IN THE SUPREME COURT OF THE STATE OF NEVADA

SMITH'S FOOD AND DRUG CENTERS, INC., D/B/A SMITH'S FOOD KING #381,
Appellant,
vs.
RONALD WINIARSKI,
Respondent.

No. 36490

FILED

MAY 14 2002

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final judgment in an action for negligence and related claims. On appeal, Smith's Food and Drug Centers, Inc. ("Smith's") argues that the district court retained jurisdiction and should not have declined to consider the motion for new trial since the motion was filed before an appeal was filed with this court. Smith's also claims that the jury award for past and future medical expenses was excessive. Further, Smith's argues that the district court erred in excluding evidence of respondent's prior felony convictions. Smith's also alleges that the district court made several errors with respect to witness testimony, jury instructions and expert witness costs. Lastly, Smith's argues that the attorney fees awarded to respondent were unreasonable. We agree only to the extent that the attorney fees awarded to Winiarski were unreasonable.

Smith's first claims that the district court retained jurisdiction to decide the motion for new trial since the motion was filed before an appeal was filed with this court. Pursuant to NRAP 4(a)(2), "[a] notice of appeal filed before the formal disposition of [a motion for new trial] shall have no effect."

Here, the jury returned its verdict on May 5, 2000, and notice of entry of the judgment was filed on May 15, 2000. Smith's filed a motion for new trial, or in the alternative, a motion for remittitur on May 25, 2000. Smith's filed a notice of appeal on June 30, 2000, but the district court had not conducted a hearing to consider Smith's motion for new trial. There appears to be nothing in the record suggesting that the district court expressly denied Smith's motion. However, Judge Douglas ruled that although the motion was timely, the district court was divested of jurisdiction since an appeal had been filed.

When the district court conducted a hearing on July 17, 2000, it retained jurisdiction to consider the motion for new trial because Smith's appeal was filed before the district court disposed of the motion for new trial. Therefore, pursuant to NRAP 4(a)(2), the notice of appeal had no effect. However, since the district court indicated that it found no merit in the motion, we conclude that the district court's ruling, particularly due to the judge's comments on the record, adequately disposed of Smith's motion for new trial.

Smith's argues that the jury award for past and future medical expenses was excessive since Winiarski proved a maximum of $15,107.70 in medical expenses, but the jury awarded $30,000.00. We disagree.

"The party seeking damages has the burden of proving both the fact of damages and the amount thereof. The latter aspect of the burden need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of

damages."[1] An evidentiary basis must be provided by the plaintiff upon which the district court may determine the amount of damages.[2]

In this case, Winiarski used qualified expert testimony to justify damages. However, Winiarski need not achieve absolute certainty to prove damages. "Obviously, once the fact of damage has been established, some uncertainty in the amount is allowed."[3] Here, expert testimony established past medical damages at approximately $5,100.00, and future medical damages specifically for surgery on Winiarski's finger at $8,000.00 to $10,000.00. Smith's claims that this could not reasonably result in more than approximately $15,000.00 in medical damages. However, at trial Winiarski also argued that a portion of his past medical expenses were dedicated to pain management medication, which would continue for the rest of Winiarski's life. We conclude that Winiarski provided an adequate evidentiary basis upon which the jury could properly determine the amount of his damages, and the award was not excessive.

Smith's claims that Winiarski put his character into evidence when he attempted to have the jury perceive him as a loving and caring son. Therefore, Smith's claims that evidence of Winiarski's felony convictions was admissible. In addition, Smith's claims that the admission of the felony convictions would have served to prove that Winiarski's vocational expert lacked sufficient information to develop an opinion regarding his ability to obtain employment. We disagree.

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[1]Mort Wallin v. Commercial Cabinet, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) (citations omitted).

[2]Id.

[3]Id.

The district court's determination of whether to admit evidence will not be disturbed unless it is "manifestly wrong."[4] Furthermore, this determination is within the sound discretion of the district court.[5] Pursuant to NRS 50.095, felony convictions are admissible for impeachment purposes if the convictions are less than ten years old. However, the district court also has the discretion to admit or exclude evidence after balancing the probative value and the prejudicial effect.[6]

Here, the district court determined that, in an effort to "get to the heart of the matter," Smith's would be prohibited from referring to Winiarski's prior felony convictions, but allowed Smith's to inform the jury that Winiarski was not allowed to obtain a Sheriff's card for the purposes of employment. Here, the district court did not abuse its discretion in excluding information regarding Winiarski's felony convictions. The prior convictions took place nearly ten years prior to the commencement of this action, were not factually related to this civil case, and had minimum, if any, probative value.

Smith's contends that the district court erred in allowing Winiarski's mother to testify because she was not identified as a witness until one week prior to the start of trial. A witness that is untimely listed may be precluded from testifying at trial but this decision is within the

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[4]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985) (quoting Brown v. State, 81 Nev. 397, 400, 404 P.2d 428, 430 (1965).

[5]Id.

[6]Id.

discretion of the district court.[7] Here, the district court found no reason to preclude the witness from testifying despite her being listed after the close of discovery. We conclude that the district court did not abuse its discretion by permitting such testimony. This is particularly evident in light of the district court's willingness to streamline her testimony to ensure it covered relevant evidence, and Smith's opportunity to depose the witness prior to trial.

Smith's argues that the district court erred in allowing Winiarski's witness to testify as an expert because the witness lacked expertise on grocery store stocking procedures. An "expert witness" must possess "special knowledge, training and education" in the field to qualify as an expert.[8] In addition, NRS 50.275 provides that "a witness qualified as an expert by special knowledge . . . may testify to matters within the scope of such knowledge." "The determination of the competency of an expert witness is largely in the discretion of the trial judge."[9] Furthermore, absent a clear abuse of discretion, this decision will not be disturbed.[10]

Here, Smith's subjected the expert witness to voir dire examination regarding his background as a safety consultant. The district court was satisfied that he qualified as an expert. Therefore, we conclude

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[7]Consolidated Generator v. Cummins Engine, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

[8]Freeman v. Davidson, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989).

[9]Levine v. Remolif, 80 Nev. 168, 172, 390 P.2d 718, 720 (1964).

[10]Cheyenne Construction v. Hozz, 102 Nev. 308, 311, 720 P.2d 1224, 1226 (1986).

that the district court did not clearly abuse its discretion in allowing the witness to be designated, and to testify as an expert regarding safety procedures.

Smith's claims that the district court erred in allowing Winiarski to impeach a witness by reading a portion of a previously recorded statement when the witness was never afforded the opportunity to explain his statement nor was Smith's counsel afforded the opportunity to interrogate on the subject. NRS 50.135(2) provides that "[e]xtrinsic evidence of a prior contradictory statement by a witness is inadmissible unless . . . the witness is afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon."

Here, the witness testified regarding his duties while employed by Smith's, and his recollection of the events surrounding Winiarski's accident. The witness testified that he was aware of other incidents where items had fallen, but those incidents were when persons had hit the merchandise, knocking items over. Neither party questioned the witness specifically regarding a prior recorded statement where he said that items fall all the time. However, counsel for Winiarski referred the witness to his prior recorded statement generally, and inquired as to whether items fell over often. On direct as well as cross-examination, the witness confirmed that items fell over often in the past, but clarified that stacks of items fell over all the time only when people bumped into them. After the witness was excused, Winiarski was permitted to read the witness' prior statement to the jury. The district court expressed on the record its desire not to delay the proceeding, but also acknowledged the parties' opportunity to rebut and sur-rebut the recorded statement. The

witness was never recalled to the stand to explain his prior recorded inconsistent statement. Thus, the statute's requirements were not met. Nevertheless, we conclude that the failure to confront this witness specifically with this prior inconsistent statement was harmless error under these limited facts.[11] A careful review of the record reveals that the witness was thoroughly questioned by both parties regarding the circumstances under which stacked items fell.

Smith's maintains that the district court gave jury instructions that prevented the jury from giving expert opinions the weight the jury deemed it was entitled. Article 6, Section 12 of the Nevada Constitution provides that "[j]udges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law." Jury Instruction No. 17 provided that the jury should "draw no negative conclusions from the fact that the Plaintiff used experts in this matter."

Contrary to Smith's contention, Jury Instruction No. 17 did not comment on the credibility of the expert witnesses. Rather, the judge instructed the jury to avoid judging the merits of Winiarski's case by the mere fact that Winiarski employed expert witnesses. We conclude that this instruction was proper.

Smith's claims that, pursuant to NRS 18.005, the prevailing party can only be awarded up to $1,500.00 for an expert witness, and the district court erred in allowing a larger award. The amount of expert

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[11]See Atkins v. State, 112 Nev. 1122, 1132, 923 P.2d 1119, 1126 (1996) (holding that the introduction of prior inconsistent statements without confronting the witness concerning the statements was harmless error under the circumstances).

witness fees is left to the sound discretion of the trial judge.[12] Furthermore, NRS 18.005, which applies to NRS 18.010 through NRS 18.150, prohibits an award for expert witnesses above $1,500.00. However, NRS 17.115(4) provides that "if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court . . . may order the party to pay to the [offeror]" reasonable expert witness costs.

Pursuant to NRS 17.115, Winiarski was eligible for an award not limited by NRS 18.005. Therefore, we conclude that the district court did not err in allowing such an award.

Smith's argues that the attorney fees awarded to Winiarski were unreasonable, and that Smith's was arguably the prevailing party since the jury award of $37,500.00 was less than the arbitration award of $40,000.00. We agree to the extent that the attorney fees awarded were unreasonable.

NRS 17.115 compares the amount awarded by the jury to the amount presented in an offer of judgment in determining the prevailing party. Smith's provides no authority for the proposition that Smith's was the prevailing party since the jury award was less than the arbitration award. Here, Winiarski sent two offers of judgment to Smith's in the amount of $22,000.00 each, along with Winiarski's costs to date, but Smith's declined both offers. Therefore, pursuant to NRS 17.115, we conclude that Smith's was not the prevailing party.

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[12]Arnold v. Mt. Wheeler Power, 101 Nev. 612, 615, 707 P.2d 1137, 1139 (1985).

Smith's argues that the factors set forth in Beattie v. Thomas[13] dictate that the award provided was unreasonable. In Beattie, the court stated that the following factors are to be considered in awarding attorney fees:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.[14]

Further, this court has held that "it is an abuse of discretion for the court to award the full amount of fees requested" without considering these factors, where the court has not made a finding based on the evidence that the requested attorney fees are "reasonable and justified."[15]

In the instant case, the only applicable factor is whether the fees sought are reasonable and justified. According to Smith's, the fees awarded were unreasonable because one of the attorneys had less than two years experience but billed at a rate of $200.00 per hour. In addition, the other attorney with more experience billed at a rate of $400.00 per hour. The district court made no finding on whether the attorney fees were reasonable and justified. Here, we conclude that the attorney fees requested by Winiarski were excessive and the record does not indicate that the district court considered typical rates in the community. We

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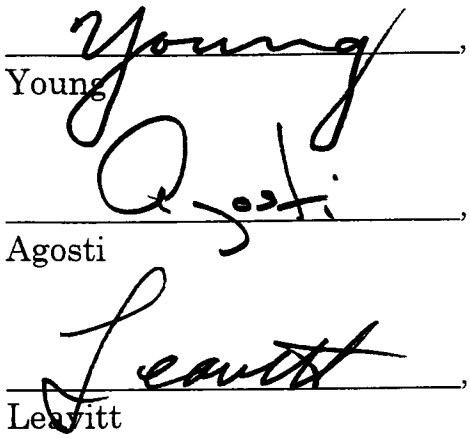
[13]99 Nev. 579, 668 P.2d 268 (1983).

[14]Id. at 588-89, 668 P.2d at 274.

[15]Id. at 589, 668 P.2d at 274.

therefore reverse the district court's award of attorney's fees to respondent Winiarski, and remand for a re-determination on the record of the amount of attorney's fees to be awarded in light of the factors enumerated in this opinion. Accordingly, 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.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Michael L. Douglas, District Judge
Barker Brown Busby Chrisman & Thomas
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