IN THE SUPREME COURT OF THE STATE OF NEVADA

IMPERIAL PALACE, HOTEL AND CASINO,
Appellant,
vs.
WILLIAM GAUD AND WINIFRED GAUD,
Respondents.

No. 42728

FILED

JUL 25 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment entered on a jury verdict and an order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Upon entering the main casino restroom in the Imperial Palace Hotel and Casino (Imperial Palace) in January 2000, William Gaud slipped in a puddle of water and severely broke his ankle. William and his wife, Winifred Gaud, filed suit in district court and the case proceeded into the court annexed arbitration program, in which William Gaud received an award in his favor. Imperial Palace moved for a trial de novo. At trial, the Gauds received a favorable jury verdict, upon which the district court entered judgment awarding the Gauds more than they had received in arbitration. Although Imperial Palace moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial, its motion was denied. On appeal, Imperial Palace asserts that the district court committed reversible error at trial and improperly denied its motion for new trial. We disagree.

The district court did not err in denying Imperial Palace's motion

NRCP 59(a) establishes seven grounds upon which a party may move the district court for a new trial, including accident or surprise

which ordinary prudence could not have guarded against, manifest disregard by the jury of the instructions of the court, and error in law occurring at the trial and objected to by the party making the motion. "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse."[1]

For the reasons set forth below, the district court was within its discretion when it denied Imperial Palace's motion for a new trial, and the district court's decision will not be overturned.[2]

Surprise which ordinary prudence could not have guarded against

Imperial Palace argues that it is entitled to a new trial because of a surprise theory of liability involving reference at trial to defective floor slope and drainage that it was not able to guard against.

"The grant or denial of a new trial based upon a claim of 'surprise' lies within the sound discretion of the trial court."[3] "The 'surprise' contemplated by NRCP 59(a) must result from some fact, circumstance, or situation in which a party is placed unexpectedly, to his injury, without any default or negligence of his own, and which ordinary prudence could not have guarded against."[4]

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[1]Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

[2]The district court's order denying Imperial Palace's motion for JNOV is not appealable. Ringle v. Bruton, 120 Nev. 82, 94 n. 21, 86 P.3d 1032, 1039 n. 21 (2004); Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995).

[3]Havas v. Haupt, 94 Nev. 591, 593, 583 P.2d 1094, 1095 (1978).

[4]Id.

The Gauds' complaint alleged "[t]hat the [Imperial Palace] failed to place signs, or otherwise warn [Gaud] of dangerous conditions existing in or upon the property," and "[t]hat Imperial Palace . . . negligently, carelessly and recklessly maintained and allowed to exist in a dangerous condition, to wit: water on floor." The complaint does not specifically mention a defective floor slope or drain; however, it does mention problems that floor drains and proper floor slope are designed to eliminate, namely water on the floor. Thus, the reference to defective floor slope and drains in closing arguments was not improper and did not create unfair surprise under NRCP 59(a)(3). The district court properly denied Imperial Palace's motion for a new trial on this basis.

Disregard of jury instructions

Imperial Palace argues that it should have been granted a new trial based on juror disregard of the court's instructions pursuant to NRCP 59(a)(5).

"'A jury is presumed to follow its instructions.'"[5] A new trial may be granted when the jury manifestly disregards the court's instructions.[6] A district court's denial of a new trial motion is reviewed for an abuse of discretion.[7] It is not necessary to decide how the jury reached its verdict, but only whether it was possible to do so.[8] It is important to

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[5]Leonard v. State, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (quoting Weeks v. Angelone, 528 U.S. 225, 234 (2000)).

[6]NRCP 59(a)(5).

[7]Banks v. Sunrise Hosp., 120 Nev. ____, ____, 102 P.3d 52, 65 (2004).

[8]Town & Country Electric v. Hawke, 100 Nev. 701, 702, 692 P.2d 490, 491 (1984).

note that when there is conflicting testimony, it is within the jury's province to determine the weight and credibility of the evidence,[9] and to resolve any conflicts in the testimony.[10] Where there is a conflict in the evidence, a verdict will not be disturbed on appeal unless there is plain error or the verdict results in manifest injustice.[11] Manifest injustice results when a verdict is obviously and palpably contrary to the evidence.[12]

A business owner must exercise ordinary care and prudence to render the premises safe for business purposes.[13] A property owner will be liable if the property owner caused the dangerous condition from which an injury resulted.[14] If the dangerous condition was caused by a third party, the property owner will be liable if the owner had actual or constructive notice of the condition.[15] In Nevada, there is no defined standard for constructive notice; however, other states have concluded that constructive notice requires that a condition be present for "such a length

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[9]Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

[10]Ferris v. Albright's Electric Co., 70 Nev. 528, 532, 275 P.2d 755, 757 (1954).

[11]Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993).

[12]Meyer v. Estate of Frances Swain, 104 Nev. 595, 598, 763 P.2d 337, 339 (1988).

[13]Twardowski v. Westward Ho Motels, 86 Nev. 784, 787, 476 P.2d 946, 947 (1970).

[14]Sprague v. Lucky Stores, 109 Nev. 247, 250, 849 P.2d 320, 322 (1993).

[15]Id. at 250, 849 P.2d at 322-23.

of time that, in exercise of ordinary care, the defendant should have known of the condition."[16] Whether a property owner had constructive notice of a dangerous condition is a question of fact properly left to the jury.[17]

Evidence was presented at trial that Imperial Palace employees knew that water did not flow to the floor drain in the main casino restroom. There was also evidence presented that no Imperial Palace employee had inspected the stall area of the bathroom for at least two hours before the incident. Moreover, Imperial Palace custodian Tien Nguyen knew of the necessity that a large amount of water be present on the floor in order for it to flow to the floor drain. Imperial Palace presented no evidence showing that it lacked constructive notice. In fact, Clinton Johnson's statement that a man said there was water in the stalls and moments later Johnson found William Gaud, suggests otherwise.

The credibility and weight given to the evidence presented was clearly within the jury's province. The jury's determination that Imperial Palace had constructive notice was not abhorrent to the jury instructions nor was it obviously and palpably against the evidence. Therefore, the district court did not err in denying Imperial Palace's motion for a new

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[16]Cisneros v. Costco Wholesale Corp., 754 So. 2d 819, 821 (Fla. Dist. Ct. App. 2000); see also Walker v. Montgomery Ward & Company, Inc., 511 P.2d 699, 702 (Ariz. Ct. App. 1973); Trotter v. Dillard Dept. Stores, Inc., 742 So. 2d 1024, 1027-28 (La. Ct. App. 1999); Young v. Wendy's Intern., Inc., 840 So. 2d 782, 784 (Miss. Ct. App. 2003); Lee v. Bethel First Pentecostal Church, 762 N.Y.S.2d 80, 81-82 (N.Y. App. Div. 2003); Dubry v. Safeway Stores, 689 P.2d 319, 322 (Or. Ct. App. 1984).

[17]Sprague, 109 Nev. at 250, 849 P.2d at 323.

trial based on the jury's alleged manifest disregard of the court's instructions.

Attorney misconduct

Imperial Palace contends that the Gauds' closing argument contained statements improperly gleaned from potential juror, Harlan Braaten.

Reversal of a district court's order denying a motion for new trial is warranted if attorney misconduct "sufficiently permeate[s] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict."[18] The standard of review for a district court's ruling on a motion for new trial under NRCP 59(a) is an abuse of discretion.[19]

During closing argument, the Gauds' attorney stated, "there was a person [Harlan Braaten] sitting right back there that was the president of Coast Casinos . . . [a]nd there was talk about restrooms need[ing] to be cleaned frequently. Whether it's a half hour or every hour, it's frequently." The district court overruled Imperial Palace's objection, indicating that the reference was not for evidentiary purposes; it was only so the Gauds' attorney could "talk about what he thinks is the standard [of] care."

The Gauds' counsel's argument was improper and the district court erred in refusing to strike the Gauds' reference to Harlan Braaten.

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[18]Standard Oil Company of California v. Perkins, 347 F.2d 379, 388 (9th Cir. 1965) (quoted in DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000)).

[19]DeJesus, 116 Nev. at 816, 7 P.3d at 462.

However, counsel's misconduct did not sufficiently permeate the entirety of the proceedings, such that the jury was influenced by passion and prejudice. Therefore, the district court did not abuse its discretion in refusing to grant a new trial.

Arbitration award

Finally, Imperial Palace contends that the district court erred by admitting evidence regarding the arbitration award. Specifically, Imperial Palace contends that the arbitration award was made before the effective date of the amended Nevada Arbitration Rule (NAR) 20, and thus it was error to admit the arbitration award into evidence at trial. We disagree

NAR 20, amended in 2003, states in pertinent part, "[i]f a trial de novo is requested, the arbitration award shall be admitted as evidence."[20] Formerly, NAR 20 stated, "[t]he arbitration commissioner shall seal any arbitration award if a trial de novo is requested. The jury, if a jury is demanded, will not be informed of the arbitration proceedings, the award, or about any other aspect of the arbitration proceedings."[21] This rule was amended to clear up a conflict between the former NAR 20 and NRS 38.259, which directs any arbitration findings made under NRS Chapter 38 to be admitted at a subsequent jury trial.

The district court did not abuse its discretion by admitting the arbitration award at trial. This court signed the amendment to NAR 20 on the 28th day of April, 2003. The amendment became effective 60 days later, on June 27, 2003. This case was tried to a jury in September 2003.

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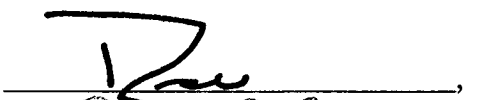
[20]NAR 20(A).

[21]NAR 20(A) (2001).

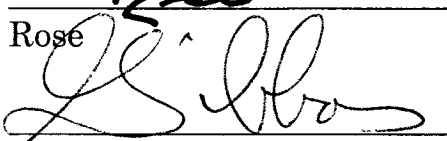
Trial commenced after the effective date of the amended rule; therefore, the district court was within its discretion in admitting the arbitration evidence pursuant to amended NAR 20. No arbitration rule specifically addresses whether a rule enacted while a case is pending should be applied to that case. Generally, changes made to a court's procedural rules apply to cases pending at the time such changes become effective.[22] And, NRCP 86(a) indicates that district court rule changes apply to cases pending on the amended rule's effective date, unless such application is not feasible or would work injustice. By analogy, the district court's decision to admit evidence based on amended NAR 20 was proper, as its application was feasible and created no injustice.[23]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



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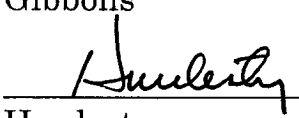

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[22]See Niven v. Siqueira, 487 N.E. 2d 837, 941 (Ill. 1985); Hrouda v. Winne, 491 N.Y.S. 2d 749, 751 (N.Y. App. Div. 1985).

[23]Compare NRCP 86(a) (stating that a district court has discretion to apply a rule that becomes effective while a case is pending so long as the effect would be feasible or would not work injustice); with Bank of Nev. v. Drayer-Hanson, 70 Nev. 416, 416, 270 P.2d 668, 668 (1954) (stating that a rule of civil procedure enacted while a case is pending becomes binding on that case pursuant to judicial discretion).

cc: Hon. Stewart L. Bell, District Judge
Lewis Brisbois Bisgaard & Smith, LLP
Paul W. Vanderwerken
Clark County Clerk