

IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND FROST AND RACHEL
FROST,
Appellants,

No. 53249

vs.
TAB CONTRACTORS, INC., A NEVADA
CORPORATION; ERIC ROGERS,
INDIVIDUALLY; AND ADVANCED
TRAFFIC SAFETY, INC.,
Respondents.

FILED

OCT 04 2010

TRACE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict in a tort action, from a post-judgment order granting attorney fees and costs, and from an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

On appeal, appellants Raymond and Rachel Frost argue that a new trial is warranted, pursuant to NRCP 59(a)(5), because the jury manifestly disregarded the jury instructions when it returned a verdict finding respondent Eric Rogers negligent, but finding that his negligence was not the proximate cause of Raymond's injuries.¹ We disagree.

¹Appellants also contend that: (1) the district court abused its discretion in allowing impeachment of a witness based on a complaint filed by the witness's attorney on his behalf; (2) the district court abused its discretion in excluding evidence of future medical damages based on appellants' failure to provide the amount of claimed damages until one week before trial; and (3) the district court abused its discretion in awarding attorney fees and costs, and the award was excessive. We conclude these claims are without merit.

The underlying cause of action in this case arose from a car accident. Raymond was driving on a street where road construction was taking place. In a normal setting, there would be two lanes of traffic open on either side of the road and a center turning lane. Due to construction, there was only one lane for westbound traffic and one lane for eastbound traffic. Raymond was driving eastbound in the shoulder, which was not a proper traffic lane, to make a right-hand turn. Rogers, working in the course and scope of his employment with respondent Tab Contractors, was traveling westbound in the same area from the construction site. As Rogers made a left-hand turn, Raymond entered the intersection as he made a right-hand turn, and the vehicles collided. After the accident, Raymond was taken to the hospital. The parties dispute the cause of the accident.

Appellants filed a complaint in district court. After offers of judgment in March and July of 2008, a jury trial began in September 2008. After a nine-day trial, the jury rendered its verdict in favor of respondents Tab and Advanced Traffic Safety, Inc. (ATS). The jury found Rogers liable for the collision but did not find his negligence to be the cause of Raymond's injuries. Subsequently, Tab, ATS, and Rogers filed motions requesting attorney fees and costs. The district court awarded ATS \$126,096.14 and \$112,810.04 to Tab and Rogers in attorney fees and costs. The district court also denied appellants' motion for new trial based on NRCP 59(a)(5). This appeal followed.

On appeal, appellants assert that respondents did not produce evidence to suggest anything other than the collision caused Raymond's injuries. Appellants argue that the jury failed to heed the instructions of

the district court by finding Rogers negligent but not the proximate cause of Raymond's injuries and that a new trial is warranted.

Respondents counter that the jury's findings were reasonable based on the evidence at trial because respondents' theory of the case was that Raymond caused the accident by being impatient and improperly using the shoulder of the road as a second travel lane. Therefore, respondents assert that, after hearing all the evidence presented at trial, the jury agreed with their theory of the accident and found Raymond's injuries to be the result of his own misconduct.

This court reviews a district court's denial of a motion for a new trial for abuse of discretion.² Langon v. Matamoros, 121 Nev. 142, 143, 111 P.3d 1077, 1078 (2005). Additionally, "[t]he district court's decision will not be overturned absent a palpable abuse of discretion." Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). In order to determine whether granting a new trial is appropriate under NRCP 59(a)(5), the inquiry turns on "whether we are able to declare that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." M & R

²Under NRCP 59(a)(5), a district court may grant a new trial on the basis that the jury manifestly disregarded its instructions. A court may not substitute its own judgment in place of the jury's judgment unless the jury erred as a matter of law. Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993) (concluding that a jury's verdict supported by substantial evidence will not be overturned unless the verdict is clearly erroneous when viewed in the light of all the evidence presented); Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989) (holding that a motion for a new trial under NRCP 59(a) for manifest disregard of jury instructions will not be permitted absent evidence that the jury could not have reached the decision it did as a matter of law).

Investment v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729, 730 (1989) (quoting Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982)); see Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (stating that this “court is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party”).

Appellants’ argument relies on a presumption that the jury could not have reached its conclusion that Raymond did not sustain his injuries as a result of the accident if it had properly followed the instructions. However, in light of the record presented, we conclude that the issue of causation was properly presented to the jury and, based on the differing accounts of the collision,³ the jury could have found that Rogers’ negligence was not the legal cause of Raymond’s injuries.

The determination of proximate cause involves “a policy consideration that limits a defendant’s liability to foreseeable consequences that have a reasonably close connection with both the defendant’s conduct and the harm which that conduct created.” Goodrich

³Appellants failed to provide this court with the completed verdict form. It is appellants’ responsibility to make certain “that the record on appeal contains the material to which exception is taken.” Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996). Missing portions of the record are presumed to support the district court’s decision. Id. Here the district court gave the jury instructions provided by appellants, and appellants now question whether or not the jury followed those instructions. Because appellants failed to provide the completed verdict form for this court’s review on appeal, we have no basis on which to review appellants’ contention and must assume that the district court was correct in denying appellants’ motion for a new trial. Prabhu, 112 Nev. at 1549, 930 P.2d at 111.

& Pennington v. J.R. Woolard, 120 Nev. 777, 784, 101 P.3d 792, 797 (2004) (internal citation omitted). Specifically, proximate cause is ““any cause which in natural [foreseeable] and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.”” Id. (alteration in original) (quoting Taylor v. Silva, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (quoting Mahan v. Hafen, 76 Nev. 220, 225, 351 P.2d 617, 620 (1960))) (in the context of awarding consequential damages).

Appellants claim that the only explanation for the jury’s determination that Rogers was negligent but not the cause of Raymond’s injuries was that the jury failed to follow the instructions of the district court. However, the jury instructions allowed for a finding of negligence without finding Rogers the proximate cause of Frost’s injuries;⁴ the jury could have found that appellants failed to prove Rogers’ negligence was a proximate cause of Raymond’s injury, and thus, limited respondents’ liability.

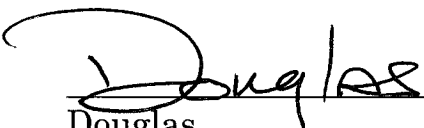
⁴In this case, the jury was given the following instruction regarding proximate cause:


Each plaintiff has the burden to prove that the plaintiff sustained damage, that the defendant was negligent, and that such negligence was a legal cause of the damage sustained by the plaintiff. The defendants have the burden of proving, as an affirmative defense, that some contributory negligence on the part of the plaintiff himself, was a legal cause of any damage plaintiff may have sustained.

In light of the record presented, we conclude that the jury was properly instructed and reached its decision based on the instructions it was given. It cannot be said that had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict it reached because the instructions allowed for the determination the jury made. M & R Investment, 105 Nev. at 226, 773 P.2d at 730. Further, the jury did not manifestly disregard the jury instructions and the district court did not abuse its discretion in denying appellants' motion for new trial. There is no palpable abuse of discretion that warrants overturning the decision. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Hardesty


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Susan Johnson, District Judge
Janet Trost, Settlement Judge
Law Office of William R. Brenske
Hall Jaffe & Clayton, LLP
Murchison & Cumming
Eighth District Court Clerk