IN THE SUPREME COURT OF THE STATE OF NEVADA

RODY H. SCOTT,
Appellant,
vs.
THE EQUITY GROUP, INC., A NEVADA CORPORATION; DVK REALTY VENTURES, INC.; AND STG REALTY VENTURES, INC., A FOREIGN CORPORATION,
Respondents.

No. 54806

FILED

JUL 31 2012

TRACIE 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 and from a post-judgment order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Scott appeals from a defense judgment in a slip-and-fall case and from an order denying a motion for a new trial. We are asked to consider whether it was possible for the jury to return a special verdict finding negligence but no proximate cause without manifestly disregarding the jury instructions. We conclude that the jury did not render an impossible verdict and, therefore, affirm the district court's judgment on the jury verdict and its order denying a new trial.

I.

Appellant Rody Scott worked inside a building managed by

respondent The Equity Group, Inc.[1] One evening, she slipped in the building's public restroom and fell, injuring her shoulder. Scott sued The Equity Group and the building owner for negligence, asserting that they negligently waxed the bathroom floor, causing her fall. The case went to trial. The parties stipulated to a special verdict form that asked the jury to determine first whether the defendants were negligent and, if so, whether the negligence was the proximate cause of Scott's injuries. The jury filled out the special verdict by answering "yes" to the first question and "no" to the second. The court entered judgment on the verdict, whereupon Scott moved for judgment as a matter of law and, in the alternative, a new trial. The district court denied Scott's motion and this appeal followed.

II.

Scott presses us to reverse the district court because the jury manifestly disregarded the instructions and, under NRCP 59(a)(5), she is entitled to a new trial. To this end, her main contention is that if the jury had followed the instructions, it would have been impossible for the jury to reach the verdict it returned: that The Equity Group negligently waxed the floor but that its negligence was not the proximate cause of her injuries. She bases her argument on the fact that no evidence of any other cause for her fall was presented during trial, and as such, once the jury concluded that respondents improperly waxed the floors, they had to find that it caused her fall. We will not overturn the district court's denial of a

[1]STG Realty Ventures, Inc., and DVK Realty Ventures, Inc., were also named defendants below and are respondents here. The respondents are collectively referred to as "The Equity Group."

motion for a new trial absent a "palpable abuse of discretion." Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). We conclude that the district court did not abuse its discretion and, therefore, affirm the district court's order.

> The standard for overturning a jury verdict is high.
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> Rule 59 relating to new trials was amended in 1964 to eliminate as a ground for a new trial "insufficiency of the evidence to justify the verdict." . . . The aim of the amendment [wa]s to preclude a trial court from substituting its view of the evidence for that of a jury in a case where the losing party is not entitled to judgment as a matter of law.[2]

Fox v. Cusick, 91 Nev. 218, 219-20, 533 P.2d 466, 467 (1975) (quoting NRCP 59(a)(7) (1961)); see also Kroeger Properties v. Silver State Title, 102 Nev. 112, 114-15, 715 P.2d 1328, 1329-30 (1986). Simply, the jury is allowed to determine whether a claim is meritorious. Crippens v. Sav On Drug Stores, 114 Nev. 760, 763, 961 P.2d 761, 763 (1998).

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[2]Nevada's "impossible" verdict standard is a clear departure from FRCP 59, which Nevada expressly rejected. Compare FRCP 59(a) with NRCP 59(a). Unlike NRCP 59(a)'s enumeration of grounds for a new trial, FRCP 59(a)(1)(A) provides a district court with discretion to grant a motion for a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Included in that is the discretion to grant a motion for a new trial when the verdict is against the weight of the evidence. See 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2806 (2d ed. 1995); see, e.g., Thomas v. Stalter, 20 F.3d 298, 304 (7th Cir. 1994) (noting that the district court could weigh the evidence in deciding a motion for a new trial).

The new-trial inquiry under NRCP 59(a)(5) 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 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)). "We need not determine how the jury reached its conclusion . . . ; we need only determine whether it was possible for the jury to do so." Town & Country Electric v. Hawke, 100 Nev. 701, 702, 692 P.2d 490, 491 (1984). This "impossible verdict" standard grows out of the Nevada rule drafters' desire to avoid substituting a court's view for the jury's. 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").

III.

"To prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." Klasch v. Walgreen Co., 127 Nev. ___, ___, 264 P.3d 1155, 1158 (2011). To show legal causation, the plaintiff must establish both foreseeability and cause in fact. Doud v. Las Vegas Hilton Corp., 109 Nev. 1096, 1105, 864 P.2d 796, 801 (1993), superseded by statute on other grounds as stated in Estate of Smith v. Mahoney's Silver Nugget, 127 Nev. ___, 265 P.3d 688 (2011); Restatement (Second) of Torts § 431 (1965).

Correctly, the district court instructed the jury that for Scott to succeed, it must find that the defendants were negligent and that "the [d]efendants' negligence was a proximate cause of damage to the

[p]laintiff." The court used the pattern jury instruction to define proximate cause,[3] and in a separate instruction related to the jury that "[i]f one slips and falls because of [a foreign substance on the ground], liability may be found . . . ." (Emphasis added). Neither party objected to this instruction during trial, nor do they contest its appropriateness on appeal.

The stipulated special verdict form mirrored these instructions. The jury had to decide (1) whether The Equity Group acted negligently and, if so, (2) whether that negligence proximately caused her injuries. On appeal, Scott appears to suggest that the jury's finding of negligence means that it found all elements that comprise the tort of negligence, i.e., duty, breach, causation, and damages. We cannot agree with Scott's contention because it is inconsistent with the use of the two jury prompts in the verdict form.

Our law tasks courts to adopt the "'view of a case under which a jury's special verdicts may be seen as consistent.'" See Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 1112, 197 P.3d 1032, 1038 (2008) (quoting Bernardini v. Rederi A/B Saturnus, 512 F.2d 660, 662 (2d Cir. 1975)). We understand the special verdict form's use of the term "negligence" as shorthand to represent a finding of duty and breach by The Equity Group. Black's Law Dictionary 1061-62 (8th ed. 2004) (first definition of negligence describes duty and breach elements, not the

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[3]"A proximate cause of injury, damage, loss, or harm is a cause which, in natural and continuous sequence, produces the injury, damage, loss, or harm and without which the injury, damage, loss, or harm, would not have occurred." Nev. J.I. 4.04 (1986).

complete tort of negligence with all its elements). The instruction defining negligence described duty and breach, but did not mention causation. The jury found negligence; The Equity Group had a duty of care and breached that duty by waxing the floors in a way that left slippery spots. But then the jury found that Scott failed to show, by a preponderance of the evidence, that The Equity Group's breach was the actual cause of Scott's fall and subsequent injuries.[4] This is not an impossible finding, since Scott could have fallen for a reason other than the wax. And Scott's understanding of the jury form—that a finding of negligence embodies a finding of duty, breach, and causation—is inconsistent with the instructions and special verdict form, which subdivided negligence from causation. If Scott intended that a jury finding of negligence represented the complete tort, she should have objected, not stipulated, to the special verdict form.

Scott's other arguments fail for the same reason: she was required to establish that waxing the floor caused her fall and succeeding injuries, but the jury found that she did not. The trial transcript shows that Scott provided ample evidence that The Equity Group was responsible for waxing the bathroom floor, and that the floor should not have been waxed. Given these facts, Scott appears to argue that once duty

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[4]We note that, ideally, a trial court would not use proximate cause on a special verdict form to represent both foreseeability and cause in fact. See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 29 cmt. b (2010) ("[T]he term 'proximate cause' is a poor one to describe limits on the scope of liability. It is also an unfortunate term to employ for factual cause or the combination of factual cause and scope of liability.").

and breach are shown (that it was negligent to wax the floor as it did), the defense bears the burden of establishing an intervening cause to avoid an inference of causation from a finding of negligence. But she provides no authority to suggest that negligence in this context creates an inference or presumption of causation. Instead, even when breach of a duty is shown, the plaintiff still bears the burden of showing causation in slip-and-fall cases, specifically. R.D. Hursh, Annotation, Liability of Proprietor of Store, Office, or Similar Business Premises for Fall on Floor Made Slippery by Waxing or Oiling, 63 A.L.R.2d 591 § 17[a] (1959) (stating that plaintiff must show proximate cause in slip-and-fall cases); Rickard v. City of Reno, 71 Nev. 266, 272, 288 P.2d 209, 212 (1955) (noting that plaintiff had to prove proximate cause).

This argument might also be an attempt to make a res ipsa loquitor argument, but Scott did not request a res ipsa instruction or argue to the district court that this case is a candidate for application of the doctrine. See Otis Elevator Co. v. Reid, 101 Nev. 515, 519, 706 P.2d 1378, 1380 (1985) (res ipsa inference is permissible when the accident is one that does not ordinarily occur in the absence of negligence); American Elevator Co. v. Briscoe, 93 Nev. 665, 670, 572 P.2d 534, 537 (1977) (res ipsa instruction warranted against elevator maintenance company for injuries sustained when elevator plummeted to the basement). Nor, as unfortunate as Scott's fall was, is slipping on a bathroom floor something that normally only occurs as a result of negligence.[5] The jury did not

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[5]Scott also argues that the district court's failure to make specific findings as to its denial of her motion for a new trial necessitates reversal, relying on Lioce v. Cohen, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008)
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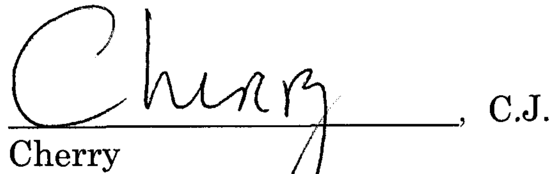
manifestly disregard the district court's instructions and the district court did not abuse its discretion in denying Scott's post-judgment motion.

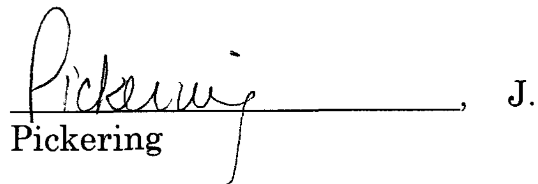
Accordingly, we

ORDER the judgment of the district court AFFIRMED.



Cherry, C.J.

Gibbons, J.



Pickering, J.

cc: Hon. Jennifer P. Togliatti, District Judge
William F. Buchanan, Settlement Judge
Bowen Law Offices
Cisneros, Clayson & Marias
Eighth District Court Clerk

. . . continued

("[W]hen deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order."). Her reliance is misplaced. Lioce was confined to district court decisions on motions for a new trial based on attorney misconduct. Id. at 18, 174 P.3d at 982. Cf. Pagni v. City of Sparks, 72 Nev. 41, 44, 293 P.2d 421, 422 (1956) (holding that Rule 59 does not require a district court to make specific findings as to why it granted a new trial).