AGAPITA DIAZ, PETITIONER, VS. COURT OF APPEALS; HEIRS OF SHERLY MONEÑO, MAMERTA C. MONEÑO, JASPHIN M. VILLAMIL, WHELHELMIA M. DECARO, EDDIE MONEÑO, GININA M. DAQUIPIL, FERNAN C....

G.R. NO. 149749. July 25, 2006

Ponente: CORONA, J.

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CORONA, J.:

In this petition for certiorari under Rule 65 of the Rules of Court, petitioner imputes grave abuse of discretion to the Court of Appeals vis-a-vis its May 30, 2001 decision[2] in CA-G.R. CV No. 67017, the dispositive portion of which read:

> WHEREFORE, premises considered, the present appeal is hereby DISMISSED for lack of merit. The Decision (Judgment) dated October 29, 1999 of the Regional Trial Court of Malaybalay City, Bukidnon, Branch 10 in Civil Case No. 2586-95 is hereby AFFIRMED and REITERATED.[3]

The facts follow.

Petitioner Agapita Diaz operated a common carrier, a Tamaraw FX taxi plying the route of Cagayan de Oro City to any point in Region 10. On July 20, 1996, petitioner's taxi, driven by one Arman Retes, was moving at an excessive speed when it rammed into the rear portion of a Hino cargo truck owned by private respondent Teodoro Lantoria and driven by private respondent Rogelio Francisco. As a result, nine passengers of the taxi died including Sherly Moneño.

On August 13, 1996, the heirs of Sherly Moneño[4] filed with the Regional Trial Court of Malaybalay City, Branch 10,[5] an action for breach of contract of carriage and damages[6] against petitioner and her driver, Arman Retes.

On motion,[7] petitioner filed a third-party complaint against private respondents Teodorio Lantoria and Rogelio Francisco.[8]

The pre-trial conference was initially set on July 11, 1998 but was reset to July 30, 1998 for petitioner and her counsel's failure to appear[9] despite due notice. Registry receipt number 04364[10] showed that notice had been sent to petitioner's counsel, Atty. Cipriano Lupeba.[11] On scheduled date, petitioner and her counsel again failed to appear, prompting the court to allow private respondents to present evidence ex parte.

More than seven months after the conclusion[12] of private respondents' ex parte presentation of evidence, petitioner filed a motion for leave to present evidence on her defense and third-party complaint.[13] The trial court denied this.[14]

On October 29, 1999, the trial court rendered a decision holding petitioner and Arman Retes jointly and severally liable to pay private respondent heirs of Sherly Moneño P50,000 for her death, P50,000 as moral damages,

P20,000 as exemplary damages and P20,000 as attorney's fees.[15]

On appeal, the trial court's decision was affirmed by the Court of Appeals in the assailed May 30, 2001 decision.[16] The motion for reconsideration was denied.[17] Hence, this recourse.

> The issues raised by petitioner are:
>
> 1) whether or not the Court of Appeals committed grave abuse of discretion in affirming the trial court's decision denying petitioner's motion for leave to present evidence on her defense and third-party complaint, and
>
> 2) whether or not the Court of Appeals committed grave abuse of discretion in affirming the trial court's decision holding petitioner liable for breach of contract.
>
> The petition lacks merit.

First, Section 3, Rule 18 of the Rules of Court states that:

> The notice of pre-trial shall be served on counsel, or on the party who has no counsel. The counsel served with such notice is charged with the duty of notifying the party represented by him.

Petitioner was represented by Atty. Cipriano Lupeba to whom the notice was sent.[18] It was incumbent on the latter to advise petitioner accordingly. His failure to do so constituted negligence which bound petitioner.

Further, Sections 4 and 5 of Rule 18 read:

> Sec. 4. Appearance of Parties. - It shall be the duty of the parties and their counsel to appear at the pre-trial. The non-appearance of the party may be excused only if a valid cause is shown therefore or if a representative shall appear in his behalf fully authorized in writing to enter into an amicable settlement, to submit to alternative modes of dispute resolution, and to enter into stipulations or admissions of facts and of documents.
>
> Sec. 5. Effect of failure to appear. - The failure of the plaintiff to appear when so required pursuant to the next preceding section shall be cause for the dismissal of the action. The dismissal shall be with prejudice, unless otherwise ordered by the court. A similar failure on the defendant shall be cause to allow the plaintiff to present his evidence ex parte and the court to render judgment on the basis thereof.

Consequently, it was no error for the trial court to allow private respondents to present their evidence ex parte when petitioner and her counsel failed to appear for the scheduled pre-trial conference.

Second, "a common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with a due regard for all the circumstances."[19]

In a contract of carriage, it is presumed that the common carrier is at fault or is negligent when a passenger dies or is injured. In fact, there is even no need for the court to make an express finding of fault or negligence on the part of the common carrier. This statutory presumption may only be overcome by evidence that the carrier exercised extraordinary diligence.[20]

In the case at bar, petitioner, as common carrier, failed to establish sufficient evidence to rebut the presumption of negligence. The findings of the trial court, as affirmed by the Court of Appeals, showed that the accident which led to the death of Sherly Moneño was caused by the reckless speed and gross negligence of petitioner's driver who demonstrated no regard for the safety of his passengers.[21] It was thus correct to hold petitioner guilty of breach of the contract of carriage.

WHEREFORE, this petition is hereby DISMISSED.

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Costs against petitioner.
SO ORDERED.

Puno, (Chairperson), Sandoval-Gutierrez, Azcuna, and Garcia, JJ., concur.

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[1] In some pleadings, Moneño was spelled as "Moñeno" or "Moneno."

[2] Penned by Associate Justice Martin S. Villarama, Jr. and concurred in by Associate Justices Conrado M. Vasquez, Jr. and Eliezer R. de los Santos of the Thirteenth Division of the Court of Appeals; rollo, pp. 32-39.

[3] Id., p. 39.

[4] Some of herein private respondents.

[5] Presided by Judge Jesus Barroso, Jr.

[6] Civil Case No. 2586-96 entitled, Heirs of Sherly Moneno v. Agapita Diaz and Arman Retes.
[7] Motion for leave to file third party complaint, dated November 6, 1996.

[8] Rollo, pp. 13-14.

[9] RTC Order dated June 11, 1998, id., p. 15.

[10] Dated June 16, 1998.

[11] Per RTC resolution dated July 13, 1999, rollo, pp. 25-27.

[12] The presentation of private respondents' evidence was concluded in November 1998, as stated in the RTC decision, id., p. 30.

[13] Motion to allow defendants and third party plaintiff to present evidence to support her defense and third party complaint dated June 11, 1999, rollo, pp. 18-19.

[14] Id., pp. 25-27.

[15] Penned by Judge Jesus M. Barroso, Jr., id., pp. 28-31.

[16] Id., pp. 32-39.

[17] Id., p. 46.

[18] Registry Number 04364 dated June 16, 1998, as stated in the RTC resolution dated July 13, 1999, id., pp. 25-27.

[19] Article 1755 of the Civil Code.

[20] Tiu v. Arriesgado, G.R. No. 138060, 1 September 2004, 437 SCRA 426.

[21] RTC Decision, rollo, p. 28.

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