IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN LEWIS, TERESA RAE WEBB AND TRICIA MARIE GASSE,
Appellants,
vs.
SEA RAY BOATS, INC., A TENNESSEE CORPORATION,
Respondent.

No. 45001

FILED

JUN 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 after a jury verdict in a products liability case and from a post-judgment order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Leo Gasse and Robin Lewis were poisoned by carbon monoxide (CO) while sleeping on a Sea Ray boat. As a result, Gasse died and Lewis suffered a catastrophic brain injury. Lewis, along with Gasse's heirs, (collectively appellants), sued Sea Ray for strict liability, contending that when the boat was manufactured in 1981 it contained defective warnings, which caused Gasse's death and Lewis's injury. Before trial, the district court granted Sea Ray's motion in limine to preclude reference to a post-sale duty to warn. After a jury trial, the jury found in favor of Sea Ray. Appellants moved for a new trial arguing, among other things, that Sea Ray's counsel committed misconduct during its closing argument by arguing facts that were not in evidence. The district court denied the motion for new trial. Appellants appealed, arguing that (1) the district court abused its discretion by granting Sea Ray's motion in limine to exclude reference to a post-sale duty to warn, (2) the district court erroneously instructed the jury, and (3) the district court abused its

discretion by denying appellants' motion for new trial. We conclude that the district court did not err, and we affirm the district court's judgment. The parties are familiar with the facts, and we do not relate them further, except as necessary.

Motion in limine to preclude reference to a post-sale duty to warn

We review a district court's ruling on a motion in limine for an abuse of discretion.[1] Appellants argue that the district court abused its discretion by granting Sea Ray's motion in limine to exclude reference to a post-sale duty to warn because, between 1981 and 1993, Sea Ray learned that migrating CO from the generator could cause death or permanent brain injury and, therefore, Sea Ray had a duty to provide a post-sale warning. We conclude that this argument is without merit.

First, Nevada has not adopted a post-sale duty to warn in strict products liability actions, and we are not persuaded to adopt such a position based on appellants' citations to the American Law of Products Liability, Madden Products Liability, and the Restatement (Third) of Torts.

Second, appellants sued Sea Ray under the theory of strict liability based on inadequate warnings. Under this theory, "strict liability may be imposed even though the product is faultlessly made if it was unreasonably dangerous to place the product in the hands of the user without suitable and adequate warning concerning safe and proper use."[2] Thus, the issue was whether the warnings Sea Ray issued with the boat

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[1]Whisler v. State, 121 Nev. ___, ___, 116 P.3d 59, 62 (2005).

[2]Outboard Marine Corp. v. Schupbach, 93 Nev. 158, 162, 561 P.2d 450, 453 (1977).

when it was manufactured in 1981 were sufficient. If the 1981 warnings were insufficient, Sea Ray would be strictly liable and, as Sea Ray argued, adding a post-sale duty to warn if the original warning was inadequate, would be meaningless. Thus, we conclude that the district court did not abuse its discretion by granting Sea Ray's motion in limine to preclude reference to a post-sale duty to warn.

Erroneous jury instructions

Appellants argued that the district court erroneously instructed the jury regarding, (1) the post-sale duty to warn, (2) foreseeability, (3) superseding cause, (4) misuse, and (5) assumption of the risk. We will not reverse a judgment based on erroneous jury instructions unless, in light of the evidence, that instruction amounted to prejudicial error.[3] "[A] party is entitled to have the jury instructed on all of his theories of the case that are supported by the evidence."[4] A jury instruction must be consistent with existing law and, even if correct, the district court retains discretion to refuse to admit a misleading instruction.[5] Finally, it is the parties' responsibility to make an adequate appellate record,[6] and to preserve a jury instruction issue for appeal, it is

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[3]Mainor v. Nault, 120 Nev. 750, 768, 101 P.3d 308, 320 (2004); Pfister v. Shelton, 69 Nev. 309, 310, 250 P.2d 239, 239 (1952).

[4]Lewis v. Sea Ray Boats, Inc., 119 Nev. 100, 106, 65 P.3d 245, 249 (2003).

[5]Silver State Disposal v. Shelley, 105 Nev. 309, 311, 774 P.2d 1044, 1046 (1989).

[6]Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

necessary that the party object and "distinctly state the grounds for the objection."[7]

Post-sale duty to warn[8]

Appellants contend that jury instruction number 48, which stated that a manufacturer does not have a post-sale duty to warn, was error. As stated above, we have not adopted a post-sale duty to warn in a strict products liability case, and we decline to do so. Further, appellants did not actually proffer a jury instruction containing the language of the Restatement (Third) of Torts or other law but, instead, appellants orally requested that Sea Ray's instruction describing that it had no post-sale duty to warn be modified to state that a manufacturer who issues an adequate warning at the time the product is sold does not have a post-sale duty to warn. Again, the issue at trial was whether Sea Ray's warning was adequate or whether Sea Ray would be held strictly liable for the 1981 warning, not whether Sea Ray was liable because of a post-sale duty to warn. The instruction properly stated Nevada law, and we conclude that the modification Sea Ray requested would do little besides mislead the jury.

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[7]Johnson v. Egtedar, 112 Nev. 428, 434, 915 P.2d 271, 275 (1996); see NRCP 51(c)(1); see also Carson Ready Mix, 97 Nev. at 476, 635 P.2d at 277 ("[W]hen the record does not contain the objections or exceptions to instructions given or refused [this court will] not consider appellant's claim of error with regard to those instructions.").

[8]Although it is true, as Sea Ray argues, that appellants failed to object to the instruction below, we nevertheless address appellants' argument because appellants did ask the district court to modify the instruction, and on appeal are challenging denial of the modification.

Foreseeability

Appellants proffered two instructions regarding foreseeability, which the district court denied. Appellants argue that one of the instructions was necessary because there was testimony that their theory of the accident was too "freakish" to be true, which raised the issue of whether appellants were required to prove that the actual sequence of events leading to the injury was foreseeable, or whether it was sufficient that they prove that the general field of danger was foreseeable to the manufacturer. Appellants cite to Moran v. Faberge, Inc.[9]

Moran is distinguishable from the instant case because it is a negligence case and not a strict products liability case. The primary issue in Moran was whether the plaintiff was making a reasonably foreseeable use of the product that then imposed the manufacturer with a duty to warn.[10] The jury was properly instructed on the duty to warn in a strict products liability case, and it would have been improper to extend Moran to the instant situation. Further, there was expert testimony that the manner in which the accident occurred was foreseeable, thus making the foreseeability issue one of expert credibility.

Regarding the second instruction, appellants argue that it was necessary to instruct that a warning must be given if death or serious injury is reasonably foreseeable, though rare because Robert Taylor gave expert testimony that warnings should not be given for hazards that are rarely encountered.

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[9]332 A.2d 11 (Md. 1975).

[10]Id. at 18-19.

Appellants' argument is without merit. They base their request for this instruction on a mischaracterization of Taylor's testimony. Taylor was actually discussing why all 151 warnings given in the boat manuals are not also placed on placards on the helm station of the boat. He opined that, because it would result in information overload and could cause boaters to potentially ignore the warnings, it would be better to warn at the helm of events that had a high risk and frequency. Thus, we conclude that appellants' argument is without merit, and the jury was properly instructed on foreseeability.

Superseding cause

Appellants argue that the instruction on superseding cause was erroneous because there was no evidence that Anthony Caro was a superseding cause. We conclude that Caro's testimony that he boarded the boat, opened the door, and could not recall whether he closed the bi-fold cabin door completely, along with expert testimony that the CO entered the cabin through a partially opened, bi-fold cabin door and the accident would not have happened if the bi-fold door had remained closed and that Gasse usually kept the door fully closed when the air conditioner was running, sufficiently supported the superseding cause instruction.

Misuse

The jury was instructed on the affirmative defense of misuse. Appellants argue that this was erroneous because there was no evidence to support an instruction on misuse. However, appellants failed to object below to the instruction. Appellants argue that it was impossible for them to object below to the misuse instruction because when the district court reviewed instructions with counsel, the misuse instruction was not included. We conclude that this assertion is without merit and that appellants have waived this issue on appeal.

The portion of the record appellants cited to as support that the misuse instruction was surreptitiously introduced for the first time when the instructions were read to the jury was the settling of the parties' supplemental instructions. Sea Ray represents that the misuse instruction was actually settled when the parties first settled the jury instructions, but appellants did not provide this transcript in the record. Further, the parties met jointly at appellants' attorney's office to number the jury instructions, and appellants failed to object to the misuse instruction when it was read to the jury. Thus, we conclude that appellants have not preserved this issue for appeal, and we decline to address it.

Assumption of the risk

Appellants argue that there was no evidence that Gasse and Lewis knew of the CO hazards the boat's generator presented, nor did they know of CO's dangerous properties. Appellants contend that without knowledge of the four dangerous properties of CO, Gasse and Lewis could not appreciate the hazard.

We first conclude that appellants' argument that Gasse and Lewis must have had knowledge of the four dangerous properties of CO to appreciate its hazard is without merit. Second, there is evidence supporting both appellants' position that Gasse and Lewis did not assume the risk and Sea Ray's position that they did. The district court stated that whether Gasse and Lewis knew of the risks of CO should properly be argued to the jury and that the jury should therefore be instructed accordingly. We conclude that because Sea Ray and appellants have conflicting interpretations of the evidence and testimony, such conflicts are appropriately resolved by the jury, and Sea Ray presented some

evidence to support that Gasse and Lewis had been warned about CO, it was not improper to give this instruction.

Based on the above, we conclude that the district court did not erroneously instruct the jury.

Misconduct during closing argument

We review an order denying a motion for new trial for an abuse of discretion,[11] and "[a] jury's verdict will not be overturned if it is supported by substantial evidence unless the verdict was clearly erroneous when viewed in light of all of the evidence presented."[12] Appellants argue that, during his closing argument, Sea Ray's attorney knowingly made a false statement of material fact to the jury in violation of SCR 172(1)(a). Appellants contend that Sea Ray's attorney's argument, that no boats or boat manufacturers provided the warning that appellants argued Sea Ray was responsible to give, was misconduct because there were no facts in the record to support this assertion. Sea Ray argues that appellants have waived this issue on appeal for failure to object. Sea Ray contends that even if not waived, evidence supported the statements, and it committed no misconduct.

We first conclude that Sea Ray is judicially estopped from arguing that appellants waived their claim. Judicial estoppel is a discretionary doctrine, which is designed to protect the judiciary's

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[11]Langon v. Matamoros, 121 Nev. ___, ___, 111 P.3d 1077, 1078 (2005).

[12]Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 698, 962 P.2d 596, 601 (1998).

integrity.[13] In deciding whether judicial estoppel applies, courts look to whether:

> "(1) the same party has taken two positions; (2) the positions were taking in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake."[14]

Applying the above factors, Sea Ray argued below that appellants objected to the closing argument statements, and the district court properly overruled the objection because there was evidence in the record to support the argument. On appeal, Sea Ray asserts the contrary position. Sea Ray was successful in asserting its former position below, as the district court denied appellants' motion for a new trial based on Sea Ray's arguments. There is nothing to indicate that Sea Ray's position was taken out of ignorance, fraud, or mistake. Thus, we conclude that Sea Ray is estopped from arguing waiver.

However, we next conclude that Sea Ray is correct that evidence supported the statements. An attorney's closing argument is not evidence and does not establish the facts of the case.[15] As such, attorneys enjoy "wide latitude in arguing facts and drawing inferences from the

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[13]Mainor v. Nault, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004); NOLM, LLC v. County of Clark, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004).

[14]Mainor, 120 Nev. at 765, 101 P.3d at 318 (quoting Furia v. Helm, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

[15]Jain v. McFarland, 109 Nev. 465, 475, 851 P.2d 450, 457 (1993).

evidence" during closing argument.[16] And, attorneys are permitted "to argue any reasonable inferences from the evidence the parties have presented at trial."[17]

Sea Ray contends that when appellants introduced the poster containing the compilation of warnings made to boaters as of 2003, it was entitled to introduce the entire 2003 Coast Guard manual, which dealt with the current state of knowledge regarding CO risks. Sea Ray also introduced an industry document that described the comprehensive information that recreational boaters needed to know about CO, which was published in 1991. Appellants did not object to introduction of this evidence. We conclude that, because appellants introduced the exhibit describing the various warnings and never objected to Sea Ray's introduction of the evidence, it was not improper for Sea Ray to comment on appellants' evidence during closing argument, and there was sufficient evidence to support Sea Ray's comments. Therefore, we conclude that the district court did not abuse its discretion by denying appellants' motion for a new trial.[18]

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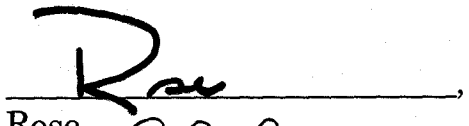
[16]Id. at 476, 851 P.2d at 457.

[17]Id.

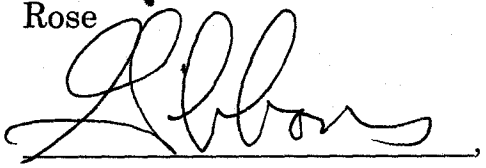
[18]Although Sea Ray requested clarification of appellants' counsel, contending that there was a defect in appellants' appeal, our decision renders this issue moot and we decline to otherwise address it.

Accordingly, we

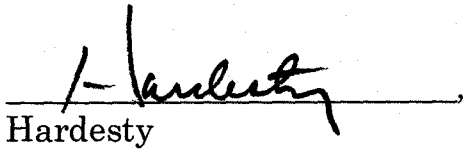
ORDER the judgment of the district court AFFIRMED.



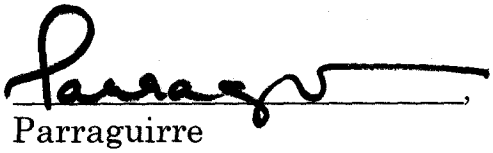
_____, C.J.
Rose



_____, J.
Gibbons



_____, J.
Hardesty



_____, J.
Parraguirre

MAUPIN, J., dissenting:

I would reverse. In my view, on further reflection, the original warnings in this case were defective as a matter of law.

_____, J.
Maupin

cc: Hon. Jessie Elizabeth Walsh, District Judge
Bourgault & Harding
Frank C. Cook
Parnell & Associates
Snell & Wilmer/Phoenix
Clark County Clerk