IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES FRANKLIN,
Appellant,
vs.
HARRAH'S LAS VEGAS, INC., A NEVADA CORPORATION, D/B/A HARRAH'S HOTEL & CASINO,
Respondent.

No. 43413

FILED

FEB 16 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a negligence action. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant James Franklin appeals the district court's denial of his jury trial request, exclusion of evidence of subsequent remedial measures taken by respondent Harrah's, and the district court's granting of Harrah's motion for a directed verdict. Finding no error, this court affirms the judgment of the district court.

Franklin's untimely jury trial request

Franklin argues that the case conference report is evidence that Harrah's consented to a jury trial, that he relied on Harrah's representation in the case conference report, and that he did not knowingly waive his right to a jury trial. Franklin relies primarily on Walton v. Eighth Judicial District Court, wherein this court remanded to allow a party to apply to the district court for an order granting more time

to file a jury trial demand.[1] As in the instant matter, one party indicated its intent to file a jury trial demand, but never did.

However, in Walton, the case was set three times for a jury trial, without objection by either party. This court held that the circumstances of the case made a strong argument for permitting a jury trial demand under NRCP 39(b), finding that no prejudice would have resulted to the other party if such a demand were considered.[2]

Harrah's correctly points out that notice of the non-jury trial setting had been sent to Franklin's counsel nearly a year prior to the motion, that Franklin's motion was untimely under NRCP 38(b), and that Franklin had therefore waived his right to a jury trial under NRCP 38(d). Harrah's further argues that it had never agreed to a jury trial, and that permitting a jury trial at such a late date would have been costly and severely prejudicial to them.

NRCP 38(a) preserves "inviolate" the constitutional or statutory right to a jury trial. NRCP 38(b) permits any party to an action to demand a jury trial by serving written notice of same on the other parties "at any time after the commencement of the action and not later than the time of the entry of the order first setting the case for trial." Under NRCP 38(d), failing to properly serve such a demand "constitutes a waiver by the party of trial by jury."

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[1]94 Nev. 690, 586 P.2d 309 (1978).

[2]Walton, 94 Nev. at 695, 586 P.2d at 312.

NRCP 39(b) states that "notwithstanding the failure of a party to demand a jury in an action in which such demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues." A district court hearing a motion for a jury trial under NRCP 39(b) should consider whether the circumstances shown warrant such relief.[3] The decisions by a district court as to whether a party has waived its jury trial right, and whether to grant or deny a motion to set aside that waiver, are reviewed for an abuse of discretion.[4]

Based on NRCP 39(b) and the Walton case cited above, we conclude that it was within the discretion of the district court to deny the motion. However, the district court order denying Franklin's motion gives no hint of what determinations were made, or what circumstances were considered. It simply states that "good cause appearing," the motion is denied. Normally, a district court abuses its discretion by not making explicit findings as to whether it considered the circumstances in denying relief, or just denied the motion as untimely under NRCP 38, based on this court's precedent in Executive Management, Ltd. v. Ticor Title Insurance Co..[5] However, although such a lack of findings may constitute reversible error, this court may imply findings where the record clearly supports the judgment.[6] It is apparent from the record that Franklin

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[3]Executive Mgmt. v. Ticor Title Ins. Co., 118 Nev. 46, 54, 38 P.3d 872, 877 (2002).

[4]Walton v. District Court, 94 Nev. 690, 695, 586 P.2d 309, 312 (1978); Kohlsaat v. Kohlsaat, 62 Nev. 485, 488, 155 P.2d 474, 475 (1945).

[5]118 Nev. 46, 53, 38 P.3d 872, 876-77 (2002).

[6]Hardy v. First Nat'l Bank of Nev., 86 Nev. 921, 478 P.2d 581 (1970).

made a scant showing of circumstances that warranted relief from the district court. Therefore, this court implies the necessary findings, as a review of the record makes it clear that the district court did not abuse its discretion in denying the motion.

Proper exclusion of evidence of subsequent remedial measures

Franklin argues that the district court improperly excluded evidence that Harrah's security guards requested a bath mat be placed in Franklin's shower after the incident.[7] Franklin argues that the testimony of the security guards is evidence that at least two of Harrah's employees perceived the shower to be dangerous without a mat. According to Franklin, that evidence was admissible for the purpose of impeaching Harrah's contentions that a bath mat would not have necessarily made the shower less slippery or dangerous, contentions made not at trial but in Harrah's answer to Franklin's complaint.

Harrah's counters that the bath mat was a remedial measure under NRS 48.095(1), and that testimony that Franklin was given a bath mat after his fall would not contradict or impeach any defense testimony, since Harrah's never presented, or intended to present, any witnesses who claimed otherwise.

NRS 48.095(1) provides that evidence of subsequent measures "which, if taken previously, would have made the event less likely to occur . . . is not admissible to prove negligence or culpable conduct[.]" Subsection (2), however, makes such evidence admissible when it is "offered for another purpose, such as proving ownership, control,

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[7]The district court did permit a security guard to testify that he noted the lack of a bath mat in his report; it was only the security guard's subsequent request to housekeeping for a bath mat that was excluded.

feasibility of precautionary measures, or impeachment." "This court will not overturn the district court's exclusion of relevant evidence absent an abuse of discretion."[8]

In Bomar v. United Resort Hotels, Inc., this court found error in a district court's decision to preclude cross-examination of a defense witness as to subsequent remediation.[9] The case involved the safety of a step that had been painted shortly after the alleged accident. This court held that defense counsel "opened the door" by asking the witness if there had been any change in the step, to which the witness replied "no." There was already evidence before the jury that the step was not painted at the time of the injury, and that it was painted shortly after. Thus, this court concluded that the plaintiff should have been permitted to impeach or contradict the witness. However, this court also held that the error was harmless, since the jury already knew of the contradictory evidence.[10]

We conclude that Harrah's is correct in asserting that the door was never "opened" by testimony or evidence from the defense about the bath mat. The deposition of Harrah's expert, the only evidence at all about the bath mat, was introduced into evidence by Franklin. The question in that deposition about the potential remedial effect of a bath mat was asked by Franklin's counsel. Even assuming that Franklin could properly impeach that testimony, the testimony of the security guards cannot be properly considered impeachment, since they were not certified

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[8]Hansen v. Universal Health Servs., 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999).

[9]88 Nev. 344, 346, 497 P.2d 898, 899 (1972).

[10]Id.

as experts in the matter, nor were they testifying as to Harrah's housekeeping policies or procedures. We conclude, therefore, that Franklin has not made a showing that the district court abused its discretion in refusing to admit the evidence.

Directed verdict

A court facing a motion for judgment as a matter of law under NRCP 50(a) must determine whether there is any question of fact to be submitted to the jury, and whether any verdict other than one directed would be erroneous as a matter of law.[11] The court must view all inferences and evidence most favorable to the party against whom the motion is made.[12]

This court on review is required to apply the same test as the trial court, not to test the credibility of witnesses nor weigh the evidence, and to hold an order directing a verdict proper if there was no question of fact remaining to be decided.[13] A directed verdict is appropriate only "where the evidence is so overwhelming for one party that any other verdict would be contrary to the law.[14]

Franklin contends that the district court did not interpret the evidence in the light most favorable to Franklin, and that it did not consider the substantial evidence presented by Franklin at trial. According to Franklin, the evidence established that Harrah's did not act

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[11]Bliss v. DePrang, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965).

[12]Id., see also Sheeketski v. Bortoli, 86 Nev. 704, 706, 475 P.2d 675, 675 (1970).

[13]Kline v. Robinson, 83 Nev. 244, 247, 428 P.2d 190, 192 (1967).

[14]Bliss, 81 Nev. at 602, 407 P.2d at 727-28.

reasonably in providing Franklin with a dangerously slippery shower. Franklin bases this contention primarily on the testimony of the security guards, who noted that the shower was "still slippery the day after the accident," and who Franklin claims were concerned about the safeness of the shower. Franklin further argues that the evidence showed that Harrah's failed to warn Franklin of this danger, and that Harrah's had other showers in the hotel with slip guards molded into the shower surface.

Harrah's counters that Franklin failed to show that the shower was unreasonably dangerous, and that the mere showing that Franklin slipped and was injured does not make for a prima facie case of negligence. Further, Harrah's argues that the case law from other jurisdictions relating to slip-and-fall cases in showers supports the contention that a wet, slippery shower surface is not sufficient to prove negligence absent some evidence of a violation of industry standards or an unforeseen and unreasonable risk.

The Court of Appeals of Ohio decided a case very similar to the instant matter in 1961. In Coyle v. Beryl's Motor Hotel, a directed verdict in favor of the defendant hotel was affirmed where a hotel patron slipped in a wet bathtub.[15] Since the plaintiff failed to show that the facilities provided were substandard or unreasonably dangerous, the court held that the hotel "met the requirement of the law to use ordinary care for the protection of its guests[.]"[16] The court noted:

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[15]171 N.E.2d 355 (Ohio Ct. App. 1961).

[16]Coyle, 171 N.E.2d at 358.

> The dearth of cases on the question of falling in showers or tubs is astounding. There is almost a paucity of precedent. The scarcity of adjudicated cases indicates to us that the trend in the law is against the theory seeking to hold an innkeeper responsible who provides paying guests with a place to bathe.[17]

In 1995, a Florida appeals court reversed a trial court's denial of a directed verdict in another similar case, where a female plaintiff fell while showering.[18] The court found that "[v]iewed in the light most favorable to her, such evidence shows only that at some point during the course of her shower, the tub became slippery. The evidence, however, does not establish why. [Thus, she] failed to establish a prima facie case of negligence."[19]

In Portnova v. Trump Taj Mahal Associates, a New York appellate court ruled that summary judgment was appropriate in a case where the plaintiff stepped out of the shower and slipped on a cotton bath mat provided by the hotel.[20] The court determined that "in a case where the defendant comes forward with evidence that the accident was not necessarily attributable to a defect, the burden shifts to the plaintiff to come forward with direct evidence of a defect."[21] Since the plaintiff did not present any "competent evidence of any defect in the bath mat or

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[17]Id.

[18]Cooper Hotel Services, Inc. v. McFarland, 662 So. 2d 710 (Fla. Dist. Ct. App. 1995).

[19]Id. at 713.

[20]270 A.D.2d 757 (App. Div. 2000).

[21]Portanova, 270 A.D.2d at 759.

bathroom flooring material," the court found that the trial court should have granted defendants' motion for summary judgment.[22]

We conclude, based on our review of the record, that Franklin did not prove negligence. The only evidence of a dangerous condition was what could be inferred from the depositions of the security guards, who were admittedly positing their own opinions, and who merely assumed that a mat should have been in the shower. The only expert testimony about the condition of the shower was that the shower was in safe, excellent condition, and that the addition of a bath mat or handrails would not necessarily have made the shower safer. Even considering the evidence in a light most favorable to Franklin, there was no question of fact to be decided by a jury, since no competent evidence proved that the shower was unreasonably dangerous, or that negligence by Harrah's caused Franklin's fall.[23] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.
Douglas

Becker, J.
Becker

Parraguirre, J.
Parraguirre

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[22]Id.

[23]We also note that, as this was a bench trial, the district court could have reached the same result by denying the directed verdict and then concluding that Franklin had not proven negligence by a preponderance of the evidence.

cc: Hon. Valorie Vega, District Judge
Fitzgibbons & Anderson
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Clark County Clerk