IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SALISHA ODUM, AN INDIVIDUAL,
Appellant,
vs.
FREY SPRAY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JERRY FREY, AN INDIVIDUAL,
Respondents.

No. 87266-COA

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Salisha Odum appeals from a judgment after a jury trial and district court order denying a motion for a new trial in a tort action. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Respondent Jerry Frey owns and operates his business, respondent Frey Spray, LLC, wherein he drops various pesticides from his airplane onto agricultural fields in a process known as crop-dusting.[1] Odum is a certified organic produce farmer in the area that Frey operates. As an organic farmer, Odum does not use pesticides on her crops. Odum previously sued Frey in 2016 because Frey allegedly sprayed her property with pesticides, but the parties settled the matter before trial.

Odum filed another civil complaint against Frey in October 2021 based on four incidents between 2020 and 2021 when Frey again allegedly sprayed her property with pesticides. Odum asserted claims for negligence, negligence per se, assault, battery, trespass, nuisance, conversion, vicarious liability, and exemplary damages. After a five-day

[1]We recount the facts only as necessary for our disposition.

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jury trial, the jury found Frey not liable on all claims. Odum moved for a new trial following the entry of judgment. The district court denied Odum's motion, and she timely appealed. On appeal, she argues that the district court abused its discretion in excluding evidence she offered at trial and that NRS 40.140(2), which was restated in a jury instruction, is unconstitutional as applied. We disagree, and therefore affirm.

The district court did not abuse its discretion in excluding Odum's proffered evidence at trial

The district court's decision to admit or exclude evidence is reviewed for abuse of discretion and it "will not be disturbed absent a showing of palpable abuse." *LVMPD v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013) (internal quotation marks omitted). An abuse of discretion occurs if the district court's decision is "arbitrary or capricious" or "exceeds the bounds of law or reason." *Flangas v. Perfekt Mktg., LLC*, 138 Nev. 224, 227, 507 P.3d 574, 578 (2022) (internal quotation marks omitted); *see also Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

Evidence related to Odum's prior lawsuit and settlement

During the jury trial, Odum sought to introduce evidence of her 2016 lawsuit against Frey (including evidence of the alleged spraying incident, its impact on her business, and the parties' subsequent settlement) under NRS 48.045(2) to show Frey's knowledge, intent, and absence of mistake. Following a *Taylor* hearing,[2] the district court excluded evidence related to the lawsuit after finding that it was redundant to other evidence presented in support of Odum's claims, would likely confuse and mislead

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[2]*Taylor v. Thunder*, 116 Nev. 968, 13 P.3d 43 (2000).

the jury, and the risk of unfair prejudice substantially outweighed its probative value. Odum argues that this was an abuse of discretion, in part because Frey testified at trial that he was unaware Odum was a farmer prior to the instant litigation and therefore Frey opened the door to the admission of the 2016 lawsuit.

Under NRS 48.045(2), "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." However, it may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Before admitting evidence of other acts under NRS 48.045(2), the district court must conduct a hearing pursuant to *Taylor v. Thunder* and determine that (1) the evidence of the other act "is relevant," (2) "the other act is proven by clear and convincing evidence," and (3) the other act's probative value "is not substantially outweighed by the danger of unfair prejudice." 116 Nev. 968, 973, 13 P.3d 43, 46 (2000) (internal quotation marks omitted). The district court conducted the requisite *Taylor* hearing and found that the 2016 lawsuit and related evidence should be excluded.

We conclude that the district court did not abuse its discretion when it excluded evidence related to Odum's previous settled lawsuit after the requisite *Taylor* hearing. Evidence of the 2016 lawsuit—which resulted in a settlement—would likely have confused and misled the jury, particularly since evidence of the parties' prior settlement in that case was inadmissible. *See* NRS 48.105(1)(b) (prohibiting the admission of evidence that a party accepted an offer of compromise). Further, had evidence of the 2016 lawsuit been admitted, the jury could have improperly inferred, due to the similarities of the claims and parties involved in the two lawsuits, that because Frey was previously accused of spraying Odum's property, he

likely did it again, which is inadmissible propensity bad act evidence. *Cf.* NRS 48.045(2). Admitting evidence of the prior lawsuit would also have been contrary to established public policy, which encourages the parties to resolve or settle cases "without the fear of having statements made during the negotiation process haunt a future legal proceeding." *Morrison v. Beach City LLC*, 116 Nev. 34, 39, 991 P.2d 982, 985 (2000) (internal quotation marks omitted).

To the extent Odum wanted to introduce evidence of the facts giving rise to the 2016 lawsuit to allegedly prove knowledge, intent, or absence of mistake, Odum had already introduced evidence of several other recent spraying incidents in support of her allegations and any additional evidence was arguably cumulative. *See Brant v. State*, 130 Nev. 980, 989 n.5, 340 P.3d 576, 582 n.5 (2014) (finding no abuse of discretion in the exclusion of prior bad acts that were "cumulative" of other impeachment evidence presented at trial). Furthermore, because Frey denied that the acts occurred at all, and he did not argue that he had sprayed Odum's property accidentally or unintentionally, these nonpropensity purposes had minimal probative value. *See Hubbard v. State*, 134 Nev. 450, 457, 422 P.3d 1260, 1266 (2018) ("Hubbard denied participation in the act or being present at the scene in his statements to the police and his testimony at trial. Under these facts, evidence of Hubbard's 2012 burglary had little relevance to establishing Hubbard's intent at the time he entered the residence . . . ."). Therefore, we conclude that Odum has not established that the district

court abused its discretion in excluding evidence related to her prior lawsuit.[3]

The 2014 NDA report

Without first obtaining permission to elicit prior bad act testimony related to record-keeping violations, Odum asked Frey on cross-examination if Frey had ever been penalized for keeping inaccurate records related to his crop-dusting business. Frey responded that he did not recall any penalties for keeping inaccurate business records. In response, Odum sought to introduce a 2014 Nevada Department of Agriculture (NDA) report that showed Frey had been fined for record-keeping violations that year. The district court excluded the NDA report, finding that it was extrinsic evidence of a collateral matter. Additionally, the district court found that the report was too remote in time to be relevant. On appeal, Odum argues that the district court abused its discretion in excluding the NDA report because the jury could not consider the veracity of Frey's testimony,

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[3]To the extent Odum argues that Frey opened the door to admit evidence related to the 2016 lawsuit by testifying that he did not previously know Odum was a farmer, we disagree. While Odum arguably should have been permitted to impeach Frey with his contradictory testimony from the 2018 deposition, *see* NRCP 32(a)(8), evidence of the prior lawsuit, the incident underlying the lawsuit, and the subsequent settlement were properly excluded. Because Odum does not argue that the district court erred when it prohibited him from impeaching Frey with an excerpt of his 2018 deposition testimony, any such argument is waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues an appellant does not raise on appeal are waived). In any event, we conclude that such error would have been harmless in light of the other admissible evidence. *Cf.* NRCP 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

particularly as it related to records Frey presented to the NDA during investigations relevant to her complaint.

A party may impeach a witness in many ways, including by introducing evidence of ulterior motives or questioning the witness about prior incidents of conduct. *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004). However, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence." NRS 50.085(3).

Extrinsic evidence is inadmissible to contradict a witness on a collateral matter. *Jezdik v. State*, 121 Nev. 129, 137, 110 P.3d 1058, 1063 (2005). "Facts are collateral if they are outside the controversy, or are not directly connected with the principal matter or issue in dispute." *Id.* (internal quotation marks omitted). "The policy behind this rule is to prevent the cross-examiner from injecting collateral matters into the trial by setting the witness up and then allowing the very party that injected the matter into the trial to impeach the witness's credibility with extrinsic evidence relating to those collateral matters." *Id.* at 137, 110 P.3d at 1063-64.

The district court properly found that Frey's 2014 record-keeping violations were collateral because they were not directly connected to the principal matter in dispute: whether Frey intentionally or negligently sprayed Odum's property with pesticides in 2020 and 2021. Odum was not entitled to impeach Frey with the extrinsic evidence contained in the 2014 NDA report. *See id.*; NRS 50.085(3). The district court's finding that the report was too remote in time to be relevant, as it was compiled nearly ten years before the trial, is entitled to deference as well. *See Bongiovi v. Sullivan*, 122 Nev. 556, 575, 138 P.3d 433, 447 (2006) ("The district court's

determination [to admit or exclude evidence] is given great deference, and we will not reverse the district court's decision absent manifest error."). Therefore, we conclude that the district court did not abuse its discretion in excluding the 2014 NDA report.

Joseph Frey's Testimony

Lastly, Odum called Joseph Frey to testify about Frey's record-keeping practices during the time that Joseph worked for Frey from 2013 to 2015. The district court excluded Joseph's testimony on two grounds: first, the court found that if Joseph's testimony was offered for impeachment purposes, it was inadmissible extrinsic evidence of a collateral matter; second, if Joseph's testimony was offered as substantive evidence, it was inadmissible as a prior bad act.

Odum contends that the district court's refusal to admit Joseph's testimony was an abuse of discretion because it prevented her from effectively impeaching Frey's credibility. Like the NDA report, Joseph's testimony was extrinsic evidence offered to prove a collateral matter because whether Frey falsified records from 2013 to 2015 was not central to deciding if he negligently or intentionally injured Odum or her property as alleged in her complaint. *Jezdik*, 121 Nev. at 137, 110 P.3d at 1063. Odum does not challenge the district court's determination that Joseph's testimony referenced a prior bad act, and "[u]nless in some way related to the case *and admissible on other grounds*, extrinsic prior bad act evidence is always collateral and therefore inadmissible to attack credibility." *Lobato*, 120 Nev. at 519, 96 P.3d at 770 (emphasis added); *see also* NRS 50.085(3). Odum does not argue any other basis to admit Joseph's testimony aside from impeachment. Therefore, Odum failed to establish that the district court abused its discretion in excluding Joseph's testimony.

NRS 40.140(2) does not create an unconstitutional taking of Odum's property

After the close of evidence, the district court provided Instruction 14 to the jury, which restated the language of NRS 40.140(2), Nevada's "right-to-farm" statute.[4] Odum contends the statute is unconstitutional as applied, and so the district court erred in giving the instruction. NRS 40.140(2) states the following:

> It is presumed:
>
> (a) That an agricultural activity conducted on farmland, consistent with good agricultural practice and established before surrounding nonagricultural activities is reasonable. Such activity does not constitute a nuisance unless the activity has a substantial adverse effect on the public health or safety.
>
> (b) That an agricultural activity which does not violate a federal, state or local law, ordinance or regulation constitutes good agricultural practice.

Odum asserts that NRS 40.140(2) allows Frey to invade her property by spraying pesticides without any associated cost. Thus, she argues the statute creates a temporary government-authorized physical taking in violation of the Fifth Amendment by restricting her right to exclude others from her property.

Generally, "[a] district court's decision to give or decline a proposed jury instruction is reviewed for an abuse of discretion or judicial

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[4]*See* Jennifer Bennett, *Act v. Amendment:* Schultz Family Farms, *Legislative Exceptions, and the Future of Right-to-Farm*, 23 J. Env't & Sustainability L. 2, 6 n.22 (Fall 2016) (referencing NRS 40.140 as Nevada's "right-to-farm act"). All 50 states have enacted some form of right-to-farm laws containing similar provisions to NRS 40.140(2), including protection from nuisance lawsuits. *Id.* at 6-7.

error." *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004). However, we review a challenge to the constitutionality of a statute de novo. *Tam v. Eighth Jud. Dist. Ct.*, 131 Nev. 792, 796, 358 P.3d 234, 237 (2015). "In contrast to a facial constitutional challenge, which seeks to invalidate a statute . . . itself, an as-applied constitutional challenge concedes that a statute may be facially constitutional or constitutional in many of its applications but contends that it is not so under the particular circumstances of the case." *Willson v. First Jud. Dist. Ct.*, 140 Nev., Adv. Op. 7, 547 P.3d 122, 137 (Ct. App. 2024) (omission in original) (internal quotation marks omitted).

The Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1088 (9th Cir. 2015). "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner . . . ." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322 (2002). Unlike physical takings, a regulatory taking occurs where "government regulation of private property [is] so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

To support her contention that NRS 40.140(2) is unconstitutional as applied, Odum first relies on *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). In that case, a California regulation required employers to allow union organizers onto their property to speak with employees for up to four 30-day periods per year. *Id.* at 144. The United States Supreme Court concluded this regulation enacted a physical taking

because it restricted the employer's ability to use their property or to exclude others from their property. *Id.* at 149. However, in contrast to the California regulation at issue in *Cedar Point Nursery*, NRS 40.140(2) does not automatically grant third-party access to Odum's property; rather, it creates a rebuttable presumption that certain agricultural activity is not a nuisance. *Cf. id.* at 144 (stating that under the California regulation, employers were subject to sanctions if they failed to permit third-party union organizers access to their property). Thus, NRS 40.140(2) does not effect an unconstitutional taking under *Cedar Point Nursery*.

Odum next points to *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998), to support her argument that NRS 40.140(2) effects a taking. In *Bormann*, the Iowa Supreme Court determined that its right-to-farm statute amounted to an unconstitutional taking because the statute provided that "[a] farm or farm operation located in an agricultural area *shall not be found to be a nuisance* regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." *Id.* at 314 (emphasis added) (quoting Iowa Code Ann. § 352.11(1)(a) (West 1993)). The Iowa court held that the statute authorized the creation of a nuisance easement, which amounted to a taking of private property for public use. *Id.* at 321.

At the outset, we note that "the decision in *Bormann* appears to be an outlier" and that Iowa appears to be the only state to have concluded that "providing immunity from nuisance suits effects a taking." *Ehlebracht v. Crowned Ridge Wind II, LLC*, 972 N.W.2d 477, 492 (S.D. 2022); *see also Labrayere v. Bohr Farms, LLC*, 458 S.W.3d 319, 335 (Mo. 2015) (declining to find that Missouri's right-to-farm statute effects an unconstitutional taking); *Lindsey v. DeGroot*, 898 N.E.2d 1251, 1259 (Ind. Ct. App. 2009) ("[W]e expressly decline the [appellants'] invitation to adopt Iowa's

proposition that the right to maintain a nuisance contained in the [Indiana right-to-farm] Act creates an easement . . . ."); *Moon v. N. Idaho Farmers Ass'n*, 96 P.3d 637, 645 (Idaho 2004) ("We reiterate that Idaho has not recognized the right to maintain a nuisance as an easement . . . ."); *Barrera v. Hondo Creek Cattle Co.*, 132 S.W.3d 544, 549 (Tex. Ct. App. 2004) (rejecting the appellants' argument that Texas's right-to-farm statute effected an unconstitutional taking). Even the Iowa Supreme Court has recognized that its decision in *Bormann* is an anomaly. *See Garrison v. New Fashion Pork LLP*, 977 N.W.2d 67, 79 n.3 (Iowa 2022) ("As noted, the constitutional challenges to the nuisance immunities in right-to-farm statutes failed in every other court.").

In any event, we are not persuaded that the Iowa Supreme Court's analysis in *Bormann* would apply to NRS 40.140(2) given its dissimilarity to the Iowa statute deemed unconstitutional in that case. Whereas Iowa's right-to-farm statute granted blanket immunity to farming operations for nuisance activities, NRS 40.140(2) creates only a rebuttable presumption that reasonable agricultural activity is not a nuisance. With the possibility to rebut the agricultural activity's presumed reasonableness, plus the additional qualifier that the practice must not have a substantial adverse effect on public health or safety, NRS 40.140(2) does not authorize a taking of Odum's private property via a nuisance easement in the manner deemed unconstitutional in *Bormann*.

Lastly, Odum relies on *McCarran International Airport v. Sisolak*, 122 Nev. 645, 137 P.3d 1110 (2006), as an example of a government-created easement over a property owner's airspace. In that case, the county adopted an ordinance imposing a height restriction on Sisolak's property, which prevented him from developing a hotel, casino, or apartment complex despite the property being zoned for such uses. *Id.* at 651-53, 137 P.3d at

1114-16. The Nevada Supreme Court held that the ordinance amounted to a per se regulatory taking of Sisolak's property. *Id.* at 659-61, 137 P.3d at 1119-21.

Odum submits that NRS 40.140(2) allows for a physical intrusion of her property similar to that recognized in *Sisolak*. However, the ordinance at issue in *Sisolak* directly imposed upon his property's airspace and created easements for the public benefit of air travel. *Id.* On the other hand, NRS 40.140(2) does not create an easement or restrict Odum's use of her land; rather, the statute provides some protection to agricultural operations under the law. Odum's property is not subjected to a blanketly-approved intrusion by aircraft for public or private benefit. Therefore, Odum has not established that NRS 40.140(2) is unconstitutional as applied. Thus, we conclude that the district court did not abuse its discretion in giving Instruction 14.[5]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Gibbons

_______________, J.
Bulla

_______________, J.
Westbrook

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[5]Insofar as Odum has raised other issues which are not specifically raised or addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

cc: Hon. Thomas L. Stockard, District Judge
Debbie Leonard, Settlement Judge
Luke A. Busby
Carl M. Hebert
Petrie Leath Larrivee & O'Rourke, LLP
Churchill County Clerk