IN THE SUPREME COURT OF THE STATE OF NEVADA

NEW YORK-NEW YORK HOTEL & CASINO, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
PENTACORE, INC., A NEVADA CORPORATION; AND PENTACORE ADA CONSULTING, INC., A NEVADA CORPORATION,
Respondents.

No. 43837

FILED

DEC 01 2006

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment on a jury verdict and an order denying a new trial motion in a professional negligence action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

The primary issue on appeal involves appellant New York-New York Hotel & Casino's (NYNY) argument that the district court erred in not giving a requested jury instruction on concurrent causation relevant to NYNY's professional negligence claim.[1] We conclude that the district court erred in refusing the instruction, and we therefore reverse and

[1]NYNY raises three additional issues on appeal: the district court erred by not (1) giving a jury instruction incorporating the Americans with Disabilities Act (ADA) standards as the relevant standard of care; (2) granting a new trial because counsel for respondents Pentacore, Inc. and Pentacore ADA Consulting, Inc. (collectively, Pentacore) committed misconduct during closing argument; and (3) granting a new trial based on juror misconduct because jurors took their notebooks home over a weekend. We conclude that NYNY's arguments on each of these issues lack merit.

remand for a limited new trial. Because the parties are familiar with the facts, we do not recount them except as necessary for our disposition.

A party is entitled to have the jury instructed on the law applicable to any "'hypotheses or combinations of facts which the jury, from the evidence, might legitimately find.'"[2] A district court has broad discretion to settle jury instructions, and we review a district court's decision to decline to give a particular instruction for an abuse of discretion.[3] A party challenging a district court's decision not to give a requested jury instruction has the burden of showing that prejudice resulted from the decision.[4] This burden is met when the party reasonably demonstrates that the jury might have reached a different result but for the lack of instruction.[5]

When the evidence indicates that the defendant is a contributing cause to the plaintiff's injury, even if not the sole cause, an instruction on concurrent causation of joint tortfeasors is warranted.[6]

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[2]American Cas. Co. v. Propane Sales & Serv., 89 Nev. 398, 400, 513 P.2d 1226, 1227 (1973) (quoting Dixon v. Ahern, 19 Nev. 422, 429, 14 P. 598, 601 (1887)); see also Woosley v. State Farm Ins. Co., 117 Nev. 182, 188, 18 P.3d 317, 321 (2001) ("A party is entitled to an instruction on every theory that is supported by the evidence. . . .") (citing Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996); Village Development Co. v. Filice, 90 Nev. 305, 312, 526 P.2d 83, 87 (1974)).

[3]Insurance Co. of the West v. Gibson Tile, 122 Nev. ___, ___, 134 P.3d 698, 702 (2006).

[4]Cf. Driscoll v. Erreguible, 87 Nev. 97, 101-02, 482 P.2d 291, 294 (1971).

[5]See id. at 102, 482 P.2d at 294.

[6]See Banks v. Sunrise Hospital, 120 Nev. 822, 841-42, 102 P.3d 52, 65-66 (2004).

During the settling of jury instructions, NYNY proposed an instruction on concurrent causation based on Pentacore's implications during trial that even if Pentacore gave NYNY incorrect advice regarding ADA compliance, other entities were responsible for causing NYNY's damages—the so called "empty chair" defense. The district court rejected the proposed instruction, concluding that NYNY's professional negligence claim was "grounded in contract" and that "a person is not liable jointly and severally for the breach of someone else's contract."

We conclude that the district court erred in rejecting the instruction. First, the district court's comment that NYNY's negligence claim was "grounded in contract," which somehow obviated a need for a concurrent causation instruction, was unfounded. NYNY pleaded and presented evidence on both a breach of contract cause of action and a professional negligence cause of action. Both are separate and distinct causes of action—one in contract and one in tort—which would require different jury instructions attendant to each claim.[7]

Next, the record indicates instances during Pentacore's case in chief and during its cross-examination of NYNY witnesses, which suggest a theory from Pentacore that even if it gave NYNY incorrect ADA advice, other entities responsible for construction of the NYNY caused NYNY's damages. The most notable of these instances is in the direct examination of Pentacore's expert on ADA compliance, James Terry. During Terry's examination, he admitted that Pentacore gave NYNY incorrect advice that

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[7]See generally Szekeres v. Robinson, 102 Nev. 93, 715 P.2d 1076 (1986) (discussing professional negligence and breach of contract claims against doctor and hospital as separate causes of action in wrongful birth context).

accessible rooms did not also have to be hearing impaired compliant. Terry stated, however, that the incorrect advice was immaterial because the builders of NYNY decided to use portable visual alarms, which could be placed in any room.

Trial testimony evidenced that during the initial construction of the NYNY, the accessible rooms were stacked on top of one another so that they could easily share the same wiring for visual alarms necessary in rooms for visually impaired guests. Midway through construction, however, Pentacore advised NYNY that the accessible rooms would have to be disbursed throughout the hotel according to the Department of Justice. The record indicates that, upon this change of plans, the architect of record determined to stop hardwiring the accessible rooms for installation of visual alarms and instead use portable visual alarms.

The record shows that, at NYNY's request, Pentacore reviewed a model of portable visual alarm for ADA compliance. NYNY's ADA expert, Gail Austin, opined that Pentacore was negligent in reporting ADA compliance of the portable visual alarm because it failed to inform NYNY that the portable alarm would have to be connected to the building's central alarm system. In cross-examining Austin, Pentacore's counsel asked Austin why Pentacore's omission mattered when the original plans indicated hardwiring for the visual alarms and the decision to stop hardwiring and use the portable alarms came from the architect and the company charged with wiring the building. Pentacore's counsel also questioned Austin regarding the fact that NYNY opted to go with a portable alarm system different than the one Pentacore reviewed. Pentacore's counsel then asked Austin whether whatever Pentacore said in its report on the portable alarms mattered because NYNY used a

different model; thus Pentacore pointed the finger at other entities despite its faulty advice.

In cross-examining David Downey, an in-house architect for Primadonna who worked on the NYNY project, counsel for Pentacore asked, "In your experience as an architect is it usually the architectural design professional who bears responsibility for compliance with the Americans With Disabilities Act in design services?" Pentacore's counsel then asked, "In this case, as you understood it as a representative of Primadonna did Gaskin & Bezanski [the architect of record for NYNY] have responsibility to comply with the ADA based on your discussions with them?"

The above indicates that a theory of Pentacore's case was that even if Pentacore gave NYNY incorrect advice regarding ADA compliance, it did not matter because other entities responsible for construction of the NYNY caused NYNY's damages. It also indicates Pentacore's theory that other entities were responsible for ensuring ADA compliance even if Pentacore's advice was faulty. We conclude that these theories warranted a jury instruction on concurrent causation as NYNY requested. Therefore, the district court erred in not giving the instruction.

We further conclude that the district court's error prejudiced NYNY because, but for the decision not to give a concurrent cause instruction, the jury might have found for NYNY. Substantial evidence supports NYNY's claim that Pentacore gave incorrect advice regarding ADA compliance. As already discussed, Pentacore's own ADA expert at trial testified that Pentacore's advice to NYNY that accessible rooms did not also have to be hearing impaired compliant was incorrect. Additionally, NYNY's ADA expert, Austin, testified that Pentacore's report concerning the portable visual alarms fell below the standard of care in

not clearly advising NYNY that the reviewed model was not compliant with the ADA and that a portable visual alarm system must be connected to the building's central alarm system to be ADA compliant.

The evidence therefore supports a conclusion that Pentacore could have caused at least some of NYNY's damages resulting from having to rewire accessible guest rooms disbursed throughout the hotel to provide visual emergency alarms for hearing impaired guests. Because the jury was not instructed on concurrent causation, however, they were precluded from holding Pentacore liable unless they found Pentacore was the sole cause of NYNY's damages.

We therefore ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial limited to the issue of the visual alarms.[8]

_____, J.
Becker

_____, J.
Hardesty

_____, J.
Parraguirre

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[8]We note that NYNY also faulted Pentacore with substandard ADA compliance advice regarding the 32-inch clear doorway width requirement for guestrooms. Our review of the record, however, indicates that Pentacore's defense of this claim centered around lack of duty to monitor compliance, not lack of proximate cause. Pentacore alleged they reviewed and corrected plans presented to them, but they had no duty to ensure the corrections were implemented and that other plans were not presented for review. Therefore, the district court's refusal to give a concurrent cause jury instruction did not impact the jury's ability to decide liability on the doorway width issue.

cc: Hon. Kathy A. Hardcastle, District Judge
Howard Roitman, Settlement Judge
Jones Vargas/Las Vegas
Kravitz, Schnitzer, Sloane, Johnson & Eberhardy, Chtd.
Morris Polich & Purdy, LLP/Las Vegas
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Clark County Clerk