IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT LORD AND JACQUELINE DEERR-LORD,
Appellants,
vs.
CHEE CHEW,
Respondent.

No. 49969

FILED

FEB 23 2011

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court order in a tort action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Robert Lord was severely injured while participating in a high-tech scavenger hunt in Las Vegas. Lord was rendered a blind quadriplegic when he fell approximately 30 feet headfirst down an abandoned mine shaft. Lord and his wife, appellant Jacqueline Deerr-Lord, filed suit against settling defendants Joe Belfiore, Kristina Belfiore, Kevin Shields, Walter Smith, Scott Schell, and Argentena Consolidated Mining Co., and proceeded to trial against the only nonsettling defendant, respondent Chee Chew. The Lords appeal the jury's defense verdict in favor of Chew.

On appeal, the Lords contend that the district court abused its discretion: (1) in refusing to provide three jury instructions that they argue could have been used to impose vicarious liability on Chew for the negligence of his fellow game organizers and (2) in awarding attorney fees to Chew. Although we agree that the district court abused its discretion in awarding attorney fees to Chew, we conclude that the Lords' remaining arguments lack merit. Accordingly, we affirm the district court's

judgment entered on the jury verdict, reverse its award of attorney fees, and remand for further consideration of whether attorney fees are proper.[1]

Jury instructions

The Lords argue that the district court abused its discretion in refusing to provide the following three proffered jury instructions that they argue could have been used to impose vicarious liability on Chew for the negligence of his fellow game organizers: (1) the joint enterprise instruction, (2) the concerted action instruction, and (3) the common duty instruction.[2] We address each proffered instruction below, and conclude that the district court did not abuse its discretion in refusing to provide the instructions.[3] See Hoagland v. State, 126 Nev. ___, ___, 240 P.3d 1043, 1045 (2010) (explaining that while "a district court has broad discretion to settle jury instructions, . . . [w]hen . . . the issue involves a question of law, this court applies de novo review").

The joint enterprise instruction

The district court did not abuse its discretion in refusing to provide the Lords' proposed jury instruction regarding joint enterprise liability for two reasons. First, the instruction misstated the applicable

---

[1]The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

[2]For the reasons explained below, we similarly reject the Lords' related contention that the district court erred in refusing to grant their motion for judgment as a matter of law as to these issues.

[3]Because the jury was properly instructed and found that Chew was not negligent, we do not reach the parties' arguments concerning the admission or validity of the express exculpatory agreement signed by Lord.

legal principles. Second, the Lords did not present sufficient evidence to support the conclusion that Chew and his fellow game organizers shared a common pecuniary interest in designing the game. We address each rationale below.

First, the right to have the jury instructed on an applicable theory is limited by the requirement that the proffered instruction must correctly state the law. See Beattie v. Thomas, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983) (holding that jury instructions must be "consistent with existing law"). The district court may refuse to provide a jury instruction if it "tend[s] to confuse or mislead the jury." Carver v. El-Sabawi, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005); see also Lubeck v. Lopes, 62 Cal. Rptr. 36, 43 (Ct. App. 1967) ("It is not error for a trial court to refuse a proposed instruction which is misleading; nor is the court required to correct, modify or edit such an instruction . . . ." (citations omitted)). While parties are generally entitled to instructions on their theory of the case, the district court should not give instructions where the evidence cannot support the theory. See Rocky Mt. Produce v. Johnson, 78 Nev. 44, 52, 369 P.2d 198, 202 (1962) ("A court should not instruct a jury on a theory of the case which is not supported by any evidence.").

Generally, other jurisdictions have recognized that one tortfeasor may be held vicariously liable for the tortious acts of another where the two tortfeasors were engaged in a joint enterprise.[4] See

---

[4]The joint enterprise doctrine is closely related to the joint venture doctrine, which we have recognized as providing a valid basis for imputing liability to co-venturers for injuries sustained by third persons as a result of negligence. See, e.g., Radaker v. Scott, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (1993); Bruttomesso v. Las Vegas Met. Police, 95 Nev. 151,

continued on next page . . .

Blackburn v. Columbia Medical Center, 58 S.W.3d 263, 271 (Tex. App. 2001) ("Joint enterprise liability . . . makes each party thereto the agent of the other and thereby . . . hold[s] each responsible for the negligent act of the other." (second and third alterations in original) (internal quotations omitted)). The Restatement (Second) of Torts expressly sets forth four essential elements for the joint enterprise doctrine:

> The elements which are essential to a joint enterprise are commonly stated to be four: (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Restatement (Second) of Torts § 491 cmt. c (1965).

Here, the Lords' proffered instruction excluded any reference to the requirement that joint enterprises share a common pecuniary interest. Instead, the instruction invited the jury to find a joint enterprise if it believed that Chew and the other organizers had acted with a "community of interest for their mutual benefit or pleasure."[5] This

---

. . . continued

154, 591 P.2d 254, 256 (1979). However, we have not addressed whether a joint enterprise may serve as a similar basis for liability. In light of our conclusion that the doctrine would not apply here, we do not reach this question.

[5]Some older decisions from other jurisdictions impose liability in the absence of any pecuniary interest. However, the Restatement (Second) requires a plaintiff to show a community of pecuniary interest, and more modern cases evidence a clear, if not absolute, trend away from such

continued on next page . . .

language could have misled the jury into believing that a joint enterprise could exist even in the absence of a community of pecuniary interest.

To satisfy the third element of the joint enterprise doctrine, a plaintiff must show that the joint enterprisers shared "a community of pecuniary interest" in the common purpose of the enterprise. Restatement (Second) of Torts § 491 cmt. c (1965). Courts have interpreted this to mean that the purpose of the group must be "'of or pertaining to money,'" and the parties must have agreed to share equally in the monetary benefits resulting from the success of the enterprise. St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 531 (Tex. 2002) (quoting Webster's New Universal Unabridged Dictionary 1428 (1996)). This requirement recognizes the doctrine's roots in agency law and exists to limit the imposition of "'liability in the non-commercial situations which are more often matters of friendly or family cooperation and accommodation.'" Id. at 526 (quoting Shoemaker v. Estate of Whistler, 513 S.W.2d 10, 16-17 (Tex. 1974)).

An agreement to share in the costs of a common though nonpecuniary purpose is not sufficient in itself to meet the Restatement Second's community-of-pecuniary-interest requirement. "The Restatement . . . requires the members of a joint enterprise to have a community of pecuniary interest in the common purpose or goal of the

---

. . . *continued*

unrestricted liability. See, e.g., Easter v. McNabb, 541 P.2d 604, 606 n.1 (Idaho 1975) (noting that while not all jurisdictions require a community of pecuniary interest, the inclusion of the element is "the modern trend"); see also W. Page Keeton, et al., Prosser and Keeton on the Law of Torts § 72, at 518 (5th ed. 1984) (recognizing the older approach as "very much in the minority and almost passing out of the picture").

enterprise, not the means by which that purpose or goal is achieved." Id. at 533.

Here, there is not sufficient evidence in the record to support a conclusion that the game organizers shared a community of pecuniary interest in the common purpose of the game. The game organizers did not seek any monetary benefit; to the contrary, it appears from the record that they expected to—and did—lose money. The game organizers collectively spent about $40,000 to host the game, and only charged a participation fee of $250. Participation in the game was by invitation only, and the game organizers did not invite enough people to recoup their costs or make a profit. In the end, the game organizers received approximately $12,000 in entry fees—just over a quarter of their expenditures.

It is not enough that the game organizers shared the costs of their endeavor, and there is no evidence that the game organizers' purpose in planning the game was pecuniary in nature. Based on this record, we conclude that the evidence did not support a joint enterprise instruction.

The concerted action instruction

The concerted action doctrine provides that joint tortfeasors who agree "to engage in conduct that is inherently dangerous or poses a substantial risk of harm to others" may be held jointly and severally liable. GES, Inc. v. Corbitt, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001). "[T]his requirement is met when the defendants agree to engage in an inherently dangerous activity, with a known risk of harm, that could lead to the commission of a tort. Mere joint negligence, or an agreement to act jointly, does not suffice." Id.

Here, the Lords did not argue to the district court that Chew should be held strictly liable for having participated in an inherently dangerous activity. Instead, they argued that Chew had been negligent in

helping plan the game, and invited the jury to hold Chew liable for the "other game organizers' negligent acts" if the jury found "that Chew committed a negligent act in concert with another game organizer or pursuant to a common design with him." In other words, the instruction asked the jury to find Chew jointly and severally liable based upon joint negligence. Thus, the instruction runs afoul of our holding in GES that "[m]ere joint negligence" does not support the imposition of joint and several liability under the concerted action theory. 117 Nev. at 271, 21 P.3d at 15.

Because the jury found that Chew's conduct was not tortious, they did not need to determine whether liability would have been joint or several. See id. (explaining that a key predicate to imposing joint and several liability under the doctrine is "that the conduct of each tortfeasor be in itself tortious." (quoting Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1488-89, 970 P.2d 98, 111-12 (1998), disagreed with on other grounds by GES, 117 Nev. at 270-71, 21 P.3d at 14-15)). Accordingly, the district court did not abuse its discretion in refusing to provide this instruction.

The common duty instruction

This court has not addressed whether the common duty theory of liability is recognized under Nevada law. However, we do not need to decide that question here because Chew did not share either a nondelegable duty nor an ownership interest in the real property where the injury occurred. See Restatement (Second) of Torts § 878 cmt. a (1979) ("[T]he [common duty theory of liability] applies to partners or persons engaged in a common enterprise made liable for the nonperformance of a nondelegable duty, and to co-owners of any form of tangible things that do harm, such as joint tenants of a dangerously defective building that falls

upon persons in the highway."). Therefore, the doctrine is inapplicable, and we conclude that the district court did not abuse its discretion in refusing to provide the proposed instruction.[6]

Attorney fees

The Lords argue that the district court abused its discretion in awarding over $500,000 in attorney fees to Chew in light of its findings on the requisite factors laid out by this court in Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). We agree.

"Claims for attorney fees under NRS 17.115 and NRCP 68 are fact intensive," and thus, "we will not disturb such awards in the absence of an abuse of discretion." See Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428 (2001). In exercising its discretion to award attorney fees, the district court must carefully consider the following factors:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Id. (citing Beattie, 99 Nev. at 588-89, 668 P.2d at 274).

Here, the district court considered each of the four Beattie factors and concluded that: (1) "plaintiff[s'] claim was brought in good

---

[6]In addition to the arguments addressed above, the Lords argue that judicial misconduct requires reversal, and that the district court's order should be reversed because the presiding judge dismissively rushed through juror admonitions. After carefully reviewing the record and relevant authority, we conclude that these arguments lack merit.

faith"; (2) while "reasonable minds could differ . . . I find [that Chew's offers of judgment were] reasonable, [in] both timing and amount"; (3) "[w]hether the plaintiff[s'] decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith. I don't think so"; and (4) the attorney fees requested were reasonable and justified in amount.

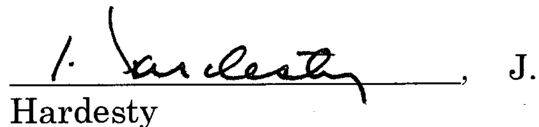
The district court did not discuss the evidence upon which its findings were based, nor did it discuss how it weighed the evidence in concluding that attorney fees were warranted. Wynn, 117 Nev. at 13, 16 P.3d at 428 (noting that a district court's decision to award attorney fees is discretionary so long as "the record clearly reflects that the district court properly considered the Beattie factors"). For example, there is no indication in the record that the district court considered the fact that the Lords had recently defeated two dispositive motions at the time Chew submitted his offers of judgment.

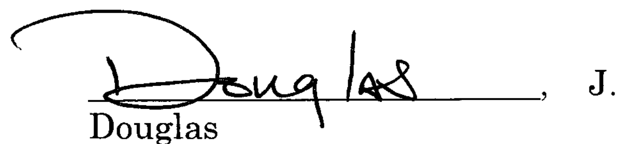
The district court's failure to develop the record is especially troubling in light of its findings. Specifically, the district court found in favor of the Lords on two of the three initial factors and concluded that reasonable minds could differ on the only other factor that could justify an award of attorney fees to Chew—whether Chew's offer was reasonable in both timing and amount. In other words, the district court's findings suggest that the decision to award attorney fees was a close and difficult one.

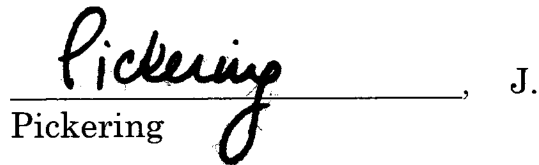
In such close cases, Beattie requires more of a district court than a mere recitation of the court's conclusions as to the relevant factors; the record must show why the factors that weigh in favor of awarding attorney fees outweigh the factors that weigh against awarding those fees. Because the record does not indicate that the district court analyzed the

evidence and status of the case when it determined that the offers were reasonable and in good faith in both timing and amount, and because the district court did not explain why attorney fees were warranted based on its findings, we conclude that the district court abused its discretion in awarding attorney fees to Chew.[7] Accordingly, we

AFFIRM the judgment of the district court, REVERSE its award of attorney fees, and REMAND to allow the district court to determine whether attorney fees are warranted.[8]


_______________, J.
Hardesty


_______________, J.
Douglas


_______________, J.
Pickering

---

[7]We conclude that the district court properly awarded costs based on the Lords' rejection of Chew's offers of judgment prior to trial. See NRS 17.115(4)(c) ("[I]f a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court . . . [s]hall order the party to pay the taxable costs incurred by the party who made the offer.").

[8]We note that some of the attorney fees awarded appear to pre-date Chew's offers of judgment. Should the district court conclude upon remand that attorney fees are warranted, we caution that such fees may only be granted if they were incurred after the date of Chew's offers of judgment. See NRCP 68.

cc: Hon. Jackie Glass, District Judge
Ara H. Shirinian, Settlement Judge
Sean P. Rose
Barr & Mudford
Echeverria Law Office
Gerald I. Gillock & Associates
Bonne, Bridges, Mueller, O'Keefe & Nichols/Las Vegas
Lewis & Roca, LLP/Las Vegas
McGaughey Bridges Dunlap, PLLC
Eighth District Court Clerk