IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHELIN NORTH AMERICA, INC., A NEW YORK CORPORATION, Appellant, vs. GAYLENE DEAL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF RICHARD LEE DEAL (DECEDENT) AND LONNIE LEE DEAL (DECEDENT); AND TRYSTIN DEAL, A MINOR BY AND THROUGH HIS GUARDIAN AND NATURAL PARENT, ROCHELLE WEBSTER, Respondents.	No. 54472
GAYLENE DEAL, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF RICHARD LEE DEAL (DECEDENT) AND LONNIE LEE DEAL (DECEDENT); AND TRYSTIN DEAL, A MINOR BY AND THROUGH HIS GUARDIAN AND NATURAL PARENT, ROCHELLE WEBSTER, Appellants, vs. MICHELIN NORTH AMERICA, INC., A NEW YORK CORPORATION, Respondent.	No. 55863

FILED

MAY 23 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment on a jury verdict in a wrongful death action and from a post-judgment order denying a new trial and cross-appeal from a post-judgment order retaxing costs. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

12-16304

Appellants Trystin and Gaylene Deal sued respondent Michelin North America, Inc., asserting various tort claims after a tire manufactured by Michelin separated, causing a vehicle rollover and resulting in the death of the Deals' family members.[1] The case was tried before a jury, which returned a verdict in favor of Michelin. Following entry of judgment, Michelin filed a memorandum of costs as the prevailing party. The Deals filed a motion to retax costs and a motion for new trial. The district court granted the Deals' motion to retax but denied their motion for new trial. This appeal and cross-appeal followed.

Case No. 55863: Judgment on jury verdict and denial of new trial motion

On appeal, the Deals contend that the district court: (1) improperly issued two jury instructions, (2) abused its discretion on two evidentiary matters, and (3) improperly denied their motion for new trial. We conclude that the Deals' contentions fail, and therefore we affirm the district court's order in No. 55863.

The district court properly issued the jury instructions

This court reviews de novo whether "a proffered instruction is an incorrect statement of the law." Cook v. Sunrise Hospital & Medical Center, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008). If a jury instruction accurately states the law, this court will not disturb the district court's discretionary decision to issue a jury instruction unless the decision is arbitrary or capricious. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). We conclude that the district court did not err in issuing Instructions No. 27 and No. 28.

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[1]The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

Instruction No. 27: "Gunlock"

Instruction No. 27 was based on Gunlock v. New Frontier Hotel, 78 Nev. 182, 370 P.2d 682 (1962), and is commonly referred to as a "mere happening" instruction. Instruction No. 27 provided:

> The mere fact [that] there was an accident and that someone was injured does not of itself prove that the product was unreasonably dangerous. Liability is never presumed but must be established by the preponderance of the evidence.

On appeal, the Deals primarily argue that Instruction No. 27 misstated the applicable law because Gunlock dealt with negligence liability, and therefore its reasoning should not apply in a strict products liability claim.[2]

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[2]The Deals make two alternative arguments. First, they claim that Instruction No. 27 misstated the law by using the word "never." Because the instruction upheld in Gunlock includes this same word, we determine that this argument lacks merit. See 78 Nev. at 185, 370 P.2d at 684 ("Negligence is never presumed but must be established by substantial evidence.").

Second, the Deals suggest that Instruction No. 27 misled the jury, arguing that it was an improper curative device because they never relied on the tire's failure alone as evidence of a defect. See Cutler v. P. S. P. M. Co., 34 Nev. 45, 57, 116 P. 418, 423 (1911) ("The court should never charge a jury upon any matter which is not responsive to the issues in the case.") As discussed below, a prominent theme in the Deals' case was that an off-road tire is defective if it malfunctions before its tread wears out. Because the tire tread at issue was undisputedly "half worn," their argument created a reasonable inference that the accident was caused only by a defect. Thus, the district court acted within its discretion to issue Instruction No. 27 to avoid the risk of juror confusion. American Cas. Co. v. Propane Sales & Serv., 89 Nev. 398, 400, 513 P.2d 1226, 1227 (1973) ("[A] party is 'entitled to have specific charges upon the law applicable to each of the hypotheses or combinations of facts which the jury, from the

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Although we have curtailed the use of a "mere happening" instruction in the context of res ipsa loquitor, we have never held that this instruction is limited to negligence cases only. See Carver v. El-Sabawi, 121 Nev. 11, 16, 107 P.3d 1283, 1286 (2005) (concluding that a mere happening instruction conflicts with the res ipsa loquitor presumption of negligence, and is thus a prejudicially confusing instruction). In the context of a strict liability claim, such as the case here, a plaintiff must still show evidence of a defect to bring a successful claim. See, e.g., Walker v. General Elec. Co., 968 F.2d 116, 120 (1st Cir. 1992) (holding that "the malfunction theory in no way relieves the plaintiff of the burden of proving a defect" (quoting Ocean Barge Transport v. Hess Oil Virgin Islands, 726 F.2d 121, 125 (3d Cir. 1984))). Therefore, issuance of the "mere happening" instruction would not present a similar conflict in strict liability cases, and thus, Instruction No. 27 did not misstate the law.[3]

Contrary to the Deals' argument, this conclusion does not conflict with our prior decision in Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 686 P.2d 925 (1984). In Stackiewicz, we held that "[w]hen there

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...continued
evidence, might legitimately find.'" (quoting Dixon v. Ahern, 19 Nev. 422, 429, 14 P. 598, 601 (1887))).

[3]Other jurisdictions to adopt the "mere happening" doctrine have likewise expanded its scope to apply in strict products liability claims. See, Cooper Tire & Rubber Co. v. Mendez, 204 S.W.3d 797, 807 (Tex. 2006) ("[T]he mere fact that the tire failed . . . [was] insufficient to establish a manufacturing defect"); Clement v. Griffin, 634 So. 2d 412, 429 (La. Ct. App. 1994) ("Failure of a tire is not such an unusual event that a defect can be inferred solely from the fact that the accident occurred." (quoting Traut v. Uniroyal, Inc., 555 So. 2d 655, 656 (La. Ct. App. 1989) superseded by statute as stated in Clement, 634 So. 2d at 423)).

is evidence of some dangerous condition, the 'factfinder can find, where other identifiable causes are absent, that the mere evidence of a malfunction is sufficient evidence of a defect.'" Id. at 449, 686 P.2d at 928 (emphasis added) (quoting Kileen v. General Motors Corp., 421 A.2d 874, 876 (Conn. Super. Ct. 1980)). Because Stackiewicz exists as a narrow exception to general liability principles by holding that the specific cause of a malfunction need not always be shown, an inference of liability is proper under Stackiewicz only where there is no other identifiable cause for the malfunction. Id. Here, Stackiewicz did not apply because Michelin had introduced evidence showing alternative explanations of a malfunction—the tire had been punctured, improperly repaired, suffered impact, and was underinflated—all of which were potentially identifiable causes of the separated tire.[4]

Instruction No. 28: "Tire that never fails"

Next, the Deals object to Instruction No. 28, which provided:

> Michelin is not required to manufacture a tire that never fails. It is economically, if not technologically, infeasible to create a tire that does not wear. A tire cannot be termed defective that has failed because of wear.

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[4]Moreover, we conclude that any alleged error in issuing Instruction No. 27 was harmless. Here, the jurors were charged with 43 different instructions, which included the specific elements for establishing a claim of strict liability and a manufacturing defect, and the record indicates multiple other possible causes for the tire failure. Thus, it is reasonable for the jury to have concluded that a manufacturing defect did not cause the accident. Cook, 124 Nev. at 1005-06, 194 P.3d at 1219 (instructing this court to uphold a jury verdict "unless the error has resulted in a miscarriage of justice," such that "but for the error, a different result might have been reached" (citation omitted) (internal quotation marks omitted)).

Specifically, the Deals argue that because they withdrew their design defect claim before submission to the jury, reference to the feasibility of an alternative design was irrelevant because the sole remaining claim was for a manufacturing defect.

We conclude that the district court did not abuse its discretion, as Instruction No. 28 was intended for a different and more specific purpose: to distinguish a defective tire from a worn tire. See American Cas. Co., 89 Nev. at 400, 513 P.2d at 1227 (recognizing that "general, abstract ('stock') statements of the law are not sufficient if [a] proper request for a specific instruction on some important point has been duly proffered to the court").

A review of the record demonstrates that "tire wear" was a prominent issue throughout trial.[5] Namely, the Deals' theory was that because the subject tire was an off-road tire, it should have been able to withstand off-road use up to the point at which its tread life expired. In its defense, Michelin theorized that even an off-road tire could wear in other ways.

In support of this theory, Michelin introduced evidence of other types of "tire wear." Specifically, after the Deals' expert classified damage to the tire's inside center as "normal wear and tear," Michelin cross-examined the expert and had him acknowledge that this damage could have contributed to the tire's failure. Moreover, Michelin's expert commented on photographs of the subject tire's outward appearance and noted that these photographs displayed "an abundance of cutting and

[5]The Deals contend that "tire wear" was never an issue at trial. We reject this contention, as it is based on the misleading premise that "tire wear" is synonymous with "tread wear."

chipping" caused by off-road use. He proceeded to discuss the overall condition of the tire—including a patched nail hole and underinflated usage—and whether these factors alone could cause the subject tire to fail.

Accordingly, Instruction No. 28 was applicable because Nevada's stock definition of a manufacturing defect was insufficient to educate the jury that an off-road tire need not be indestructible.

The district court did not abuse its discretion in its evidentiary exclusions

The Deals challenge two of the district court's evidentiary rulings as reversible error: the exclusion of a Firestone tire recall report, and the exclusion of Federal Motor Vehicle Safety Standard (FMVSS) 139. 49 C.F.R. § 571.139 (2011). We conclude that these arguments are unpersuasive.

Standard of review

This court reviews a district court's "'decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value,'" for an abuse of discretion. University & Cmty. Coll. Sys. v. Sutton, 120 Nev. 972, 985, 103 P.3d 8, 16-17 (2004) (quoting Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998) overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 271, 21 P.3d 11, 15 (2001)). See also NRS 48.035(1) ("Although relevant, evidence 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.").

The Firestone recall report

At trial, the Deals sought to introduce evidence from a Firestone recall report to contradict Michelin's expert, who testified that a tire with defects similar to those alleged here would fail within the first

ten percent of its expected tread life. Specifically, the Deals sought to impeach this statement with evidence that the defective Firestone tires did not separate until after several years of operation. The district court prohibited any reference to the recall as irrelevant and too prejudicial.

On appeal, the Deals argue that evidence of the Firestone recall report should have been admitted to impeach the credibility of Michelin's expert because the testimony was based on his "opinion." As such, they claim this evidence was relevant to test the breadth of his experience.[6]

Although this court has found reversible error in the district court's exclusion of evidence that was "directly relevant to the impeachment of the expert's opinion," McCourt v. J. C. Penney Co., 103 Nev. 101, 104, 734 P.2d 696, 698 (1987) (emphasis added), the proffered evidence in this case carried little probative value because it related to dissimilar tires and a dissimilar defect. The statement of Michelin's expert related to the expected failure of a tire suffering from trapped air, porosity, and open innerliner splice. Comparatively, the Firestone defects were attributed to a belt-edge separation and shoulder pocket cracking. As such, the experience of Michelin's expert regarding these unrelated defects would have been only marginally relevant.

Therefore, we conclude that the district court acted reasonably in excluding evidence of a Firestone recall report.

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[6]Notably, the district court offered an alternate avenue for the Deals to impeach the experience of Michelin's expert. The Deals seem to have declined this approach and at no point during cross-examination do they appear to have asked Michelin's expert about the basis for his opinion.

FMVSS 139

Prior to trial, Michelin moved to exclude reference to FMVSS 139, 49 C.F.R. § 571.139 (2011), on the ground of relevance, as it was inoperative at the time the tire was manufactured in 1996 and at the time of the accident in 2002. In response, the Deals moved to exclude evidence of the tire's compliance with FMVSS 119, 49 C.F.R. § 571.119 (1996) (establishing standards for light truck tires), on the ground that it was an outdated standard.[7] The district court ruled in favor of Michelin and against the Deals, concluding that FMVSS 119 was admissible as the relevant government standard at the time of the accident and that FMVSS 139 should be excluded for risk of confusing the jury.

On appeal, the Deals argue that evidence of FMVSS 119 alone was misleadingly incomplete without evidence of FMVSS 139 to reflect the updated standard of the National Highway Traffic Safety Administration [NHTSA]. We find this claim to be unpersuasive, as it is undisputed that FMVSS 119 alone governed the performance requirements for light truck tires manufactured prior to 2007. Thus, FMVSS 139 was not relevant to this matter because it was enacted 11 years after the subject tire was produced and 5 years after the accident occurred.

Therefore, the district court acted within its discretion in admitting evidence of FMVSS 119 and excluding evidence of FMVSS 139.

The district court properly denied the Deals' motion for new trial

During trial, Michelin's expert relied on a copy of The Pneumatic Tire to support his opinions. U.S. Department of

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[7]The relevant sections of the FMVSS were updated effective June 1, 2007. See Federal Motor Vehicle Safety Standards; Tires, 68 Fed. Reg. 38,116, 38,148, 38,150 (June 26, 2003) (codified at 49 C.F.R. pt. 571).

Transportation, National Highway Traffic Safety Administration, The Pneumatic Tire (2006). Intermittently throughout the expert's testimony and in Michelin's closing argument, reference was made to the publication's status as a government publication.

Following the jury verdict in Michelin's favor, the Deals discovered a copy of The Pneumatic Tire with the following disclaimer:

> The opinions, findings and conclusions expressed in this publication are those of the author(s) and not necessarily those of the Department of Transportation or the [NHTSA].

The Deals moved for a new trial, contending that Michelin had deliberately used a non-disclaimer version of The Pneumatic Tire to mislead the jury into believing that the treatise was indeed a government publication. After extensive briefing on this issue, the district court found that Michelin's use of the non-disclaimer version was inadvertent and denied the Deals' motion.

"'The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse.'" Bass-Davis v. Davis, 122 Nev. 442, 453, 134 P.3d 103, 110 (2006) (quoting Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996)). Given this standard of review, we are necessarily restricted to considering only those arguments and authorities considered by the district court itself. See Schuck v. Signature Flight Support, 126 Nev. ___, ___, 245 P.3d 542, 544 (2010) (noting that "'[p]arties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below'" (quoting Dermody v. City of Reno, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997))).

On appeal, the Deals concede that Michelin did not deliberately use a non-disclaimer version of The Pneumatic Tire. This concession alone is sufficient to affirm the district court's denial of their new trial motion.[8] Nonetheless, we briefly address the Deals' argument that they were unfairly prejudiced by Michelin's remarks.

The crux of the Deals' argument is that Michelin's references to government approval at trial prevented the Deals from adequately arguing that The Pneumatic Tire was biased in favor of the tire industry.[9] This argument lacks merit. Even though Michelin told the jury that The Pneumatic Tire was a government document, the record supports that the Deals were fully aware that the document's authors were associated with the tire industry (as opposed to being government officials). Thus, they were free to counter Michelin's remarks concerning government approval with their own assertions of bias, and their failure to do so had nothing to do with an absence of the disclaimer.

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[8]Perhaps recognizing that their NRCP 59 motion for new trial would be more appropriately characterized as a NRCP 60 motion for relief from judgment, the Deals' reply brief cites case law from other jurisdictions stating that "fraud" under NRCP 60(b)(3) need not be intentional. Because the Deals never presented this argument to the district court, it has been waived. Schuck, 126 Nev. at ___, 245 P.3d at 544.

[9]To the extent that the Deals are still challenging the classification of The Pneumatic Tire as a learned treatise, we find this argument unpersuasive. At trial, the Deals' own expert acknowledged that he referenced a copy of the publication while he worked in the tire industry. Moreover, the Deals have never articulated how the presence of a government disclaimer diminished the document's status as an authoritative resource in the tire industry.

In sum, the district court did not abuse its discretion when it denied the Deals' motion for new trial.

Case No. 54472: Award of costs and disbursements to the prevailing party

Following entry of judgment, Michelin filed a memorandum of costs and disbursements as the prevailing party, claiming it was entitled to roughly $320,000. In opposition, the Deals moved to retax costs and provided extensive analysis as to why Michelin's costs were not warranted, arguing that $19,320 was a more accurate recovery. The district court ultimately issued a two-page order, granting the Deals' motion to retax and awarding Michelin costs in the amount of $9,320. Michelin cross-appeals this order, arguing that the district court abused its discretion by failing to articulate the rationale for its determination of costs.

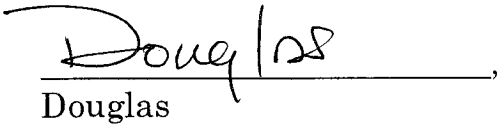
This court reviews a district court's determination of allowable costs for an abuse of discretion. Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (1998). Under NRS 18.020, "[c]osts must be allowed of course to the prevailing party" after entry of a judgment. Although an award of costs is mandated, "the district court still retains discretion when determining the reasonableness of the individual costs to be awarded." U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. 458, 463, 50 P.3d 170, 173 (2002). However, "[w]ithout an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation." Jitnan v. Oliver, 127 Nev. ___, ___, 254 P.3d 623, 629 (2011).

Such is the case here. Although the district court reviewed extensive briefing and more than 300 pages documenting Michelin's costs, its two-page order fails to articulate why it reduced Michelin's award of

reporters' fees to $10,000 below the Deals' recommended statutorily appropriate award based on NRS 18.005(2).[10]

Therefore, we reverse the district court's order awarding costs in No. 54472 and remand for further proceedings consistent with this disposition. Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, J.
Douglas

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Parraguirre

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[10]Michelin also argues that the district court erred by (1) categorically denying any costs that were not expressly documented in relation to a specific issue or aspect of the case, and (2) limiting expert fees to the $1,500 statutory cap.

A review of the record shows that the Deals went to great lengths to catalogue each of Michelin's proffered costs and that they provided the district court with evidence that many of Michelin's costs were inflated, not properly documented, or not statutorily recoverable. The district court's order suggests that its award in these respects tracks the Deals' reasoning, but we are unable to adequately consider whether the district court properly exercised its discretion in arriving at these amounts. Accordingly, on remand, the district court is to reconsider the reasonableness of these cost awards as well.

cc: Hon. Doug Smith, District Judge
Campbell & Williams
Law Offices of Thomas F. Dasse, P.C.
Lewis & Roca, LLP/Las Vegas
Eighth District Court Clerk

GIBBONS, J., concurring:

Instruction #27 is based upon Gunlock v. New Frontier Hotel, 78 Nev. 182, 370 P.2d 682, (1962). In this case we concluded that "[t]he mere fact that there was an accident or other event and someone was injured is not of itself sufficient to predicate liability. Negligence is never presumed but must be established by substantial evidence." Id. at 185, 370 P.2d at 684. The Gunlock case was based upon a slip and fall injury sustained by Mrs. Gunlock. Id. at 183, 370 P.2d at 683. I would not extend the "mere happening" instruction to strict products liability claims. However, I agree with the majority that any alleged error in issuing Instruction #27 was harmless.

, J.
Gibbons