

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH CHARLES TICICH, BY AND THROUGH HIS GUARDIAN AD LITEM, DAVID P. TICICH; EMILY LYNN TICICH, BY AND THROUGH HER GUARDIAN AD LITEM, DAVID P. TICICH; PETER M. TICICH, AN INDIVIDUAL; AND SUE MCCALL, AN INDIVIDUAL,

Appellants,

vs.

PACIFIC COAST BUILDING PRODUCTS, INC., A NEVADA CORPORATION; AND PACIFIC COAST BUILDING PRODUCTS, INC., D/B/A PABCO GYPSUM,
Respondents.

No. 47937

FILED

MAY 06 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered on a jury verdict in a wrongful death action and from a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Appellants Sue McCall, Peter Ticich, and Joseph and Emily Ticich through guardian at litem David Ticich (the Ticiches), sued respondents Pacific Coast Building Products and Pacific Coast Building Products d.b.a. Pabco Gypsum (collectively Pabco) for the wrongful death of their father, Gary Ticich. Gary Ticich died as a result of injuries he sustained when he fell from the top of a load he was securing to his truck at the Pabco facility.

After a four-day trial, the jury found that Pabco did not negligently cause Ticich's death. The Ticiches appeal, arguing that the

district court erred when it excluded testimony regarding Pabco's standard of care, refused jury instructions regarding Occupational Safety and Health Administration (OSHA) guidelines and Federal Motor Carrier Safety Regulations (FMCSR), issued a comparative negligence jury instruction, and commented to the jury about the timing of jury deliberations. The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

The exclusion of evidence did not affect the Ticiches' substantial rights

The Ticiches argue that the district court erred when it excluded or limited the testimony from safety expert Dr. Nigel Ellis, human factors expert Dr. Doug Young, and security guard Mike Werner.¹

This court reviews a district court's decision to admit evidence for an abuse of discretion.² "The exercise of such discretion will not be interfered with on appeal in the absence of a showing of palpable abuse."³ Even if this court finds an abuse of discretion in the district court's

¹The Ticiches also argue that the district court committed prejudicial error when it did not permit them to make substantive offers of proof. However, the Ticiches provide no record citation to an occasion where they requested to make an offer of proof and the district court refused. Our review of the record indicates that no such refusal occurred. In fact, each time the parties argued about the admissibility of this evidence, the district court asked the Ticiches for what purpose they were offering the witnesses. Therefore, the district court did not err with regard to permitting the Ticiches to make offers of proof.

²University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 985, 103 P.3d 8, 16-17 (2004).

³Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (quoting State ex rel. Dep't Hwys. v. Nev. Aggregates, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976)).

decision to admit or exclude evidence, it will not reverse a jury verdict or grant a new trial unless that error substantially affected the parties' rights.⁴

In this case, the Ticiches had to prove that Pabco breached a duty it owed Ticich and that Pabco's breach caused the Ticiches' damages. Whether a defendant owes a duty to a plaintiff is a question of law answered by the court.⁵ This court imposes upon a landowner a duty to act as a reasonable person to prevent injury to people on his or her land.⁶ Therefore, Pabco owed a duty to act as a reasonable person to prevent injury to Ticich, whom Pabco conceded was on its property. What a reasonable landowner would do to protect people on his or her property, whether or not the defendant landowner in a particular case conformed to that standard, and whether a defendant's failure to conform proximately caused a plaintiff's damages are questions of fact to be considered by the jury.⁷

The Ticiches argue that the district court improperly excluded testimony that would have helped the jury discern Pabco's standard of care and whether Pabco breached that standard of care. The Ticiches offered testimony from Dr. Ellis, Dr. Young, and Werner to prove that

⁴NRCP 61.

⁵Lee v. GNLV Corp., 117 Nev. 291, 295, 22 P.3d 209, 212 (2001).

⁶Moody v. Manny's Auto Repair, 110 Nev. 320, 332-33, 871 P.2d 935, 943 (1994) (superseded by statute on other grounds).

⁷Lee, 117 Nev. at 296, 22 P.3d at 212; Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1106, 864 P.2d 796, 802 (1993).

Pabco, as a reasonable landowner, should have provided an operational fall protection system and mandated its use.

We conclude that any error in excluding or limiting this evidence did not affect the Ticiches' substantial rights. In this case, the Ticiches elicited much testimony in favor of their proposed standard of care. Witnesses, including Dr. Young and Werner, testified that Pabco provided fall protection but did not mandate it, did not instruct independent truck drivers on its use, and that it was not operational the day of Ticich's accident. Although additional expert testimony may have helped the jury understand the technical requirements of safety systems, including warnings and instructions, the absence of this evidence did not substantially impair the Ticiches' right to present their case. The Ticiches could, and did, argue for the jury to apply this standard of care in making its determination. The jury concluded that Pabco was not negligent and we will not overturn the jury's verdict in this case.⁸

The district court properly instructed the jury

The Ticiches next argue that the district court improperly rejected their proposed instructions regarding the legislative purpose of OSHA and the standards of care OSHA establishes. They also argue that the district court improperly accepted Pabco's proffered comparative negligence instruction because there was insufficient evidence to support a theory of comparative negligence.

⁸Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989) ("We will not overturn the jury's verdict if it is supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong.").

This court reviews a district court's decision to give a jury instruction for an abuse of discretion.⁹ A party is entitled to have the court give a particular jury instruction if the party has presented evidence that supports the theory to which the instruction is addressed.¹⁰ The district court should give meaningful instructions that direct the jury concerning the law applicable to the case.¹¹

Because the standard of care is a question of fact for the jury,¹² instruction on statutory regulations would be inappropriate absent a court finding that negligence per se applied to the case. The Ticiches concede that the regulations on which they sought jury instructions did not control Pabco's actions in this case. Even if the district court had allowed further testimony regarding OSHA and FMCSR, the Ticiches' proposed jury instructions would have been inappropriate because those regulations did not control the outcome of the case. Those regulations were only arguably admissible as evidence of a possible standard of care. Because the Ticiches' proposed instructions did not concern the law applicable to the case, the district court did not err when it rejected the Ticiches' proposed jury instructions.

The parties presented significant evidence regarding how a truck driver should tarp his load and the considerable amount of care that

⁹Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. ____, ____, 148 P.3d 710, 714 (2006).

¹⁰Bass-Davis v. Davis, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006).

¹¹Price v. Sinnott, 85 Nev. 600, 606, 460 P.2d 837, 840 (1969).

¹²Lee, 117 Nev. at 296, 22 P.3d at 212.

the driver needs to take to prevent injury to himself. Based on testimony that Ticich was standing upright at the time of his fall and that he fell off the load backwards, the jury could have found that Ticich was not taking reasonable measures to ensure his own safety at the time of the accident. Therefore, the district court properly instructed the jury that if it found Ticich negligent, it could reduce any damages awarded to the Ticiches accordingly.

The district court's comments to the jury did not constitute misconduct

Lastly, the Ticiches contend that the district court committed prejudicial error when it suggested that the jury would be able to return a verdict on the same day the district court submitted the case for deliberations. The Ticiches' argue that the district court's comments implied that their case was weak. Pabco responds that the district court's comments could not be interpreted as favoring one party or the other in any way. We agree with Pabco.

After closing arguments, the district court told the deliberating jurors that they could decide whether they wanted to stay and deliberate that evening or return to deliberate in the morning. The court reiterated that statement when it excused the jury to deliberate, saying, "As soon as you decide whether you're going to deliberate this evening or come back tomorrow, please, let the bailiff know." The Ticiches did not object to either comment or ask the court to clarify its meaning.

This court may review judicial conduct to which the parties made no objection for plain error.¹³ This court will conclude that judicial

¹³Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368-69, 892 P.2d 588, 590 (1995) (citing Agee v. Lofton, 287 F.2d 709, 710 (8th Cir. 1961)).

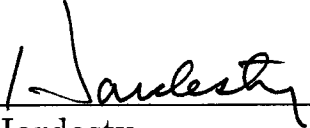
conduct constitutes plain error if the cumulative effect of the judicial conduct, viewed in the totality of the circumstances, undermined the integrity of the proceeding, depriving a party of a fair trial.¹⁴

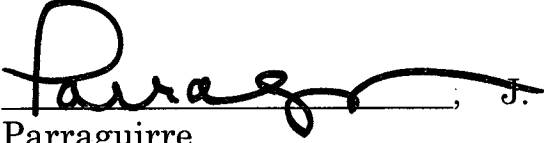
The district court's comments did not constitute misconduct. The statements did not tell the jury, expressly or implicitly, that the district court thought the jury could reach a decision that evening. The record reflects that jury instructions and closing arguments were not completed until after four o'clock in the afternoon. The district court was simply asking the jury to decide whether it would begin deliberations that night or wait until the next morning. Considering the totality of the circumstances surrounding this case, these two statements did not constitute plain error.


Because we conclude that any error in excluding or limiting the Ticiches' proffered evidence did not affect the Ticiches' substantial rights, the district court properly instructed the jury, and the district court did not prejudice the Ticiches by way of its comments to the jury, we

¹⁴Id.

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Sally L. Loehrer, District Judge
Janet Trost, Settlement Judge
Daniels, Fine, Israel, Schonbuch & Lebovits, LLC
Lewis Brisbois Bisgaard & Smith, LLP
Stephenson & Dickinson
Eighth District Court Clerk