doctor whom she trusted with her life. We therefore accord credence to Gonzales' testimony on the matter, i.e., ZHIENETH performed no act that facilitated her tragic death. Sadly, petitioners did, through their negligence or omission to secure or make stable the counter's base.

Gonzales' earlier testimony on petitioners' insistence to keep and maintain the structurally unstable gift-wrapping counter proved their negligence, thus:

> Q

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When you assumed the position as gift wrapper at the second floor, will you please describe the gift wrapping counter, were you able to examine?

A

Because every morning before I start working I used to clean that counter and since it is not nailed and it was only standing on the floor, it was shaky.

xxx

Q

Will you please describe the counter at 5:00 o'clock [sic] in the afternoon on [sic] May 9 1983?

A

At that hour on May 9, 1983, that counter was standing beside the verification counter. And since the top of it was heavy and considering that it was not nailed, it can collapse at anytime, since the top is heavy.

xxx

Q

And what did you do?

A

I informed Mr. Maat about that counter which is [sic] shaky and since Mr. Maat is fond of putting display decorations on tables, he even told me that I would put some decorations. But since I told him that it not [sic] nailed and it is shaky he told me "better inform also the company about it." And since the company did not do anything about the counter, so I also did not do anything about the counter.[24] [Emphasis supplied]

Ramon Guevarra, another former employee, corroborated the testimony of Gonzales, thus:

Q

Will you please described [sic] to the honorable Court the counter where you were assigned in January 1983?

xxx

A

That counter assigned to me was when my supervisor ordered me to carry that counter to another place. I told him that the counter needs nailing and it has to be nailed because it might cause injury or accident to another since it was shaky.

Q

When that gift wrapping counter was transferred at the second floor on February 12, 1983, will you please describe that to the honorable Court?

A

I told her that the counter wrapper [sic] is really in good [sic] condition; it was shaky. I told her that we had to nail it.

Q

When you said she, to whom are you referring to [sic]?

A

I am referring to Ms. Panelo, sir.

Q

And what was the answer of Ms. Panelo when you told her that the counter was shaky?

A

She told me "Why do you have to teach me. You are only my subordinate and you are to teach me?" And she even got angry at me when I told her that.

xxx

Q

From February 12, 1983 up to May 9, 1983, what if any, did Ms. Panelo or any employee of the management do to that (sic)

xxx

Witness:

None, sir. They never nailed the counter. They only nailed the counter after the accident happened.[25] [Emphasis supplied]

Without doubt, petitioner Panelo and another store supervisor were personally informed of the danger posed by the unstable counter. Yet, neither initiated any concrete action to remedy the situation nor ensure the safety of the store's employees and patrons as a reasonable and ordinary prudent man would have done. Thus, as confronted by the situation petitioners miserably failed to discharge the due diligence required of a good father of a family.

On the issue of the credibility of Gonzales and Guevarra, petitioners failed to establish that the former's testimonies were biased and tainted with partiality. Therefore, the allegation that Gonzales and Guevarra's testimonies were blemished by "ill feelings" against petitioners - since they (Gonzales and Guevarra) were already separated from the company at the time their testimonies were offered in court - was but mere speculation and deserved scant consideration.

It is settled that when the issue concerns the credibility of witnesses, the appellate courts will not as a general rule disturb the findings of the trial court, which is in a better position to determine the same. The trial court has the distinct advantage of actually hearing the testimony of and observing the deportment of the witnesses.[26] However, the rule admits of exceptions such as when its evaluation was reached arbitrarily or it overlooked or failed to appreciate some facts or circumstances of weight and substance which could affect the result of the case.[27] In the instant case, petitioners failed to bring their claim within the exception.

Anent the negligence imputed to ZHIENETH, we apply the conclusive presumption that favors children below nine (9) years old in that they are incapable of contributory negligence. In his book,[28] former Judge Cezar S. Sangco stated:

> In our jurisdiction, a person under nine years of age is conclusively presumed to have acted without discernment, and is, on that account, exempt from criminal liability. The same presumption and a like exemption from criminal liability obtains in a case of a person over nine and under fifteen years of age, unless it is shown that he has acted with discernment. Since negligence may be a felony and a quasi-delict and required discernment as a condition of liability, either criminal or civil, a child under nine years of age is, by analogy, conclusively presumed to be incapable of negligence; and that the presumption of lack of discernment

> or incapacity for negligence in the case of a child over nine but under fifteen years of age is a rebuttable one, under our law. The rule, therefore, is that a child under nine years of age must be conclusively presumed incapable of contributory negligence as a matter of law. [Emphasis supplied]

Even if we attribute contributory negligence to ZHIENETH and assume that she climbed over the counter, no injury should have occurred if we accept petitioners' theory that the counter was stable and sturdy. For if that was the truth, a frail six-year old could not have caused the counter to collapse. The physical analysis of the counter by both the trial court and Court of Appeals and a scrutiny of the evidence[29]on record reveal otherwise, i.e., it was not durable after all. Shaped like an inverted "L," the counter was heavy, huge, and its top laden with formica. It protruded towards the customer waiting area and its base was not secured.[30]

CRISELDA too, should be absolved from any contributory negligence. Initially, ZHIENETH held on to CRISELDA's waist, later to the latter's hand.[31] CRISELDA momentarily released the child's hand from her clutch when she signed her credit card slip. At this precise moment, it was reasonable and usual for CRISELDA to let go of her child. Further, at the time ZHIENETH was pinned down by the counter, she was just a foot away from her mother; and the gift-wrapping counter was just four meters away from CRISELDA.[32] The time and distance were both significant. ZHIENETH was near her mother and did not loiter as petitioners would want to impress upon us. She even admitted to the doctor who treated her at the hospital that she did not do anything; the counter just fell on her.

WHEREFORE, in view of all the foregoing, the instant petition is DENIED and the challenged decision of the Court of Appeals of 17 June 1996 in C.A. G.R. No. CV 37937 is hereby AFFIRMED.

Costs against petitioners.

SO ORDERED.

Puno, Kapunan, Pardo, and Ynares-Santiago, JJ., concur.

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[1] Annex "A" of Petition; Rollo, 36-47. Per Justice Godardo A. Jacinto, with Justices Salome A. Montoya and Maximiano C. Asuncion, concurring.

[2] Annex "B" of Petition; Rollo, 49.

[3] TSN, 13 February 1985, 5, 6, 7-8, 21-22, 31.

[4] Id., 32, 36, 42, 52.

[5] Original Record (OR), 8.

[6] Exhibit "H."

[7] OR, 603-612. Per Judge Pedro N. Lagui.

[8] One who maintains on his premises dangerous instrumentalities or appliances of a character likely to attract children in play, and who fails to exercise ordinary care to prevent children from playing therewith or resorting thereto, is liable to a child of tender years who is injured thereby, even if the child is technically a tresspasser in the premises.

The principal reason for the doctrine is that the condition or appliance in question although its danger is apparent to those of age, is so enticing or alluring to children of tender years as to induce them to approach, get on or use it, and this attractiveness is an implied invitation to such children. (Hidalgo Enterprises, Inc. v. Balandan, et al., 488,

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490 [1952].

[9] TSN, 10 September 1987, 12.

[10] Criminal Case No. 118986 filed with the Makati Metropolitan Trial Court, Branch 61.

[11] Exhibit "D."

[12] Exhibit "F."

[13] Supra note 1.

[14] Supra note 2.

[15] See Novo & Co. v. Ainsworth, 26 Phil. 380, 387 [1913].

[16] Black's Law Dictionary, 5th ed. 1979, 14.

[17] McKee v. Intermediate Appellate Court, 211 SCRA 517, 539 [1992] citing Black's Law Dictionary, 5th ed., 1979, 930.

[18] U.S. v. Barias, 23 Phil. 434, 437 [1912] citing Judge Cooley's work on Torts, 3rd ed., 1324.

[19] See Cavanaugh v. Jepson Iowa, 167 N.W.2d 616, 623 [1969]. See also Restatement, Second, Torts §8.

[20] 37 Phil. 809 [1918].

[21] Ibid, 813.

[22] TSN, 10 September 1987, 12, 13.

[23] Ricardo J. Francisco, III Evidence, 1997, 591 citing Keefe v. State of Arizona, 60 Ariz. 293; Stukas v. Warfield, Pratt, Howell Co., 175 N.W. 81, 85 [1919].

[24] TSN, 10 September 1987, 8, 9, 11.

[25] TSN, 2 October 1987, 9, 11.

[26] See BPI Credit Corporation v. Court of Appeals, 204 SCRA 601, 608 [1991]; Geronimo v. Court of Appeals, 224 SCRA 494, 498 [1993].

[27] Borillo v. Court of Appeals, 209 SCRA 130, 140-141 [1992]; McKee v. Intermediate Appellate Court, supra note 16, 537; Salvador v. Court of Appeals, 243 SCRA 239, 253 [1995].

[28] I Philippine Law On Torts And Damages, 70-71 (1993).

[29] Exhibit "D."

[30] Exhibits "K," "M," and "N." The counter was made of heavy wood measuring about 4 to 5 meters in height; 1 meter in length; and 2½ to 3 meters in width; with four (4) square legs. Its top was made of 5 ½ inch thick wood covered by formica about ¾ inch thick.

[31] TSN, 13 February 15, 20.

[32] Ibid., 11, 22.

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