IN THE SUPREME COURT OF THE STATE OF NEVADA

TANYA STUART AND JENNIFER O'HARA,

Appellants,

vs.

OASIS RESIDENTIAL, D/B/A SANDPIPER VILLAGE APARTMENTS,

Respondent.

No. 34635

FILED

JUN 12 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment and a post-trial order denying appellants' motion for judgment notwithstanding the verdict or, in the alternative, motion for a new trial. Appellants Tanya Stuart and Jennifer O'Hara were raped and robbed by an unknown assailant while residing in an apartment complex owned by respondent Oasis Residential, d/b/a Sandpiper Village Apartments ("Oasis"). Appellants sued Oasis on various grounds including negligent security and fraudulent misrepresentation. The jury returned a verdict for Oasis. Stuart and O'Hara now appeal, alleging various errors by the district court and the jury. We conclude that their arguments lack merit and affirm the judgments of the district court.

On appeal, Stuart raises three arguments with respect to the admission of the apartment security acknowledgment. First, she argues that releases in general are void as against public policy, and therefore, the district court should not have admitted the acknowledgment into evidence in any form. Second, she argues that the release contradicts language in the lease agreement (which was also admitted into evidence in a redacted form) requiring Oasis to refrain from acting negligently. Third, she argues that because O'Hara did not sign it, the release should not have been admitted into evidence.

We conclude that Stuart's arguments lack merit and the district court did not abuse its discretion in admitting the redacted acknowledgment.

The decision to admit or deny evidence is within the sound discretion of the trial court and will not be overturned absent manifest error or an abuse of discretion.[1] An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.[2]

The general rule is that releases in residential leases and other contracts are not void as against public policy, but rather they are disfavored and are to be strictly construed.[3] The majority of courts that have considered this issue have adopted the general rule.[4]

The cases cited by Stuart for the proposition that releases are against public policy focus on releases for negligent acts.[5] We conclude that the acknowledgment in this case is distinguishable because it does not attempt to release Oasis from liability for its own negligence but simply informs the tenant that Oasis is not responsible for ensuring the tenant's personal safety. In fact, contrary to Stuart's

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[1]See NRS 48.035; Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998).

[2]See State, Dep't Mtr. Veh. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

[3]See Alack v. Vic Tanny Int'l of Missouri, Inc., 923 S.W.2d 330, 334 (Mo. 1996) (holding that releases must be clear, unambiguous, unmistakable, and conspicuous).

[4]See John D. Perovich, Annotation, Validity of Exculpatory Clause in Lease Exempting Lessor from Liability, 49 A.L.R. 3d 321 (1973).

[5]See, e.g., Stanley v. Creighton Co., 911 P.2d 705 (Colo. Ct. App. 1996) (clause purporting to relieve landlord of liability for any act other than gross negligence void against public policy); Crawford v. Buckner, 839 S.W.2d 754 (Tenn. 1992) (apartment lease provision relieving landlord for negligent acts void).

assertion that Oasis was trying to relieve itself of liability for its own negligence, the lease contained a provision stating that Oasis was responsible for its own negligence. In sum, Oasis was not trying to exculpate itself from its own negligence through the acknowledgment, but rather it was attempting to inform tenants of their responsibilities under the lease.

Second, Stuart argues that the acknowledgment contradicts a lease provision stating that Oasis is liable only for its own negligence. The lease provision, paragraph 31, reads as follows:

> 31. LIABILITY: Management shall not be liable for any damage or injury to Tenant, or any other person, or to any property, occurring on the premises or any part thereof, or in common areas thereof, unless such liability is based on the negligent acts or omissions of Management, his agent, or employee, and Tenant agrees to hold Management harmless from any claims for damages if caused by the negligent acts or omissions of the Tenant or his/her guest.

We conclude that Stuart's argument lacks merit. As previously discussed, the acknowledgment served to inform Oasis's tenants of their reciprocal duties under the lease. The lease provision simply stated that Oasis was liable only for its own negligence and not the negligence of third parties. Thus, the provisions are complementary and not contradictory.

Third, Stuart argues that the acknowledgment should not have been admitted into evidence because O'Hara did not sign the document. This argument is without merit because the district court correctly instructed the jury not to consider the acknowledgment as against O'Hara. Specifically, jury

instruction 8a stated, "Exhibits 46 [the acknowledgment] and 48 [the lease] shall not apply to Jennifer O'Hara."

The district court has broad discretion to settle jury instructions and decide evidentiary issues.[6] This court reviews a district court's decision to give a particular instruction for an abuse of discretion or judicial error.[7] We conclude that the district court did not abuse its discretion in this instance.

Next, Stuart argues that the district court incorrectly redacted portions of the lease and that it should have admitted the entire lease into evidence. Specifically, Stuart argues that admitting the entire lease into evidence would have counterbalanced the erroneous admission of the acknowledgment. Additionally, Stuart argues that Oasis waived its right to seek a redaction because it had offered the exhibit and the lease had initially been admitted in its entirety.

We conclude that the district court did not abuse its discretion in redacting paragraph 31 from the lease. First, because the district court properly admitted the acknowledgment, there was no need to admit the entire lease in order to "put the plaintiffs on even footing with the defendants," as Stuart claims. Second, the district court was faced with inconsistent demands given that one plaintiff

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[6]See Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997), receded from on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

[7]See Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986); see also Quillen v. State, 112 Nev. 1369, 1381, 929 P.2d 893, 901 (1996) (stating in dicta that decisions on whether to give or decline proposed jury instructions are reviewed for abuse of discretion). In addition, this issue is not properly before us because neither Stuart nor O'Hara objected to jury instruction 8a and, as such, they have waived the right to object on appeal. See Brascia v. Johnson, 105 Nev. 592, 596, 781 P.2d 765, 768 (1989).

(O'Hara) wanted the lease redacted and the other plaintiff (Stuart) wanted the lease admitted in its entirety. This sort of dispute is best resolved within the framework of the district court's discretion.

Third, Stuart argues that because Oasis moved to admit the lease in its entirety, it waived its right to have the lease redacted. Stuart supports this argument by analogizing to the general rule that failure to object at trial waives the issue on appeal.[8] We conclude that this analogy is neither accurate nor persuasive and that the district court did not abuse its discretion in admitting the redacted lease.

Next, Stuart and O'Hara both argue that a new trial should have been granted because the jury either disregarded jury instruction 8a (which limited exhibits 46 and 48 to Stuart) or was confused by the instruction.

A new trial may be granted for (1) irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) misconduct of the jury or prevailing party; (3) accident or surprise which ordinary prudence could not have guarded against; (4) newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial; (5) manifest disregard by the jury of the instructions of the court; (6) excessive damages appearing to have been given under the influence of passion or prejudice; or (7) error in law occurring at the trial and objected to by the party making

[8]See, e.g., Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 577 P.2d 1234 (1978).

the motion.[9] The standard of review for granting or denying a motion for a new trial is abuse of discretion.[10]

In general, the jury's findings will be affirmed on appeal if they are based upon substantial evidence in the record.[11] "Substantial evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'"[12]

We conclude that the jury had substantial evidence upon which to base its verdict and that its decision should not be disturbed on appeal. For example, neither appellant was able to definitively state that she selected the particular apartment because of its high level of security. In addition, although Stuart testified that security was her top concern when she chose Sandpiper Village, the application for the lease indicated that her primary motivation for renting there was its location and proximity to work.

Given the conflicting testimony and the weight assigned to the testimony by the jury, it does not appear that the jury was confused or misled such that a manifest injustice occurred nor was it impossible for the jury to reach its verdict. We, therefore, conclude that the district court's decision to admit the redacted documents did not justify a new trial.

Next, Stuart and O'Hara argue that the district court improperly denied their motion for judgment notwithstanding the verdict on the fraud claim. We note that

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[9]See NRCP 59(a).

[10]See Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993).

[11]Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996).

[12]Id. (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

no appeal may be taken from a post-judgment order denying a motion for judgment notwithstanding the verdict.[13]

Additionally, Stuart argues that the district court abused its discretion by limiting the testimony of Dr. Kennedy, Stuart's security expert. Specifically, Stuart argues that the district court abused its discretion by preventing Dr. Kennedy from commenting on the 1994 police reports regarding Sandpiper Village. Stuart argues that because the information was relevant, it should have been admitted.

We conclude that the district court's limitation of Dr. Kennedy's testimony was reasonable under the circumstances.

The scope of a witness's testimony and whether a witness may testify as an expert are matters within the discretion of the trial court, and the trial court's ruling will not be disturbed absent an abuse of discretion.[14] In certain circumstances, the exclusion of a witness for the violation of a discovery order may be appropriate.[15]

Here, the discovery commissioner and the district court considered evidence showing that Dr. Kennedy was named as an expert during the early stages of the litigation, but the entire scope of his opinion was not timely disclosed to Oasis. Thus, the court sanctioned Stuart by limiting the

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[13] See Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995); Ross v. Giacomo, 97 Nev. 550, 635 P.2d 298 (1981).

[14] See Johnson v. Egtedar, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996).

[15] See GNLV Corp. v. Service Control Corp., 111 Nev. 866, 900 P.2d 323 (1995).

scope of Dr. Kennedy's testimony to that which was timely disclosed. The court's ruling was not an abuse of discretion.

Because the assignments of error lack merit, we ORDER the judgment and order of the district court AFFIRMED.

_____, J.
Young

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Mark W. Gibbons, District Judge
Cook & Kelesis
Albert D. Massi, Ltd.
Parnell & Associates
Clark County Clerk