IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL MOORE,
Appellant,
vs.
KMS, INC., A NEVADA CORPORATION D/B/A JOSHUA'S PUB,
Respondent.

No. 37036

SEP 10 2002

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

ORDER OF AFFIRMANCE

This is an appeal from the district court's denial of appellant Michael Moore's motion for a new trial and judgment notwithstanding the verdict (JNOV). Moore filed a negligence claim against respondent KMS Industries, Inc. (KMS) for back injuries he allegedly suffered on its premises, Joshua's Pub, when his barstool collapsed. At the time of the accident, Moore worked for Gibson Tile, loading and delivering tile. He was 34 years old, married, and allegedly physically active, although he weighed 290 pounds. Moore testified at trial that due to the barstool collapse and his resulting back injury, he has been unable to work or to exercise, has become morbidly obese and now weighs 475 pounds, and that his marriage has fallen apart.

The underlying complaint originally named KMS, the owner of Joshua's Pub, and Wonderbar, the manufacturer of the barstool, as defendants. However, before trial, Moore settled with Wonderbar and the claim against Wonderbar was dismissed with prejudice by way of stipulation between the parties. The remaining claim against KMS went to trial on August 15, 2000. After a four-day jury trial, the jury returned a

verdict in favor of KMS. Before final judgment was entered, Moore filed a motion for a new trial and JNOV, the denial of which he now appeals.

Moore argues that the district court should have granted his motion for JNOV because, based on the evidence presented at trial, a reasonable jury could not have ruled in favor of KMS. We disagree. In order to succeed on his negligence claim, Moore needed to show that KMS owed him a duty, that it breached that duty, and that it, thereby, caused him injury.[1] Viewing the evidence in the light most favorable to KMS, the non-moving party, we conclude that KMS presented sufficient evidence such that a reasonable jury could conclude that KMS was not negligent, and that Moore's injuries were not a result of the barstool collapse.[2]

Moore testified at trial that his injury was caused by the collapse of his barstool. However, Moore also testified that he had been drinking a lot that day. KMS argued that the barstool did not collapse, but rather, that Moore fell off the stool. In addition to Moore's own testimony, evidence was presented that showed that on the day of the accident, Moore participated in a golf tournament and consumed enormous amounts of alcohol (at least fourteen drinks) throughout the day). KMS also presented testimony that the barstools were inspected bimonthly and repaired as needed. When reviewing a denial of a motion for JNOV, this court does not consider the weight of the evidence or the

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[1]See Hospital Ass'n v. Gaffney, 64 Nev. 225, 228, 180 P.2d 594, 596 (1947).

[2]See Drummond v. Mid-West Growers, 91 Nev. 698, 704, 542 P.2d 198, 203 (1975).

credibility of witnesses.[3] We, therefore, conclude that a reasonable jury could have found that KMS did not breach its duty to Moore.

In addition, enough evidence was presented at trial to indicate that a reasonable jury could have found that even if KMS breached its duty to Moore, the breach was not the proximate cause of his injuries. Several medical experts testified for KMS that Moore's back problems were not caused by his fall from the barstool, but rather, from his age, obesity, and/or a long history of traumatic physical events. Even Moore's medical expert, who testified that his injury was caused by the barstool incident, acknowledged that Moore had pre-existing back problems. Moore testified that he played football through college and that the day before the incident he lifted a "bunch" of clay tiles that "were extremely heavy." Because KMS presented sufficient evidence to indicate that it was not negligent or that its negligence was not the proximate cause of Moore's injuries, we conclude that the district court did not abuse its discretion by denying Moore's motion for JNOV.

Moore also argues that the district court should have granted his motion for JNOV because the jury did not consider and apply all of the jury instructions it was provided. NRCP 59(a) provides:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved

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[3]See University System v. Farmer, 113 Nev. 90, 95, 930 P.2d 730, 734 (1997).

> party: . . . . (5) Manifest disregard by the jury of the instructions of the court.

Moore argues that, here, the jury deliberated for less than one hour and, therefore, could not possibly have considered all thirty-five jury instructions and/or properly applied them to the evidence, which included forty-three exhibits and more than 200 pages of testimony. The brevity of jury deliberations does not, however, necessitate a new trial.[4]

Lastly, Moore argues that the district court should not have denied his motion for a new trial because evidence of his settlement with Wonderbar, the barstool manufacturer, was improperly admitted at trial. However, Moore is unable to cite to any place in the transcript where the district court admitted collateral source evidence. Moore alleges that he is unable to do so because the transcript is inaccurate. Although that may be true and unfortunate, this court's review is limited to the record as it exists on appeal, and this court will not substitute facts alleged by the parties for deficiencies in the record.[5]

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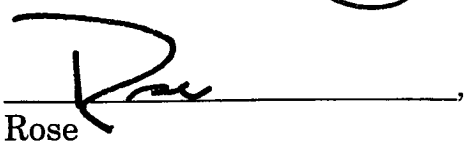
[4]See Segars v. Atlantic Coast Line Railroad Company, 286 F.2d 767, 770-71 (4th Cir. 1961); Park v. Belford Trucking Co., 165 So. 2d 819, 823 (Fla. Dist. Ct. App. 1964); Lappe v. Blocker, 220 N.W.2d 570, 574 (Iowa 1974); Cuthbertson v. Clark Equipment Co., 448 A.2d 315, 318 (Me. 1982); Gaskill v. Cook, 315 S.W.2d 747, 757 (Mo. 1958); Patten v. Newton, 159 A.2d 809, 811 (N.H. 1960); Urquhart v. Durham & S. C. R. Co., 72 S.E. 630, 632 (N.C. 1911); Val Decker Packing Co. v. Treon, 97 N.E.2d 696, 701 (Ohio Ct. App. 1950); Carrara v. Noonan, 31 A.2d 424, 426 (R.I. 1943); Fisher v. Leach, 221 S.W.2d 384, 394 (Tex. Civ. App. 1949); State v. Jackman, 783 P.2d 580, 583-84 (Wash. 1989).

[5]Lindauer v. Allen, 85 Nev. 430, 433, 456 P.2d 851, 853 (1969).

We, therefore, AFFIRM the district court's order denying Moore's motion for judgment notwithstanding the verdict .

It is so ORDERED.


_____, J.
Shearing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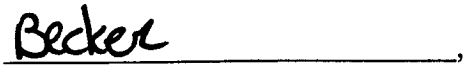
Rose


_____, J.
Becker

cc: Hon. Mark R. Denton, District Judge
Robert T. Knott, Jr.
Skaggs & Associates
Clark County Clerk