

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS VAUGHAN,
INDIVIDUALLY, AND AS PERSONAL
REPRESENTATIVE OF KATHLEEN
VAUGHAN, DECEASED AND JARED
SHAFER, PERSONAL
REPRESENTATIVE OF KATHLEEN
VAUGHAN, DECEASED,
Appellants,
vs.
HARRAH'S LAS VEGAS, INC., A
NEVADA CORPORATION D/B/A
HARRAH'S LAS VEGAS; AND SHARON
AFFLERBACK,
Respondents.

No. 46821

FILED

JUL 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from district court judgment as a matter of law, judgment on a jury verdict in a personal injury action, and post-judgment orders awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellants Kathleen and Douglas Vaughan (collectively, Vaughan) filed this personal injury action against respondents Harrah's Las Vegas, Inc. (Harrah's) and Sharon Afflerback. Vaughan alleges that she was assaulted and battered by Afflerback, a Harrah's employee. Based upon this allegation, Vaughan sued Harrah's for respondeat superior liability, negligent hiring, and negligent training, supervision and retention. Vaughan sued Afflerback for assault and battery. At trial, the district court granted Harrah's judgment as a matter of law on all of Vaughan's claims. The district court allowed Vaughan's assault and

battery claim against Afflerback to go to the jury, and they concluded that Afflerback was not liable.

Vaughan raises five issues on appeal. First, Vaughan contends that the district court erred when it granted Harrah's judgment as a matter of law on her respondeat superior, negligent hiring, and negligent training, supervision and retention claims. Second, Vaughan argues that the district court abused its discretion when it trifurcated the trial into liability, compensatory damages, and punitive damages phases because the issues of liability and damages were inextricably intertwined. Third, Vaughan asserts that the district court abused its discretion when it excluded the following three pieces of evidence: (1) her Sunrise Hospital emergency room records and the testimony of her treating physician, (2) Afflerback's prior employment records, and (3) Afflerback's psychiatric records. Fourth, Vaughan contends that the district court manifestly abused its discretion when it granted, in part, Harrah's and Afflerback's motions for attorney fees and costs. Fifth, Vaughan argues that the district court abused its discretion when it denied her new trial motion. For the following reasons, we conclude that all of Vaughan's contentions lack merit except for her argument concerning the erroneous exclusion of her Sunrise Hospital medical records and the proffered testimony of her treating physician. While we conclude that the district court abused its discretion when it excluded this evidence, we hold that the error was harmless. The parties are familiar with the facts of this case, and we recount them only as necessary to explain our decision.

Granting judgment as a matter of law to Harrah's

Vaughan contends that the district court erred when it granted Harrah's judgment as a matter of law on her following claims: (1)

respondeat superior, (2) negligent hiring, and (3) negligent training, supervision, and retention. We disagree.

This court reviews de novo a district court's grant of judgment as a matter of law.¹ The district court improperly grants a judgment as a matter of law "[i]f there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, [because] the question is one of fact for the jury and not one of law for the court."² In determining whether the district court properly granted a judgment as a matter of law, this court will view all the facts in the light most favorable to the nonmoving party, and draw all reasonable inferences in his or her favor.³

1. Respondeat superior

NRS 41.745 governs employer liability for intentional torts by an employee. Under NRS 41.745(1), an employer is not liable for an employee's intentional tort unless the plaintiff proves all three of the following requirements: (a) the employee's conduct was not an independent venture, (b) the employee's conduct was committed in the course of his or her assigned tasks, and (c) the employee's conduct was reasonably foreseeable in light of the nature and scope of his or her employment. An employee's conduct was reasonably foreseeable "if a

¹Nelson v. Heer, 123 Nev. 26, ___, 163 P.3d 420, 425 (2007).

²Broussard v. Hill, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984).

³Id.

person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.”⁴

Forseeability

After viewing all the facts in Vaughan’s favor and assuming arguendo that respondent Sharon Afflerback assaulted Vaughan in the bathroom, we conclude that the district court did not err when it found that Afflerback’s conduct was not reasonably foreseeable in light of the nature and scope of her employment as a casino porter. The record on appeal indicates that Afflerback did not have a prior criminal history and had not received any customer or co-worker complaints of past violent assault. Accordingly, we do not need to reach the remaining two elements of NRS 41.745(1) and conclude that the district court did not err in granting Harrah’s judgment as a matter of law on the Vaughan’s respondeat superior claim.⁵

2. Negligent hiring

“The tort of negligent hiring imposes a general duty on an employer to conduct a reasonable background check on a potential

⁴NRS 41.745(1); see Wood v. Safeway, Inc., 121 Nev. 724, 740, 121 P.3d 1026, 1036-37 (2005) (concluding that a sexual assault by an employee of an independent contractor against a store employee was not reasonably foreseeable to the perpetrator’s employer because the perpetrator did not have a prior criminal history, and the employer had not received any customer or co-worker complaints of past improper sexual advances by the perpetrator or any other of its employees in the past ten years).

⁵See Wood, 121 Nev. at 740, 121 P.3d at 1036-37.

employee to ensure that” he or she is suitable for the position.⁶ “An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee’s dangerous propensities.”⁷

After viewing all the facts in Vaughan’s favor, we conclude that the district court did not err when it found that Harrah’s conducted a reasonable background check on Afflerback for a casino porter position. According to the record on appeal, the background check did not reveal any potentially dangerous propensities because she did not have a criminal record, and her prior work history did not include any violent altercations. While the record indicates that Afflerback was written-up at Harrah’s for sticking her tongue out at a supervisor and refusing to clean a certain area, this incident did not involve violence. Accordingly, we conclude that the district court did not err in granting Harrah’s judgment as a matter of law on the Vaughan’s negligent hiring claim.

3. Negligent training, supervision, and retention

An employer has a general duty to exercise reasonable care to ensure that an employee is properly trained and supervised in the performance of his or her position.⁸

After viewing all the facts in Vaughan’s favor, we conclude that the district court did not err when it found that Harrah’s did not

⁶Burnett v. C.B.A. Security Service, 107 Nev. 787, 789, 820 P.2d 750, 752 (1991).

⁷Hall v. SSF, Inc., 112 Nev. 1384, 1392, 930 P.2d 94, 98 (1996).

⁸Id. at 1393, 930 P.2d at 99.

breach its general duty to exercise reasonable care in training and supervising Afflerback. Vaughan failed to introduce any evidence that Afflerback received insufficient training. The record indicates that Afflerback had over 20 years of experience in the hospitality industry, and there is no evidence that Afflerback improperly performed her daily tasks or was inadequately supervised while performing her assignments. Accordingly, we conclude that the district court did not err in granting Harrah's judgment as a matter of law on the Vaughan's negligent training, supervision, and retention claim.

Trifurcating the trial

Vaughan contends that the district court abused its discretion when it trifurcated the trial into liability, compensatory damages, and punitive damages phases, because the issues of liability and damages were inextricably intertwined. We disagree.

This court reviews a district court's decision to bifurcate the liability and damages phases of a trial for an abuse of discretion.⁹ NRCP 42(b) governs whether a district court should separate a trial into distinct phases. Under NRCP 42(b), "[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim." A district court may not bifurcate a trial if the plaintiff's damages are inextricably interrelated with the defendant's liability.¹⁰

⁹Verner v. Nevada Power Co., 101 Nev. 551, 554, 706 P.2d 147, 150 (1985).

¹⁰Id. at 553-54, 706 P.2d at 149-50.

We conclude that the district court did not abuse its discretion when it separated the liability and damages phases under NRCP 42(b). The district court's decision was conducive to expedition and economy because it saved weeks of medical testimony about Vaughan's surgeries and subsequent paraplegia. The decision also avoided prejudicing the respondents because Vaughan's quadriplegia could readily distract the jury from the issue of liability and unreasonably impassion them. Lastly, Vaughan's injuries were not inextricably interrelated with respondents' liability because her alleged back and thumb injuries could have been sustained from a variety of different sources both before and after the alleged altercation.¹¹

Evidentiary issues

Vaughan contends that the district court abused its discretion when, over her objection, it excluded the following evidence from the liability phase of the trial: (1) her emergency room medical records and the proffered testimony from her emergency room treating physician, (2) Afflerback's prior employment records, and (3) Afflerback's psychiatric records. While we agree that the district court abused its discretion when it barred testimony from Vaughan's treating physician and her emergency room medical records, we conclude that its error was harmless. We further conclude that Vaughan's remaining two arguments lack merit.

¹¹Cf. id. (concluding that the district court abused its discretion when it bifurcated a trial because the issues of liability and damages were inextricably intertwined in a case where a plaintiff fell off an electric pole and was severely burned).

This court reviews a district court's decision to admit or exclude evidence for abuse of discretion.¹² If a district court abuses its discretion in allowing or excluding certain evidence or testimony, this court will not reverse a verdict and remand for a new trial unless the error affected the petitioning party's substantial rights.¹³ In determining whether an error affected the party's substantial rights, this court will review the entire record to determine whether the petitioner satisfied his or her burden of showing that a different verdict could reasonably be expected.¹⁴

NRS Chapter 48 et seq. governs the general admissibility of evidence, and NRS 50.085 governs questioning a witness about their character or past conduct. NRS 48.015 states that "relevant evidence" means evidence having any 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." Under NRS 48.025(1), a district court must generally admit all relevant evidence unless an exclusionary rule applies. Once such rule, NRS 48.035, empowers a district court to exclude evidence that is unduly prejudicial, wastes time, or is needlessly cumulative. Another exclusionary rule, NRS 50.085(3),

¹²State ex rel. Dep't Hwys. v. Nev. Aggregates, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976).

¹³NRS 178.598; NRCP 61.

¹⁴Boyd v. Pernicano, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963); see Morrison v. Air California, 101 Nev. 233, 237, 699 P.2d 600, 603 (1985) ("Appellant must show that but for the error in excluding the evidence, a different result might reasonably have been expected").

bars a party from introducing extrinsic evidence of a witness' past conduct to support his or her credibility unless the evidence concerns a criminal conviction. Under NRS 50.085(3), a party may cross-examine a witness about his or her prior conduct if the act is relevant to his or her truthfulness.

1. The proffered testimony of Vaughan's treating physician and Vaughan's emergency room records

We agree with Vaughan that the district court abused its discretion when it excluded testimony from her treating physician and her Sunrise Hospital emergency room medical records because the evidence was relevant and not unduly prejudicial. While we conclude that the district court abused its discretion by excluding this evidence, the error was harmless because the evidence carried little probative value. The medical records and proffered testimony essentially repeated Vaughan's statements to Harrah's employees after the alleged altercation. Moreover, the proffered evidence did not reveal a unique or substantial injury that Vaughan may have neglected to report to Harrah's employees. After reviewing the entire record, we conclude that the error was harmless because Vaughan failed to satisfy her burden of showing that a different verdict could have reasonably been expected if the medical evidence had been admitted.

2. Afflerback's prior employment records

While we agree with Vaughan that Afflerback's prior employment records may have been relevant to proving Vaughan's claims, we conclude that the records were inadmissible for two reasons. First, the records were inadmissible extrinsic evidence under NRS 50.085 because Vaughan attempted to introduce them to attack Afflerback's credibility and the records were not a criminal conviction. Second, the records lacked

an adequate foundation because Vaughan did not introduce any evidence showing who authored the disciplinary notation or exactly when it was entered.

3. Afflerback's psychiatric records

While we agree with Vaughan that Afflerback's psychiatric records may have been relevant to impeach her competence and memory,¹⁵ we conclude that the district court did not abuse its discretion when it excluded the records under NRS 48.035. The psychiatric records were highly prejudicial because the jury could have been misled to find Afflerback liable for the battery based upon their emotional reaction to her mental illness. Thus, the probative value of the psychiatric records was substantially outweighed by the danger of unfair prejudice.

The district court did not abuse its discretion when it granted attorney fees and costs

Vaughan contends that the district court abused its discretion when it granted attorney fees and costs to Harrah's and costs to Afflerback because they would not have prevailed if the district court had not repeatedly abused its discretion. We disagree.

¹⁵See Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (concluding that the collateral fact rule never bars a party from impeaching a witness' competence to testify with extrinsic evidence of his or her defective perception or memory).

This court reviews a district court's decision to award attorney's fees for a "manifest abuse of discretion."¹⁶ Under NRS 18.010(2), the court may award a prevailing party attorney fees if either of the following occurred: (a) he or she recovered less than \$20,000, or (b) the opposing party brought his or her claim without reasonable grounds.

We conclude that the district court did not manifestly abuse its discretion when it awarded attorney fees and costs to Harrah's and costs to Afflerback because they both prevailed at trial, and they did not recover more than \$20,000.

The district court did not abuse its discretion when it denied Vaughan's new trial motion

Vaughan contends that the district court abused its discretion when it denied her new trial motion. We disagree.

This court reviews the district court's ruling on a new trial motion for abuse of discretion.¹⁷ A petitioning party is entitled to a new trial under NRCP 59(a) if the district court erred, the party objected, and the error materially affected the party's substantial rights. NRCP 61 reiterates that a new trial is warranted only if the error affects the petitioning party's substantial rights.

We conclude that the district court did not abuse its discretion when it denied Vaughan's new trial motion because, as discussed above, the exclusion of her medical records did not affect her substantial rights and her remaining arguments lack merit.

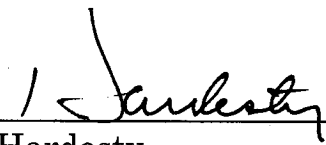
¹⁶Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139 (1994).

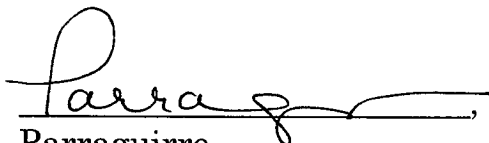
¹⁷Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).

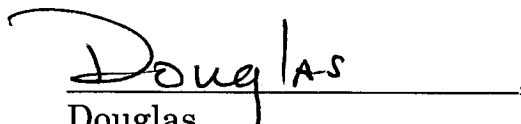
Conclusion

In summation, we reach five conclusions in this order. First, the district court did not err when it granted Harrah's judgment as a matter of law on Vaughan's respondeat superior and negligence claims. Second, the district court did not abuse its discretion when it trifurcated the trial because the liability and damages issues were not inextricably intertwined. Third, the district court did not abuse its discretion when it excluded Afflerback's prior employment records and her psychiatric records. While we conclude that the district court abused its discretion when it excluded Vaughan's Sunrise Hospital emergency room records and the testimony of her treating physician, we hold that the error was harmless because Vaughan failed to satisfy her burden of showing that a different verdict could reasonably have been expected if the evidence had been admitted. Fourth, the district court did not manifestly abuse its discretion when it granted, in part, Harrah's and Afflerback's motions for attorney fees and costs. Fifth, the district court did not palpably abuse its discretion when it denied Vaughan's new trial motion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Ara H. Shirinian, Settlement Judge
Richard Harris Law Firm
Ranalli & Zaniel, LLC
Smith Currie & Hancock LLP/Las Vegas
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
Eighth District Court Clerk