IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSEANN CALLARA,
Appellant,
vs.
LAS VEGAS HILTON CORPORATION D/B/A LAS VEGAS HILTON,
Respondent.

No. 51645

FILED

APR 29 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict in a torts action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant Roseann Callara fell on a valet parking driveway owned by respondent Las Vegas Hilton. Callara filed suit, alleging that the Hilton negligently failed to keep the driveway clean and that its employees negligently moved her after she fell. After a trial, the jury returned a verdict in favor of the Hilton for the first claim of negligence for the slip-and-fall accident, and returned a verdict in favor of Callara for the second claim of negligence for the post-accident handling of Callara by employees.

Callara now appeals, arguing that the district court abused its discretion by (1) refusing to give the Hilton's responses to requests for admissions conclusive effect, (2) improperly questioning a witness during trial, and (3) refusing to give a spoliation jury instruction. We disagree, and therefore, affirm the district court's judgment. Because the parties are familiar with the facts of this case, we do not recount them further except as necessary to our disposition.

DISCUSSION

I. Standard of review

District courts have broad discretion to determine whether evidence is admissible at trial and to settle jury instructions. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 492, 117 P.3d 219, 226 (2005); Bass-Davis v. Davis, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). This court will not overturn the district court's rulings absent an abuse of discretion. M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. ___, ___, 193 P.3d 536, 544 (2008).

II. The district court did not err when ruling on the Hilton's responses

Callara argues that the Hilton's responses to her requests for admissions were conclusively established under NRCP 36, and therefore, the district court abused its discretion by admitting testimony that contradicted these responses. We disagree.

NRCP 36(a) states that a party may serve an opposing party with written requests for admissions and the opposing party has 30 days to respond. The matter at issue in the request is deemed admitted unless a response or objection is served within the 30 days. Id. NRCP 36(b) states that matters admitted under this rule are conclusively established unless a court allows a party to withdraw or amend the admissions.

When assessing whether responses should be given conclusive effect, any ambiguities in the requests for admissions should be construed against the drafter. Ortho Diagnostic Systems Inc. v. Miles Inc., 865 F. Supp. 1073, 1079 (S.D.N.Y. 1994). If a party attempts to give an admission a construction broader than its plain meaning permits, it is inappropriate to give the admission conclusive effect. See International Paper Co. v. U.S., 36 Fed. Cl. 313, 318-19 (1996).

Here, the Hilton responded to Callara's requests for admissions in a timely manner. In Request No. 4, Callara stated that the Hilton should "[a]dmit that the valet parking area where the incident occurred had not been washed or scrubbed on 9/19/03 or 9/20/03 with a degreaser due to a shortage of staff."[1] The Hilton responded by objecting for vagueness and denying Request No. 4 on that basis. However, the Hilton went on to state: "Without waiving said objection, the area in question was not cleaned with a degreaser on either 9/19/03 or 9/20/03, due to a shortage of staff." Callara also maintains that other responses, in addition to the Hilton's response to Request No. 4, are relevant to this issue.

At trial and on appeal, Callara argues that the Hilton's responses to Callara's requests for admissions conclusively established that the staff did not clean the driveway prior to her fall. The district court, however, refused to give the Hilton's responses conclusive effect and permitted witnesses to testify about the staff's cleaning practices prior to the fall.

We conclude that the district court did not abuse its discretion by refusing to give the Hilton's responses conclusive effect. Although Callara argues that the responses preclude all evidence about whether staff cleaned the valet parking area prior to her fall, this interpretation is overbroad. The requests and responses only address September 19, 2003, and September 20, 2003, the weekend before the fall. They do not address

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[1]Various requests by Callara refer to "9/19/03" and "9/20/03." These dates comprise the Friday and Saturday before Callara's accident. Callara did not fall until Tuesday, September 22, 2003.

whether staff cleaned the driveway on September 21, 2003, or September 22, 2003, the final time period before Callara's fall. Because Callara attempts to give the responses a construction broader than their plain meaning, it is inappropriate to give them conclusive effect. See id.

III. The district court did not err by questioning a witness

Callara argues that the district court abused its discretion by questioning a witness because the questions violated a stipulation. We disagree.

NRS 50.145(2) states that a district court judge may question any witness, and parties may object to the judge's questions "at any time prior to the submission of the cause." Here, the district court judge asked Callara's witness, Eddie DeLucia, several questions about the Hilton's driveway during trial. One question asked by the district court judge was: "Given the amount of valet traffic how often would you estimate the driveway was scrubbed?" DeLucia responded that staff scrubbed the driveway "[e]very day." Callara did not object to the judge's questions.

Because Callara did not object, we conclude that Callara failed to preserve this issue for appeal. Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Regardless, we conclude that the district court did not abuse its discretion in asking this question since the judge was attempting to clarify DeLucia's testimony. See NRS 50.145(2).

IV. The district court did not err by refusing to issue a spoliation instruction

A. The preservation of evidence

Callara argues that this court must extend Nevada caselaw concerning the preservation of evidence to require defendants to create records regarding their cleaning practices. We disagree.

Parties in Nevada must preserve evidence after an injury or accident if there is potential for litigation. Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 651, 747 P.2d 911, 913-14 (1987). In Fire Insurance Exchange, the district court properly imposed sanctions after a party removed a television from the scene of a fire while knowing that there was a potential for litigation and that the fire originated near the television. Id. at 649, 747 P.2d at 912-13. In Bass-Davis v. Davis, the district court erred by failing to give an adverse inference instruction after a defendant negligently lost a videotape of the plaintiff's slip-and-fall accident. 122 Nev. 442, 446, 452, 134 P.3d 103, 103, 109-10 (2006).

Unlike Fire Insurance Exchange and Bass-Davis, the Hilton did not negligently or willfully destroy evidence. The Hilton failed to produce records about when its staff cleaned the valet parking area because it never created such records. Because the Hilton failed to produce maintenance records, Callara argues that the Hilton circumvented the spoliation of evidence rules by implementing a company-wide policy prohibiting the creation of certain records. Callara also argues that this court should extend its previous rulings so that corporate defendants are required to create maintenance records.

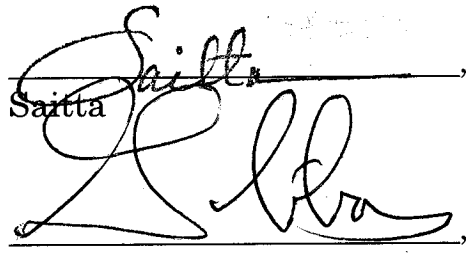
We disagree with Callara's arguments and decline to extend Nevada caselaw for two reasons. First, Callara failed to cite any legal authority that suggested the Hilton had a duty to create maintenance records. Second, any reliance by Callara on Nevada caselaw for her argument is misplaced. Both Fire Insurance Exchange and Bass-Davis address factual situations where evidence had existed at some point but a party lost or destroyed it. Fire Ins. Exchange, 103 Nev. at 649, 747 P.2d at 912; Bass-Davis, 122 Nev. at 446, 134 P.3d at 105. Unlike these cases,

Callara is asking the court to require defendants to create evidence, which we decline to do.

B. Failure to give spoliation instruction

Callara argues that the district court abused its discretion by refusing to include a spoliation jury instruction. We disagree. Since the Hilton had no duty to create maintenance records, there was no abuse of discretion by the district court refusing to give the spoilation instruction. See Bass-Davis, 122 Nev. at 447, 134 P.3d at 106 (this court reviews a district court's decision to decline a proposed jury instruction for an abuse of discretion). Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Saitta

_____, J.
Gibbons

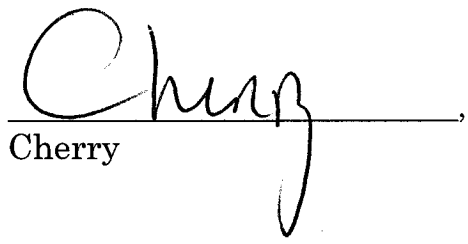
cc: Hon. Douglas W. Herndon, District Judge
William C. Turner, Settlement Judge
Edward J. Achrem & Associates
Thorndal Armstrong Delk Balkenbush & Eisinger/Las Vegas
Eighth District Court Clerk

CHERRY, J., dissenting:

I respectfully dissent from the majority and would reverse and remand this matter for a new trial. I would hold that the district court erred in its ruling on the Hilton's responses to Callara's request for admissions and should have found that said responses to the request for admissions were conclusively established under NRCP 36. Therefore, the district court abused its discretion by admitting testimony that contradicted said responses.

Further, the record before us is clear that Callara's request for admissions are not overbroad and are relevant and probative as to the time frame before Callara's fall.

In light of the above, I would reverse the jury verdict and have this matter tried once again.



Cherry, J.