IN THE SUPREME COURT OF THE STATE OF NEVADA

BETH REYNOSO,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE JENNIFER TOGLIATTI, DISTRICT JUDGE,
Respondents,
and
HAROLD ROZINSKI,
Real Party in Interest.

No. 46371

FILED

DEC 21 2006

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

ORDER GRANTING PETITION AND VACATING STAY

This is an original petition for a writ of mandamus and prohibition challenging a district court order that granted a petition for judicial review of a short trial verdict.

This case arises out of an automobile accident. The parties stipulated to participate in a short trial, governed by the Nevada Short Trial Rules (NSTR).[1] Real party in interest Harold Rozinski rode as a passenger in the car of Gregorio Perez while Rozinski administered a driving examination for the Department of Motor Vehicles. While crossing an intersection, petitioner Beth Reynoso struck Perez's car, allegedly

[1]Because the parties' stipulation to proceed in the short trial program occurred in 2004, before the amendment and renumbering of the short trial rules in 2005, we conclude that the rules as they existed in 2004 apply to this case.

injuring Rozinski. Rozinski and Reynoso settled with Perez prior to trial. Rozinski then proceeded against Reynoso in the short trial program.

Reynoso brings a petition for writs of mandamus and prohibition. Reynoso seeks a writ of mandamus to direct the district court to vacate its order granting Rozinski's petition for judicial review. Further, Reynoso seeks a writ of prohibition to enjoin the district court from reversing the short trial judgment and remanding for a new short trial. In her petition, Reynoso first argues that writs of mandamus and prohibition are procedurally appropriate because she has no other avenue for review of the district court's order. Next, on the merits of her petition, she contends that the district court abused its discretion by vacating the short trial judgment because the short trial judge did not exceed her authority or act with a manifest disregard of the law. We agree on both points.

Procedural propriety of writ petition

Rozinski contends that Reynoso's writ petition is procedurally inappropriate because she had a direct right of appeal, which she did not timely pursue.[2] We conclude that this contention lacks merit.

Neither a writ of mandamus nor a writ of prohibition will issue when the petitioner has a plain, speedy, and adequate remedy in the

[2]Rozinski also asserts that, a direct right to appeal notwithstanding, Reynoso's petition should be barred by the doctrine of laches. We conclude that Reynoso's timing of filing her petition did not substantially prejudice Rozinski. Therefore, her petition is not barred by laches.

ordinary course of the law.[3] A right of appeal is generally considered a plain, speedy, and adequate remedy, which would preclude writ relief.[4]

In support of his argument, Rozinski likens the district court's order, which was pursuant to NRS 38.145 (now NRS 38.241), to an order granting a motion for a new trial under NRCP 59, which is directly appealable under NRAP 3A(b)(2).

Rozinski's argument fails for two reasons: (1) the grounds for vacating an arbitration award (i.e., the same grounds for vacating the short trial verdict in this case under the parties' stipulation) are substantially different than the grounds for granting a motion for a new trial such that analogizing the two makes little sense; (2) the statutes specifically providing for a direct right of appeal in an arbitration context do not include a direct right of appeal from an order vacating an arbitration award and granting rehearing.

A motion for new trial may be granted on grounds, among others, such as irregular proceedings, misconduct by the prevailing party or the jury, newly discovered evidence, manifest disregard by the jury of jury instructions, or error in the law.[5] None of these grounds is available in vacating an arbitration award, or in this case, a short trial judgment.

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[3]Gumm v. State, Dep't of Education, 121 Nev. 371, 375, 113 P.3d 853, 856 (2005); NRS 34.170; NRS 34.330.

[4]Pan v. Dist. Ct., 120 Nev. 222, 224, 88 P.3d 840, 841 (2004); Dayside Inc. v. Dist. Ct., 119 Nev. 404, 407, 75 P.3d 384, 386 (2003); Karow v. Mitchell, 110 Nev. 958, 962, 878 P.2d 978, 981 (1994).

[5]NRCP 59(a).

NRS 38.145(1)(b)-(d)[6] only provide for vacating an arbitration award based on abuses by arbitrators, while NRS 38.145(1)(a) only provides for vacating an arbitration award upon the severe grounds of corruption, fraud, or other undue means. Thus, using NRS 38.145(1) as providing the grounds for vacating a judgment in a short trial context would not, for example, provide a party to a short trial a means to obtain rehearing based on juror misconduct, opposing party misconduct, newly discovered post-trial evidence, or objected-to errors of law committed by the short trial judge.

Additionally, NRAP 3A(b)(2) specifically grants litigants the right to an appeal from an order granting a motion for a new trial. NRS 38.247(1) provides the only statutory rights to an appeal in the arbitration context. NRS 38.247(1)(e) provides for an appeal from "[a]n order vacating an award without directing a rehearing." However, the statute provides no right to an appeal from an order vacating an award with directing a rehearing, as is the case here. No right to appeal exists unless that right is provided by statute or court rule.[7]

Based on the above, we conclude that Reynoso had no direct right of appeal from the district court's order vacating the short trial

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[6]The legislature repealed NRS 38.145, and it was replaced with NRS 38.241 in 2003. Because the parties' stipulation referred to NRS 38.145 to provide the grounds for vacating the short trial verdict, all references in this disposition are to NRS 38.145.

[7]Phelps v. State, 111 Nev. 1021, 1022, 900 P.2d 344, 345 (1995); Taylor Constr. Co. v. Hilton Hotels, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984); Kokkos v. Tsalikis, 91 Nev. 24, 25, 530 P.2d 756, 757 (1975).

verdict and remanding for a new trial. Therefore, Reynoso's writ petition to this court is procedurally appropriate.[8]

Merits of writ petition

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from office[9] or to control an arbitrary or capricious exercise of discretion.[10] A writ of prohibition is available when a district court acts without or in excess of its jurisdiction.[11] "Writ relief is not proper to control the judicial discretion of the district court, 'unless discretion is manifestly abused or is exercised arbitrarily or capriciously.'"[12]

Reynoso contends that the district court exercised its discretion arbitrarily or capriciously in concluding that the short trial

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[8]Rozinski also contends that a direct right of appeal exists from an order vacating a short trial judgment and remanding for a new short trial under our holding in Heilig v. Christensen, 91 Nev. 120 (1975). Heilig, however, merely reiterated the statutory right to appeal from an order confirming an arbitration award under NRS 38.205(1)(c) (now NRS 38.247(1)(c)). Id. at 122-23. Heilig does not support a conclusion that a direct right of appeal exists from an order vacating an arbitration award and remanding for a new trial. Therefore, Rozinski's argument lacks merit.

[9]NRS 34.160; see also Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 852 (1991).

[10]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

[11]State of Nevada v. Dist. Ct. (Anzalone), 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

[12]State of Nevada, 118 Nev. at 147, 42 P.3d at 237-38 (quoting Round Hill Gen. Imp. Dist., 97 Nev. at 604, 637 P.2d at 536).

judge acted in excess of her powers and in a manifest disregard for the law. The pertinent issue involves the short trial judge's refusal to instruct the jury on legal versus proximate causation and a theory of joint and several liability. The district court concluded that by rendering this ruling, the short trial judge exceeded her powers and manifestly disregarded the law. We disagree.

In Health Plan of Nevada, Inc. v. Rainbow Medical, LLC, we specifically addressed the statutory ground of an arbitrator exceeding his or her authority under NRS 38.145(1)(c) (now 38.241(1)(d)) for vacating an arbitration award.[13] We concluded that arbitrators exceed their powers when acting outside the scope of the governing contract.[14] "However, allegations that an arbitrator . . . made factual or legal errors do not support vacating an award as being in excess of the arbitrator's powers."[15] As we stated, the relevant question is "whether the arbitrator had the authority under the agreement to decide an issue, not whether the issue was correctly decided."[16]

Under NSTR 13 (2004), a short trial judge has authority during the pretrial conference to "rule on any motions or disputes including motions to exclude evidence, witnesses, jury instructions or

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[13]120 Nev. 689, 697-99, 100 P.3d 172, 178-79 (2004).

[14]Id. at 697, 100 P.3d at 178.

[15]Id. (citing SIGNAL Corp. v. Keane Federal Systems, 574 S.E.2d 253, 257 (Va. 2003); Batten v. Howell, 389 S.E.2d 170, 172 (S.C. Ct. App. 1990); Jaffa v. Shacket, 319 N.W.2d 604, 607 (Mich. Ct. App. 1982)).

[16]Id.

other pretrial matters." Although no record exists of the short trial here, the parties agree that it was during such a pretrial conference when the short trial judge ruled on the joint and several liability issue. Therefore, the short trial judge had the necessary authority to render the ruling denying Rozinski the ability to argue one-percent fault and recover on a theory of joint and several liability. Even if the short trial judge's ruling was incorrect, it would not constitute an excess of authority. Accordingly, we conclude that the district court erred in its conclusion that the short trial judge exceeded her authority.

We also addressed in Health Plan of Nevada, Inc. the manifest disregard of the law standard as a common law ground for vacating an arbitration award.[17] In so doing, we concluded that a "[m]anifest disregard of the law goes beyond whether the law was correctly interpreted, it encompasses a conscious disregard of applicable law."[18]

Joint and several liability is a method of apportioning damages against party defendants.[19] When a defendant settles with the plaintiff prior to trial, and only one defendant remains at trial, a jury instruction on joint and several liability is inappropriate.[20] In such a case,

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[17]Id. at 699, 100 P.3d at 179.

[18]Id.

[19]See Buck v. Greyhound Lines, 105 Nev. 756, 763-65, 783 P.2d 437, 442-43 (1989).

[20]NRS 41.141(3).

the judge will setoff any damages against the sole defendant by the amount of settlement with the other, previous defendant.[21]

Because Rozinski settled with Perez and proceeded to trial only against Reynoso, the short trial judge correctly refused to instruct the jury on joint and several liability. We therefore conclude that the district court erred in finding that the short trial judge manifestly disregarded the law by refusing a jury instruction on joint and several liability allegedly encompassed in the proffered "legal cause" instruction.

During oral argument before this court, counsel for Rozinski also asserted that the short trial judge manifestly disregarded the law by giving a jury instruction that, in order to be found liable, Reynoso had to be "the" proximate cause of the accident rather than "a" proximate cause. This argument was based on Rozinski's desire to be permitted during the short trial to show that even if Reynoso was not the sole cause, she would be liable so long as Rozinski proved that she was a cause of the accident—i.e., concurrent causation.

First, the actual instruction given to the jury on proximate cause is not in the record. We therefore cannot determine whether the short trial judge gave a correct proximate cause instruction. However, the proximate cause instruction proffered is contained in Rozinski's written objection to the short trial judge. We conclude that the instruction proffered, based on Nevada Pattern Jury Instruction 4.04, is a correct proximate cause instruction under Nevada law.

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[21]Id.

Second, based on the record, Rozinski did not sufficiently raise this argument to the short trial judge or to the district court in the petition for judicial review. Rozinski's objection to the short trial judge regarding the proximate cause instruction was that a legal cause instruction should be given instead of a proximate cause instruction. Rozinski then made the same argument to the district court. Rozinski never argued for a concurrent causation instruction or the use of the word "a" versus "the" in the proffered proximate cause instruction.

Rozinski may have been entitled to an instruction on concurrent cause. A concurrent cause instruction would have permitted the jury to consider that even if Reynoso showed that Perez was a cause of Rozinski's injuries, Reynoso would nevertheless be liable so long as Rozinski proved that Reynoso was a concurring cause of the injury.[22] Notably, the instruction on concurrent cause does not distinguish between "proximate" and "legal" cause.[23]

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[22]See Nev. J.I. 4.05, which states,

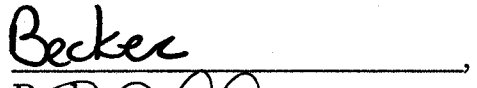
> There may be more than one [proximate] [legal] cause of an injury. When negligent conduct of two or more persons contributes concurrently as [proximate] [legal] causes of an injury, the conduct of each of said persons is a [proximate] [legal] cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. [It is no defense that the negligent conduct of a person not joined as a party was also a [proximate] [legal] cause of the injury.]

[23]Id.

Because Rozinski did not proffer a concurrent cause instruction to the short trial judge, the issue is not adequately preserved. Even if it were preserved, because there is no record of the evidence adduced during the short trial, we cannot determine whether a concurrent cause instruction was warranted as Rozinski suggests. Accordingly, even if properly preserved, the record does not support a finding of manifest disregard of the law.

Based on the foregoing, we grant the petition and direct the court clerk to issue a writ of mandamus instruction to the district court to vacate its order granting Rozinski's petition for judicial review and to enter an order denying the petition. Additionally, we vacate the stay previously granted by this court.

It is so ORDERED.



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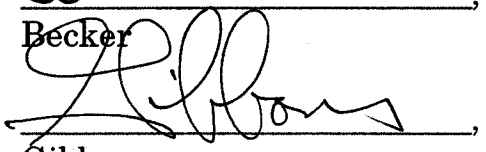
Becker



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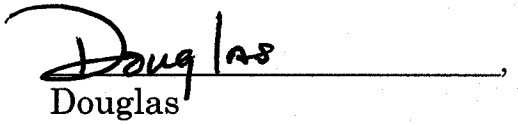
Gibbons



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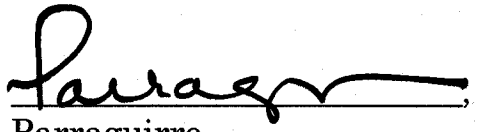

_____, J.
Parraguirre

cc: Hon. Jennifer Togliatti, District Judge
Lewis & Associates, LLC
Craig P. Kenny & Associates
Clark County Clerk

MAUPIN, J., concurring:

I concur in the result only.

 , J.

Maupin