IN THE SUPREME COURT OF THE STATE OF NEVADA

NORTON CO.,

Appellant,

vs.

ERIC FERGESTROM AND TIMOTHY MATTHEWS,

Respondents.

No. 35719

FILED

NOV 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY D. Richards
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment upon a jury verdict and from an order denying a new trial in a personal injury action. Respondent Eric Fergestrom was seriously injured when a grinding wheel, owned by respondent Timothy Matthews, exploded while he was sharpening a knife on the wheel. Fergestrom sued Matthews for personal injuries arising from the explosion of the wheel. Matthews failed to answer the complaint and a default judgment was entered against him.

After the district court denied Matthews' motion to set aside the default judgment, Fergestrom entered into a loan receipt agreement with Farmers Insurance Exchange ("Farmers"), Matthews' homeowners insurance carrier. The agreement required Fergestrom to stipulate to setting aside the default judgment and to file an amended complaint naming appellant Norton Co., the manufacturer of the grinding wheel, as a defendant. In consideration, Farmers loaned Fergestrom $150,000.00 to assist with the costs of Fergestrom's claims against Norton. The agreement limited Farmers' total liability for any claims Fergestrom had against Matthews to $150,000.00.

In the early stages of the litigation, Norton cross-claimed against Matthews for contribution to which Matthews responded by filing a motion for summary judgment. The district court granted Matthews' motion, concluding that Norton was not entitled to contribution as a matter of law.

The case proceeded to trial. At the close of Fergestrom's case, Matthews moved for dismissal. Matthews' motion was unopposed and was granted. Shortly thereafter, Norton requested that the loan receipt agreement between Fergestrom and Farmers be admitted into evidence.

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The district court denied Norton's request and the agreement was never offered into evidence.

The jury returned a $2,000,000.00 verdict in favor of Fergestrom. Norton moved for a judgment notwithstanding the verdict and for a new trial. The district court denied both motions. Norton now timely appeals, alleging various errors by the district court.

First, Norton argues that the district court erred by enforcing the loan receipt agreement, by not admitting it into evidence, and by not instructing the jury with regard to the existence of the agreement. Fergestrom and Matthews argue that the loan receipt agreement is enforceable, is not against public policy, and that the district court correctly refused to admit the agreement into evidence. We conclude that the loan receipt agreement is enforceable and is not against public policy. In addition, the district court did not abuse its discretion by excluding evidence of the agreement.

Private agreements, which constitute a partial settlement of a dispute between a plaintiff and two or more defendants and which retain the settling defendant as a party at the trial have become known as "Mary Carter agreements."[1] These agreements take on various forms depending on the individual facts of a particular case and the underlying law of the jurisdiction.[2] Generally, Mary Carter agreements have the following characteristics:

1) The liability of the settling defendant is limited and the plaintiff is guaranteed a minimum recovery;

2) The settling defendant remains a party to the pending action without disclosing the full agreement to the non-settling parties and/or the judge and jury, absent court order; and

3) If judgment against the non-settling defendant is for more than the amount of settlement, any money collected will first offset the settlement so that the settling defendant may ultimately pay nothing.[3]

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[1]See Note, The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions, 47 S. Cal. L. Rev. 1393, 1396 (1974).

[2]See Grillo v. Burke's Paint Co., Inc., 551 P.2d 449, 452 (Or. 1976).

[3]See Carter v. Tom's Truck Repair, 857 S.W.2d 172, 175 (Mo. 1993).

The facts of Lum v. Stinnett[4] typify the traditional Mary Carter agreement. In Lum, the plaintiff and two co-defendant physicians sought to shift the malpractice liability to a third defendant physician. Under the agreement, the two settling defendants agreed to pay plaintiff $20,000.00 if the jury awarded plaintiff nothing or less than $20,000.00. On the other hand, if the jury verdict exceeded $20,000.00, the two settling physicians would pay nothing. Plaintiff further agreed not to settle with the third physician for less than $20,000.00 without the consent of the two settling physicians. The two settling defendants participated at trial, but the plaintiff directed his case toward the third physician. At the close of the case, plaintiff dismissed all charges against the settling defendants and recovered a judgment of $50,000.00 against the remaining physician.[5] This court reversed the decision on appeal concluding that such collusive agreements were void and that "agreements whereby insurance carriers agree to any pay consideration to foster litigation in which they are not interested, in order to avoid their own liabilities, [are] contrary to law and public policy."[6]

This court's decision in Lum has been observed by other courts as adopting a per se rule against the enforcement of Mary Carter agreements.[7]

Norton's argument on appeal is predicated largely on Lum and its per se invalidation of Mary Carter type agreements. We conclude, however, that this case is factually and legally distinct from Lum and this court's more recent pronouncement in NAD, Inc. v. District Court,[8] controls the resolution of this issue.

In NAD, this court upheld a loan receipt agreement similar to the one entered into in the present dispute. In doing so, this court stated, "[W]e join the majority of jurisdictions that recognize that a loan receipt agreement is a proper means for an insurer to avoid subrogation, and

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[4]87 Nev. 402, 488 P.2d 347 (1971).

[5]See id.

[6]Id. at 409, 488 P.2d at 351.

[7]See Vermont Union School District No. 21 v. H.P. Cummings Constr. Co., 469 A.2d 742 (Vt. 1983) (discussing Lum).

[8]115 Nev. 71, 976 P.2d 994 (1999).

thereby avoid being named a real party in interest in a third party contribution action."[9]

We conclude that the loan receipt agreement is valid under NAD and that it lacks distinct features of the Mary Carter agreement disapproved in Lum.

The Lum court was primarily concerned about the secret and collusive nature of the agreement involved in the case.[10] However, the loan receipt agreement in the present dispute was never a secret and collusive arrangement; and therefore, the concerns of the Lum court are not implicated. Norton was aware of the existence of the agreement more than two years before the trial. In addition, at trial, Matthews was not secretly aligned with Fergestrom's position, as was the case in Lum; but rather, Matthews defended his interests on the basis that he was not liable for Fergestrom's injury. Therefore, the loan receipt agreement is not contrary to the public policies of this state and is enforceable.

The decision to admit or deny evidence is within the sound discretion of the trial court and will not be overturned absent manifest error or an abuse of discretion.[11] Deciding whether a settlement agreement should be disclosed to a jury rests within the broad discretion of the trial court.[12] An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.[13]

Although some courts admit evidence of the existence of Mary Carter agreements,[14] the district court, after considering the arguments of both counsel, concluded that the existence of the agreement did not affect or alter the trial and in no way prejudiced Norton. The district court stated:

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[9]Id. at 73, 976 P.2d at 997.

[10]Lum, 87 Nev. at 409-10, 488 P.2d at 351.

[11]See NRS 48.035; Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998).

[12]See Doty v. Bishara, 848 P.2d 387, 393 (Idaho 1992).

[13]See State, Dep't Mtr. Veh. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

[14]See, e.g., Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1987).

> In Mary Carter agreements, the Courts have been concerned with what might appear to a jury to be adversarial when it is not and thereby result in fraud on the jury. There has also been a concern based on this, that the non-consenting defendant may not have received a fair trial.
>
> In this case the settling defendant's goal was to limit its liability and the goal or trial strategy of the non-settling defendant was not any different than what one would expect, absent the agreement. The jury was exposed to an adversarial atmosphere in which Matthews's [sic] position was adverse to both the Plaintiff and Norton's. Matthew's [sic] took the position that he was not responsible to the Plaintiff because he properly installed the grinder and that the grinder must have been defective and, therefore, Norton's responsibility.
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> This Court finds that the jury was not misled by a sham defense and once it was disclosed that Fergestrom did not hold Matthews responsible for his injuries, Matthews was released from the case. The Court does not feel that the trial would have progressed any differently absent the agreement. Further, that there was nothing to be gained by disclosing the agreement to the jury. Norton received a fair trial.

We conclude, therefore, that the district court did not abuse its discretion by excluding the loan receipt agreement from evidence.

Second, Norton argues that there was insufficient evidence to support the jury's verdict of liability against it. Fergestrom and Matthews argue that the record contains substantial evidence that supports the jury's verdict against Norton. We conclude that Norton's argument lacks merit and the jury's verdict was supported by substantial evidence.[15]

In general, the jury's findings will be affirmed on appeal if they are based upon substantial evidence in the record.[16] "'Substantial

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[15]Although Norton attempts to appeal from the district court's denial of its JNOV motion, we note that no appeal may be taken from such an order. See Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995). However, we elect to construe the assignment of error as an appeal from the underlying judgment. Id.

[16]Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996).

evidence has been defined as that which 'a reasonable mind might accept as adequate to support a conclusion.'"[17]

In order to successfully bring a strict liability claim, a plaintiff must prove that (1) the product was defective, which rendered it unreasonably dangerous; (2) the defect existed at the time the product left the manufacturer; and (3) the defect caused the plaintiff's injury.[18] A product is defective when it fails to perform "'in the manner reasonably to be expected in the light of its nature and intended function.'"[19] Proof of the defective condition can be made either circumstantially or directly.[20]

We conclude that the record contains substantial evidence upon which the jury could have based its verdict. First, Fergestrom testified that he was using the grinding wheel in the normal and intended manner. It appears from the record that Norton did not dispute this fact. Second, Norton's experts were cross-examined extensively about the safety instructions provided with the grinding wheel. We conclude that the jury could have reasonably concluded, based on this testimony, that the product warnings were deficient. Third, there was evidence presented to the jury that no testing was done on the wheels after they were shipped from Brazil to Texas and that the wheels could have been damaged during shipment. Finally, there was evidence presented to the jury that the wheel's instructions inadequately explained that the consumer needed to perform a "ring test on vitrified wheels" in order to identify any defects in the wheel.

We conclude that substantial evidence was presented to the jury and its decision should not be disturbed on appeal.

Third, Norton argues that a new trial is warranted because the damages awarded in this case were excessive and were based on

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[17]Id. (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

[18]See Fyssakis v. Knight Equipment Corp., 108 Nev. 212, 214, 826 P.2d 570, 571 (1992); see also Shoshone Coca-Cola v. Dolinski, 82 Nev. 439, 420 P.2d 855 (1966).

[19]Ward v. Ford Motor Co., 99 Nev. 47, 49, 657 P.2d 95, 96 (1983) (quoting General Electric Co. v. Bush, 88 Nev. 360, 498 P.2d 366 (1972)).

[20]See Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 447, 686 P.2d 925, 929 (1984).

passion, prejudice, and the improper remarks of counsel. Fergestrom and Matthews argue that the damages awarded by the jury were not excessive and were based on substantial evidence. We conclude that the jury's verdict was reasonable in light of the evidence presented and the gravity of Fergestrom's injury.

A new trial may be granted under NRCP 59(a)(2) and (6) when the verdict is the product of "[m]isconduct of the jury or prevailing party" or when the jury has awarded "[e]xcessive damages appearing to have been given under the influence of passion or prejudice."

"[I]n actions for damages in which the law has provided no legal rule of measurement, it is the jury's responsibility to determine the amount to be allowed."[21] A court should not grant a new trial on the ground of excessive damages "unless the verdict is 'so flagrantly improper as to indicate passion, prejudice or corruption in the jury.'"[22] Furthermore, this court may not "invade the province of the jury by arbitrarily substituting what the court feels is a more suitable sum."[23]

The standard to be used in determining whether reversal is warranted by the misconduct of the prevailing party's attorney is as follows:

> "To warrant reversal on grounds of attorney misconduct, the 'flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'"[24]

Furthermore, this court has stated that "[o]n review, we will not disturb the district court's ruling on a motion for a new trial absent an abuse of discretion."[25]

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[21]Hazelwood v. Harrah's, 109 Nev. 1005, 1009-10, 862 P.2d 1189, 1193 (1993) (citing Stackiewicz, overruled on other grounds by Vinci v. Las Vegas Sands, 115 Nev. 243, 984 P.2d 750 (1999).

[22]Id. (quoting Stackiewicz, 100 Nev. at 454, 686 P.2d at 932).

[23]Id.

[24]Barrett v. Baird, 111 Nev. 1496, 1515, 908 P.2d 689, 702 (1995) (quoting Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984)).

[25]DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000) (citing Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978)).

Given the substantial amount of evidence presented, the jury's award does not appear to have been based on passion, prejudice, or the improper remarks of counsel. We, therefore, conclude that $2,000,000.00 is not shocking or flagrantly improper given the severity of Fergestrom's injury.

Fourth, Norton argues that the district court erred in granting Matthews' motion for summary judgment on its cross-claim because it was entitled to contribution from Matthews. Matthews argues that the district court's decision was proper because Norton was not entitled to contribution and because Norton waived its right to seek contribution from Matthews because it failed to object to his dismissal during the trial. We conclude that the district court correctly entered summary judgment and that Norton's arguments are without merit.

Summary judgment should be entered where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[26] Upon a motion for summary judgment, the non-movant must set forth specific facts that demonstrate a genuine factual issue and may not rest upon general allegations.[27] A genuine issue of material fact exists where the evidence is such that "a reasonable jury could return a verdict for the non-moving party."[28] The proof offered to the lower court must be construed in a light most favorable to the non-moving party.[29] The non-movant's statements must be accepted as true and all reasonable inferences that can be drawn from the evidence must be admitted.[30]

This court conducts a de novo review of an order granting summary judgment.[31] On appeal, this court must determine whether the

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[26]See NRCP 56; see also Dermody v. City of Reno, 113 Nev. 207, 211, 931 P.2d 1354, 1357 (1997).

[27]See NRCP 56(e); see also Bird v. Casa Royale West, 97 Nev. 67, 70, 624 P.2d 17, 19 (1981).

[28]Dermody, 113 Nev. at 210, 931 P.2d at 1357.

[29]Id.

[30]See Great American Ins. v. General Builders, 113 Nev. 346, 350-51, 934 P.2d 257, 260 (1997).

[31]See Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992).

district court erred in concluding that an absence of genuine issues of material fact justified the granting of summary judgment.[32]

We conclude that Norton was not entitled to contribution from Matthews because contributory negligence is not a defense in a products liability action.[33] In addition, because Norton alleged that Fergestrom was comparatively at fault, there can be no right of contribution between concurrent tortfeasors as a matter of law.[34]

In addition, we conclude that Norton failed to preserve the issue for appeal by failing to object to Matthews' dismissal at the close of Fergestrom's case.[35]

We conclude that each of the district court's decisions regarding this case were correct. Specifically, we conclude that: (1) the loan receipt agreement was enforceable and evidence of the agreement did not have to be introduced to the jury; (2) sufficient evidence supports the jury verdict; (3) the jury verdict was not excessive or the product of passion or prejudice; and (4) the district court correctly granted summary judgment on Norton's cross-claim.

We, therefore,

AFFIRM the district court's judgment and order denying a new trial.

Young, J.

Agosti, J.

Leavitt, J.

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[32]See Bird, 97 Nev. at 68, 624 P.2d at 18.

[33]See Andrews v. Harley Davidson, 106 Nev. 533, 537-38, 796 P.2d 1092, 1094 (1990); Central Telephone Co. v. Fixtures Mfg., 103 Nev. 298, 299, 738 P.2d 510, 511 (1987); see also NRS 17.225, NRS 41.141.

[34]See, e.g., Watson Truck and Supply Co., Inc., v. Males, 801 P.2d 639, 643 (N.M. 1990).

[35]See Landmark Hotel v. Moore, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988).

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