IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM A. LEONARD, AS CHAPTER 7 BANKRUPTCY TRUSTEE FOR ALAN CHENIN,
Appellant,
vs.
SEARS ROEBUCK AND COMPANY,
Respondent.

No. 36177

FILED

MAY 15 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Alan Chenin's[1] motion for a new trial following a jury verdict on behalf of respondent Sears Roebuck Co. in a personal injury tort action.

Chenin purchased a dishwasher from Sears. On April 3, 1995, Chenin's dishwasher sprang a leak. Chenin contacted Sears which dispatched one of its service technicians, Gary Isaksen, to resolve the leak. In the course of repairing the leak, a soldered connection cracked causing water to flood into Chenin's home. Chenin and Isaksen ran outside in order to shut off the water supply. Isaksen indicated he needed a wrench to shut off the valve and returned to the Chenin home to get a wrench from his tool kit. As he was returning to the street, Isaksen bumped into Chenin. The impact was not sufficient to cause either party to fall down.

Chenin believed he was injured by the collision and went to Desert Springs Hospital emergency room. Desert Springs Hospital records indicate Chenin had fractures to the ninth and tenth ribs on his

[1]Alan Chenin filed for bankruptcy during the course of this appeal. William Leonard was appointed bankruptcy trustee for Alan Chenin. For the sake of simplicity, we refer to appellant as Chenin throughout the memorandum.

03-08275

left side with patient report of pain extending from the low back down the right leg. He was given minimal treatment, and the broken ribs resolved in time with little additional treatment.

About two days after the collision, Chenin sought medical medical treatment for back and leg pain. Several disc problems were discovered. and over the course of the next eighteen months, Chenin would undergo a spinal diskectomy surgery to fuse lumbar disks four and five (L4-5) and insertion of both a transcutaneous electrical nerve stimulator (TENS unit) and a dorsal column stimulator for pain management as a result of lingering back pain. Chenin's doctors indicated his back problems were congenital, but based upon his history, asymptomatic prior to the collision. The doctors' therefore concluded that the collision aggravated Chenin's pre-existing congenital condition. Based on these injuries and his belief that the April 3 collision was the direct and proximate cause of his injuries, Chenin filed suit against Sears and Isaksen.[2]

During the course of Chenin's back treatments, Chenin and his family were involved in an auto accident on June 10, 1996, wherein the Chenin vehicle was rear-ended while at a stoplight. Chenin received treatment for transient cervical and lumbar strain (i.e., whiplash). His treating physician determined these strains were fully resolved within a short period of time and had no effect on his preexisting back trauma. However, in Chenin's claim to recover damages from the car accident, he asserted permanent damage to his back.

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[2]Gary Isaksen was subsequently dismissed from this appeal by stipulation of the parties.

Chenin claimed Sears was liable based on two theories. First, as Isaksen's employer, Sears was responsible for Isaksen's negligence. Second, the original leak was beyond Isaksen's expertise, and he should have called Sears' independent plumbing contractor rather than attempt to repair the leak itself. Sears acknowledged if Isaksen was negligent for running into Chenin, they would be liable. However, they disputed any liability based upon Isaksen's alleged lack of expertise. In addition, Sears disputed Chenin's claim that the collision caused his back problems. Sears claimed the back injuries were the result of the pre-existing congenital condition, and no aggravation of the pre-existing condition occurred from the Isaksen collision. Sears claimed Chenin was not truthful when he said he never had back symptoms prior to the collision.

Following trial on January 5, 2000, the jury returned a verdict on behalf of Sears. Sears was awarded costs.

On January 20, 2000, Chenin filed a motion for a new trial. Chenin argued he was entitled to a new trial pursuant to NRCP 59(a). Chenin alleged five grounds in support of his motion: (1) the district court improperly denied two pretrial motions in limine regarding exclusion of prior medical treatment and information pertaining to the subsequent auto accident; (2) publication of a civil complaint involving the subsequent auto accident; (3) the district court's limitation of testimony from Bob Lang, owner of Rakeman Plumbing, Sears' independent plumbing contractor; (4) the admission of Dr. Lew Etcoff's testimony regarding Chenin's psychological information; and (5) juror misconduct, including racist or biased comments, independent juror research and investigation, and improper influence of fellow juror members during jury deliberations.

Sears opposed Chenin's motion arguing that the motion was untimely and had no merit. On April 12, 2000, the district court denied Chenin's motion for a new trial stating:

> "The court finds no support for [Chenin's] contentions of "irregularities" that prevent [him] from receiving a fair trial. This court spent a considerable amount of time reviewing [Chenin's] numerous motions in limine and ruled on them appropriately. In addition, the court finds no support for [Chenin's] allegations of juror misconduct. Jurors are not expected to lay aside their own observations and experiences in life.

Standard of review

The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will only be reversed upon a showing of palpable abuse.[3] Chenin also argues that the district court erred in admitting, excluding or limiting evidence, thus depriving him of his right to a fair trial. A district court's "decision to admit or exclude relevant evidence, after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge."[4]

First, Chenin argues the district court's denial of four of Chenin's pretrial motions in limine denied him a fair trial. Chenin contends, but for the denial of the pretrial motions in limine, the jury would have found on his behalf. Two of the motions in limine were included in his motion for a new trial. They are: motion #4 – seeking the exclusion of pre-existing conditions and motion #18 – seeking to exclude

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[3]See Pappas v. State Dep't of Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988).

[4]Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998).

information about the subsequent auto accident. On appeal, Chenin also contends the district court erred in denying two additional motions in limine: motion #11 – seeking the exclusion of the testimony of Sears' employee, Jeff Trujillo, and motion #15 – seeking the exclusion of the testimony of Dr. Lew Etcoff, rebuttal witness for Sears.

Sears contends that since the motions were dismissed without prejudice, Chenin was required to object to the evidence when it was presented at trial. Because Chenin failed to properly object at trial, he has waived these issues on appeal and may only raise motion #4 and motion #18 through the appeal of the denial of the new trial. We have recently overturned our previous case law on this issue and now hold that "[W]here an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal."[5]

Turning to the substance of the motions, we conclude the district court did not err in admitting evidence of prior and subsequent injuries. The district court reviewed the information regarding the injuries and determined it was admissible. The decision to admit or exclude relevant evidence is within the sound discretion of the trial court.[6] Given the nature of the collision, the diagnosis and prognosis reflected in the emergency room records and the claim of permanent disability from the subsequent injury, the prior and subsequent records were relevant to the issues of credibility, causation and damages. The same is true of Dr.

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[5]Richmond v. State, 118 Nev. ___, ___, 59 P.3d 1249, 1254 (2002).

[6]Dow Chemical Co., 114 Nev. at 1506, 970 P.2d at 123.

Etcoff's testimony. Accordingly, we conclude the district court did not err in its rulings regarding the pretrial motions in limine and the denial of a new trial based upon those grounds.[7]

Second, Chenin contends the district court erred in allowing publication of Chenin's civil complaint involving the subsequent auto accident. Chenin contends the publication was highly prejudicial, was not listed as a trial exhibit, and was not produced by Sears during discovery. In particular, Chenin contends two statements taken from the complaint were highly prejudicial and unfair: (1) [Chenin] was an able-bodied individual physically capable of engaging in all activities before the [auto] accident, and (2) [Chenin's] back, legs, nervous system, arms and neck were permanently disabled. Chenin also argues the presentation of the complaint was a back door attempt by Sears, without the use of expert medical testimony, to apportion the injuries between the accident at bar and the subsequent auto accident.

Generally, "'a pleading containing an admission is admissible against the pleader in a proceeding subsequent to the one in which the pleading is filed.'"[8] This rule applies so long as the pleader either verifed the complaint or allows the statements to stand without amendment.[9] Thus, statements made in pleadings are admissible unless the party making the statements establishes the statements were inadvertently

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[7]We have considered Chenin's additional arguments regarding Trujillo and the Rakeman Plumbing contract and find them to be without merit.

[8]Whittlesea Blue Cab Co. v. McIntosh, 86 Nev. 609, 611, 472 P.2d 356, 357 (1970) (quoting Dolinar v. Pedone, 146 P.2d 237, 241 (Cal. App2d. 1944)).

[9]Id. at 612, 471 P.2d. at 357.

made, not authorized, or were made under mistake of fact.[10] We see no reason why the same standard should not apply to statements made in subsequent cases that bear on issues relevant to a pending case.

We conclude the district court did not err in allowing publication of the auto accident complaint. Chenin verified the complaint, and it contained admissions by him inconsistent with his claims against Sears. Thus, it was admissible for impeachment purposes.[11] Moreover, Chenin did not, on redirect, take the opportunity to establish the statements in the complaint were made inadvertently, were not authorized by him, or were made under mistake of fact.[12] The district court did not abuse its discretion in admitting the subsequent complaint or in denying the motion for a new trial on that ground.

Finally, Chenin asserts the district court erred in denying his motion for a new trial based on four instances alleged of juror misconduct. In support of his motion, Chenin attached the affidavit of one of the jurors. The affidavit indicated that: (1) the jury foreperson commented during deliberations that 'Jews sue a lot' and 'Chenin and his family are sue happy,' (2) two jurors talked about how their husbands shut off water valves in their consideration of the evidence, (3) some jurors discussed seeing Chenin walking to a restaurant during the lunch hour and their view that his appearance was inconsistent with his claims, and (4) the jury foreperson told jurors holding out on behalf of Chenin that they could go home for the evening if they would vote on behalf of Sears. Chenin also

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[10]Id. at 612, 472 P.2d. at 357-58.

[11]Id. at 611-12, 472 P.2d at 357.

[12]Id. at 611-12, 472 P.2d at 357-58.

argues the four instances of alleged juror misconduct demonstrate the jurors disregarded the jury instructions and, therefore, constitute cumulative juror misconduct warranting a new trial. Neither Chenin nor Sears introduced affidavits from any other member of the jury.

Sears argues the district court did not err in denying Chenin's motion for a new trial where Chenin did not establish jury misconduct sufficient to warrant a new trial. Sears contends the threshold issue in this instance is whether, and to what extent, the juror's affidavit may be considered as evidence of alleged misconduct. In support of its contention, Sears claims NRS 50.065(2)(a) and (b)[13] prohibits the admission of juror affidavits to show the mental processes of the jury or the effects of alleged juror misconduct. With these limits imposed, Sears argues the affidavit fails to demonstrate any prejudicial misconduct.

NRCP 59 provides that a new trial may be granted due to juror misconduct.[14] A motion for a new trial may be premised upon juror misconduct where such misconduct is readily ascertainable from objective facts and overt conduct without regard to the state of mind and mental

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[13]NRS 50.065(2)(a) and (b) state:

> (a) A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith.
>
> (b) The affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose.

[14]See NRCP 59(a)(2).

processes of any juror.[15] In reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings.[16] Further, jurors are prohibited from conducting independent investigations of evidence presented in trial testimony and informing other jurors of the results of that investigation.[17]

"The unsworn testimony of a juror as to a fact which is relevant to the determination of an issue before the jury constitutes misconduct."[18] However, not every incidence of juror misconduct requires the grant of a new trial, and a new trial need not be granted if no prejudice occurred.[19] The question of misconduct and any resulting prejudice is ultimately a question of fact for the district court, and this court will not disturb the determination of the district court absent an abuse of discretion.[20]

Jurors are permitted to bring to the evaluation of the evidence their life experiences. Thus, the use of a juror's life experiences to determine issues of fact or credibility is not misconduct.[21] As to the issue

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[15]See State v. Thacker, 95 Nev. 500, 501, 596 P.2d 508, 509 (1979); see also NRS 50.065.

[16]See Thacker, 95 Nev. at 501, 596 P.2d at 509.

[17]Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151-52 (1997).

[18]Thacker, 95 Nev. at 502, 596 P.2d at 509.

[19]See Tanksley, 113 Nev. at 1002-1003, 946 P.2d at 151-52.

[20]See Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 452, 686 P.2d 925, 931 (1984); see also Walker v. State, 95 Nev. 321, 594 P.2d 710 (1979).

[21]Jordan v. State, 481 P.2d 383, 387-88 (Alaska 1971); State v. Miller, 1 P.3d 1047, 1050-51 (Or. Ct. App. 2000).

of the shut-off valve, the affidavit simply indicates the two jurors had seen their husbands turn off valves and it was different than some of the trial testimony. There is no indication that they asked their husbands to conduct experiments during the trial or that this was anything other than a comment on a past life experience. Thus, this discussion does not involve extrinsic evidence and is not admissible to impeach the verdict.

The lunch-time observation of Chenin is a closer question, however, the affidavit does not establish, as suggested by Chenin, that the jurors were following him. Instead, it indicates that the jurors saw Chenin walking as they were proceeding to lunch themselves. We disagree with Sears' contention that this information was inadmissible. The portion of the affidavit that indicates that the jurors saw Chenin walking is admissible to prove that the jury discussed an extrinsic fact. However, the portion of the affidavit indicating the jurors' views about Chenin is an inadmissible inquiry into their mental processes. The mere fact that some jurors observed Chenin walking, standing alone, is insufficient to establish prejudice, and the district court did not abuse its discretion in rejecting this as a ground for a new trial.

As to the jury foreperson's comments regarding reaching a verdict in order to go home, these too are an inquiry into the mental process of the jurors and generally inadmissible. Only on rare occasions have courts permitted the admission of intra-jury communications to prove jury coercion.[22] This is not such a case. Therefore, that portion of the affidavit would be inadmissible, and the district court was correct in

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[22]State v. Kelley, 517 N.W.2d 905 (Minn. 1994) (juror physically threatened another juror); People v. Rudnick, 878 P.2d 16 (Colo. Ct. App. 1993) (juror stalking fellow juror).

finding a motion for a new trial could not be based upon the alleged foreperson's comment regarding going home.

Finally, we turn to the portion of the juror's affidavit containing anti-semitic remarks by the foreperson. This is an intra-jury communication that would generally be inadmissible to impeach a verdict. However, some courts have recognized an exception to the general rule for racist remarks.[23] Assuming, without deciding, that the racist remarks were admissible, we conclude that the district court did not abuse its discretion in denying a new trial based upon the remarks.

Chenin has the burden of demonstrating that the alleged misconduct so prejudiced the trial as to deny him of the right to a fair trial.[24] Here, Sears introduced evidence from which the jury could conclude that Chenin's claim of severe back injury relating to the accident was not credible. Chenin's doctors indicated that they relied on Chenin's history in establishing that the collision aggravated Chenin's congenital back condition. The nature of the collision, together with Chenin's inconsistent statements in the subsequent auto accident claim, is substantial evidence to support a jurys' rejection of Chenin's claims of no pre-existing back symptoms.

Finally, in the instant case, we have a single anti-semitic remark, not the multiple and pervasive remarks present in the Powell and Heller cases. While reprehensible, we must consider whether this single remark, in the totality of the evidence, so tainted the proceedings as to

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[23]Powell v. Allstate Ins. Co., 652 So. 2d 354 (Fla. 1995); United States v. Heller, 785 F.2d 1524 (11th Cir. 1986); see also U.S. v. Henley, 238 F.3d 1111, 1119-22 (9th Cir. 2001).

[24]See Tanksley, 113 Nev. at 1002-03, 946 P.2d at 151-52.

deny Chenin a fair trial. Given the evidence, we conclude the district court was within its discretion in finding Chenin failed to demonstrate that racial prejudice permeated the trial and denied him due process.

Having considered Chenin's claims and found them to be without merit, accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Joseph S. Pavlikowski, Senior Judge
Glen J. Lerner & Associates
Segal & McMahan
Hutchison & Steffen, Ltd.
Clark County Clerk