IN THE SUPREME COURT OF THE STATE OF NEVADA

WYNANDA HOFFMAN,
Appellant,
vs.
THE SALVATION ARMY,
Respondent.

No. 44067

FILED

JUL 12 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment and post-judgment orders denying appellant's motion for new trial and awarding respondent attorney fees and costs in a personal injury action. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. We affirm.

In this decision, we consider the applicability of the "open and obvious danger" rule, as stated in Harrington v. Syufy Enterprises.[1] We also address the following claims of error: that substantial evidence does not support the jury's verdict; that respondent's examination of witnesses and comments made during opening and closing statements require reversal; and that the district court abused its discretion in precluding certain expert testimony and in awarding attorney fees to respondent.

FACTS AND PROCEDURAL HISTORY

Appellant, Wynanda Hoffman, suffered a foot and ankle injury at a thrift store operated by respondent, The Salvation Army ("TSA"). She walked up some stairs to an outside landing to look at t-shirts on a round rack. The landing was 25 inches above parking lot level. As she walked around the rack, she fell off the landing, injuring her left foot. She conceded that she was aware that the landing was above the parking lot,

[1]113 Nev. 246, 931 P.2d 1378 (1997).

that she was not watching where she was stepping as she walked around the rack, and that she was unaware which foot fell first because of the sudden nature of the incident. She also admitted that she had been to this particular store twice before.

After litigation commenced, the parties exchanged offers of judgment. Ms. Hoffman initially offered to settle for $39,000, then later for $16,906. TSA, on the other hand, made three successive offers of judgment to Ms. Hoffman: the first in the amount of $1,001, and two more separate offers of $5,001. TSA made the last offer after Ms. Hoffman obtained new counsel.

None of the offers were accepted, and the parties proceeded to a two-day trial. Ms. Hoffman's theory of the case focused on TSA's negligence in attracting customers, by means of sales items, to an elevated landing that lacked a guardrail. TSA's theory centered on the open and obvious nature of the landing, its compliance with applicable building codes, and Ms. Hoffman's carelessness while browsing for items on the landing.

The jury returned a defense verdict. Ms. Hoffman moved for judgment notwithstanding the verdict and for a new trial. The district court denied these motions and granted TSA's motion for attorney fees brought under NRCP 68(f) and NRS 17.115(4). Ms. Hoffman appeals.

DISCUSSION

Open and obvious danger

Ms. Hoffman asserts that the defense improperly based its case on whether TSA created an "open and obvious danger" in its placement of the clothing racks. Ms. Hoffman reasons that, under

Harrington v. Syufy Enterprises,[2] the issue of whether a property owner created an open and obvious danger is relevant only in cases in which a plaintiff asserts that a property owner had a duty to warn of a hidden danger. She asserts that she made no such claim. Rather, she claims that TSA may have created an obvious danger, but that TSA's arrangement of the clothing racks negligently distracted her from that danger.

In Syufy Enterprises, we reversed summary judgment based upon the "open and obvious danger" rule, concluding that a material issue of fact existed regarding the obviousness of tire spikes on a grate traversing the entrance to the defendant's property, over which the plaintiff had tripped and fallen.[3] We also rejected the notion that the comparative negligence statute, NRS 41.141, subsumes the "open and obvious danger" rule, stating that "[r]ecovery is barred when the danger is obvious, not because the negligence of the plaintiff is greater than that of the defendant, but because the defendant is not negligent at all."[4] However, we also went on to observe that "the obvious danger" rule was inapplicable when liability was based upon acts other than failure to provide adequate warning of a dangerous condition,[5] and that "even where a danger is obvious, a defendant may be negligent in having created the peril or in subjecting the plaintiff to the peril."[6]

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[2]113 Nev. 246, 931 P.2d 1378 (1997).

[3]Id. at 247, 250, 931 P.2d at 1379, 1381.

[4]Id. at 249, 931 P.2d at 1380.

[5]Id. at 250, 931 P.2d at 1381.

[6]Id.

This last statement indicates that, in cases in which the obviousness of the danger is in dispute, judgment may be ultimately premised upon findings regarding the comparative negligence of the plaintiff versus the defendant. However, when an issue of fact on obviousness occurs, defendant is entitled to instructions on the application and non-application of the "open and obvious danger rule."[7]

Ms. Hoffman also takes issue with the jury instruction addressing the rule. This instruction provided the following:

> The owner of property is under a duty to warn an invitee of hidden dangers. This duty does not, however, extend to obvious dangers. The owner of property is entitled to assume that an invitee on the property will perceive that which would be obvious to her upon the ordinary use of her own senses. The owner is not required to give the invitee notice or warning of an obvious danger. However, even if a danger is obvious, a Defendant may be negligent in having created the peril.

Despite her contention on appeal regarding this instruction, we note that she failed to object to this instruction below. Failure to object on an issue at trial generally precludes consideration of the issue on appeal.[8] Regardless, we conclude that the instruction, taken in conjunction with the comparative negligence instructions given to the jury, correctly stated the law per Syufy Enterprises. In short, the instruction covered both sides of the Syufy Enterprises equation, that there is no duty of a defendant to

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[7]Ms. Hoffman claims that her failure to raise a duty to warn precludes consideration of the "open and obvious danger" rule. We disagree. A single party cannot restrict another party's theory of the case by its construction and framing of the issues it wants tried.

[8]Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1324, 970 P.2d 1062, 1069 (1998).

warn of obvious dangers, but that other acts making the peril non-obvious must be considered. Having weighed that question, the jury in this case could, on the facts presented, find that TSA was not negligent, that it was negligent but not liable under NRS 41.141, or that it was negligent and liable under NRS 41.141.

Substantial evidence

Ms. Hoffman asserts that the defense produced insufficient evidence to controvert her case.

In reviewing a jury verdict, we consider whether substantial evidence supports it.[9] Substantial evidence is that which reasonable minds might accept as sufficient to support a conclusion.[10] As the finder of fact, the jury is entitled to weigh the evidence, determine witness credibility, and act upon such conclusions.[11]

We conclude that substantial evidence supports the jury verdict. Ms. Hoffman conceded that she had visited the store twice before the incident, and that she knew she was on a raised ledge. Further, her expert conceded that the ledge violated no building codes. Accordingly, as stated above, the jury could have reasonably concluded that either TSA was not negligent or that her negligence exceeded that of TSA. Certainly, the general defense jury verdict subsumes one of these two findings.[12]

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[9]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

[10]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998).

[11]Olivero v. Lowe, 116 Nev. 395, 403, 995 P.2d 1023, 1028 (2000).

[12]The special verdict on comparative negligence was not provided with the record on appeal.

Improper questions and arguments

Ms. Hoffman takes issue with several questions and arguments of defense counsel, asserting that their impropriety tainted the jury verdict.

First, based on her successful motion in limine excluding hearsay statements suggesting she smelled of alcohol at the time of the incident, Ms. Hoffman claims that TSA improperly cross-examined her on this subject. In summary, given that the court granted the motion to exclude the hearsay evidence, Ms. Hoffman reasons that the issue was completely removed from the case. Because her conclusion doesn't follow the premise, we disagree. While the ruling in limine excluded the admission of the hearsay evidence, the ruling did not prohibit direct confrontation of her on the subject. Further, although excluded, the hearsay evidence provided a good-faith basis for the question asked by TSA of Ms. Hoffman.[13] Finally, we note that Ms. Hoffman only objected to this line of inquiry during the examination of her expert, Gary Presswood. Accordingly, we discern no error with regard to the examination of Ms. Hoffman concerning the possibility that alcohol was involved.

Second, Ms. Hoffman takes issue with some of TSA's commentary in its opening statement and during its closing argument. One set of commentary focused on TSA's charitable mission, and suggested that Ms. Hoffman was seeking "Christmas in July." Another comment indicated that Christopher Columbus discovered that the world was not flat, and that people should watch their step.

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[13]See State v. Grant, 874 A.2d 330, 335 (Conn. Ct. App. 2005). We also note that Ms. Hoffman denied using alcohol at any time. There is no indication in this record compelling the conclusion that the questions, in and of themselves, warrant reversal.

As to these comments, we conclude that neither was improper because they constituted fair comment based on the evidence. We conclude that the "Christmas in July" commentary lacked impropriety because Lew's deposition testimony indicated that Ms. Hoffman sought payment for her injuries immediately after the incident, yet walked away without a limp. Although Ms. Hoffman claims that Lew was describing another incident at the store that did not involve her, the jury was charged with deciding whether Lew was a credible witness on that point. Similarly, we discern no impropriety in the Christopher Columbus comment because Ms. Hoffman conceded that she was not watching where she was stepping as she walked around the clothing rack.

Third, Ms. Hoffman claims error with TSA's speculation in closing argument that the incident report at issue burned in a fire at a TSA records office. We agree that this comment was improper because TSA produced no evidence regarding this fire. However, this comment was not so egregious as to merit reversal, especially in light of Ms. Hoffman's failure to object to this statement.

Expert testimony

During trial, Ms. Hoffman's counsel informed the court that Dr. Mark Rosen could not testify until the afternoon of the second day, and requested a recess to permit introduction of his testimony. The district court refused this request, and admonished counsel that he knew that the court wanted to complete the trial in two days. The district court therefore advised counsel to request that Dr. Rosen testify on the morning of the second day, but Dr. Rosen refused. Counsel renewed his request on the morning of the second day, but the district court denied it, stating that Dr. Rosen's testimony would cover issues already addressed in another doctor's deposition testimony.

Ms. Hoffman argues that the district court abused its discretion in denying her a brief continuance to permit Dr. Rosen to testify during the afternoon of the last day of trial. We disagree. First, the district court has wide discretion to administer the presentation of the witnesses by the parties. Second, it appears that Dr. Rosen's testimony had been largely addressed by Dr. Michael Monroe, who testified at trial by way of his deposition.[14]

Attorney fees

Ms. Hoffman argues that the district court abused its discretion in awarding TSA attorney fees because TSA's offers of judgment were made in bad faith. In this, she claims that the offers would not have even covered her medical expenses.

NRS 17.115(4) and NRCP 68(f) permit an award of attorney fees and costs when a party fails to recover more than a tendered offer of judgment. In exercising its discretion under NRCP 68(f), the district court must consider the following:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.[15]

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[14]We also note that, in retrospect, any error in refusing the requested continuance was harmless given the defense verdict on liability. The doctor's testimony related to causation, not negligence.

[15]Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001) (citing Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983)).

We conclude that the district court committed no abuse of discretion in its award of attorney fees. While Ms. Hoffman appears to have made her claim in good faith, the district court could reasonably have concluded that TSA's offers were made good faith and, given the relative weakness of her liability claims against TSA, that her refusal was grossly unreasonable. Finally, there is no indication that TSA's fees were unreasonable or unjustifiable in amount.

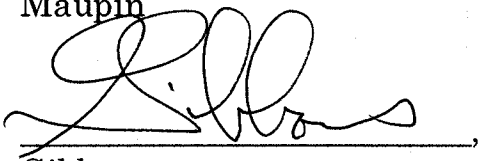
CONCLUSION

We conclude that the jury instruction addressing the "open and obvious danger" rule contained a correct statement of law. We also discern no other errors that justify reversal for a new trial.

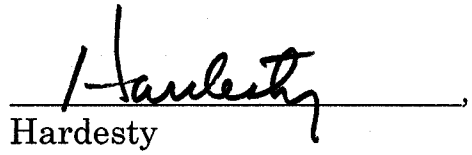
Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Stewart L. Bell, District Judge
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