IN THE SUPREME COURT OF THE STATE OF NEVADA

ANN GRASS,
Appellant,
vs.
PARK PLACE ENTERTAINMENT CORPORATION, A CORPORATION,
Respondent.

No. 47888

FILED

MAY 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment on a jury verdict in a tort action and a post-judgment order awarding attorney fees. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

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

In this appeal, we consider whether the district court erred in allowing the testimony of expert witness Jon Jasper. We also briefly address whether the district court committed reversible error by giving a "mere happening instruction" together with a res ipsa loquitur instruction. Finally, we determine whether the district court abused its discretion when it awarded attorney fees to respondent Park Place Entertainment Corporation.

Disclosure of expert witness

The mandatory pretrial discovery requirements provide that a party shall disclose to other parties the identity of any potential witness.[1] In addition, when a party's witness "is retained or specially employed to

[1]NRCP 16.1(a)(2)(A).

provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, [the identity of the potential witness shall] be accompanied by a written report prepared and signed by the witness."[2]

In this case, Park Place failed to accompany the disclosure of its potential expert witness Jasper with a written report. Accordingly, Grass argues that under NRCP 16.1, the district court should not have allowed Jasper to testify. We disagree.

We conclude that although Jasper was designated as an expert he merely testified as a percipient witness. Specifically, Jasper was an employee of the Otis Elevator Company, where he routinely provided service and maintenance to the Otis elevators located on Park Place's property. Thus, he was not a retained expert for whom a written report was required to be disclosed. Additionally, because Jasper's duties did not regularly involve giving expert testimony, Park Place was not required to disclose Jasper as an expert witness under NRCP 16.1. Therefore, we conclude that Grass' argument lacks merit.[3]

Jury instructions

During the settling of jury instructions, Grass had asked for and received a res ipsa loquitur instruction. The district court also gave a "mere happening instruction." This court recently concluded that unmodified mere happening instructions and res ipsa loquitur instructions

---

[2]NRCP 16.1(a)(2)(B).

[3]We have reviewed Grass' other arguments relating to Park Place's expert witness and conclude that they also are without merit.

should not be given together because they may confuse the jury.[4] Accordingly, Grass argues that by providing these two conflicting instructions, the district court committed reversible error. We disagree.

Indeed, "[j]ury instructions that tend to confuse or mislead the jury are erroneous."[5] "However, a judgment will not be reversed by reason of an erroneous instruction, unless upon consideration of the entire case, including the evidence, it appears that such error has resulted in a miscarriage of justice."[6] In this case, we conclude that the district court erred in giving the mere happening instruction together with the res ipsa loquitur instruction. However, we also conclude that such error has not resulted in any miscarriage of justice.[7] We therefore conclude that reversible error has not been demonstrated, and thus conclude that this argument also lacks merit.

Attorney fees

The district court awarded Park Place $23,976 in attorney fees after Grass failed "to obtain a judgment that exceed[ed] the arbitration award by at least 20 percent of the award."[8] In the pre-amendment

---

[4]Carver v. El-Sabawi, 121 Nev. 11, 15, 107 P.3d 1283, 1285 (2005).

[5]Id. at 14, 107 P.3d at 1285.

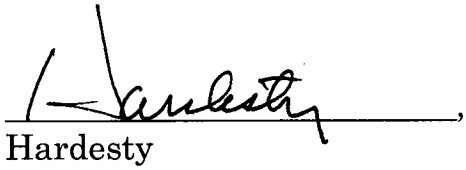
[6]Id.

[7]The record clearly indicates that Grass did not establish the requisite elements of res ipsa loquitur. Therefore, we conclude that the district court erred in giving the res ipsa loquitur instruction. However, we also conclude that this error does not warrant reversal because the inclusion of the res ipsa loquitur instruction served only to benefit Grass.

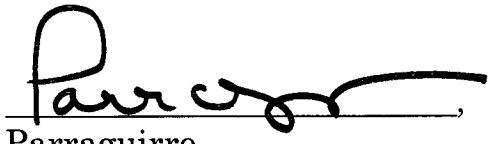
[8]See NAR 20(B)(2)(a).

version of NAR 20(B)(2), the prevailing party at a trial de novo was entitled to attorney fees, not to exceed $10,000.[9] Accordingly, Grass argues that the district court's award of attorney fees was excessive and must be capped at $10,000. We agree with Grass and conclude that the pre-amendment version of NAR 20(B)(2) applies because the request for trial de novo was submitted in April 2003, and the amendment to NAR 20(B)(2) was not made until January 2005. Accordingly, we

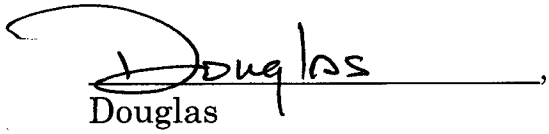
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Valorie Vega, District Judge
William F. Buchanan, Settlement Judge
Law Office of Donna Lee Schubert
Royal Jones Miles Dunkley & Wilson
Eighth District Court Clerk

---

[9]NAR 20(B)(2) (amended January 1, 2005).