

IN THE SUPREME COURT OF THE STATE OF NEVADA

COURTESY CARS, INC., A NEVADA
CORPORATION D/B/A COURTESY
MITSUBISHI, N/K/A CITY
OLDSMOBILE, INC.; AND EDWARD T.
RINCON,
Appellants,
vs.
MARGARET MORGAN AND ROBERT
M. SPARKS,
Respondents.

No. 47582

FILED

APR 30 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY: *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered on a jury verdict in a personal injury action and a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

On September 6, 2004, John Oakes Jr., Robert Sparks, and Edward Rincon were involved in a fatal motor vehicle accident. Before the collision, Rincon, a car salesperson at Courtesy Mitsubishi, offered to take Sparks on a test drive of a high-performance Lexus. Rincon drove the car at high speeds, then turned it over to Sparks, encouraging him to "punch it." As Sparks sped through the streets of Las Vegas, Oakes was making a left turn into an apartment complex. The Lexus was traveling at least 67 miles per hour when it struck Oakes' car. The force of the impact threw Oakes out of his car and onto the street, causing his death. Thereafter, Margaret Morgan, Oakes' mother, and John Oakes Sr., Oakes' father (collectively, "Morgan") filed wrongful death actions against Courtesy and Rincon. The jury found in favor of Oakes' parents and awarded approximately \$12 million dollars in damages.

Courtesy Cars, Robert Sparks, and Edward Rincon (collectively, "Courtesy"), contend that a new trial is warranted because the district court made several evidentiary errors. In the alternative, Courtesy asserts that, even if the evidentiary errors do not rise to the level of reversible error, they prejudiced the jury resulting in a grossly excessive verdict. Finally, Courtesy contends a new trial is warranted because the jury verdict was inconsistent.

We conclude that the district court did not abuse its discretion in its evidentiary findings, and that the jury verdict was neither inconsistent nor inflamed by the jury's passion or prejudice.

DISCUSSION

Evidentiary findings

On appeal, Courtesy argues that the district court abused its discretion when it excluded evidence of Oakes' toxicology report and his failure to use his seat belt, and admitted evidence of Rincon's traffic citations. We disagree.

After addressing our standard of review, and a general review of the applicable law, we address each argument in turn.

Standard of review

This court reviews the district court's decision to admit evidence for abuse of discretion. Felder v. State, 107 Nev. 237, 241, 810 P.2d 755, 757 (1991).

Pursuant to NRS 48.035, the district court can exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.035 favors admissibility. Krause Inc. v. Little, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001). To merit exclusion on the basis of unfair prejudice, the "evidence must unfairly prejudice an opponent, typically by appealing to the emotional and sympathetic

tendencies of the jury, rather than the jury's intellectual ability to evaluate evidence." Id.

The toxicology report

Courtesy argues that the district court abused its discretion when it excluded Oakes' toxicology report, which showed marijuana metabolite in his system. Courtesy contends that the toxicology report was relevant to show contributory negligence because Oakes was driving while intoxicated.¹ Morgan argues that the toxicology report was irrelevant and prejudicial, and flawed.

Evidence of substance use prior to an accident is, by itself and absent evidence of erratic behavior at the time of the accident, insufficient to establish contributory negligence. See Holderer v. Aetna Cas. And Sur. Co., 114 Nev. 845, 852-53, 963 P.2d 459, 464 (1998).

We conclude that the district court did not abuse its discretion because there was insufficient evidence presented to establish a causal connection between Oakes' marijuana usage and the accident. Rather, there is an abundance of uncontroverted evidence that supports the district court's decision to exclude the toxicology report. At trial, an eyewitness testified that the Lexus was "weaving in and out of traffic at high speeds." Another eyewitness said that the Lexus was being driven in a "sporadic" way, with the driver stepping on the gas and then stopping. A witness who called 911 immediately after the accident told the emergency

¹Courtesy also argues that the district court abused its discretion by excluding testimony of Courtesy's expert pathologist who would have explained the effect of the marijuana in Oakes' system. Because Courtesy failed to timely disclose the expert, we do not reach the merits of its argument. NRCP 16.1(a)(2)(A) and (C).

operator that the Lexus had been “hauling ass.” The same eyewitness saw Oakes’ car stop and then, with plenty of time to proceed, turn left. According to the eyewitness and the police report, Oakes’ was almost entirely inside the apartment complex he was attempting to turn into when his car was struck by the Lexus. Sparks, who was driving the Lexus at the time of the collision, testified that Rincon never told him to slow down during the test drive and in fact encouraged him to speed up. While Rincon denied this, Nezar Shakshir, Sparks’ friend who had accompanied Rincon to the dealership, corroborated Sparks’ testimony. Moreover, Detective Redfairn, who had been assigned by the Las Vegas Metropolitan Police Department to perform the accident reconstruction, concluded that the Lexus’ excessive speed was the sole cause of the accident; he testified that Oakes’ left turn was proper. Moreover, there was no evidence presented at trial that showed that Oakes had been driving erratically.

It is also relevant to note that the Clark County coroner who performed Oakes’ autopsy testified that the blood drawn from Oakes that was used in the toxicology test was cardiac blood, not peripheral blood. The coroner explained that because cardiac blood is concentrated and prone to false results, the Coroner’s office had since changed its policy to draw both cardiac and peripheral blood, and to test the peripheral blood first.

We conclude that other than speculation, Courtesy has failed to demonstrate that Oakes’ marijuana use was a contributing cause to the fatal accident. Accordingly, we conclude that the district court did not abuse its discretion when it excluded the toxicology report.

Failure to use a seat belt

Courtesy argues that the district court abused its discretion when it excluded evidence of Oakes’ failure to use his seat belt at the time

of the accident. Courtesy asserts that the jury should have been allowed to consider the ramifications of Oakes' failure with regard to comparative negligence or failure on Oakes' part to mitigate damages. Courtesy's argument is without merit because Nevada prohibits the introduction of such evidence to establish negligence.

NRS 484.641 prohibits a party from using a failure to wear a seat belt to establish negligence or causation. NRS 484.641 states in pertinent part:

2. Any person driving, and [certain] passenger[s]....shall wear a safety belt if one is available for his seating position.

....

4. A violation of subsection 2 ... (b) May not be considered as negligence or as causation in any civil action or as negligent or reckless driving under NRS 484.377.

We have had occasion to consider NRS 484.641 in the strict product liability context. Jeep Corporation v. Murray, 101 Nev. 640, 708 P.2d 297 (1985), abrogated on other grounds by Countrywide Home Loans v. Thitchener, 124 Nev. ___, ___ & n.39, 192 P.3d 243, 252-55 & n.39 (2008). There, we expressed "serious doubts" about the relevance of evidence concerning the presence and use of seat belts. Id. at 645, 708 P.2d at 301. We concluded that evidence of the non-use of a seat belt was properly excluded because its probative value was substantially outweighed by the danger that it would "confuse the issues, mislead the jury, or result in undue delay." Id. at 646, 708 P.2d at 301.

Here, applying the same reasoning, we conclude that the district court correctly applied NRS 484.641 and excluded evidence of Oakes' failure to use his seat belt. Pursuant to NRS 484.641, Courtesy is

prohibited from using Oakes' failure to use his seat belt to establish negligence or causation. Further, our review of the record yields no facts supporting the argument that Oakes' failure to wear his seat belt was relevant to the fatal collision. Rather, the undisputed evidence shows that the Lexus was speeding and could not avoid hitting Oakes' car. We also note that the jury was aware that Oakes was ejected out of the car due to the force of the impact, and could have inferred that Oakes was not wearing a seat belt. Accordingly, we find no abuse of discretion in the district court's action to exclude Oakes' failure to use his seat belt.

Rincon's citation history

Courtesy asserts the district court abused its discretion when it admitted evidence of Rincon's prior and subsequent driving citations because it was inadmissible character evidence pursuant to NRS 50.085(3). Courtesy urges this court to reject the district court's explanation that the evidence was admissible for impeachment purposes because, on direct, Rincon admitted that he had received traffic citations and, therefore, there was no reason to impeach. Morgan, on the other hand, contends that the evidence was properly admitted for impeachment purposes because Courtesy opened the door to Rincon's driving history by attempting to portray Rincon as a good driver who received only one traffic citation between the ages of 17 and 30. We agree.

We conclude that the district court did not abuse its discretion when it admitted evidence of Rincon's traffic citation history because the defense opened the door to the evidence by attempting to portray Rincon as a good driver with only one traffic violation. Nevada's collateral evidence rule allows questions on cross-examination regarding a witness's past conduct. NRS 50.085(3) states as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

In an effort to show that Rincon was a safe driver, Courtesy referred to Rincon's driving history in its opening statement and during Rincon's direct testimony. On direct examination, Rincon testified that, prior to the fatal collision, he had received only one traffic citation between the ages of 17 and 30. Since Courtesy initiated the issue of Rincon's character as a safe driver, Morgan acted properly when questioning Rincon about two speeding tickets he had received in the months leading up to the fatal accident with Oakes. Rincon initially denied the two tickets, testifying that he had no recollection of them, but later admitted receiving the two traffic citations in the months before the fatal collision. The cross-examination was proper pursuant to NRS 50.085 because it was relevant to Rincon's truthfulness, and was within the boundaries of the issues raised on direct. Therefore, since Courtesy initiated the issue of Rincon's citation history, thereby opening the door to his character of being honest and a good driver, we conclude the district court did not abuse its discretion when it admitted evidence of Rincon's traffic citations to impeach Rincon.

Jury verdict

Although Courtesy has assigned several issues regarding the jury verdict for our review, the resolution of this appeal is determined by focusing on the overarching issues of (1) whether the jury verdict was legally inconsistent, and (2) whether the cumulative effect of all the argued evidentiary errors was such that it inflamed the jury with passion and prejudice. We conclude that the verdict was legally consistent and that the cumulative effect of any alleged errors did not inflame the jury with passion and prejudice. After addressing our standard of review, we will address each argument in turn.

Standard of review

The district court's decisions concerning special interrogatories and verdicts are reviewed for abuse of discretion. Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. ____, ____, 197 P.3d 1032, 1037 (2008).

Inconsistent jury verdict contention

Courtesy argues that inconsistencies in the verdict form are grounds for a new trial. Specifically, Courtesy points to two jury determinations as inconsistent: (1) the jury found Sparks both negligent and the proximate cause of Oakes' injuries, yet found Sparks zero percent responsible for the damages, and (2) the jury did not award damages for past loss of companionship, society, and comfort, but did award damages for future losses.

The parties have a duty to object to alleged inconsistent jury verdicts before the jury is discharged, however, the district court is obligated to refrain from entering a judgment when the answers to interrogatories are inconsistent with each other and one or more answers are also inconsistent with the general verdict. Lehrer McGovern, 124 Nev.

at ____, 197 P.3d at 1038 (2008). Further, a new trial is only warranted when the jury manifestly disregards the court's instructions. Carlson v. Locatelli, 109 Nev. 257, 260, 849 P.2d 313, 315 (1993).

Here, Courtesy did not object to the verdict before the jury was discharged. Rather, Courtesy objected to the verdict as inconsistent in its motion for a new trial. We conclude that Courtesy waived any objection to the allegedly inconsistent jury verdict. We further conclude that there were no fatal inconsistencies in the verdicts that would have required the district court not to enter judgment.

The verdict was not inconsistent because the jury properly followed the district court's instructions. The district court instructed the jurors to "impute" the driver's negligence to the dealer if it found that the driver, Sparks, drove the car for the dealer's benefit, and that the dealer retained control over the vehicle. The instruction was proper because it is consistent with Nevada law. Rocky Mt. Produce v. Johnson, 78 Nev. 44, 57-58, 369 P.2d 198, 204-05 (1962) (holding that an instruction permitting the jury to impute liability to a vehicle owner if "the presumption of agency by reason of car ownership was not rebutted" is a correct statement of the law and a question of fact to be determined by the jury in light of the evidence). Further, the jury's determination was proper because it is supported by the facts. Rincon, the dealer's agent, drove the car recklessly while demonstrating its capabilities to Sparks; Rincon encouraged Sparks to test drive the car, instructing Sparks to "step on it" to "see what it's got"; and Sparks and Shakshir testified that Rincon never told Sparks to slow down. Accordingly, the evidence supports the jury's finding that Sparks' negligence was imputed to the dealer via the dealer's agent, Rincon.

We also note that the allocation of fault is an issue of indemnity and contribution among the dealer, Rincon, and Sparks. Pursuant to NRS 41.141, which establishes a comparative negligence defense for injuries to person or property, even if the jury had not imputed all the negligence to the dealer, it could still have been held jointly liable to Morgan.

Courtesy's argument that the jury's award was inconsistent because it awarded only future damages is without merit. Not only did Courtesy fail to make a timely objection, but the instruction regarding damages did not differentiate between past and future damages.

Therefore, we conclude that the district court did not abuse its discretion when it denied a new trial because the jury verdict was not inconsistent and Courtesy failed to make timely objections to the alleged inconsistencies.

Jury verdict inflamed with passion or prejudice


Courtesy argues the jury verdict was excessive and based upon passion or prejudice. We reject Courtesy's assertion and conclude the district court did not abuse its discretion when it denied Courtesy's motion for a new trial on this basis.

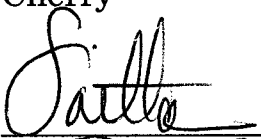
An award of punitive damages should not be disturbed unless it is so large as to appear to have been given under the influence of passion or prejudice. NRCP 59(a)(6). The district court has the power, pursuant to NRCP 59(a)(6), to order a new trial when excessive damages appear to have been given under the influence of passion or prejudice. Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 22, 16 P.3d 415, 417 (2001). However, this court has held that the mere fact that a verdict is large is not conclusive of it being the result of passion or prejudice. Id. at 24, 16 P.3d at 418.

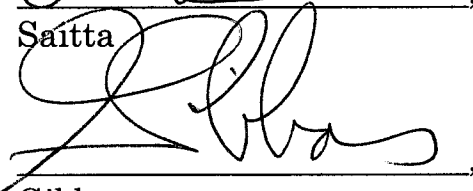
As previously discussed, we conclude that there is an abundance of uncontroverted evidence supporting the jury's verdict, and that the jury properly followed the district court's jury instructions. Accordingly, because there is evidentiary support for the damages reward, it cannot be deemed excessive or based upon passion or prejudice. Therefore, we conclude that the district court did not abuse its discretion in denying Courtesy's motion for a new trial.

Therefore, because we find that the district court did not abuse its discretion in its evidentiary findings, nor in its denial of Courtesy's motion for a new trial, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Valerie Adair, District Judge
M. Nelson Segel, Settlement Judge
Alverson Taylor Mortensen & Sanders
Cotkin & Collins
Lewis & Roca, LLP/Las Vegas
Palmer & Associates
Eighth District Court Clerk