IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY O. GARMONG,
Appellant,
vs.
ROGNEY AND SONS CONSTRUCTION; PETER ROGNEY, AN INDIVIDUAL; VALLEY DOOR WORKS; CHARLES GRANT AND KATHY GRANT, AS INDIVIDUALS; AND MCFARLAND DOOR MANUFACTURING COMPANY,
Respondents.

No. 53427

FILED

APR 27 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a constructional defect action. Third Judicial District Court, Lyon County; William Rogers, Judge; Robert E. Estes, Judge.

Appellant Gregory Garmong sought to build his dream home in Smith Valley, Nevada. Garmong hired as his contractor respondent Peter Rogney of respondent Rogney & Sons Construction, after being referred by Peter's son, Graham Rogney. As part of the project, Peter ordered 21 interior doors for Garmong's home from respondent Valley Door Works (VDW) in May 2004. VDW had purchased the unfinished doors from the manufacturer, respondent McFarland Door Manufacturing Company, Inc., owned by respondents Charles and Kathy Grant. VDW partially finished the doors it purchased from McFarland Door and delivered them to Peter at Garmong's home. Peter finished and installed the doors in Garmong's home.

In September 2004, approximately four to six weeks after the doors were installed, Garmong noticed that the doors had begun to crack.

After Garmong discovered the doors were damaged, he communicated his discovery to Peter, VDW, and McFarland Door. Subsequently, McFarland Door had one of its sales representatives, Chad Morgan, perform an inspection. Thereafter, McFarland Door and VDW proposed two possible solutions: either that VDW workers be sent to fill and sand the cracks in the doors; or, that McFarland Door could remove and repair the doors, which would require Garmong to pay for the reinstallation and refinishing. Garmong found these options unacceptable because they would still leave him with no warranty on the doors and would cost him thousands of additional dollars. VDW next offered to replace ten doors, an offer Garmong refused because more than ten of the doors were damaged and he would still have to pay for the finishing and installation. Peter then advised Garmong to wait two years for the doors to heal themselves—advice which Garmong took.

On September 7, 2007, after the doors did not heal themselves, Garmong filed a complaint against Peter, Graham, Rogney & Sons, VDW, McFarland Door, the Grants, and Morgan alleging nine causes of action stemming from the purchase, installation, and damage of the doors. Garmong then filed a first amended complaint adding new causes of action. Less than three months before discovery was to end, Garmong filed a motion for leave to file a second amended complaint, adding some thirty new causes of action, which the district court denied.

Garmong, Graham, and Morgan all filed motions for summary judgment in the district court. The district court denied Garmong's motion for summary judgment, but granted Graham and Morgan's motions for summary judgment. The case proceeded to trial against the

remaining respondents. After an eight-day jury trial, the jury returned a verdict finding no liability on the part of any of the remaining respondents

On appeal, Garmong argues that the district court: (1) erred in its rulings on the several motions for summary judgment, (2) abused its discretion in denying his motions for leave to file amended complaints, (3) abused its discretion in granting a motion in limine regarding the presentation of evidence of damages, and (4) abused its discretion in giving certain jury instructions. We disagree, and we therefore affirm the district court's judgment.

Summary judgment

"'This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.'" George L. Brown Ins. v. Star Ins. Co., 126 Nev. ___, ___, 237 P.3d 92, 96 (2010) (quoting Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). Summary judgment is proper only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. NRCP 56(c); see Wood, 121 Nev. at 729, 121 P.3d at 1029. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Wood, 121 Nev. at 729, 121 P.3d at 1029.

Garmong argues that the district court erred in denying his motion for summary judgment because 36 of the 48 material facts that he identified as undisputed were, in fact, not disputed by any of the opposing briefs filed by the respondents.

We conclude that Garmong's argument is without merit because the respondents provided the district court with sufficient

admissible evidence showing that genuine issues of material fact existed, including whether there was a construction defect in the doors, whether McFarland Door breached any standard in the industry or violated any law in the manner in which it manufactured the doors, whether McFarland Door made any misrepresentation of material fact or intended to mislead Garmong, and whether Garmong was comparatively negligent in causing the damage to the doors. Specifically, the oppositions of VDW and McFarland Door/Morgan contained sworn deposition testimony from four persons involved, invoices for the doors, answers to interrogatories, and a sworn affidavit by Morgan.[1] Therefore, the district court did not err in denying Garmong's motion for summary judgment.

Garmong also argues that the district court erred in granting Graham's motion for summary judgment. Specifically, Garmong argues that the district court violated his due process rights by allowing Graham to supplement his motion for summary judgment with an affidavit after Garmong's opposition was due under DCR 13(3).

We conclude that Garmong's argument is without merit as Graham's motion for summary judgment simply pointed out that no facts in the record supported Garmong's claims against him, which is a permissible strategy. See NRCP 56(c). Moreover, Garmong was unable to show in his opposition that facts existed to support his claims against Graham. Garmong has also failed to cite to cases to support his argument that his due process rights were violated by the filing of an affidavit after

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[1]While the Rogneys' opposition did not include this evidence, it specifically incorporated the evidence provided by VDW and McFarland Door/Morgan.

his opposition was due under DCR 13(3). Because Garmong was unable to show any existing facts to support his claims against Graham, the late filing of the affidavit had no bearing on the district court's determination of Graham's motion for summary judgment, and the affidavit was not required based on the arguments made by Graham in his summary judgment motion. NRCP 56(e) (noting that an adverse party's response to a motion for summary judgment "must set forth specific facts showing that there is a genuine issue for trial."). Therefore, the district court did not err in granting Graham's motion for summary judgment.

Garmong further argues that the district court erred in granting Morgan's motion for summary judgment. Garmong contends that the undisputed material facts set forth by Morgan in his motion for summary judgment do not address the issues of liability under tort principles, including Garmong's fraud, agency, and conspiracy claims against Morgan. Garmong also argues that the district court's order misinterprets Torrealba v. Kesmetis, 124 Nev. 95, 100, 178 P.3d 716, 720 (2008), to support its decision to grant Morgan's motion for summary judgment. In Torrealba, we held that "[w]here the nonmoving party would bear the burden of persuasion at trial 'the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'" 124 Nev. at 100, 178 P.3d at 720 (quoting Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev. 598, 603, 172 P.3d 131, 134 (2007)). Furthermore, we stated that "[t]o successfully defend against a summary judgment motion, 'the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence,

introduce specific facts that show a genuine issue of material fact.'" Id. We conclude that Garmong's arguments are without merit because there were no facts that supported Garmong's claim against him and Garmong was unable to show in his opposition that facts existed that supported his claim against Morgan. See Torrealba, 124 Nev. at 100, 178 P.3d at 720. Accordingly, we conclude that the district court did not err in granting Morgan's motion for summary judgment.

Garmong's motions for leave to file amended complaints

Garmong argues that the district court abused its discretion in denying his pretrial motion for leave to file a second amended complaint.

Under NRCP 15(a), a district court may grant leave to amend a complaint when justice so requires. However, the decision whether to grant leave to amend a complaint for a second time is within the sound discretion of the district court and a denial may be warranted if undue delay, bad faith, or dilatory motives on the part of the movant are involved. Kantor v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000). "A motion for leave to amend is left to the sound discretion of the trial judge, and the trial judge's decision will not be disturbed absent an abuse of discretion." University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004).

We conclude that Garmong's argument is without merit because the second amended complaint would have prejudiced the respondents by causing undue delay. Specifically, Garmong filed his motion to amend his complaint a second time at the end of September 2008, just two months before the discovery deadline and several months before the trial was scheduled to begin. We conclude that the respondents would have been prejudiced if required to conduct discovery on 31 new

claims in the matter of a few months in order to be properly prepared to defend those claims at trial. Further, undue delay would have resulted had Garmong been permitted to amend the complaint because the district court would have had to postpone the trial in order to give the respondents enough time to prepare their defenses against these new claims. Because Garmong was aware of the damage to the doors some four years before he sought to file his amended complaint, which included the thirty-one new claims, we conclude he had adequate time to seek to amend his complaint earlier instead of filing his motion at such a late date and so close to trial. Therefore, we conclude that the district court did not abuse its discretion in denying Garmong's second motion to amend his complaint.

Garmong also argues that the district court abused its discretion in denying his motion during trial to amend the complaint to conform to the proofs. We conclude that Garmong has failed to show that the district court abused its discretion in finding that the parties had not expressly or impliedly consented to try the issues not raised in Garmong's first amended complaint. Amendments to conform to the evidence are covered by NRCP 15(b), which states that "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." However, the fact that respondents filed oppositions to Garmong's second motion to amend his complaint shows that the respondents did not consent to try new issues not raised in Garmong's first amended complaint. Therefore, we conclude that the district court did not abuse its discretion in denying Garmong's motion to amend his complaint at trial.

McFarland Door and Morgan's motion in limine

Garmong argues that the district court abused its discretion in granting McFarland Door and Morgan's motion in limine when the motion in limine severely prejudiced him without any authority to support the district court's decision to prohibit him from presenting evidence of damages at trial.

Nevada has long held that in a mixed tort and contract case, the measure of damages are often the same, i.e., the benefit of the bargain. Topaz Mutual Co. v. Marsh, 108 Nev. 845, 851-852, 839 P.2d 606, 610 (1992). More recently this court has held that in a construction defect case, such as this one, regardless of the number of legal claims asserted by the plaintiff, the damages recoverable are limited to those set forth in NRS Chapter 40. Skender v. Brunsonbuilt Constr. & Dev. Co., 122 Nev. 1430, 1439 n.26, 148 P.3d 710, 717 n.26 (2006).

District courts have broad discretion when determining whether evidence is admissible at trial. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). Therefore, this court will not overturn the district court's rulings unless there was an abuse of discretion. Woods v. Label Investment Corp., 107 Nev. 419, 425, 812 P.2d 1293, 1297-98 (1991), disapproved on other grounds by Hanneman v. Downer, 110 Nev. 167, 180 n.8, 871 P.2d 279, 287 n.8 (1994). An abuse of discretion occurs when there is a clear disregard for guiding legal principles. Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 993, 860 P.2d 720, 722-23 (1993).

We conclude that Garmong's argument is without merit because he has failed to show that the district court acted outside of its discretion in granting McFarland Door and Morgan's motion in limine

prohibiting Garmong from introducing evidence relating to tort damages. Specifically, because this case was a mixed tort and contract case, as well as a construction defect case, Garmong's damages were limited by NRS Chapter 40 to what he lost in the benefit of the bargain he made with the respondents. The introduction of evidence of emotional or tort damages sustained by Garmong would do nothing but possibly incite the passions of the jury and prejudice them against the respondents, exactly the type of evidence sought to be excluded by NRS 48.035(1).[2] Thus, we conclude that the district court did not abuse its discretion in granting McFarland Door and Morgan's motion in limine.

Jury instructions

Garmong argues that the district court abused its discretion in giving jury instruction 19 and 24 because the language of the jury instructions are contrary to, and not a correct statement of, Nevada law. Garmong further argues that the giving of jury instruction 19 was improper because it was in direct conflict with jury instruction 17.

Jury instruction 17 stated that, "Where a defect was initially not visible to the unaided eye but later becomes visible, it was a latent defect. Its existence is proved circumstantially by evidence that plaintiff used the product in a normal fashion." Jury instruction 19 stated that, "For a manufacturing-related construction defect, plaintiff must prove that the defect existed when the product left the defendant's possession." Jury instruction 24 stated that, "A construction defect claimant has a duty

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[2]"[E]vidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

to accept a reasonable written offer of settlement made as a part of a response to the construction defect claim."

This court reviews a district court's decision to give or refuse a jury instruction for an abuse of discretion. See Allstate Insurance Co. v. Miller, 125 Nev. ___, ___, 212 P.3d 318, 331 (2009). However, this court reviews de novo whether "'a proffered instruction is an incorrect statement of the law.'" Id. (quoting Cook v. Sunrise Hospital & Medical Center, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008)). "If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and 'but for the error, a different result may have been reached.'" Id. (quoting Cook, 124 Nev. at 1006, 194 P.3d at 1219).

Consistent with jury instruction 19, it is well established in Nevada that in a defective product case, a plaintiff must show that his injuries were caused by a defect in the product, and that the defect existed when the product left the defendant's control. See Maduike v. Agency Rent-A-Car, 114 Nev. 1, 6, 953 P.2d 24, 27 (1998); Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 414, 470 P.2d 135, 138 (1970). As such, we conclude that Garmong's argument regarding the accuracy of jury instruction 19 is without merit because the instruction was a correct statement of Nevada law.

As noted above, jury instruction 24 states that a claimant has a duty to accept a reasonable written offer of settlement. NRS 40.650 states that if a claimant unreasonably rejects a reasonable written offer of settlement as part of a response pursuant to the statute, then attorney fees and costs may be awarded to the offering party. Therefore, Garmong

has failed to show that the language of jury instruction 24 was error as the language of the instruction was consistent with Nevada law pursuant to NRS 40.650.

Additionally, we conclude that the language of jury instructions 17 and 19 are not in conflict, as both involve defects in a product—one involving defects that can be seen and one involving latent defects. As such, we conclude that the district court did not abuse its discretion in giving jury instructions 19 and 24.[3]

In light of the foregoing discussion, we

ORDER the judgment of the district court AFFIRMED.

Cherry, J.
Cherry

Gibbons, J.
Gibbons

Pickering, J.
Pickering

[3]Garmong argues that the district court erred in denying his motion to amend the appellate record by including his requested jury instructions. We note that the rejected jury instructions he sought to have reviewed were added to the appellate record pursuant to a motion filed by Garmong in this court. Garmong v. Rogney & Sons Construction, Docket No. 53427 (Order Granting Motion to Supplement the Appellate Record, December 10, 2019). Moreover, Garmong failed to provide any cogent argument in support of his allegation that he was severely prejudiced by the district court's denial of his motion to amend the record. See generally Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Accordingly, no relief is warranted with respect to this argument.

cc: Hon. Robert E. Estes, District Judge
Hon. William Rogers, District Judge
Laurie A. Yott, Settlement Judge
Les W. Bradshaw
Kelly R. Chase
Georgeson Angaran, Chtd.
Law Offices of Mark Wray
Lyon County Clerk