IN THE SUPREME COURT OF THE STATE OF NEVADA

WESTSIDE CAR SALES & SERVICE, INC.; FRED WOODS; AND ALICE WOODS,
Appellants,
vs.
THE LARKIN COMPANY, INC., A NEVADA CORPORATION, D/B/A LARKIN PLUMBING, A NEVADA CORPORATION,
Respondent.

No. 48771

FILED

JUN 13 2008

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court's summary judgment in a negligence action. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellants Westside Car Sales & Service, Inc., Fred Woods, and Alice Woods (collectively, "Westside") owned the building in which Westside operated an auto repair business. A fire destroyed Westside's building, as well as a van owned by respondent, The Larkin Company, Inc., d/b/a Larkin Plumbing, which was in the building for repair services.

A week after the fire, Lorne Lomprey, a fire investigator hired by Larkin's insurance company, conducted an on-site investigation and prepared a report of his findings, which concluded that the fire originated in the van's dashboard as a result of a two-way radio's faulty installation. Lomprey's report also specifically eliminated the building's overhead fluorescent light fixtures as a cause of the fire.

Based on Lomprey's report, Westside filed a negligence complaint against Larkin in the district court, seeking monetary damages related to the fire. Thereafter, Larkin filed a third-party complaint for

indemnity against both the manufacturer and the installer of the van's radio. Both Westside and Larkin designated Lomprey as their expert witness.

Approximately three years later, Lomprey re-examined the van and reviewed the photographs that he had originally taken, after which he determined that his original conclusion was wrong. Then, during a deposition, Lomprey testified that he had an alternate theory about the fire's cause and that he now believed that fifty-one percent, or the preponderance, of the evidence showed that the fire originated in a fluorescent light above the van, and that there was only a "slight" chance that the radio caused the fire. Lomprey explained that he had not examined the light fixtures before completing his initial report because he had recommended that an electrical engineer conduct a forensic examination and he did not want to disturb the evidence.

Because Lomprey had changed his initial opinion, Westside designated Keith Mashburn as its expert witness. Soon thereafter, Larkin moved for summary judgment against Westside. The summary judgment motion relied upon Lomprey's deposition testimony to support Larkin's argument that no evidence showed that the radio in the Larkin van caused the fire. Additionally, the district court considered two other experts' affidavits obtained by the radio manufacturer and installer, which stated that the fire was not caused by the van's two-way radio.

Westside opposed the summary judgment motion, based on Lomprey's initial report and Mashburn's expert report, in which Mashburn indicated that he was not able to determine the fire's exact cause, but had no reason to dispute Lomprey's initial conclusion that the van's radio caused the fire.

After a hearing, the district court granted Larkin's motion for summary judgment, determining that no evidence supported Westside's negligence theory that the van's radio was responsible for the fire. This appeal followed.

Summary judgment is reviewed de novo and is properly granted when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[1] The evidence must be construed in a light most favorable to the non-moving party.[2] But once the movant has properly supported the summary judgment motion, the non-moving party may not rest upon general allegations and conclusions and must instead set forth, by affidavit or otherwise, specific facts demonstrating the existence of a genuine issue of material fact for trial to avoid summary judgment.[3]

In this case, the evidence must be construed in a light most favorable to Westside. Even without Mashburn's report and despite Lomprey's and the two other experts' opinions, genuine issues of material fact existed to preclude summary judgment. As Lomprey's initial report and later deposition testimony made clear, while conflicting, the evidence could support a conclusion that the fire started in the van's radio. Although Lomprey changed his initial conclusion to ultimately opine that the majority of the evidence showed that the fire started in the lighting

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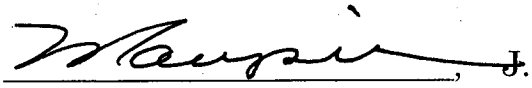
[1]Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

[2]Id.

[3]Id. at 731, 121 P.3d at 1030-31; NRCP 56(e).

fixture and not in the radio, a jury is free to reject his opinion and reach a different conclusion.[4] Accordingly, we

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



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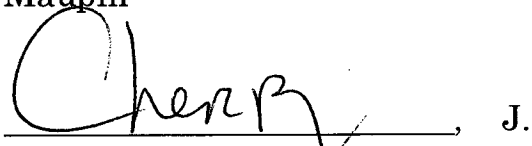
Maupin



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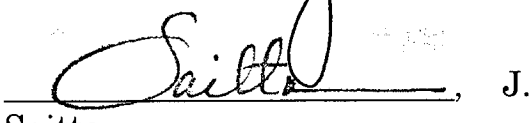

_____, J.
Saitta

cc: Hon. David Wall, District Judge
Leonard I. Gang, Settlement Judge
Kirk T. Kennedy
Ryan, Mercaldo, & Worthington, LLP
Eighth District Court Clerk

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[4]Barrett v. Baird, 111 Nev. 1496, 1503, 908 P.2d 689, 694 (1995), overruled on other grounds by Lioce v. Cohen, 124 Nev. ___, 174 P.3d 970 (2008); Grondin v. State, 94 Nev. 5, 6, 573 P.2d 205, 206 (1978); see Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981) (noting courts' reluctance to affirm summary judgment in negligence cases because the issue of a defendant's negligence generally involves factual questions for a jury to resolve).