IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC,
Appellant,
vs.
FRANCES ANN BLANKENSHIP,
Respondent.

No. 65615

FILED

JUL 17 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

This is an appeal from a district court judgment on the jury verdict in a personal injury action and from a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

This appeal arises from a jury verdict in a personal injury claim for damages following a trip-and-fall in May 2009. Respondent Frances Ann Blankenship was on the premises of appellant Wynn Las Vegas, LLC ("Wynn") when she tripped over a curb. As a result of the fall, Blankenship suffered a broken arm and other injuries. Blankenship filed a complaint against Wynn alleging, as relevant to this appeal, negligence.

On the night of the incident, Blankenship ate dinner with her family and friends at the Botero restaurant at the Encore at Wynn Las Vegas, which is owned by Wynn. After finishing dinner, the group ordered dessert and coffee, and, while waiting to be served, Blankenship and her husband decided to leave the restaurant to smoke a cigarette. Blankenship and her husband exited the restaurant through the front doors, proceeded down some steps, and walked between two large columns

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that mark the restaurant's entrance. They then turned left and proceeded down a walkway that runs alongside the restaurant's patio area. A curb separates the walkway from the patio. Blankenship and her husband followed the walkway, passing alongside the curb, until they reached the Encore's pool area where they smoked their cigarettes.

After finishing their cigarettes, Blankenship and her husband did not use the walkway to return to the restaurant. Instead, they attempted to reach the restaurant's front doors by passing through its patio area. But, Blankenship tripped over the curb surrounding the patio area and fell.

Photographs were introduced at trial depicting the patio area, curb, walkway, and lighting in the area. The photographs show a number of tables and chairs inside the patio area and arranged alongside the curb. The photographs were taken during the day, however, and do not necessarily depict the tables and chairs as they were positioned on the night of the incident. The photographs also show overhead lighting in the patio area's canopy and lighting in the landscaping along the walkway.

At trial, Blankenship testified she did not see the curb or any indication she could not cross through the patio area, and she would have used an alternate route if she saw the curb. Blankenship also testified she recalled the space between the tables being larger than depicted in the photographs. According to Blankenship, her chosen route appeared to be a safe, direct route to the entrance that would not intrude on other

patrons' dining experience. Blankenship testified she did not know what part of her foot hit the curb, but "she fell flat and it knocked [her] out."[1]

Blankenship acknowledged she purchased four alcoholic beverages on the day of the incident: two beers during the day, a scotch and water at the bar before dinner, and a scotch and water at dinner. But, Blankenship also testified she did not recall whether she drank the entire scotch and water at the bar, and she did not drink the entire scotch and water at dinner. Blankenship further acknowledged she was wearing two and one-half inch heels when she fell.

Blankenship retained an expert to testify regarding the curb, but the district court granted Wynn's motion to strike that expert because the expert relied upon photographs of the curb to form an opinion.[2] Thus, Blankenship did not adduce expert testimony regarding the curb.

Wynn's expert, Deruyter Orlando Butler, testified the building code required Wynn to install a barrier between the patio area and the walkway due to a small elevation difference between the two surfaces. Mr. Butler further testified the curb was compliant with the building code,

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[1]Blankenship's medical records from the night of the incident states Blankenship saw the curb and was stepping over it, suggesting she knew the curb was there and attempted to navigate it. Blankenship testified she did not recall making that statement, and she was groggy when she went to the hospital.

[2]Blankenship alleges Wynn redesigned the curb before offering her an opportunity to inspect it. To the extent Blankenship argues Wynn spoliated evidence, that argument fails on appeal because she did not raise it before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

but other barriers, including a planter, rails, or glass would have also been compliant. Mr. Butler acknowledged the curb was not the safest possible barrier, Wynn has used different barriers at other properties, Wynn selected the curb for aesthetic purposes, and other barriers would have also served those aesthetic purposes. Finally, Mr. Butler testified Wynn painted the curb a contrasting color to promote guest safety and the lighting in the area was code compliant.

The jury returned a verdict in favor of Blankenship, awarding $100,000 in damages, but that amount was reduced to $60,000 because the jury also found Blankenship forty percent liable for the incident. Thereafter, Wynn brought a post-trial motion for judgment as a matter of law, or, in the alternative, a motion for a new trial, which the district court denied. This appeal followed.

On appeal, Wynn challenges the district court's determination on several bases. First, Wynn contends substantial evidence did not support the jury's verdict. Second, Wynn argues the jury manifestly disregarded the district court's instructions, and, therefore, the district court abused its discretion by denying Wynn's motion for a new trial. Third, Wynn asserts the district court abused its discretion by denying Wynn's motion for a new trial because Blankenship's counsel encouraged jury nullification during voir dire.

Whether substantial evidence supported the jury's verdict

Wynn maintains the present case concerned the design and construction of a curb. Wynn argues the standard applicable to the design and construction of a curb is not within the common knowledge of laypersons, and, therefore, Blankenship was required to present expert testimony regarding the standard of care. Because Blankenship did not

present expert testimony, Wynn asserts substantial evidence did not support the jury's verdict. By contrast, Blankenship contends the case was not about the design and construction of the curb, but rather, whether the Wynn unreasonably placed it at the location of the fall. Blankenship further argues expert testimony regarding the standard of care was not required because the reasonableness of the curb at the location of the fall was within the common knowledge of laypersons. Thus, Blankenship maintains substantial evidence supported the jury's verdict.

We will not overturn a jury's verdict if it is supported by substantial evidence, unless, "it was clearly wrong from all the evidence presented." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) (internal quotation marks omitted). In reviewing a jury's verdict, we are "not at liberty to weigh the evidence anew, and where conflicting evidence exists, [we draw] all favorable inferences . . . towards the prevailing party." *Id.*

It is well-established in Nevada "that the standard of care must be determined by expert testimony unless the conduct involved is within the common knowledge of laypersons." *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982). "Where . . . the service rendered does not involve esoteric knowledge or uncertainty that calls for [a] professional's judgment, it is not beyond the knowledge of the jury to determine the adequacy of the performance." *Id.* (citing *Aetna Ins. Co. v. Hellmuth, Obata & Kassabaum, Inc.*, 392 F.2d 472, 478 (8th Cir. 1968) ("general rule requiring expert testimony to establish a reasonable standard of professional care . . . is not

necessary in passing on commonplace factual situations that the ordinary jury layman can readily grasp and understand.").

Wynn cites *Woodward v. Chirco Constr. Co.*, 687 P.2d 1275 (Ariz. Ct. App. 1984), *Miller v. Los Angeles Cnty. Flood Control Dist.*, 505 P.2d 193 (Cal. 1973), *Lemay v. Burnett*, 660 A.2d 1116 (N.H. 1995), and *Nat'l Cash Register Co. v. Haak*, 335 A.2d 407 (Pa. Super. Ct. 1975) for the proposition that the standard of care associated with the design and construction of the curb is not within the common knowledge of laypersons. We are not persuaded by Wynn's argument. Even if those cases were binding, which they are not, they are distinguishable because Blankenship's underlying claim was not limited to negligent construction or design. Instead, Blankenship tried the case on the theory that the curb presented an unreasonable risk of harm at the location of the fall.

Given Blankenship's theory of the case, the jury was not charged with assessing the structural integrity of the curb or whether a design defect was present in the curb. It was asked to consider whether Wynn, by placing the curb at the location of the fall, created an unreasonable risk of harm—specifically, a tripping hazard. Because that issue falls within the common knowledge of laypersons, we conclude Blankenship was not required to present expert testimony regarding the standard of care. *See Daniel,* 98 Nev. at 115, 642 P.2d at 1087; *see also Foster v. Costco Wholesale Corp.*, 128 Nev. ___, ___, 291 P.3d 150, 156 (2012) (holding where a dangerous condition is open and obvious, the jury must decide whether a landowner breaches its duty of care by permitting the condition to exist and allowing a guest to encounter the condition). Given our conclusion, we turn to whether substantial evidence supports the jury's verdict.

At trial, Blankenship presented photographs depicting the area in which the fall took place. Thus, the jury was able to view the curb, walkway, and patio area; the lighting in the area; and the lack of warnings regarding the curb. Blankenship and her husband both testified they did not see the curb or any indication that they could not walk from the walkway through the patio area. Wynn's expert testified the building code required a barrier between the walkway and patio area due to a small elevation change. But, Wynn's expert also testified (1) a curb was not the only option for the location, (2) Wynn selected the curb for aesthetic purposes, and (3) other barriers may have been safer options for the location. Based on the record and given our conclusion that Blankenship was not required to present expert testimony regarding the standard of care, we conclude substantial evidence supported the jury's verdict.

Whether the jury manifestly disregarded the district court's instructions

Wynn contends that without expert testimony regarding the standard of care, the jury could not have found in favor of Blankenship unless it manifestly disregarded the district court's instructions. Thus, Wynn maintains the district court abused its discretion by denying Wynn's motion for a new trial. Blankenship counters she was not required to present expert testimony regarding the standard of care. Hence, Blankenship asserts the district court did not abuse its discretion by denying Wynn's motion for a new trial because the jury did not manifestly disregard the district court's instructions.

A district court's decision granting or denying a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Krause, Inc. v. Little*, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001). Under NRCP 59(a)(5), a district court may grant a new trial if there has been a

"[m]anifest disregard by the jury of the instructions of the court." Our Supreme Court has held "[t]his basis for granting a new trial may only be used if the jury, as a matter of law, could not have reached the conclusion that it reached." *Carlson v. Locatelli*, 109 Nev. 257, 261, 849 P.2d 313, 315 (1993). In considering whether the jury manifestly disregarded the district court's instructions, we must "assume that the jury understood the instructions and correctly applied them to the evidence." *McKenna v. Ingersoll*, 76 Nev. 169, 175, 350 P.2d 725, 728 (1960).

We already concluded Blankenship was not required to present expert testimony regarding the standard of care, and, therefore, Wynn's argument that the jury must have manifestly disregarded the district court's instructions fails. Moreover, nothing in the record suggests the jury's verdict is based on a misunderstanding or misapplication of the district court's instructions. The district court properly instructed the jury, without objection from the Wynn, that "a property owner is not an insurer of the safety of a person on its premises[,]" but a property owner still "owes its patrons a duty to keep the premises in a reasonably safe condition for its intended use." The district court also properly instructed the jury, once again without objection from the Wynn, to use common sense and draw reasonable inferences in considering the evidence. Based on the district court's instructions as well as the evidence and testimony presented at trial, it cannot be said, as a matter of law, the jury could not have reached the conclusion that it reached.

Whether Blankenship's counsel encouraged jury nullification

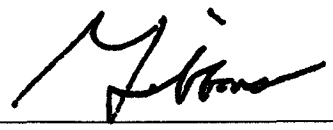
We next turn to Wynn's contention that a new trial is warranted because Blankenship's counsel engaged in misconduct by encouraging jury nullification. A district court has discretion to grant or

deny a motion for new trial based on attorney misconduct, and we will not reverse that decision absent an abuse of discretion. *See Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

Our Supreme Court has held when a district court rules on a motion for a new trial based on attorney misconduct, "the district court *must* make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described [in *Lioce*] to the facts of the case before it." *Id.* at 19-20, 174 P.3d at 982 (emphasis added).

In the present case, the district court failed to make the necessary findings—both during oral proceedings and in its written order. Without reasoning supporting the district court's decision, we are unable to determine whether the district court abused its discretion in denying Wynn's motion for a new trial based on attorney misconduct. As such, we vacate the district court's order denying that motion and remand this matter to the district court for a decision applying the standards set forth in *Lioce*. Accordingly, we

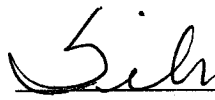
ORDER the judgment of the district court AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Silver

cc: Hon. Jerry A. Wiese, District Judge
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