IN THE SUPREME COURT OF THE STATE OF NEVADA

HOWARD BROWN, INDIVIDUALLY,
Appellant,
vs.
CURTISS JAMES KELLEY, JR; AND ATC/VANCOM, INC.,
Respondents.

No. 51091

FILED

AUG 03 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered after jury verdict for the defense in a personal injury action. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

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

Appellant Howard Brown raises two principal arguments on appeal. First, he contends that the district court erred by excluding evidence of respondent ATC/Vancom Inc.'s accident investigation report and disciplinary measures against the bus driver, respondent Curtiss James Kelley, Jr. Second, Brown argues that the misconduct of respondents' counsel warrants a new trial. Having concluded that these arguments lack merit, we affirm.

The decision to admit or exclude evidence is within the sound discretion of the district court. Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983). Therefore, we review that decision for an abuse of discretion. See, e.g., Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury. NRS 48.035(1). ATC/Vancom's internal evaluation that Kelley could have prevented this accident does not necessarily lead to the conclusion that he was negligent and caused the accident. Accordingly, the district court determined that the probative value of the report was outweighed by the danger of unnecessarily confusing the jury as to the proper standard to assess liability. We conclude that the district court did not abuse its discretion in deciding that the evidence could have confused the jury, and therefore, in excluding the report.

We also conclude that the district court did not abuse its discretion in excluding evidence of Kelley's post-accident remediation training as a subsequent remedial measure under NRS 48.095 and evidence of Kelley's pre-accident disciplinary record as improper character evidence under NRS 48.045.

Brown next argues that respondents' counsel's multiple references to excluded evidence regarding Brown's prior back injury warrant a new trial. Whether an attorney's comments constitute misconduct is a question of law, which we review de novo. Lioce v. Cohen, 124 Nev., ___, ___, 174 P.3d 970, 982 (2008). "[F]or objected-to and admonished attorney misconduct, a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." Id. at ___, 981. Conduct not objected to is not properly preserved for appeal. Id.

Although we conclude it was improper for respondents' counsel to allude to the excluded evidence, Brown's attorney's statements contributed to the problematic exchange. In particular, Brown's counsel

stated on multiple occasions that Brown had no prior back injury history. He also told the jury that it would have seen or heard evidence about Brown's prior back injury if such evidence existed. Thus, respondents' use of the evidence balanced Brown's exploitation of its exclusion.

In addition to the participation by both parties' counsel, the judge's admonishment in the presence of the jury further diminished the effect of the statements. The judge also instructed the jury not to consider evidence to which there was a sustained objection, and he advised the jury that counsel's arguments are not evidence. Based on these mitigating factors, we conclude that the objections and admonishments removed the effect of the complained-of references to evidence the court excluded.

While Brown also argues on appeal that respondents' counsel's improper comments during closing argument led to jury nullification, he failed to object to these comments at trial. Having decided that plain error analysis is not warranted, we conclude that this argument is not properly preserved for appeal. See Lioce, 124 Nev. at __, 174 P.3d at 981. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Eighth Judicial District Court Dept. 8, District Judge
William F. Buchanan, Settlement Judge
Harris/Schwartz
Wolfenzon Schulman & Ryan
Eighth District Court Clerk