IN THE SUPREME COURT OF THE STATE OF NEVADA

GLORIA SEMLER, Appellant, vs. EXBER, INC., D/B/A WESTERN HOTEL & CASINO, Respondent.	No. 35722
GLORIA SEMLER, Appellant, vs. EXBER, INC., D/B/A WESTERN HOTEL & CASINO, Respondent.	No. 35925

FILED
AUG 12 2002
JANETTE M BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is a consolidated appeal from a judgment on a jury verdict and from a special order awarding attorney fees and costs.

On August 2, 1998, while visiting the Western Hotel and Casino, appellant Gloria Semler slipped on a hardwood floor in the gaming area that allegedly had a puddle of water and ice on it. Semler fractured her hip in the fall. She was sixty-nine years old at the time of the fall.

Semler asserted that the Western was negligent for allowing a hazardous condition – ice and liquid – to remain on the floor. In particular, Semler asserted that it was unreasonable to remove carpeting, a safer condition, and replace it with hardwood flooring, thus creating a hazardous condition, considering the frequency with which drinks were spilled on the floor in the gaming area. Further, Semler asserted that, even if it was not unreasonable to install hardwood flooring, the frequency with which drinks spilled on the floor constituted a virtual and continuous

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hazard. As such, Semler argued that the Western did not take reasonable steps to address the known hazardous condition.

Raymond Tagliaferri, general manager for the Western since 1982, testified that carpeting on the gaming floor was removed and hardwood laid down approximately ten to twelve years ago. Tagliaferri stated that the carpet was replaced due to problems with the material retaining "odors; [sic] cigarettes, coffee, tea, alcohol, whatever it [was], and [would] get into it." Tagliaferri also stated that the carpet was harder to maintain or clean than the wood floors. Tagliaferri acknowledged, in addition, that drinks were spilled on both the carpet and the wood floors.

Tagliaferri testified that at that time three porters were scheduled to work the swing shift at the Western. The porters have cleaning duties and respond to calls for clean-ups but are not routinely scheduled to perform drink clean-ups. Tagliaferri testified that the hotel's policy is "if there is a spilled drink, any employee alerted to it calls for a porter to come and clean it up." Tagliaferri stated that the hotel does not put up barricade warnings regarding wet areas but that the porters are required to stand there until the spill is cleaned up. Anouleth "Joey" Vandyleuam, the pit boss on duty the day of Semler's accident, also stated that porters are called to clean up spilled drinks and that a security guard will stand over the spill until a porter arrives to clean up.

John Arto, chief engineer at the Western for the past 11 years, stated that he made daily inspections of the Western property as part of his routine duties in order to determine the presence of any hazards or parts of the building requiring repairs. In particular, Arto testified that he daily inspected the hardwood flooring of the gaming area for splintering, chips or wear patterns. Arto stated that if a problem, such as splintering, was found on the wood flooring, the area was blocked off and

repairs were immediately started. Regarding the prevalence of spilled drinks, Arto testified as follows:

> **Question**: Is it unusual when you do your walk throughs to find a spilled drink on the floor?
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> **Arto**: That's not unusual, no, sir.
>
> **Question**: And when you encounter a spilled drink what do you do?
>
> **Arto**: If I encounter it myself I'll sit there and stop, make sure no one steps in it. We have radios. All my men are issued radios. We can contact the hotel front desk or security directly and have a porter come and clean it up. And we make sure we stay there or at least till security comes to keep the area blocked off.
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> . . . .
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> **Question**: Are you aware of any slip and fall accidents where somebody's slipped on a spilled drink on the hardwood floor?
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> **Arto**: No, sir.
>
> **Question**: And you've been there eleven years, right?
>
> **Arto**: Yes, sir.

At the end of trial, Semler proposed a three-part jury instruction regarding hazardous condition, constructive notice, and the preponderance of evidence standard. Specifically:

> In determining whether any condition on the defendant's premises constitute[s] a hazardous condition you consider all the surrounding circumstances shown by the evidence.
>
> If you find by a preponderance of evidence that the defendant, Western Hotel and Casino, knew that drinks or other debris were frequently spilled on the floor and that said drinks or other debris create a hazard to its patrons, you may find the defendant was on constructive notice that any

> time a hazardous condition might exist which would result in injury to its patrons.
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> To prevail in a negligence claim plaintiff must prove by a preponderance of the evidence that defendant had notice of a dangerous condition on its premises by showing one of the following: [1:] the defendant or its agents caused the condition or, [2:] the defendant had actual knowledge or constructive notice of the condition.

The Western proposed a single part instruction covering similar issues. Specifically:

> To prevail in a negligence claim, plaintiff must prove by a preponderance of the evidence that the business proprietor had notice of a dangerous condition by showing one of the following: (1) the defendant or its agents caused the condition; (2) the defendant had actual knowledge of the condition's existence; or (3) that the defendant had constructive notice of the condition in that it had existed for such a length of time that in the exercise of due care, the proprietor should have known of it and taken action to remedy it.

Both parties cited to this court's decision in Sprague v. Lucky Stores, Inc.[1] Semler asserted that the three-part instruction was necessary to express to the jury what hazardous condition may have existed and the fact that the wood flooring was problematic. The Western asserted that the three-part instruction improperly commented on evidence in the case. The district court concluded that it would utilize the instruction proffered by the Western because it believed that it encompassed the law addressed in Sprague.

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[1]109 Nev. 247, 849 P.2d 320 (1993).

In its closing arguments, the Western specifically mentioned the single part jury instruction:

> [T]he single most [important] instruction, and of course I didn't get it blown up in this area, in [sic] Number 19. And what it tells you is the summation of the case on what it takes to find the Western Hotel liable. And what that tells you is if you believe there was ice there, one, that we caused the condition. We caused the ice being there. Two, we had actual knowledge that the ice was there. Or, three, that it had been there long enough for us to do something about it. Now, that's the law.

Following trial, the jury returned a verdict on behalf of the Western. Thereafter, without discussion or analyses, the district court awarded the Western $36,473.50 in attorney fees and costs pursuant to NRS 17.115 and NRCP 68.

Semler first argues that the district court improperly instructed the jury as to the appropriate standard for constructive notice. Semler asserts that she was entitled to a jury instruction on her theories of the case where consistent with existing law. Semler contends that this court's decision in Sprague is similar to her case and correctly states the instruction for constructive notice.

Specifically, Semler contends that Sprague stands for the proposition that the amount of time a hazard is present before an accident occurs is irrelevant to a defendant's constructive notice of a virtually continuous hazardous condition. Thus, where the Western was clearly aware that drinks were spilled on the hardwood floors of the gaming area such that they presented a safety hazard, the Western was on constructive notice that, at any time, a hazardous condition might exist that could result in injury to its patrons. Semler argues that the Western's jury

instruction regarding constructive notice included an improper time requirement regarding the length of time the specific hazard must have been present before the injury occurred.

The Western argues that Semler's proposed instruction regarding constructive notice was not proper because it was, specifically, the length of time a dangerous hazard had existed that was one of the most important factors in determining whether a defendant had constructive notice of a hazardous condition. Additionally, the Western argues that Sprague is inapplicable to the current situation because there was no evidence suggesting that a casino setting is similar to a grocery store setting where debris is "virtually continuous."

In Sprague,[2] appellant slipped and fell on a grape in the produce section of the grocery store.[3] As a result, Sprague brought suit for his resulting injuries.[4] Testimony by grocery store employees assigned to the produce section indicated that produce debris continually fell on the floor and that debris would be found on the floor "thirty to forty times" during a single shift.[5] Further, as a result of the produce debris, employees would sweep the floor "six or seven times per hour."[6] Additional testimony by the store manager indicated that because the produce department was a "fairly high-risk department to have debris on

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[2]Id.

[3]Id. at 249, 849 P.2d at 322.

[4]Id.

[5]Id.

[6]Id.

the floor . . . all employees in the Lucky's produce department were instructed to always keep an eye open for debris on the floor."[7]

In reversing the district court's granting of summary judgment on behalf of Lucky Stores, this court stated:

> Where the foreign substance is the result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it.[8]

As in Sprague, Semler offered no evidence before the district court suggesting that the Western was responsible for the liquid and ice's presence on the floor or suggesting that the Western had actual notice of the liquid and ice's presence on the floor.[9] Accordingly, Semler was required to offer proof that the Western had constructive notice of the hazardous condition pertaining to the Western's hardwood floor.[10]

In the present case, the Western's chief engineer testified that it was "not unusual" to find spilled drinks on the floor. Additionally, the Western's general manager testified that the hotel had specific policies regarding the clean-up of spilled drinks.

Generally, a party has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or

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[7]Id.

[8]Id. at 250, 849 P.2d at 322-23 (citations omitted).

[9]Id. at 250, 849 P.2d at 323.

[10]Id.

incredible that evidence may be.[11] Further, "[j]ury instructions should be clear and unambiguous."[12] The district court may, however, refuse a jury instruction on a party's theory of the case which is substantially covered by other instructions.[13] In addition, a district court must not instruct a jury on theories that misstate the applicable law.[14]

In settling the jury instructions, the district court concluded the evidence only supported instructions based upon one of Semler's theories: replacing carpet with hardwood floors constituted negligence because the Western knew that drinks were spilled, and the hardwood flooring was a hazardous condition when wet.

Semler never argued that the evidence supported an instruction that spilled drinks were a "virtually continuous" condition under Sprague. Instead, Semler requested an instruction based upon the testimony that a spilled drink is not an unusual condition. From this testimony, Semler desired to inform the jury that if the Western knew that "drinks or other debris frequently spilled on the floor" then the Western would have constructive notice of a hazard. This is an incorrect statement of the law.

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[11]See Johnson v. Egtedar, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996).

[12]Culverson v. State, 106 Nev. 484, 488, 797 P.2d 238, 240 (1990).

[13]Beattie v. Thomas, 99 Nev. 579, 583, 668 P.2d 268, 271 (1983) (citing Village Development Co. v. Filice, 90 Nev. 305, 312, 526 P.2d 83, 87-88 (1974)).

[14]Id. at 583, 668 P.2d at 271 (citing Federal Ins. Co. v. Public Service Co., 570 P.2d 239, 242 (Colo. 1977)).

The standard under Sprague is a virtually continuous condition. The evidence under Sprague demonstrated that spills occurred thirty or forty times a day and that the floor had to be swept several times an hour. Thus, the spills were so frequent that they constituted an ongoing, continuous hazard. This is a far cry from evidence that simply says a spilled drink is not an unusual occurrence. Accordingly, we conclude that the district court did not err in refusing Semler's proposed jury instruction.

Semler next contends that the district court erred in awarding attorney fees to the Western. Semler argues that the Western's motion for attorney fees should have been denied because: (1) her claim was brought in good faith; (2) the Western's offers of judgment were wholly unreasonable given the substantial damages incurred by Semler as a result of the accident; (3) Semler's decision to reject the offers of judgment was not grossly unreasonable or in bad faith; and (4) the Western failed to demonstrate that: (a) the fees sought were reasonable; or (b) justified in amount; or (c) when the fees were incurred.[15] Specifically, Semler contends that the Western only offered to provide billing memoranda, and the district court did not request any memoranda. Therefore, Semler asserts that there was insufficient evidence to review and, as a result, the district court could not then appropriately assess the reasonableness of the fees.

Conversely, the Western argues that Semler's claim was not brought in good faith. Further, the Western asserts that, as Semler's damages were speculative, it was grossly unreasonable to reject the

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[15]Citing Bidart v. American Title, 103 Nev. 175, 734 P.2d 732 (1987); Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983).

Western's offers of judgment. Lastly, the Western contends that its attorney fees were reasonable and that it offered to provide in camera any billing memorandum the district court wanted to review.

"A district court's award of attorney fees will not be disturbed on appeal absent a manifest abuse of discretion."[16] Further, "[i]t is an abuse of discretion to award attorney fees without a statutory basis for doing so."[17] This court has also stated that a trial court must evaluate the factors enunciated in Beattie v. Thomas[18] when exercising its discretion to award attorney fees and costs.[19] Specifically:

> In exercising its discretion, the trial court must evaluate the following factors: (1) whether the plaintiff's claim was brought in good faith; (2) whether the offeror's offer of judgment was brought in good faith; (3) whether the offeree's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether fees sought by the offeror are reasonable and justified in amount.
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> . . . .
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> In Schwartz v. Estates of Greenspun, 110 Nev. 1042, 881 P.2d 638 (1994), this court cautioned the trial bench to provide written support under the Beattie factors for awards of attorney fees made pursuant to offers of judgment.[20]

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[16]Frantz v. Johnson, 116 Nev. 455, 471, 999 P.2d 351, 361 (2000) (citation omitted).

[17]Id. (citation omitted).

[18]99 Nev. 579, 668 P.2d 268 (1983).

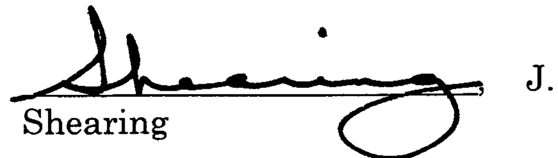
[19]Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 323-24, 890 P.2d 785, 789 (1995).

[20]Id.

In the present case, there is no dispute that the district court had the discretion to consider an award of attorney fees pursuant to NRS 17.115 and NRCP 68. However, the district court did not provide a Beattie analysis in its award of attorney fees. Accordingly, we conclude that the district court erred in making such an award without the required consideration and analysis.

Having considered Semler's arguments 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.
Shearing

_______________, J.
Becker

cc: Hon. Gene T. Porter, District Judge
Barron Vivone Holland & Pruitt Chtd.
Beckley, Singleton, Chtd./Las Vegas
Clark County Clerk

ROSE, J., dissenting:

I dissent because I believe the majority is reading our holding in Sprague v. Lucky Stores, Inc.,[1] too narrowly, and therefore erroneously concludes that Sprague is inapplicable unless evidence of "a virtually continuous hazard" is demonstrated. In my view, Semler presented enough evidence to entitle her to the proposed instruction she requested.

In Sprague, we recognized the standard rule that an owner or occupier of property may be liable for a foreign substance on the floor that causes injury to a patron if the owner or occupier has actual constructive notice of the specific foreign substance.[2] But in doing so, we extended the duty to require an owner or occupier to remedy a dangerous condition that frequently exists on the property.[3] The majority seizes upon the words "virtually continuous debris" in our Sprague opinion, observes that no such testimony used this clause in this case or established that spilled drinks were there all the time, and concludes that Semler was not entitled to an instruction relating to a hazardous condition that could be viewed as continuous.

This narrow reading of Sprague ignores the evidence presented in that case to warrant the giving of the instruction which Semler requested in the present case. In Sprague we stated:

> Based on the deposition testimony presented to the district court, a reasonable jury could have found that Lucky knew that produce was frequently on the floor, that this produce created a

[1]109 Nev. 247, 849 P.2d 320 (1993).

[2]Id. at 250, 849 P. 2d at 322-23.

[3]Id. at 251, 849 P.2d at 323.

> hazard to shoppers, and that sweeping the floor could not wholly keep the floor free of debris. A reasonable jury could have determined that the virtually continual debris on the produce department floor put Lucky on constructive notice that, at any time, a hazardous condition might exist which would result in an injury to Lucky customers. We conclude [that] the district court erred in denying Sprague the right to have these factual issues decided by a jury or other finder of fact.[4]

We clearly stated that if an occupier or owner knows that a foreign substance was frequently on the floor and it created a hazard to patrons, a jury can conclude that the foreign substance was a continuous problem and the owner or occupier was on constructive notice that, at any time, "a hazardous condition might exist" which would result in injury to a patron.[5]

The Western's chief engineer testified that it was not unusual for drinks to be spilled on the wooden floor and that procedures were in place to clean up these spilled drinks to remedy the recurring problem. I equate this testimony as being similar to the testimony in Sprague that produce was "frequently on the floor." This should have entitled Semler to an instruction that called on the jury to determine if the continually spilled drinks put the Western on notice that, at any time, a hazardous condition might exist that could endanger a patron.

Accordingly, I conclude that Semler presented sufficient evidence to warrant the giving of the requested instruction concerning the

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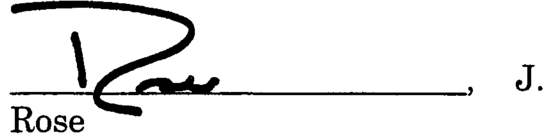
[4]Id.

[5]Id.

continual existence of a dangerous condition and the refusal to give it was reversible error. Therefore, I would reverse the judgment and remand for a new trial.



Rose, J.