

IN THE COURT OF APPEALS FOR THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

JENNIFER O'NEAL,

Case No. 70446

Appellant,

vs.

SHARNA HUDSON; GERALD
LYLES, individually;

Respondents.

RESPONDENTS' ANSWERING BRIEF

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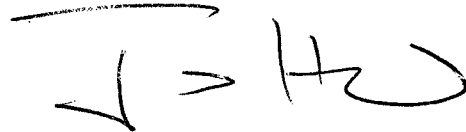
RULE 26.1 DISCLOSURE STATEMENT

Pursuant to NRAP 26.1, the Respondent hereby certifies that the only persons or entities that must be disclosed are the Respondents, their attorney, James W. Howard, Esq., and Tracey B. Howard, Esq., of The Howard Law Firm, LLC. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 22nd day of November, 2017

THE HOWARD LAW FIRM

By

A handwritten signature in black ink, appearing to be 'J. Howard', written over a horizontal line.

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1. ROUTING STATEMENT: This case should be assigned to the Court of Appeals under NRAP 17(b) because it does not meet any of the criteria set forth in NRAP 17(a) for appeals to be retained by the Supreme Court.

2. STATEMENT OF THE FACTS:

Appellant O'Neal elected not to prepare a statement of the evidence for inclusion in the record pursuant to NRAP 9(d) and instead chose to rely upon the filed record of proceedings as submitted in Appellant's Appendix. Therefore, in addition to Appellant's Appendix, Respondents will rely upon those portions of the exhibits stipulated to by the parties and entered into evidence for the consideration of the jury that rebut Appellant's position on appeal. Those are submitted in the Respondents' Appendix.

Respondents filed their Pretrial Memorandum on January 27, 2016, App. 20, Defendant's Pretrial Memorandum. In that Pretrial Memorandum, Respondents noted that, "Defendant Lyles is not contesting that he caused the accident. He is contesting Plaintiff's claims of damages." Id., at 22. Further, Respondents described the issues to be resolved at trial as, "Whether and to what extent Plaintiff was injured." Id. And, "Whether Plaintiff's medical treatment and bills were related to the accident." Id. Thus, Respondents made it clear that they were contesting whether Appellant was injured in the accident and whether

her treatment was related to the accident. Id. Respondents made it clear that they were not agreeing Appellant was injured as a result of the accident. Id.

The reasons that Respondents disputed whether Appellant was injured in the car accident are present in the exhibits that the parties stipulated into evidence and presented to the jury, none of which was included in Appellant's Appendix.

Respondents attach to their Appendix only those portions of the exhibits that are necessary to rebut Appellant's contentions. Primarily, the evidence that caused Respondents to question whether Appellant was injured in the car accident was contained in her recorded statement taken shortly after the accident (Resp. App., 1-4), in her medical records of treatment following the accident (Resp. App., 5-11), and photos of the front end of Respondent's car (Resp. App., 12-13), and photos of the rear of the Appellant's car Resp. App., 16. In the recorded statement of the Appellant she indicated that she was not injured,

Q: All right. Well, I can definitely help _____.¹ I'm sorry to hear there was an incident. Um, was there any injury?

A: No, everyone's fine as of right now, everyone's fine. Resp. App., 1, Recorded Statement of Appellant.

Thus, the jury had in front of it, evidence that Appellant denied injury after the

1. At the trial of this matter, portions of the recorded statement were redacted. The underlined portion was redacted. The redacted part says, "and get a claim set up."

accident, stating she was fine. The evidence contained in the medical records showed that Appellant did not receive any medical treatment after this accident for four months. Resp. App., 5, medical record of Appellant. And, the photos of Respondents' car show little if any damages, Resp. App., 12, 13, while the photos of Appellant's car show damages to one single part of her bumper in a u shape like she had backed into a pole, Resp. App., 14, and damage that she claimed was caused in the accident that was higher up than her bumper on the lift gate, difficult to see but present at Resp. App. 14, in photo in lower right hand corner. In addition, the photos of Appellant's car show a repair estimate for speakers she claimed were damaged in the accident, Resp. App. 15, and a photo of the speakers, Resp. App. 14. Appellant claimed in her recorded statement that the speakers had holes punctured in them as a result of the accident and her amps too. Resp. App., 4. The photos of the speakers or amps do not appear to show any holes present in them. Resp. App. 14. Appellant also claimed in the recorded statement that the rear end accident damaged her transmission. Resp. App., 3.

Following the jury's verdict for the Defendant, Appellant filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial which Respondent opposed. App., 43, Opposition. That Opposition set forth

much of the evidence presented against Appellant at the trial:

“Plaintiff Hudson did not seek treatment for her alleged injuries, that day, that week or that month. It was four months before she began any treatment on January 23, 2013. She complained of neck, low back, right lower rib and right lower sternal pain, difficulty standing and walking, bilateral hip and right wrist and right third middle toe pain. Those records state, “Ms. O’Neal was involved in another MVA in 2009 and she states to me that she did not make a complete recovery from that accident.” Id., 44; Resp. App., 6, medical record of Appellant.

So, the jury had for its consideration a statement that she was fine as of the time of the recorded statement, a four month delay in seeking treatment, and an admission that she had not completely recovered from a previous accident. She later developed a mass on her breast and was referred to Family Doctors of Green Valley, Dr. Ramanathan. Resp. App., 7., 8, Opposition. On the first visit with Dr. Ramanathan, it was noted in the medical record of that visit,

What was Pain at time of Accident? Mild and pain progressively worsened as time went on. Resp. App. 9, Appellant medical record.

Obviously, this statement that her pain was mild at the time of the accident differs from her recorded statement taken on the day of the accident when she said she was fine. Resp. App., 1. Dr. Ramanathan also noted in his medical record that she was taking a narcotic pain medication, Lortab, that was supplied to her by an Emergency Room. Resp. App., 9, Appellant medical record. Appellant O’Neal has

never disclosed an Emergency Room visit. App. 44, Opposition. The medical records state she complained of,

Pain in shoulder(s) affecting the right shoulder. Sciatica affecting the lower right side of the body, affecting the lower left side of the body. Trauma in arm(s) denies. Trauma to hip(s) affecting the right hip. Trauma to knee(s) admits. Id; Resp. App. 9.

The initial treatment with the chiropractor did not mention pain in the right shoulder, sciatica on both sides, or trauma to the knees. App., 45, Opposition; Resp. App. 7,8, Appellant medical record. Dr. Ramanathan's medical record then goes on to document,

Itchy small bumps over her entire body that started 5-6 days after the accident. Covers her entire body and has been worsening...lt. Breast lump pain 5/10 intermittent first noticed shortly after the accident. She attributes this to the seat belt, intermittent hemorrhoids and upset stomach, rib pain on rt. 4/10 intermittent, lt side rib 6/10, 2 periods in the past month lasting a few days each. She's never had irregular periods in the past and attributes this to the accident, left ear has decreased hearing, cracked a upper right molar. Pt says that she bit down when the car was hit and she heard a crack in her right jaw - pt will schedule an appt. w/ the dentist. Pt. Denies having any of these sxs prior to the accident.

Severe anxiety since the accident, worse while driving. Given Lortab at the ER for pain which helps. App. 45, Opposition; Resp. App., 10, Appellant medical record.

When she first treated with the chiropractor, Appellant did not complain of itchy small bumps over her entire body that started 5-6 days after the accident, breast lump pain on left, intermittent hemorrhoids and upset stomach, left ear decreased

hearing or a cracked molar in her mouth. App. 45, Opposition; Resp. App. 5, Appellant medical record. Again, the cracked molar that allegedly happened when she bit down when her car was hit is inconsistent with her saying she was fine in the recorded statement. Resp. App. 1. The physician ordered a left breast sonogram for the lump. Appellant submitted these bills as related to the accident. App., 45, Opposition. In summary, the jury had documentation stipulated to by the parties and entered into evidence where Appellant admitted she was not injured, Resp. App., 1, recorded statement. The jury had evidence that Appellant did not go to a medical care provider for four months. Resp. App., 5, Appellant medical record. The jury had evidence that Appellant never recovered from a previous accident. Resp. App., 6, Appellant medical record. And the jury had evidence of inconsistent testimony regarding whether she was in pain immediately after the accident and regarding what parts of her body were injured. Resp. App., 1, recorded statement; Resp. App. 9, Appellant medical record. In addition, she claimed that the lump she felt in her breast, her irregular periods and her hemorrhoids were related to the accident. Resp. App., 10, Appellant medical record. Finally, Appellant also claimed that the rear end car accident caused her interior lights to stay on in her car, which she believed would cause her battery to go out. Resp. App. 2, recorded statement. She claimed that the rear end accident

caused a problem with her transmission. Resp. App. 3, recorded statement. The speaker system was caused to fly forward and holes were punctured in her speakers and amps. Resp. App. 4, recorded statement.

At the trial of this matter, Appellant never made a Motion for judgment as a matter of law either during the trial, when a party had been fully heard on an issue and on the facts and law pursuant to NRCP 50(a)(1), or at the close of the evidence offered by the nonmoving party or at the close of the case pursuant to NRCP 50(a)(2)). App. 46, Opposition. The jury in this case, after hearing all of the testimony and being provided with exhibit books of the records entered into evidence, and hearing the jury instructions, returned a verdict in favor of the Defendant and a Judgment on Jury Verdict - Short Trial Program was filed on March 23, 2016. App. 28, Judgment. Appellant filed a Motion for Judgment Notwithstanding the Verdict Or, In the Alternative, Motion for a new Trial on March 24, 2016. App. 30, Motion. Defendant filed his Opposition to Appellant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative Motion for New Trial on April 6, 2016. App. 43, Opposition. After considering these papers, the Judge Pro Tempore gave his Order Denying Appellant's Motion on April 25, 2016. App. 51. Appellant then filed their Notice of Appeal on May 19, 2016.

3. ARGUMENT:

A. Appellant did not request Judgment as a matter of law at trial and should not be allowed to do so post trial.

NRCP 50, entitled *Judgment as a matter of law in jury trials; alternative motion for new trial*, allows a party to move for judgment as a matter of law either during a trial by jury, when a party has been fully heard on an issue and on the facts and law pursuant to NRCP 50(a)(1), or at the close of the evidence offered by the nonmoving party or at the close of the case pursuant to NRCP 50(a)(2). The rule also allows for renewing the motion after trial pursuant to NRCP 50(b), but only if a motion was made pursuant to NRCP 50(a). NRCP 50(b) provides in pertinent part,

(b) Renewing motion for judgment after trial; alternative motion for new trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after service of a written notice of entry of judgment and may alternatively request a new trial or join a motion for a new trial under Rule 59.

The Editors Note to the rule states in pertinent part,

Thus, a "renewed" motion filed under subdivision (b) must have been preceded by a motion filed at the time permitted by subdivision (a)(2). Editors Note to NRCP 50.

Thus, the initial consideration should be whether Appellant's failure to request a judgment as a matter of law at trial precludes Appellant from filing for a post-trial judgment notwithstanding the verdict.

Appellant failed to make a motion for judgment at the trial of this matter. App. 46, Opposition. Therefore, Appellant's post trial Motion for Judgment Notwithstanding the Verdict was properly denied. The inclusion of the word "renewing" in the title makes abundantly clear that the post trial motion may only be made if the motion was made at the trial of the matter. The statute says, "the movant may renew its request for judgment as a matter of law." NRCP 50(b). Further the Editors Note states explicitly that the renewed motion filed under subdivision (b) must have been preceded by a motion filed at the time permitted by subdivision (a)(2). That sub-part of NRCP 50 directs that a Motion for Judgment may be made at the close of the evidence offered by the nonmoving party or at the close of the case. Id. In this case, Appellant never made a Motion for Judgment pursuant to NRCP 50(a), so Appellant should not be allowed to make the Motion for Judgment Notwithstanding the Verdict post trial without having made it first at trial. App. 47, Opposition.

B. The Appellant should not have been granted a judgment notwithstanding the verdict because there was ample evidence for reasonable jurors to conclude Appellant was not injured.

If Appellant is allowed to reach the merits of whether Appellant's Motion for Judgment Notwithstanding the Verdict should have been granted, then the reviewing court is presented only with a question of law to be determined by the court, and the power to grant such motions should be cautiously exercised.

Dudley v. Prima, 84 Nev. 549, 551; 445 P.2d 31, 32 (Nev. 1968). The Court should not trespass on the province of the jury to be the judge of all questions of fact in the case. *Id.* The party favored by the verdict is entitled to have the testimony considered in the light most advantageous to him. *Id.* Further, the party favored by the verdict is to be given the benefit of every inference of fact fairly deducible therefrom. *Id.* And, the fact that the Court may feel that the testimony is unworthy of credit is not a proper ground for granting judgment notwithstanding the verdict for the question of credibility is the jury's sole province. *Id.*, 552. The issues of negligence and proximate cause are generally factual issues to be determined by the trier of fact. Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (Nev. 1993). Therefore, an application for a judgment notwithstanding the verdict will be refused where there is evidence tending to support the verdict, or where there is a conflict of evidence, so the jury could

properly decided either way. Dudley v. Prima, 84 Nev. 549, 551; 445 P.2d 31, 32 (1968).

Appellant cannot meet the standard of showing, “the opposing party has failed to provide a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law.” Huffey v. Phelps, 281 P.3d 1183 (Nev. 2009). For example, Appellant denied injury right away after the accident, and this evidence was stipulated to for the consideration of the jury. Resp. App. 1, recorded statement. In a trial where the issue is whether and to what extent Appellant was injured, her testimony stating that she was fine after the accident could be inferred by reasonable jurors to mean she was not injured as a result of the accident and could be a fair basis on which a jury could base a defense verdict. Or, the jury could have considered the records of her chiropractor that indicated she had been in another motor vehicle accident in 2009 and had not fully recovered, Resp. App., 6, and the jury could have reasonably concluded that her claimed injuries now were actually from the earlier accident. The jury could have looked at the photos of the Respondent’s car, Resp. App 12, 13, and the damages, or the lack thereof, to that car and concluded that the accident was more unlikely than likely to have caused Appellant’s claimed injuries. The jury could have considered the lack of damages to Respondent’s car and Appellant’s statement that

she was fine after the accident in conjunction with the fact that she did not seek treatment for four months after the accident, Resp. App 5, Appellant medical record, and reasonably concluded she was not injured by the accident. Or, the jury could have looked at Appellant's inconsistent statements and found her to lack credibility. She stated she was fine after the accident in her recorded statement, Resp. App. 1, but in her medical records, she claimed that she felt pain immediately after the accident and even claimed the accident caused her to bite down so hard she immediately cracked a right upper molar and to hear a crack in her jaw. Resp. App., 10. Certainly, reasonable jurors could look at those statements, one of being fine after the accident and others of immediate pain and a cracked tooth, and fairly infer that Appellant was not credible. The jury did have for its consideration the jury instruction that includes,

“If you believe that a witness has lied about any material fact in the case, you may disregard the entire testimony of that witness or any portion of this testimony which is not proved by other evidence.
Resp. App. 18, Jury Instruction

Thus, reasonable jurors could have used this instruction and the inconsistent statements to disregard the testimony of Appellant.

C. Appellant should not have been granted a new trial because there was substantial evidence to sustain the judgment.

Turning to the issue of whether the Judge Pro Tempore properly denied

Appellant's alternative motion for a new trial, the general rule for the standard of review is that when there is substantial evidence to sustain the judgment, it will not be disturbed. Brechan v. Scott, 555 P.2d 1230; 92 Nev. 633, 634 (1976). A court may not substitute its own judgment in place of the jury's judgment unless the jury erred as a matter of law. Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989). The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse. Southern Pac. Transp. Co. V. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

Appellant argues that Respondents did not offer any evidence at the trial, so the jury manifestly disregarded the overwhelming evidence. This is simply not correct. Respondents' evidence in support of their case was the evidence contained in the exhibit notebooks that included the recorded statement of Appellant where she admitted she was fine after the accident, Resp. App. 1. The books included photos of the vehicles, including the lack of damages to Respondents' car, Resp. App. 12-17. The jury could have reasonably wondered how the damage done to Appellant's car could be explained, given the lack of damages to Respondents' car, Id., much less Appellant's claimed damages to Appellant's transmission and wheel from a rear end fender bender, Resp. App., 3,

recorded statement. The evidence included medical records of Appellant claiming four months after the accident that the accident caused her to have a breast lump and irregular periods that she attributed to the accident, along with complaints of itchy small bumps over her entire body that started 5-6 days after the accident, intermittent hemorrhoids, decreased hearing, all of which she denied having before the accident. Resp. App., 10, Appellant medical record. The jurors could have looked at this evidence and used their common sense to find these types of complaints were not consistent with a rear end automobile accident and returned a defense verdict in the matter. The jury was instructed,

“Although you are to consider only the evidence in the case in reaching a verdict, you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women.” Resp. App. 19, jury instruction.

In short, there was a mountain of evidence that the jury had in front of it which could lead reasonable persons to conclude that the subject automobile accident did not cause Appellant’s claimed injuries even though Respondent did not dispute he caused the accident.

Finally, the jury was instructed regarding the burden of proof and the preponderance of the evidence:

“The plaintiff has the burden to prove that the plaintiff sustained damage, that the defendant was negligent and that such negligence

was a proximate cause of the damage sustained by the plaintiff. “
Resp. App., 20, jury instruction.

Further, the jury was instructed,

“The term preponderance of the evidence means such evidence as,
when weighed with that opposed to it, has more convincing force, and
from which it appears that the greater probability of truth lies
therein.” Resp. App. 21, jury instruction.

Thus, given all of the foregoing evidence, the jury could simply have felt that
Appellant failed to met her burden of proof by a preponderance of the evidence
and returned a verdict in favor Respondent.

It is for the jury to determine the credibility and the weight to be given to
testimony where evidence presented on a material point may be conflicting or facts
could support differing inferences. Banks v. Sunrise Hosp., 102 P.3d 52, 63 (Nev.
2004). So long as there is evidence in the record from which the jury could reach
the conclusion they did, a new trial should not be granted, nor should a judgment
notwithstanding the verdict be given. The simple admission by Appellant that she
was fine after the accident, Resp. App., 1, recorded statement, should by itself be
enough for reasonable persons to conclude she was not injured. Add to that the
facts that she never completely healed from a previous accident, Resp. App. 9,
Appellant medical record, the lack of damage to Respondent’s car, Resp. App. 12-
13, photos of Respondents’ car, the inconsistent and incredible damages to

Appellant's car, Resp. App. 14-17, photos of Appellant's car, the lack of seeking treatment for four months, Resp. App., 5, Appellant medical record, the inconsistent and incredible claims of injury from the accident, Resp. App., 10, Appellant medical record, and there is an abundance of evidence that could lead reasonable jurors to conclude Appellant's claimed injuries were not caused by the car accident, and/or that she lacked credibility. Accordingly, the Judge Pro Tempore correctly denied then Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial.

4. CONCLUSION

Respondent respectfully requests that the Court of Appeals for the State of Nevada affirms the lower court's ruling that denied Plaintiff's Motion for a Judgment Notwithstanding the Verdict or in the Alternative a New Trial.

5. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP32.

As undersigned counsel for the Respondent, I hereby certify as follows:

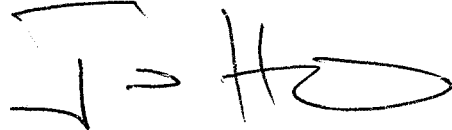
1. I have prepared and read the foregoing Answering Brief;
2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 9(a)(7).
5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) and it utilizes Times New Roman type face with 14 point type style. Further, this brief is in compliance with the type volume

limitations as it contains a word count of 4550 in the countable sections of the brief.

Dated this 22nd day of November, 2017

THE HOWARD LAW FIRM

By

A handwritten signature in black ink, appearing to read 'J. W. Howard', written over a horizontal line.

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Attorneys for Respondents

6. CERTIFICATE OF SERVICE

I hereby affirm that on this 22nd day of November, 2017, I mailed via first class U.S. Mail a copy of the foregoing Answering Brief to the Appellant at the address below:

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The Howard Law Office