IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON YOUNG, AN INDIVIDUAL,
Appellant,
vs.
CIRCUS CIRCUS CASINOS, INC., A NEVADA DOMESTIC CORPORATION, D/B/A CIRCUS CIRCUS HOTEL & CASINO,
Respondent.

No. 70551

ORDER OF AFFIRMANCE

Jason Young appeals from a jury verdict in favor of respondents Circus Circus Casinos, Inc. ("Circus Circus") on his negligence claim and from a district court order denying his NRCP 59(a) motion for a new trial. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Young injured his back at Circus Circus Casino when he leaned on an elevator handrail and it broke. As relevant to this appeal, Young brought a suit asserting negligence claims[1] against both Circus Circus and ThyssenKrupp Elevator Corporation, the elevator maintenance company. At trial, Young presented testimony from Dr. C. Stephen Carr, an expert on vertical transportation engineering and accident investigation. However, the district court excluded portions of Dr. Carr's testimony and later struck other portions of his testimony.

The jury found for Circus Circus and ThyssenKrupp, and the district court thereafter dismissed ThyssenKrupp pursuant to a good faith settlement. Young then moved for a new trial under NRCP 59(a) on his

[1]Young asserted negligence, res ipsa loquitur, and negligence per se.

claims against Circus Circus.[2] The district court denied the motion, and this appeal followed.[3]

Young asserts reversal is warranted because the district court abused its discretion by 1) excluding Dr. Carr's testimony of his subsequent inspection of other elevator handrails, 2) striking Dr. Carr's opinion on the frequency of elevator inspections and his conclusions based on that opinion, and 3) denying Young's NRCP 59(a) motion for a new trial. We disagree.

Young first argues the district court erroneously excluded evidence of Dr. Carr's inspection of Circus Circus's elevator handrails, performed approximately two years after the incident. That inspection revealed that Circus Circus had installed a different type of handrail in other elevators, and that the handrails in other elevators were loose. Young argued below the evidence was relevant to show that elevator handrails were "loose all the time" and that the incident was not a "freak" occurrence. On appeal, Young argues that, contrary to the district court's decision, the evidence of the inspection was admissible because there was a substantial similarity between the test Dr. Carr conducted and the conditions actually present at the time of the injury, citing *Way v. Hayes*, 89 Nev. 375, 377, 513 P.2d 1222, 1223 (1973), and law from other jurisdictions.

We review the district court's decision to exclude evidence for an abuse of discretion. *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 764, 312 P.3d 503, 507 (2013). Under NRS 48.035(1), evidence is

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[2]The motion, in the alternative, sought judgment as a matter of law under NRCP 50(b) on the negligence claim and a new trial on damages against Circus Circus only, but as Young does not raise that portion of the motion in his appellate briefs, we do not separately address it in this order.

[3]We do not recount the facts except as necessary to our disposition.

inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

We conclude the district court did not abuse its discretion by excluding evidence from Dr. Carr's inspection.[4] First, to the extent Young would have used the evidence as a subsequent remedial measure to show Circus Circus knew the handrail was faulty, the evidence was inadmissible under NRS 48.095(1).[5] And, although evidence of a condition's existence may support an inference that the condition existed at an earlier time, the evidence's reliability and admission into evidence is within the trial court's sound discretion.[6] *See Conner v. Union Pac. R.R. Co.*, 219 F.2d 799, 802 (9th Cir. 1955) (noting the reliability of such evidence "is usually for the sound discretion of the trial court"); *see also Liebow v. Jones Store Co.*, 303 S.W.2d 660, 665 (Miss. 1957) ("Whether testimony of a condition is admissible as evidence of the condition at a particular prior time must necessarily depend on the circumstances of the particular situation, and therefore whether the testimony is inadmissible because it is too remote must necessarily be subject to the sound discretion of the trial judge.").

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[4]*Way* dealt with an in-court demonstration and we conclude it is not controlling in this situation. *See* 89 Nev. at 377, 513 P.2d at 1223.

[5]NRS 48.095(1) excludes evidence of subsequent remedial measures when used to prove negligence or culpable conduct at the time of the incident.

[6]We note a party may not use evidence of subsequent accidents to show the defendant had knowledge of the dangerous condition prior to the incident. *Reingold v. Wet 'N Wild Nevada, Inc.*, 113 Nev. 967, 969-70, 944 P.2d 800, 802 (1997).

Here, Dr. Carr conducted the inspection of Circus Circus's elevators two years after the incident. The district court could have admitted this evidence but it was within the district court's discretion to determine that any relevance was substantially outweighed by the danger of unfair prejudice, as this evidence was remote in time to the incident and could have unfairly prejudiced the jury against Circus Circus. *C.f. Liebow*, 303 S.W.2d at 664-65 (holding the district court abused its discretion by admitting evidence of an elevator's mechanical condition more than three months after an accident). Thus, the district court's reasons for excluding the evidence are sound, and we find no abuse of discretion.

Young next argues the district court abused its discretion by striking Dr. Carr's testimony as to how often elevator handrails should be inspected, and his opinion that Circus Circus breached the standard of care for failing to timely inspect the handrail. Young further argues that the district court's admonition to the jury instructing them to disregard this testimony was confusing. We review the district court ruling on the admission of expert testimony and instruction to the jury for an abuse of discretion. *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (addressing the admission of expert testimony); *Banks v. Sunrise Hosp.*, 120 Nev. 822, 831, 102 P.3d 52, 59 (2004) (addressing jury instructions).

We conclude the record belies Young's arguments. Expert testimony is inadmissible if it is based on assumption or conjecture rather than recognized methods, treatises or codes, or other scientific evidence. *See Hallmark*, 124 Nev. at 500-01, 189 P.3d at 651-52. Here, however, Dr. Carr admitted that his testimony as to the frequency of inspections was not based on any treatise, code, manual, or publication, and the record demonstrates his opinion was not based on any recognized methods but

instead relied on assumption and conjecture. Under these facts and *Hallmark*, the district court did not abuse its discretion by determining that Dr. Carr's testimony was inadmissible where his testimony was not based on reliable methodology. Therefore, the district court did not abuse its discretion by excluding both that testimony and Dr. Carr's opinion that rested on that testimony.[7]

Moreover, Young fails to show that the district court's instruction to the jury to disregard this particular testimony warrants reversal. The record on appeal shows that the district court instructed the jury which parts of Dr. Carr's testimony to disregard, and does not demonstrate that the instruction actually mislead the jury. We therefore conclude Young fails to show any abuse of discretion warranting reversal here. *See Carver v. El-Sabawi*, 121 Nev. 11, 14, 107 P.3d 1283, 1285 (2005) (providing that this court will not reverse a district court for an erroneous instruction unless upon review of the entire record the error resulted in a "miscarriage of justice").[8]

Young's third and final argument is that the district court abused its discretion by denying his motion for a new trial because the jury manifestly disregarded the common carrier instruction. We review the district court's decision to deny Young's motion for an abuse of discretion.

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[7]Although true that defense counsel elicited the problematic opinion on cross-examination, counsel did so to clarify Dr. Carr's testimony and opinions provided on direct examination and to impeach his conclusion that Circus Circus breached the standard of care. Young has not shown why, under these facts, the district court could not have struck that testimony.

[8]We note Young failed to provide a full transcript of the trial, and we necessarily presume the missing portion supports the district court's decision. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

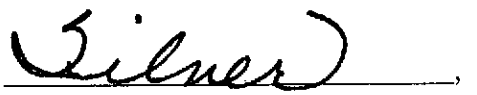
Grosjean v. Imperial Palace, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009). A new trial is appropriate where "as a matter of law, the jury could not have reached the conclusion that it reached." *Id.* We presume jurors follow the district court's instructions. *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006).

The common carrier instruction stated that Circus Circus had "a duty to its passengers to use the highest degree of care *consistent with the mode of conveyance used and the practical operation of its business* as a common carrier by elevator." (Emphasis added). We conclude the record does not show that the jury manifestly disregarded this instruction or that a new trial was warranted on that basis. The evidence presented at trial did not prove that Circus Circus failed to timely inspect the elevator, knew the handrail was loose, or otherwise breached any duty of care as set forth under that instruction. Rather, evidence favorable to Circus Circus showed that housekeeping cleaned the handrails daily and reported any problems, that the handrail in question had been tightened only a few weeks before the accident, and that handrails generally would not come loose in that short amount of time. From this evidence, the jury could have concluded that something besides Circus Circus's negligence caused the handrail to fail (such as tampering by another guest), or, more simply, that Young failed to show Circus Circus breached any duty of care.[9] Accordingly, the district

[9]Of note, although a common carrier has a heightened duty to protect elevator passengers, that duty does not impose liability for every injury, regardless of the circumstances. *See Sherman v. S. Pac. Co.*, 33 Nev. 385, 403-04, 111 P. 416, 423 (1910) (holding a common carrier is liable for any injury "against which human prudence and foresight should have guarded" (internal quotation marks omitted)).

court did not abuse its discretion by denying the motion for a new trial, and we

ORDER the judgment of the district court AFFIRMED.



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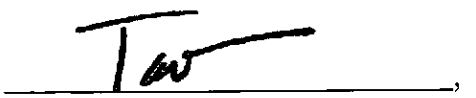

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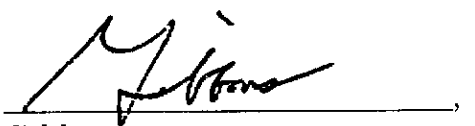

_____, J.
Gibbons

cc: Hon. Richard Scotti, District Judge
Dana Jonathon Nitz, Settlement Judge
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