IN THE SUPREME COURT OF GUAM

J. J. MOVING SERVICES, INC.,	)	**Supreme Court Case No. CVA96-013**
	)	**Superior Court Case No. CV2012-93**
Plaintiff-Appellee,	)	
	)	
vs.	)	**OPINION**
	)	
SANKO BUSSAN (GUAM) CO., LTD.	)	
	)	
Defendant-Appellant.	)	
_____	)	

Filed: September 14, 1998

Cite as: **1998 Guam 19**

Appeal from the Superior Court of Guam

Argued and Submitted on August 19, 1997

Hagåtña, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, and EDUARDO A. CALVO, Associate Justices.

SIGUENZA, C.J.:

[1] Sanko Bussan Co. Ltd. ("Sanko") appeals the trial court's ruling denying its motion for a new trial. As part of the appeal, Sanko also challenges the unfavorable jury verdict awarding $90,547.00 to J. J. Moving Services, Inc. ("JJ Moving"). Based on the record and the applicable law, this court denies the relief sought and hereby affirms both the verdict and the subsequent order denying the motion for a new trial.

FACTUAL AND PROCEDURAL HISTORY

[2] JJ Moving initiated a suit against Sanko for breach of contract and an account stated. This suit was based on a written contract between the parties in which JJ Moving was to unload fish from incoming tuna boats. Afterwards, JJ Moving was to sort, grade, count, and box the incoming fish. Finally, JJ Moving would then transport the tuna from dockside to the airport. The tuna eventually was flown to various destinations in Japan. JJ Moving, in its complaint, asserted that Sanko wrongfully terminated this contract. Sanko responded to the complaint by asserting, as an affirmative defense, the agreement was a bailment contract. In particular, Sanko defended its termination of the contract by arguing JJ Moving had not been able to account for all the goods entrusted to it. Thus, Sanko maintained it properly and legitimately terminated the agreement as result of JJ Moving's contractual breach.

[3] This case eventually went to trial and concluded on July 8, 1996 when the jury returned a verdict of approximately $90,547.00 in favor of JJ Moving. Sanko later moved for a new trial basing its motion on several grounds. First, Sanko charged that irregularities occurred at the jury view when John Mesa, the owner and president of JJ Moving, talked to the jury during a jury view. This conversation was allegedly not known to Sanko's counsel until after the verdict was rendered. Sanko also asserted a new trial was warranted because improper hearsay was admitted into evidence and resulted in prejudice to its case. Finally, Sanko maintained both the facts and the law supported a bailment situation. When the jury did not make such a finding, the verdict was not in accordance with the law or evidence.

[4] The trial court rejected these arguments and denied the motion. During the time period after the verdict and before this appeal, Sanko posted a bond of $30,000.00 in order to stay the proceedings. The trial court heard argument and, consequently, released the posted bond as partial payment and stayed the balance of the judgment pending this appeal.

[5] Sanko filed a timely Notice of Appeal. After submission of Sanko's brief, JJ Moving moved to dismiss the appeal for an insufficient record. The court declined ruling on the motion at that time and left resolution to this panel because the adequacy of the record was so intertwined with the legal issues at hand.

ANALYSIS

I.

[6] Several threshold issues concerning the record must be addressed before the merits of this

appeal can be considered. The court must initially decide whether the language of the Notice of Appeal limits our review only to the denial of Sanko's Motion for a New Trial and consequently, precludes consideration of the issues surrounding the trial itself. Similarly, we must also determine if Sanko has placed a record before this court that would allow adequate review of the issues. In particular, we refer to the evidentiary issues surrounding both the bailment contract and the admission of alleged hearsay. We must also examine the effect of Sanko's failure to designate as part of the record the actual Motion for a New Trial and the accompanying authorities. Thus, whether the transcripts submitted into the record will allows us to properly review this matter is properly questioned by JJ Moving.

[7] Generally, an order denying a motion for a new trial is not an appealable order. *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 701 (2nd Cir. 1972). The appeal instead should be taken from a final judgment and the motion reviewed as part of such appeal. *Id.* However, when irregularities in the form of the notice of appeal are present, appellate courts have the discretion to disregard the errors and construe the notice in a manner allowing review. *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978). A defect will not be fatal as long as the intent to appeal from a specific judgment can be fairly inferred from the notice and the other party is not misled or prejudiced. *Taylor v. U.S.*, 848 F.2d 715, 717-718 (6th Cir. 1988).

[8] We conclude Sanko's notice of appeal, although inept, can be construed as an appeal from the final judgment. The intent to appeal from the final judgment can be inferred from the timely-filed notice. In addition, Sanko's opening brief addresses issues raised at the hearing on the motion for a new trial and necessarily includes an examination of the trial itself. Finally, we find no

showing that JJ Moving was either misled by the notice or suffered actual prejudice from it.

[9] As to the adequacy of the record, Rule 7 of the Rules of Appellate Procedure for the Supreme Court of Guam states, in relevant part, the following:

> Within ten (10) days after filing the notice of appeal, the Appellant shall order in writing from the Clerk of the Superior Court a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. . . .
>
> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If errors of law are raised by appellant, all relevant sections of the record shall be transcribed. . . .
>
> GRAP 7(b)(1) & (2).

[10] The above rule makes clear that appellant, in any given case, has the responsibility of ordering the appropriate transcripts of the proceedings at issue. This means the appellant must place into the record all evidence, good and bad, material to the point he wishes to raise and necessary for the determination of the issues presented on appeal. *See Chernack v. Radlo*, 331 F.2d 170, 171 (1st Cir. 1964); *see also Muniz Ramirez v. Puerto Rico Fire Services*, 757 F.2d 1357 (1st Cir. 1985).

[11] The record before this court permits us, barely, to address most Sanko's issues. Under different circumstances, we would likely deem the entire record inadequate due to an incomplete transcript. In the specific instances where error is alleged based on the weight of the evidence, the adequacy of the record is central to the issues' resolution. Consequently, we address the record's adequacy in context of the merits of these specific issues.

[12] Finally, we will review issues raised at the motion for a new trial although the document was never included as part of Sanko's Designation of Record. Notwithstanding its absence, Sanko

included both the transcripts of the applicable hearing and the order denying the motion into the record. While we will not expand the record and consider documents not so designated, we can and will review the submitted transcripts surrounding the motion.

[13] As a final comment about the record, Rule 7 of the Guam Rules of Appellate Procedure also states in pertinent part:

> Unless a transcript of the entire proceeding below is ordered by Appellant . . . he shall file and serve on the appellee a description of the parts of the transcript which he intends to include in the record and a statement of the issues he intends to present on appeal.

GRAP 7(b)(3). Sanko does not dispute that it failed to notify JJ Moving of the limited transcript ordered on appeal. Although there is no prejudice as a result of such inaction, we remind appellant that failure to comply with the mandates of our rules will limit, generally, the issues this court may hear. We expect full compliance with our procedural rules and complete disclosures, whether favorable or unfavorable, of the relevant events surrounding issues before us. Full compliance and complete disclosure are necessary standards which allow parties to adequately brief issues and give full and meaningful input to this court.

II.

[14] The trial court's decision denying a motion for a new trial is reviewed for an abuse of discretion. *Larson v. Neimi*, 9 F.3d 1397, 1398 (9th Cir. 1993). Because the trial judge has the advantage of close observation of the jurors and intimate familiarity with the issues at trial, substantial weight is given to the court's appraisal of the prejudicial effects of extraneous

information. *United States v. Cheyenne,* 855 F.2d 566, 568 (8th Cir. 1988). Thus, before reversing a lower court's decision, we must first have a definite and firm conviction the trial court committed clear error of judgment in its conclusion. *Santos v. Carney,* 1997 Guam 4, ¶ 4*; People v. Tuncap,* 1998 Guam 13, ¶ 12.

[15] Sanko charges error because the trial court failed to find prejudice as a result of comments made to the jury by a party witness. Sanko describes the witness' comments during a jury view as both "unauthorized" and "extraneous." Sanko also believes the nature of these communications,, raises a serious question of fairness about the verdict. These unauthorized communications, it is argued, created a presumption of prejudice rebuttal only by a strong contrary showing by JJ Moving. This did not occur and, consequently, Sanko concludes that a new trial should have been granted. We disagree.

[16] First, Sanko mischaracterizes the comments made to the jury by the party witness. Communications or contact with a jury will give rise to a presumption of prejudice "if not made in pursuance to known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Remmer v. U.S.*, 347 U.S. 227, 229, 74 S.Ct. 450, 451 (1954)(remanding the matter because prejudice had not been determined after an attempt to bribe a juror by unknown caller). "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." *Mattox v. U.S.*, 146 U.S. 140, 150, 13 S.Ct. 50, 53 (1892)(finding prejudice after jury exposed to facts and newspaper articles outside the record). The type of communication or conduct which will give rise to questions of tampering, improper

influencing, or other jury misconduct are, essentially, contacts unauthorized by the court not made during a court proceeding. *See Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983)(communicating with a juror during deliberations by a party to the case); *see also U.S. v. Armstrong*, 654 F.2d 1328, 1332 (9th Cir. 1981)(harassing calls to member of the jury not related to the merits of the case).

[17] In spite of Sanko's assertions, we are not convinced the statements made by John Mesa to the jury were, in any fashion, improper. The record indicates a jury view occurred on the docks of Cabras Island. The court opened the proceedings by announcing the case, location, and the presence of counsel. John Mesa was then placed before the jury and told to explain both the process before him and the differences, if any, from his operation three years prior. Transcript at 3 (Jury View, July 2, 1996). At no time during the jury view was he ever told to stop testifying about the process going on before him. Objections to the content of his statements were never raised, nor did Sanko ever move to strike his testimony. Our review also indicates the trial court never halted the proceeding to go off the record. Finally, nothing in the record shows either the trial judge or counsel were away from the witness or that he was otherwise left unattended.

[18] An improper, unauthorized communication did not occur at the jury view. The testimony was properly placed before the jury by a known witness. The communications were made under the supervision and direction of the court with full knowledge of counsel for both parties. Moreover, it is apparent counsel for Sanko knew the witness was addressing the jury in a broad fashion and his testimony was not limited to simply labeling equipment or pointing out functions of the workers. First, on the day after the jury view, Sanko's counsel specifically inquired about the comments John

Mesa made at the jury view. The following dialogue took place in court:

> Ms. Lynch: Before the jury comes in, how are we going to handle integrating the transcript into this proceeding?
> The Court: It just will be part of the record of what happened yesterday.
> Ms. Lynch: Okay, because there were comments from Mr. Mesa.
> The Court: Right; and then you can work on that today, too.
>
> Transcript at 2 (July 3, 1996).

Both direct and cross examinations that followed then focused on the differences between the operations, the confusion of the process, and the different numbering systems.

[19] Because improper communications with the jury did not occur, the issue before the court changes. We must decide whether John Mesa's testimony is admissible. If not admissible, we must also decide whether the error requires a new trial.

[20] The simple answer is yes, the testimony was properly admitted. It is undisputed that an issue before the jury was the alleged breach of contractual duties occurring during the unloading, sorting, boxing, and transporting stages of the operation. The testimony of John Mesa relates directly to these specific stages of the operation. At the jury view, counsel for JJ Moving, without objection, directed the witness to "explain the process that's going on here, and then how -- If this differs from what happened three years ago, explain the differences." Transcript at 3 (Jury View, July 2, 1996). This is what the witness testified to.

[21] Even were we to assume the testimony inadmissible, our review would be limited. Rule 61 of the Guam Rules of Civil Procedure mandates the court to disregard errors and defects which do not affect the substantial rights of the parties. Pursuant to GRCP 61, if a party claiming error fails to demonstrate the prejudicial effect of the admitted evidence, then the error will be deemed

harmless. *Coughlin v. Capitol Cement Co.*, 571 F.2d 290, 306-307 (5th Cir. 1978). Moreover, the burden imposed by the standard cannot be met if the party fails to object to the admission of evidence. *Anderson v. Swift and Co.*, 380 F.2d 988, 990 (6th Cir. 1967).

[22] If an error occurred in the admissibility of the testimony, the error would be deemed harmless. First, Sanko never raised an objection when the testimony was given. Although Appellant asserts that Mesa improperly testified while unattended, we must again emphasize that he was never instructed to stop testifying. The court did not halt the proceeding or otherwise go off the record. We will not reverse the trial court's decision because counsel either missed the testimony entirely or was just inattentive and failed to make a timely objection.

[23] We also cannot ascertain the prejudicial effect of the statements. When the court directly questioned Sanko about the effect on the verdict, counsel's speculative response was "[i]t could have." Transcript at 3 (September 20, 1996). Later, Sanko could only further speculate on what may have been said and the unknown effect on the jury. Transcript at 4 (September 20, 1996).

[24] As a final note, even if the testimony in question could be characterized in a manner that would raise an issue of jury irregularity, Sanko would not prevail. Although a presumption of prejudice may arise, *Remmer*, 347 U.S. at 229, 74 S.Ct. at 451, if the harmlessness of the contact could be made to appear, then the verdict will be sustained. *Id.*

[25] The limited record before us shows the alleged prejudice suffered by Sanko was apparently corrected during the trial. At the hearing for a new trial, Sanko argued that the comments during the jury view prejudiced its case when Mesa compared his previous operation to the current system then observed. More specifically, counsel stated, ". . . it bolstered his case and it prejudiced my client's

case because there is no evidence that . . . that operation was identical." Transcript at 4 (September 20, 1996). However, Sanko's counsel later informed the jury that the operations were different. Transcript at 4 (September 20, 1996). Moreover, the in court testimony on the following day focused on the differences between the two operations. Thus, we are confident any alleged prejudice suffered by Sanko was relieved. Further, it appears Sanko's counsel encouraged John Mesa to do more than describe the scene and label the equipment before him. Specifically, during the jury view, Sanko's counsel instructed Mr. Mesa to address the jurors and direct them to move and view the scene from a different position.[1] The function of the witness is not to direct the jury in this fashion. To instruct him to do so was error and we will not reward a party encouraging and engaging in the type of conduct it now alleges to be improper.

III.

[26] We next address the issue of whether the trial court erred by failing to grant a new trial or judgment notwithstanding the verdict because the verdict was not in accordance with the law or evidence presented. Sanko argues a new trial should have been granted because the contract at issue was one for bailment of goods. Sanko maintains it presented evidence to support this characterization and, according to bailment jurisprudence, the burden shifted to JJ Moving to rebut

[1]Specifically, the following dialogue took place:
MS. LYNCH: Tell the jurors that they can walk down there and see from that end.
MR. MESA: Oh, Okay. What I'm looking at is --
(Jurors are moved closer to demonstration.)

Transcript at 3 (Jury View, July 2, 1996).

the presumption it was negligent in accounting for the fish. JJ Moving failed, Sanko further contends, to present the necessary evidence required to meet its burden of rebuttal. Thus a new trial is required. With this contention in mind, we review the trial court's decision for an abuse of discretion. *Ahern v. Scholz*, 85 F.3d 774, 780 (1st Cir. 1996).

[27] As a preliminary matter surrounding this particular issue, the record presented by appellant does not show Sanko moving for a judgment notwithstanding the verdict pursuant to Guam R. Civ. P. 50(b). Nor does the limited record indicate whether Sanko earlier requested a directed verdict under the same provision. Consequently, we will not consider Sanko's references or passing arguments to the court's failure to grant a judgment notwithstanding the verdict. Instead, we review the issues in the context of the motion for a new trial only.

[28] Whether a new trial is warranted requires the court to examine all evidence presented to the jury and make a determination that the evidence was not sufficient to support the verdict. Such evidentiary issues will almost always require a careful examination of the entire trial transcript. Like a trial judge hearing the motion, this court, before disturbing a verdict, must find the jury's decision to have been against the clear weight, overwhelming weight, or great weight of the evidence. *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 416 (8th Cir. 1985); *see also Phillips v. Ceribo*, Civ. No. 83-0053A, 1984 WL 48862 at *1 (D. Guam App. Div. April 16, 1984)(citations omitted). This criteria suggests a trial judge should not displace a verdict because he or she disagrees with the jury's conclusion. The wrong must be extreme in order for a judge to invade the jury's function. Likewise, our review of a decision denying a new trial is cautious. The trial judge is in the best position to observe the trial and evaluate the evidence along with the credibility of the

witnesses.

[29] In light of the above standards, an evaluation of the evidence presented at trial cannot be conducted as to this particular issue. Sanko fails to provide this court with the necessary trial transcripts to determine if the trial court properly evaluated the evidence. Although asserting a bailment contract was proven by competent evidence, nothing in the record supports this contention. Similarly, Sanko argues JJ Moving presented no evidence rebutting the presumption of negligence. This is mere argument on Sanko's part. Complete transcripts are not before the court permitting us to confirm whether JJ Moving failed in this regard.[2] Consequently, we accept the trial court's implicit conclusion that the verdict was not against the weight of the evidence.

IV.

[30] The court must next decide whether impermissible hearsay was introduced at trial. Essentially, Sanko's argument centers on two distinct but related issues. First, as part of Mr. Mesa's testimony surrounding the contract formation, he was improperly allowed to discuss statements made by Sanko representatives. Thus, Sanko asserts prejudicial hearsay was improperly admitted and affected the jury's verdict. Appellant also contends the trial court erred by failing to allow the rebuttal testimony of Mr. Umazume, the president of Sanko, as to his interpretation of the contract. This testimony, Sanko argues, would have addressed the actual negotiations between the parties.

[31] With these issues in mind, we review evidentiary rulings for an abuse of discretion and we

[2] This opinion should not be read to affirm the substantive law surrounding bailment contracts. The circumstances of this case do not require an analysis of this law and we do not undertake such a review.

will not reverse absent prejudice affecting the verdict. *Masson v. New Yorker Magazine, Inc.*, 85 F.3d 1394, 1400 (9th Cir. 1996).

[32] Guam defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." 6 GCA § 801(c) (1994). It is inadmissible unless it falls into a known exception. 6 GCA § 802 (1994). Conversely, Guam law also expressly provides for statements that are not hearsay. This specifically includes admissions made by party opponents. 6 GCA § 801(d)(2).

[33] In order to be deemed a party opponent admission, a statement must be offered against the opponent party. 6 GCA § 801(d)(2). The statute is clear the statement itself does not necessarily need to be personal to the party. The admission may be "a statement by a person authorized by him [the party] to make a statement concerning the subject" or "a statement by his [the party's] agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." 6 GCA § 801(d)(2)(C)&(D).

[34] The record indicates John Mesa made reference to conversations between himself and Sanko's employees. Under a plain reading of the statute, the statements were offered against Sanko, the party opponent. In addition, the statements were made by Sanko's agents acting within the scope of employment by negotiation and entering into the contract. We find no merit whatsoever in the suggestion that the individual who actually negotiated and signed the contract on Sanko's behalf acted outside the scope of his authority when he made statements now considered to be unfavorable to Sanko's legal position. We agree the statements were not hearsay and we find no error by their admission.

[35] As to Mr. Umazume's testimony, the record does not support a showing his testimony was completely excluded. Our review indicates counsel for JJ Moving objected several times to questions posed to this witness. In the only instance where the trial court sustained Appellee's objection to a question addressing the contract, it was a result of an improper foundation. Transcript at 15-16 (July 8, 1996). After first stating Sanko's counsel was testifying, the court then instructed counsel to lay a foundation establishing the witness' ability to speak of the contract negotiations. Transcript at 15-16 (July 8, 1996). This was not done. Sanko's counsel did not follow up and address the foundational issue. Thus, Mr. Umazume was not absolutely precluded from testifying on this matter. Under these circumstances, we find no error surrounding the trial court's decision as to Mr. Umazume's testimony. Furthermore, the testimony of John Mesa is not made improper just because an opposing witness, arguably, was not allowed to testify.

[36] Finally, we note 6 GCA §103(a) (1993) states: "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." If the ruling excludes evidence, the substance of the evidence must be made known to the court by offer [of proof] or was apparent from the context within which questions were asked. 6 GCA § 103(a)(2).

[37] The record does not indicate an offer of proof was presented to the court. Nor is it obvious, based on the context of the questions, what the substance of the evidence would have been.

V.

[38] Finally, Sanko maintains the trial court erred by releasing the posted bond as partial satisfaction of the judgment. Although moot in this case, the issue is capable of reoccurring and

likewise, escaping review. As a result, we now address this issue.

> Rule 62(d) of the Guam Rules of Civil Procedure states:
>
> When an appeal is taken, the appellant by giving a supersedeas bond may obtain an automatic stay subject to the exceptions contained in subdivision (a) of this rule. . . .

GRCP 62(d) entitles a party appealing a decision of the trial court to an automatic stay of a money judgment. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 87 S.Ct. 1, 3 (1966)(memorandum granting application of a stay). This stay is a matter of right if the party posts a bond in accordance with the prescribed rules. *Id.* While the bond is usually set at the full amount of the judgment, the trial court, in its discretion, may set the bond at a lesser amount. *Dillon v. City of Chicago*, 866 F.2d 902, 904 (7th Cir. 1988).

[39] The purpose of a supersedeas bond is to protect the prevailing plaintiff from the risk of a later uncollectible judgment and to compensate for delay in the entry of the final judgment. *N.L.R.B. v. Westphal*, 859 F.2d 818, 819 (9th Cir. 1988). Consequently, if the judgment is affirmed or the appeal dismissed, the bond may satisfy the judgment debt.

[40] We are convinced that the trial court abused its discretion by releasing the $30,000 bond. GRCP 62(d) was designed to give the non-prevailing party an opportunity to correct perceived errors occurring at the trial level, and, at the same time, protect the prevailing party's financial interest in the award.

[41] We find nothing in the record indicating JJ Moving's financial interest was somehow placed in jeopardy. The bond was posted to specifically secure JJ Moving's interest. If there was a concern as to Sanko's ability to collect on the judgment, then the court could have fixed the amount to cover

the total judgment award. Instead, the court used its discretion to secure only a partial amount. The mere fact the total award was not secured by bond indicates to us, at the time when the amount was fixed, that the trial court was confident the award could later be collected.

[42] The release of the funds should have occurred after resolution of this appeal. However, because Sanko's appeal has no merit, we therefore decline the suggested remedy of returning the $30,000.00 back to either Sanko or the Clerk of the Superior Court.

CONCLUSION

[43] Based on the foregoing, the order of the Superior Court denying the Motion for a New Trial is **AFFIRMED**.

JANET HEALY WEEKS
Associate Justice

EDUARDO A. CALVO
Associate Justice

PETER C. SIGUENZA
Chief Justice