IN THE SUPREME COURT OF GUAM

GUAM SANKO TRANSPORTATION, INC.,
Plaintiff-Appellant,

v.

PACIFIC MODAIR CORP.,
Defendant-Appellee.

Supreme Court Case No.: CVA13-033
Superior Court Case No.: CV0915-08

OPINION

Cite as: 2014 Guam 31

Appeal from the Superior Court of Guam
Argued and submitted on May 13, 2014
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
Carlos L. Taitano, *Esq.*
Taitano & Taitano LLP
La Casa de Colina, Third Floor
200 Chichirica St.
Tamuning, GU 96913

Appearing for Defendant-Appellee:
Thomas McKee Tarpley, *Esq.*
Law Firm, A Professional Corp.
GCIC Building
414 West Soledad Ave., Ste. 904
Hagåtña, GU 96910

BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

MARAMAN, J.:

[1] Plaintiff-Appellant Guam Sanko Transportation, Inc. ("Guam Sanko") filed a complaint for trespass against Defendant-Appellee Pacific Modair Corporation ("PMC"). In the Findings of Facts and Conclusions of Law, the trial court determined that PMC did not trespass. Guam Sanko appeals on the grounds that the trial court improperly excluded its evidence at trial. Guam Sanko argues that this court should order a new trial and assign a new trial judge. We affirm the trial court judgment finding that PMC did not trespass.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] Guam Sanko was the registered owner of Lot Number 5099-6, Municipality of Dededo, Guam ("Property"). PMC was the owner of the adjoining lot, Lot Number 5089-1-1. Guam Sanko entered into a written agreement to sell and convey the Property to SJ Rental, Inc. One day before the scheduled closing, Guam Sanko discovered that PMC had installed water and sewer pipes beneath the Property. Upon discovery of the water and sewer lines, SJ Rental delayed its purchase of the Property.

[3] Guam Sanko filed suit for trespass in the Superior Court. In its defense, PMC alleged that Guam Sanko's prior general manager, Seiji Kiyonaga ("Kiyonaga"), gave permission to install the pipes to Hideki Ichinose ("Ichinose"), then executive officer of PMC. Kiyonaga passed away in 1999 before the instant dispute arose. PMC subsequently filed a motion for summary judgment pursuant to Rule 56 of the Guam Rules of Civil Procedure ("GRCP"), which the trial court granted. The trial court denied Guam Sanko's Motion for Reconsideration, and Guam Sanko appealed. In its appeal, Guam Sanko argued that the trial court erred by not

considering evidence of reputation or opinion of Kiyonaga's character among his business associates to refute Ichinose's testimony that consent was given. This court reversed the trial court's grant of summary judgment, finding that Guam Sanko met its burden by pointing to specific facts to demonstrate that Ichinose's credibility should be tested at trial and a genuine issue of material fact existed as to whether oral consent was given by Guam Sanko's agent, Kiyonaga. However, this court refrained from ruling on the issue of admissibility because this court found that the trial court made no ruling regarding admissibility.

[4] Prior to trial, Guam Sanko filed a Declaration of Takemitsu Noguchi ("Noguchi Declaration"). In the declaration, Noguchi stated that he had "discussed with and heard from co-workers and other people in Japan and on Guam about the character of [Kiyonaga] as the General Manager of [Guam Sanko]." Record on Appeal ("RA"), tab 64 at 9 (Decl. of Noguchi, Dec. 2, 2009). Noguchi stated that he "began working for [Guam Sanko] in . . . 1991," and worked "in the same building and on the same floor as Kiyonaga on Guam on a day-to-day basis until his death." *Id.* Noguchi stated that he "heard from many people who worked closely with Kiyonaga . . . and [he] personally [knew], that Kiyonaga was a typical Japanese manager who diligently looked out for the best interest of [Guam Sanko], and who would require a written record whenever the land, the operations, or significant affairs of [Guam Sanko] would be or were affected." *Id.* In addition, Noguchi declared that while working with Kiyonaga, he "personally [knew] that Kiyonaga always required a written agreement for any lease or use by any person of [Guam Sanko's] land including the Property and Kiyonaga always required rent in cash or by check for the lease or use of [Guam Sanko's] land including the Property." *Id.* Finally, Noguchi stated that it was his opinion "that Kiyonaga would never have given any consent or permission to any person to lease or use any portion of [Guam Sanko's] land

including the Property without a written agreement for that purpose, and Kiyonaga would never have allowed any person to lease or use [Guam Sanko's] land including the Property without the payment of rent in cash or by check." *Id.* at 9-10.

[5] In addition, Guam Sanko filed a Declaration of Norio Nakajima ("Nakajima"). In the declaration, Nakajima stated that "[s]ince the early 1980's . . . [he] discussed with and heard from co-workers and other people on Guam about the character of [Kiyonaga]." RA, tab 66 at 8 (Decl. of Nakajima, Dec. 2, 2009). He stated that he had worked with Kiyonaga when they were members of the Japan Guam Travel Association. He stated that he "heard from many people who worked closely with Kiyonaga on Guam, and [he] personally [knew], that Kiyonaga was a typical Japanese manager who diligently looked out for the best interest of [Guam Sanko], and who would require a written record whenever, at least, the operations of [Guam Sanko] would be or were affected." *Id.* In addition, he stated that while he worked with Kiyonaga, he "personally [knew] that Kiyonaga always required a written record of financial or significant transactions of the [Japan Guam Travel Association]." *Id.* Finally, he stated that it was his "opinion that Kiyonaga would never have given any consent or permission to any person to lease or use any portion of [Guam Sanko's] land including the Property . . . without the payment of rent in cash or by check." *Id.* at 8-9.

[6] Finally, Guam Sanko filed the Certificate of the Chief Planner of the Department of Land Management. Guam Sanko attached minutes of the regular meeting of the Development Review Committee on July 15, 1993. The minutes indicated that Landmark, a company acting on behalf of PMC, requested a zone change of their own property from "Multi-Family Dwelling" to "Light Industrial." RA, tab 72, Ex. A at 2-3 (Certificate Chief Planner, Dec. 2, 2009). When asked whether the sewer leading to Landmark's property was privately owned, Roland Villaverde

("Villaverde"), the Planning Director of Landmark, stated that the sewer pipes went through the Property that belonged to PMC, and that PMC would maintain the sewer lines on the Property because "it was on their property and servicing their facilities." *Id.* at 3.

[7] On remand from PMC's first appeal, PMC filed a motion to exclude Noguchi and Nakajima's declarations, arguing that the evidence would be improper character evidence.

[8] The trial court filed an order granting PMC's motion to exclude the declarations as they were offered for impermissible purposes. The trial court found that the declarations could not be admitted as habit evidence because Guam Sanko failed to "establish any foundation for any 'habit' or 'routine practice'" in its opposition. RA, tab 123 at 1-2 (Pretrial Order, Jan. 23, 2013).

[9] During the bench trial, Guam Sanko moved to submit the Certificate of the Chief Planner into evidence. PMC objected, arguing that it was irrelevant. Guam Sanko argued that the evidence would show that an agent of PMC made representations that PMC was the owner of the Property in 1993. The court excluded the evidence, finding that it was irrelevant because ownership of the property was not at issue.

[10] In its written Findings of Facts and Conclusions of Law, the trial court found that Ichinose's testimony showed that Ichinose and Kiyonaga were friends; that sometime between 1989 and 1990, Ichinose and Kiyonaga agreed that PMC could install water and sewer lines through the Property; and that Guam Sanko could use the lines at PMC's expense because Guam Sanko was moving its operations onto the Property. The trial court found other circumstantial evidence supporting PMC's defense. First, the court found that on cross examination, a Guam Sanko witness stated that Kiyonaga was considering moving part of Guam Sanko's operations onto the Property, which showed that there was incentive for Kiyonaga to allow installation of the lines, especially if PMC was willing to provide water to Guam Sanko for free. Second, the

court found that installation of the water and sewer lines was designed by Taniguchi, a member of the Japan Club with Kiyonaga and Ichinose, and that it "strains credibility, absent substantive evidence to the contrary, to believe that Tanaguchi [sic] and Ichinose would cavalierly plan and make unauthorized entry onto Guam Sanko's lot when they were socializing with Mr. Kiyonaga several times a month," and that it was "more reasonable to believe that consent had been given." RA, tab 150 at 4 (Finds. Fact & Concl. Law, Oct. 2, 2013). Finally, the court found that "the installation of water and sewer lines, by the very nature of the operation, cannot be done surreptitiously," and it was "more reasonable to believe such a blatant operation was conducted with permission, rather than secretly." *Id.* The court concluded that there was no trespass because Guam Sanko, through Kiyonaga, consented to the installation of the pipes. The trial court entered judgment in favor of PMC.

[11] Guam Sanko timely filed its Notice of Appeal.

II. JURISDICTION

[12] This court has jurisdiction over this appeal pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 113-163 (2014)) and 7 GCA §§ 3107 and 3108(a) (2005).

III. STANDARD OF REVIEW

[13] This court reviews evidentiary rulings for abuse of discretion. *In re N.A.*, 2001 Guam 7 ¶ 19. A trial court abuses its discretion when the decision is based upon an erroneous conclusion of law. *Id.*

[14] This court will not grant a new trial if it finds that the trial court's error was harmless. Guam R. Civ. P. 61. The test for harmless error "is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *People v. Perry*, 2009 Guam 4 ¶ 35 (citing *Neder v. United States*, 527 U.S. 1, 15 (1999)). "A consideration in

passing on a motion for new trial is whether the grounds offered suggest a substantial chance of reaching a different result in a new trial." *Yang v. Hong*, 1998 Guam 9 ¶ 12 (citing *Moylan v. Siciliano,* 292 F.2d 704, 705 (9th Cir. 1961)).

IV. ANALYSIS

[15] On appeal, Guam Sanko argues that the trial court erred in excluding Noguchi and Nakajima's testimony as improper character evidence, that the trial court abused its discretion in excluding the Certificate of the Chief Planner of the Department of Land Management as irrelevant, and that this court should order a new trial based on the trial court's errors. Appellant's Br. at 17-29 (Feb. 10, 2014).

A. Whether the Trial Court Erred in Excluding Noguchi and Nakajima's Testimony as Improper Character Evidence.

[16] Guam Sanko first argues that the trial court improperly excluded Noguchi and Nakajima's testimony as improper character evidence. Appellant's Br. at 17. Specifically, Guam Sanko argues that the trial court erred in excluding their declarations that Kiyonaga:

> a. Diligently look[ed] out for the best interest of Guam Sanko;
>
> b. Requir[ed] a written record whenever the land, the operations, or significant affairs of Guam Sanko would be or were affected;
>
> c. Always requir[ed] a written agreement for any lease or use by any person of Guam Sanko's land including the Property; and,
>
> d. Always requir[ed] rent in cash or by check for the lease or use of Guam Sanko's land including the Property.

Id. Instead, Guam Sanko argues that the testimony should have been admitted pursuant to Guam Rules of Evidence ("GRE") Rules 404(b) and 406.

[17] Federal case law concerning the Federal Rules of Evidence ("FRE") is persuasive, given the similarities between the GRE and the FRE. *People v. Roten*, 2012 Guam 3 ¶ 16 (citing *People v. Jesus*, 2009 Guam 2 ¶ 32 n.8).

1. GRE 404(b): Character Evidence for Other Purposes

[18] Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." GRE 404(a). The circumstantial use of character evidence is generally discouraged because it carries serious risk of prejudice, confusion and delay. *See Michaelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."); *see also Cohn v. Papke*, 655 F.2d 191, 194 (9th Cir. 1981) ("Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.").

[19] However, pursuant to GRE 404(b), evidence of character may be "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." GRE 404(b).

[20] Here, Guam Sanko argues that Noguchi and Nakajima's declarations were not offered to show that Kiyonaga would have acted in conformity to his character traits but was offered for other purposes. Appellant's Br. at 20-24. However, it is clear that their declarations that Kiyonaga "diligently look[ed] out for the best interest of Guam Sanko; requir[ed] a written record whenever the land, operations, or significant affairs of Guam Sanko would be or were affected; always requir[ed] a written agreement for any lease or use by any person of Guam Sanko's land including the Property; and requir[ed] rent in cash or by check for the lease or use of Guam Sanko's land including the Property," were used to show that Kiyonaga acted in

conformity to his character traits and did not consent to the installation of the pipes through an oral agreement. RA, tab 64 at 9-10 (Decl. of Noguchi); RA, tab 66 at 8-9 (Decl. of Nakajima). Guam Sanko offered the evidence that Kiyonaga diligently looked out for the best interest of Guam Sanko to show that Kiyonaga would never have entered into the oral agreement because it would not have been in Guam Sanko's best interest. Guam Sanko offered the evidence that Kiyonaga always required a written record for Guam Sanko's "land, operations, or significant affairs" and a written agreement for any lease or use of Guam Sanko's Property to show that Kiyonaga would have required a written record and would have never entered an oral agreement to allow the pipes to be installed. Finally, Guam Sanko offered the evidence that Kiyonaga required rent in cash or check for the lease or use of Guam Sanko's Property to show that Kiyonaga would have required PMC to pay rent in order to install pipes on the Property. Therefore, the trial court properly found that Noguchi and Nakajima's evidence was offered to show that Kiyonaga acted in conformity to his character traits and not for another purpose.

2. GRE 406: Habit Evidence

[21] In addition to arguing that Noguchi and Nakajima's declarations were admissible as character evidence for other purposes under 404(b), Guam Sanko asserts the declarations were admissible as evidence of habit or routine practice. Appellant's Br. at 18. Pursuant to GRE 406, "[e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." GRE 406.

[22] FRE 406 clearly permits the use of habit evidence to show that a person acted in conformity with that habit on a specific occasion, provided a sufficient foundation has been laid

to establish the habit. *Fountain v. United States*, 953 F. Supp. 836, 845 (E.D. Mich. 1996). "Although a precise formula cannot be proposed for determining when the behavior may become so consistent as to rise to the level of habit, 'adequacy of sampling and uniformity of response' are controlling considerations." *Reyes v. Mo. Pac. R.R. Co.*, 589 F.2d 791, 795 (5th Cir. 1979) (citations omitted); *see also Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132, 1140 (Ill. App. 1995) ("The party seeking admission of the habit evidence must first establish a proper foundation to show conduct that becomes semiautomatic, invariably regular and not merely a tendency to act in a given manner."); *Grewe v. W. Washington Cnty. Unit Dist. No. 10*, 707 N.E.2d 739, 745 (Ill. App. 1999) ("In order for habit evidence to be admitted, a party must lay an adequate foundation to show that the habitual conduct has become semiautomatic and invariably regular. If the testimony is too vague, general, and ambiguous to establish a habit, it should not be allowed.").

[23] Here, Guam Sanko failed to lay an adequate foundation showing Guam Sanko conducted real estate transactions in a semiautomatic and invariably regular manner. *See Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511-12 (4th Cir. 1977) ("It is only when . . . examples offered to establish such pattern of conduct or habit are 'numerous enough to base an inference of systematic conduct' and to establish 'one's regular response to a repeated specific situation' ... that they are admissible to establish pattern or habit. . . . [I]t is obvious that no finding is supportable under Rule 406 [], which fails to examine critically the 'ratio of reactions to situations.'"); *Strauss v. Douglas Aircraft Co.*, 404 F.2d 1152, 1158 (2d Cir. 1968) ("Evidence of specific examples of other negligent repairs might conceivably be relevant to show a party's habit or custom to abuse, but such occurrences must be 'numerous enough to base an inference of systematic conduct.'"); *Poling v. Baltimore & Ohio R.R. Co.*, 166 F. Supp. 710, 717

(N.D.W.V. 1958) ("To establish a custom it is not enough to prove the act is frequently done; it must be both alleged and proved to be certain, general, uniform and recognized, and so notorious as to probably be known to all parties to be controlled by it."). Guam Sanko failed to provide examples of Kiyonaga's conduct or critically examine Kiyonaga's ratio of reactions to situations. Noguchi and Nakajima's declarations merely show a tendency for Kiyonaga to act in a certain manner and does not rise to the level of habit. Therefore, the declarations are not admissible as evidence of habit or routine practice pursuant to GRE 406.

B. Whether the Trial Court Erred in Excluding the Development Review Committee Meeting Minutes as Irrelevant.

[24] Next, Guam Sanko argues that the trial court "erred by excluding, as irrelevant the Certificate of the Chief Planner of the Department of Land Management." Appellant's Br. at 24-28.

[25] "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Organic Act of Guam, by the laws of Guam, by these Rules or other rules prescribed by the Supreme Court of Guam pursuant to statutory authority. Evidence which is not relevant is not admissible." GRE 402. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to determination of the action more probable or less probable than it would be without the evidence." GRE 401. The Rule's basic standard of relevance is a liberal one. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). "[E]vidence is admissible if it has a tendency to support a fact relevant to the issues if only in a slight degree." *Dilieto v. Cnty. Obstetrics & Gynecology Grp., P.C.*, 828 A.2d 31, 48 (Conn. 2003) (citing *Burns v. Hanson*, 734 A.2d 964, 972 (Conn. 1999)).

[26] Guam Sanko argues that Villaverde, acting as PMC's agent, misrepresented to the Development Review Committee that the Property belonged to PMC because "PMC knew that it did not have any consent from Guam Sanko to install the sewer or water lines beneath the Property, and, therefore, PMC could not ask a representative of Guam Sanko to attend the Committee hearing to consent to the zone change." Appellant's Br. at 26-27. The Development Review Committee Meeting minutes provide that Villaverde stated that PMC owned Guam Sanko's Property. Although the meeting occurred three years after the pipes were installed, the minutes of the meeting would support Guam Sanko's theory that Villaverde misrepresented to the Development Review Committee that the Property was owned by PMC and not Guam Sanko because PMC did not want a Guam Sanko representative to be present at the meeting. Therefore, given the liberal standard of relevance, the trial court abused its discretion in excluding the Development Review Committee Meeting minutes as irrelevant.

C. Whether this Court Should Order a New Trial.

[27] This court will order a new trial only if it affects the substantial rights of the parties. GRCP 61. A consideration in passing on a motion for new trial is whether the grounds offered suggest a substantial chance of reaching a different result in a new trial. *Yang*, 1998 Guam 9 ¶ 12 (citing *Moylan*, 292 F.2d at 705). This court has found that denial of a motion for new trial is proper where the evidence "would not have made a difference in the trial court's decision, thus not affecting the substantial rights of the parties." *Id.*

[28] Here, the trial court's error in excluding the Development Review Committee Meeting minutes as irrelevant does not warrant a new trial. The minutes do not suggest a substantial chance that the trial court would reach a different result in a new trial. The trial court found that all the evidence supported a finding that Kiyonaga and Ichinose entered into an oral agreement to

allow PMC to lay pipes on the Property. RA, tab 150 at 2-3, 5 (Finds. Fact & Concl. Law). At trial, Ichinose testified that he had entered into an oral agreement with Kiyonaga to allow PMC to lay pipes on Guam Sanko's property. *Id.* at 2. The court found that Ichinose was a "credible witness with credible testimony on the issue." *Id.* at 3. In addition, the trial court found that the testimony was consistent with circumstantial evidence: (1) Ichinose's testimony that Kiyonaga was considering moving Guam Sanko's operations onto the lot was backed up by another Guam Sanko witness; (2) the architect who designed the water and sewer lines was a member of the Japan Club who played golf with Kiyonaga and Ichinose, and it was more reasonable to believe that he had consent to work on the property while he was socializing with Kiyonaga multiple times a month; and (3) the installation of water and sewer lines would be "open and notorious" and more likely to be done with permission rather than secretly. *Id.* at 3-4.

[29] Even if the trial court were to consider the Development Committee Meeting minutes in a new trial, it is unlikely the trial court would reach a different result. Guam Sanko did not provide any additional evidence to support its theory that Villaverde, acting as PMC's agent, misrepresented to the Development Review Committee that the Property belonged to PMC because "PMC knew that it did not have any consent from Guam Sanko to install the sewer or water lines beneath the Property." Appellant's Br. at 26-27. In addition, Villaverde was not an employee of PMC, but an employee of Landmark, which was acting on behalf of PMC. RA, tab 72 at 3 (Certificate Chief Planner). Guam Sanko's argument is unpersuasive and inclusion of the Development Committee Meeting minutes would unlikely lead to a different result in a new trial. Therefore, we find that a new trial is inappropriate.

V. CONCLUSION

[30] We find that the trial court did not err in excluding Noguchi and Nakajima's declarations as either improper character evidence or habit evidence. In addition, we find that the trial court erred in excluding the Development Review Committee Meeting minutes as irrelevant. However, we find that a new trial is inappropriate because there is not a substantial chance of reaching a different result with the inclusion of the minutes in evidence. Therefore, we **AFFIRM** the trial court's judgment in favor of PMC. Since we affirm the trial court, we need not address whether to assign a new trial judge.

Original Signed By: **F. Philip Carbullido**

F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: **Katherine A. Maraman**

KATHERINE A. MARAMAN
Associate Justice

Original Signed By: **Robert J. Torres**

ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam

NOV 12 2014

By: IMELDA B. DUENAS
Assistant Clerk of Court
Supreme Court of Guam