IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDALL H. SELLET, AN INDIVIDUAL; AND LINDA SELLET, AN INDIVIDUAL,
Appellants,
vs.
THE HERTZ CORPORATION, A DELAWARE CORPORATION; AND ANTHONY L. SASSO, AN INDIVIDUAL,
Respondents.

No. 45788

FILED

JUL 20 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a district court judgment in a personal injury action, an order denying a motion for a new trial, and a post-judgment order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

On September 8, 2000, appellants Randy and Linda Sellet and Linda's mother, Mrs. Brooks, flew to Las Vegas from their home in South Carolina to take a driving trip through the northwest. When they arrived at McCarran International Airport, they proceeded to the shuttle bus passenger pick-up area for respondent Hertz Corporation. Respondent Anthony Sasso, a Hertz bus driver, approached the curb to pick up the Sellets and other passengers. As the bus approached, its exterior rearview mirror allegedly struck Randy on the left side of his head. Randy allegedly suffered brain damage from the accident. At trial, Hertz cast some doubt on whether the exterior rearview mirror even hit Randy; and

evidence revealed that Randy may have suffered from psychological episodes and/or deterioration, not brain damage.

At the conclusion of a five-day trial, the jury found in favor of Sasso and Hertz, and the district court entered a judgment accordingly. The district court also entered an order awarding Hertz $53,618.50 in attorney fees and $90,799.64 in costs, based upon Hertz's motion for attorney fees and third revised memorandum of costs.

The Sellets now appeal the denial of their motion for a new trial and the award of $53,618.50 in attorney fees.

Motion for a new trial

This court reviews a denial of a motion for a new trial for an abuse of discretion.[1] To determine the propriety of granting a new trial, the issue is whether it would have been impossible for a jury to reach their verdict had they properly applied the court instructions.[2]

The Sellets contend that they are entitled to a new trial under NRCP 59(a)(5)[3] because the jury manifestly disregarded the jury

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[1] Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

[2]Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982); see Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (noting that the court "is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party").

[3]NRCP 59(a) provides in part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved

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instructions. They argue that based on the evidence presented at trial, it would have been impossible for the jury to reach a verdict in favor of Hertz. They also contend that it was undisputed that Sasso's negligence caused the bus mirror to strike Randy on the left side of the head. The Sellets further argue that because there was conclusive evidence of Sasso's negligence, the jury was at least obligated to determine whether Randy was comparatively negligent.

Hertz responds that it is within the province of the jury to evaluate the credibility of the witnesses and determine which testimony to believe.[4] Hertz contends that the only eyewitness to the accident was Mrs. Brooks, and Randy did not testify. Hertz points out that the testimony shows that Mrs. Brooks was seventy-three years old at the time of the accident, and it was 11:30 p.m. in Las Vegas, or approximately 2:30 a.m. in her time zone in South Carolina. Hertz argues that other than the mirror allegedly hitting Randy, Mrs. Brooks did not remember anything else about the circumstances surrounding the accident. She did not remember whether other passengers were waiting to board the Hertz bus, she did not remember whether she needed to step off the curb in order to get on the bus, she did not recall how she got on the bus, and she did not

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> party: . . . (5) Manifest disregard by the jury of the instructions of the court.

[4]Douglas Spencer v. Las Vegas Sun, 84 Nev. 279, 282, 439 P.2d 473, 475 (1968) ("It is the prerogative of the trier of facts to evaluate the credibility of witnesses and determine the weight of their testimony, and it is not within the province of the appellate court to instruct the trier of fact that certain witnesses or testimony must be believed.").

recall whether Randy needed help getting on the bus. Mrs. Brooks admitted that she kept asking Randy whether the bus had hit him. Hertz argues that Sasso testified that he did not hit Randy with the bus mirror, that there were fifteen to twenty people waiting at the bus stop, and that no one other than Randy mentioned anything about a bus mirror hitting him. Hertz further argues that the jury followed the instructions and weighed the credibility of the witnesses as directed by the instructions.

Based on the evidence presented at trial, we conclude that it was not impossible for the jury to reach the verdict that it reached. Drawing all inferences in the respondents' favor, we conclude that there was not conclusive evidence of Sasso's negligence.[5] Randy and Mrs. Brooks were the only two eyewitnesses of the alleged accident. Randy did not testify at trial. Even though Mrs. Brooks had testified, the respondents cast doubt on her memory of events surrounding the incident. Further, Sasso testified that there were fifteen to twenty people waiting at the bus stop, and that no one other than Randy and Linda mentioned anything about a bus mirror hitting him.

Randy's accident reconstruction expert admitted that the bus would have to come in at a twenty-five degree angle for the mirror to hit Randy, if the Sellets were standing where Mrs. Brooks said they were standing; which was approximately two to three feet from the curb. The reconstruction expert based his reconstruction on a number of assumptions; he assumed the angle at which the bus approached the curb, and he assumed the distance the mirror was angled away from the bus.

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[5]See Arnoult, 114 Nev. at 238, 955 P.2d at 664.

Thus, while it was possible from the evidence presented that Randy was hit by the bus mirror, a reasonable jury could have concluded that the bus mirror never hit Randy,[6] and thus, we conclude that the district court did not abuse its discretion in denying the Sellets' motion for a new trial.

Manifest injustice

The Sellets further argue that a new trial is warranted to prevent a manifest injustice because the jury only deliberated for thirty minutes, and that the jury could not have possibly considered five days' worth of evidence and fifty-eight exhibits in thirty minutes. The Sellets additionally contend that the jury rushed its verdict because it was a Friday evening and "no juror wants to deliberate on a Saturday."

As a preliminary matter, we note that the Sellets made no objection to the Friday evening deliberations nor did they state on the record that the jury might manifestly disregard their instructions because they were deliberating on a Friday night. Failure to object to an error below generally precludes appellate review.[7] Nonetheless, a new trial may be granted due to insufficient evidence when there is plain error or manifest injustice.[8]

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[6]As for causation and damages, Hertz vigorously disputed Randy's claim that he suffered brain damage as a result of the accident. Hertz put a number of its own experts on the stand who all opined that Randy did not suffer from brain damage. One expert even opined that Randy's behavior stemmed from psychiatric disorders.

[7]Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983-84 (1981).

[8]Kroeger Properties v. Silver State Title, 102 Nev. 112, 114, 715 P.2d 1328, 1330 (1986) (providing that insufficiency of the evidence is not a

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In terms of the length of jury deliberation, we have previously concluded that the jury is presumed to have done its duty.[9] We note that the jury had access to juror notebooks containing the relevant exhibits throughout most of the five-day trial. Counsel for both parties referenced the exhibits early, and often, and encouraged the jurors to follow along. Thus, we conclude that the Sellets have not overcome the presumption that the jury abided by its duty to read and consider all instructions provided by the court. Accordingly, we conclude that a new trial is not warranted to prevent a manifest injustice.

Reversal of attorney fees

The Sellets further contend that the district court abused its discretion when it awarded attorney fees to Hertz.[10] Hertz does not oppose this argument on appeal. Further, in its answering brief, Hertz expressly waived the award of attorney fees. Therefore, we reverse the district court's award of attorney fees.

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ground for granting a new trial, except for where there is plain error or manifest injustice).

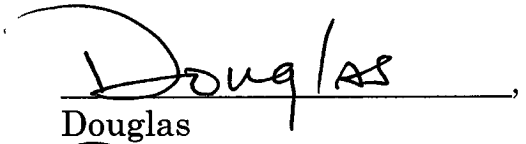
[9]Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 286 (1996) ("This court has always presumed that the jury abided by its duty to read and consider all instructions provided by the trial court.").

[10]The Sellets do not appear to challenge the district court's award of costs. Thus, we affirm the award of costs.

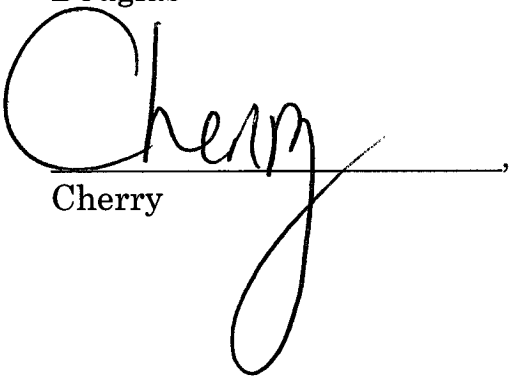
Thus, we affirm the district court's judgment and the order denying the new trial motion, and we reverse the post-judgment order awarding fees.

It is so ORDERED.

_____, J.
Gibbons



_____, J.
Douglas



_____, J.
Cherry

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Janet Trost, Settlement Judge
Barker Washburn
Stephen M. Smith
Pyatt Silvestri & Hanlon
Eighth District Court Clerk