

IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTHUR PAUL WITTE,
Appellant,
vs.
HARRAH'S HOTEL AND CASINO;
HARRAH'S CLUB; HARRAH'S LAKE
TAHOE RESORT CASINO; AND
HARRAH'S OPERATING COMPANY,
INC., D/B/A HARRAH'S CASINO
HOTEL LAKE TAHOE,
Respondents.

No. 39962

FILED

FEB 18 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a final judgment and a special order after judgment in a negligent security tort action. Appellant Arthur Paul Witte was involved in a physical altercation that occurred on respondent Harrah's Hotel and Casino's property. Subsequently, Witte brought suit against Harrah's alleging negligent security. At trial, the jury returned a verdict for Harrah's and the district court awarded attorney fees and costs to Harrah's. Witte alleges several errors on appeal.

First, Witte contends that the district court abused its discretion by refusing two of his proposed jury instructions regarding spoliation of evidence. "A party is entitled to an instruction on every theory that is supported by the evidence."¹ If the jury instruction is based on a litigant's theory of the case, but is not supported by the evidence at trial, the district court should not offer the proposed instruction.² The

¹Woodsley v. State Farm Ins. Co., 117 Nev. 182, 188, 18 P.3d 317, 321 (2001).

²Allan v. Levy, 109 Nev. 46, 49, 846 P.2d 274, 275-76 (1993).

district court's rejection of a proffered jury instruction is reviewed for an abuse of discretion.³

Witte argues that Reingold v. Wet 'n Wild Nevada, Inc.⁴ is controlling and mandated that the district court instruct the jury on spoliation of evidence in this case. In Wet 'n Wild, evidence was presented that Wet 'n Wild's policy to destroy all accident logs at the end of the season was deliberately designed to prevent production of records before the statute of limitations had run on the incidents described in those records.⁵ This court held that due to the presentation of such evidence, the jury should have been instructed on the law regarding spoliation of evidence.⁶

To the contrary, the record in this case does not contain any evidence that Harrah's willfully destroyed surveillance tapes of the incident in question for the purpose of avoiding litigation.⁷ Witte failed to include the trial transcripts in the record; therefore, this court must assume that the district court properly refused Witte's proposed instruction because

³Johnson v. Egtedar, 112 Nev. 428, 434, 915 P.2d 271, 274-75 (1996).

⁴113 Nev. 967, 944 P.2d 800 (1997).

⁵Id. at 970, 944 P.2d at 802.

⁶Id. at 970-71, 944 P.2d at 802.

⁷To the contrary, Witte's counsel admitted during oral argument that Harrah's witnesses stated they had reviewed the surveillance tapes and that the tapes did not show the incident.

it found that Harrah's did not deliberately destroy evidence to hamper litigation.⁸

Second, Witte argues that the district court abused its discretion by refusing to offer his sudden peril jury instruction. "[I]t is not error to refuse to give an instruction when the law encompassed therein is substantially covered by another instruction given to the jury."⁹ The district court refused Witte's proposed instruction, stating that the instruction was covered by Instruction 21. Witte did not include Instruction 21 in the record; therefore, we must conclude that the information contained in Witte's proposed instruction was covered by Instruction 21.¹⁰ Additionally, the sudden peril instruction would have gone to comparative negligence, which was never alleged and not relevant to this action against Harrah's.

Third, Witte argues that the district court failed to preserve surveillance tapes from Harrah's security cameras, which allegedly depicted Witte's expert examining the site several years after the incident. Witte's counsel made an oral motion to the district court demanding preservation of the tapes. Witte claims the purpose of the tapes would have been to show the detail that could be observed from the surveillance

⁸See Prabhu v. Levine, 112 Nev. 1538, 1549, 930 P.2d 103, 111 (1996); Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980); Powers v. Johnson, 92 Nev. 609, 610, 555 P.2d 1235, 1236 (1976).

⁹Ford v. State, 99 Nev. 209, 211, 660 P.2d 992, 993 (1983).

¹⁰See Prabhu, 112 Nev. at 1549, 930 P.2d at 111; Carson Ready Mix, 97 Nev. at 476, 635 P.2d at 277; Greene, 96 Nev. at 558, 612 P.2d at 688; Powers, 92 Nev. at 610, 555 P.2d at 1236.

cameras. Nevertheless, Witte admits that he was provided with a surveillance tape, which would have accomplished Witte's purpose. Moreover, Witte's oral motion was not supported by any authority, and the record does not indicate that Witte followed the discovery rules for production in an attempt to obtain such tapes. Accordingly, the district court did not err by failing to order preservation of the surveillance tapes.

Finally, Witte contends that the district court abused its discretion by awarding attorney fees and costs to Harrah's. The district court awarded attorney fees and costs based on Harrah's offer of judgment, pursuant to NRCP 68(f) and NRS 17.115(4). The award of fees and costs is within the discretion of the district court.¹¹ In exercising its discretion, the district court must evaluate the Beattie factors.¹² If the record clearly reveals that the district court evaluated the Beattie factors, its discretion will not be disturbed absent a clear abuse of discretion.¹³

The district court's order clearly shows that the district court considered the Beattie factors and awarded attorney fees and costs pursuant to NRCP 68(f) and NRS 17.115(4). Therefore, we conclude that the district court did not abuse its discretion in awarding attorney fees and costs to Harrah's.

Witte also contends that the attorney fees and costs award was excessive and not properly documented. Harrah's presented an

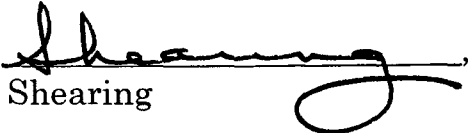
¹¹See Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

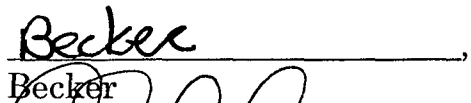
¹²Id. at 588, 668 P.2d at 274.

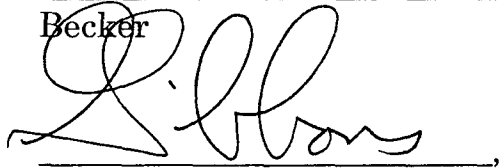
¹³Wynn v. Smith, 117 Nev. 6, 13, 16 P.3d 424, 428-29 (2001); Bidart v. American Title, 103 Nev. 175, 179, 734 P.2d 732, 735 (1987).

itemized list of costs with its motion for attorney fees and costs. We conclude the district court did not abuse its discretion in finding that \$58,397.50 in attorney fees for a year and one half of trial preparation, including several motions, depositions, and trial time, was reasonable. Additionally, substantial evidence supports the district court's conclusion that the hourly rate charged by Harrah's counsel was not excessive. We conclude that the district court did not abuse its discretion by awarding Harrah's \$79,830.55 in attorney fees and costs.¹⁴ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Shearing, C.J.


Becker, J.


Gibbons, J.

cc: Hon. David R. Gamble, District Judge
Martin G. Crowley
Piscevich & Fenner
Douglas County Clerk

¹⁴Having reviewed Witte's arguments regarding the special interrogatories given to the jury regarding NRS 651.015, we conclude it is without merit.