

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES MOORE AND DONNA
MOORE,
Appellants,
vs.
SO MIN LEE,
Respondent.

No. 45424

FILED

SEP 28 2007

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Alvarado
DEPUTY CLERK

This is an appeal from a district court judgment on a jury verdict and an order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On appeal appellants Charles and Donna Moore contend that the district court abused its discretion by allowing photographs of the two vehicles involved in the accident to be admitted into evidence. The Moores assign error to several evidentiary rulings and to the district court's decision denying their motions to excuse a juror and for a new trial.

Photographic evidence

The Moores argue that the district court abused its discretion in admitting the photographs and allowing Lee to argue without expert opinion that the lack of damage to both vehicles demonstrated that the accident was low impact. The district court has wide discretion in determining whether evidence is relevant or otherwise admissible, and the district court's decision will not be overturned absent manifest abuse of that discretion.¹ NRS 48.015 states that evidence is relevant if it has "any

¹See Parch v. Levine, 112 Nev. 1538, 1548, 930 P.2d 103, 110 (1996)

tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” NRS 48.035 allows the district court to exclude evidence if its probative value is substantially outweighed by the danger that it will confuse the issues or mislead the jury. The Moores claim that Lee was required to present expert testimony to avoid juror speculation. As support, the Moores rely on the Supreme Court of Delaware’s conclusion in Davis v. Maute.² In which the court concluded that a defendant “may not describe or characterize the magnitude of the damage to the victim’s automobile unless the defendant can produce expert testimony linking the magnitude of the automobile damage to the plaintiff’s personal injuries.”³ We decline to apply Davis to the facts presented here. Instead, we conclude that Lee was qualified to testify as a lay witness as she was involved in the accident. Furthermore, the jury had the benefit of the testimony of Dr. Holper who noted that some accidents are so minor in nature that injury is unlikely. Here, we conclude that the district court did not abuse its discretion by admitting the photographic evidence.

Jury Instructions

The Moores next argue that the district court abused its discretion in refusing to give their proposed jury instruction on the apportionment of damages, which stated:

If [the Moores] have proven that the actions of Defendant So Min Lee was the cause of the injury then, the burden shifts to [Lee] to apportion

²770 A.2d 36, 40 (Del. 2001).

³Id.

damages caused by successive accidents. If [Lee] fails to meet this burden, then she is jointly and severally liable with the other negligent drivers for the entire amount of damages attributable to the injury. Therefore, you should list [the Moores'] entire damages without reduction for any unapportioned damages.

The court instructed the jury that a person with a pre-existing condition or disability at the time of an injury is not entitled to damages for the pre-existing problem, but that a person is entitled to recover damages from any aggravation of the pre-existing conditions or disability proximately caused by the subject injury or accident. Because the district court's instruction is consistent with Nevada pattern jury instructions regarding injuries, we conclude that the district court did not abuse its discretion in refusing to instruct the jury with the Moores' proposed instruction.

Additionally, the Moores claim that the district court abused its discretion by refusing to issue a limiting jury instruction to prevent speculation as to whether the damages depicted in the photographs suggested the accident was low impact and thus insufficient to cause injury to the Moores. The Moores proposed the following instruction, which was refused by the trial court: "[t]he defendant has presented no evidence of the correlation between the damage shown in the photographs of the motor vehicles and the severity of the plaintiff's personal injuries. Therefore, you should not speculate on this issue." The Moores argue that respondent improperly argued that the minor damage to cars in the photograph consequently equals low impact and therefore no injury.

Although the Moores rely on Levine v. Remolif,⁴ and Jeep Corp. v. Murray,⁵ to support their appellate arguments, neither case prohibits the introduction of photos of the vehicles involved in a personal injury suit. Further, neither case requires a limiting instruction as to what evidentiary weight the jury should assign to the photos when the defense does not present expert testimony. Levine indicated that an expert cannot speculate about speed of the impact from examining pictures of the vehicles.⁶ Jeep Corp. concluded that expert opinion was properly supported by photographs and other reliable facts.⁷ Additionally, the Moores proposed instruction implied that Lee must disprove a causative link between the accident and the Moores' personal injury claims, but it is the Moores' burden to establish that Lee's negligence caused their injuries.⁸ Accordingly, we conclude that the district court did not abuse its discretion by refusing to give the Moores' proposed jury instructions.⁹

⁴80 Nev. 168, 390 P.2d 718 (1964).

⁵101 Nev. 640, 708 P.2d 297 (1985).

⁶80 Nev. 168, 170, 390 P.2d 718, 719 (1964).

⁷101 Nev. 640, 643, 708 P.2d 297, 299-300 (1985).

⁸Joynt v. California Hotel & Casino, 108 Nev. 539, 835 P.2d 799 (1992).

⁹We have considered all of the arguments put forth on appeal and we conclude that they lack merit.

Juror misconduct

The Moores assert that, because a juror informed a bailiff that he had made a decision in the case before the case was submitted to the jury, the district court should have disqualified that juror.

The district court's decision whether to disqualify a juror is reviewed for an abuse of discretion.¹⁰ Here, although the juror's statements to the bailiff were of concern to the trial court, any element of prejudice was eliminated following the district court's questioning of the juror in question and the other jurors as to whether they had been influenced by the first juror's statements. After questioning of the juror, the district court determined that the juror did not exhibit any bias or predisposition to rule in Lee's favor. The record indicates that the court and both parties were satisfied that none of the other jurors were tainted. Therefore, we perceive no abuse of discretion in the district court's decision not to disqualify any jurors.

Attorney misconduct

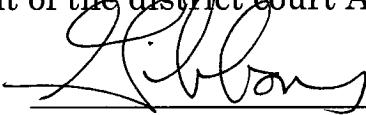
Before trial, the Moores moved to exclude references to prior trial testimony. The district court granted the motion. Nevertheless, during opening statements, Lee's attorney referred to "prior trial testimony."

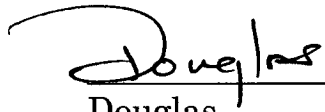
The Moores contend that the jury was irreparably tainted by the reference to "prior trial testimony". In response, Lee contends that it was impossible to know to what testimony the district court was referring.

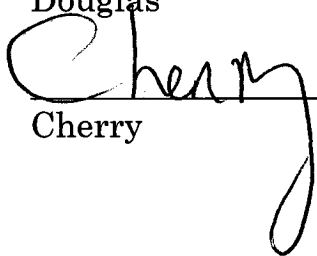
¹⁰Leonard v. State, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001).

We review orders denying new trial motions for an abuse of discretion.¹¹ In the case of attorney misconduct that is objected to and where the attorney is admonished, the party moving for a mistrial bears the burden of showing that the objection could not remove the misconduct's effect.¹² Here, the district court had instructed counsel to use "prior sworn testimony" as opposed to "prior trial testimony." The mistake was made only once and it was quickly admonished and not mentioned again. The Moores argue that the statements were prejudicial because they suggest that the Moores were litigious. However, as noted above the district court admonished Lee's counsel and the mistake was made only once. We conclude the Moores were not prejudiced by the statements made by Lee's counsel. Therefore, we conclude that it was not an abuse of discretion to deny a mistrial on this basis. For the above reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Cherry

¹¹Lioce v. Cohen, 122 Nev. ___, ___, 149 P.3d 916, 926 (2006).

¹²Id.

cc: Hon. Michelle Leavitt, District Judge
John J. Graves Jr., Settlement Judge
Victor Lee Miller
Gentile & Howard
Eighth District Court Clerk