

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HILLSBORO ENTERPRISES INC, A
NEVADA CORPORATION; MOBILE
BILLBOARDS, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
EBVB HOLDINGS, INC., A NEVADA
LIMITED LIABILITY COMPANY;
VINCE BARTELLO, AN INDIVIDUAL;
AND ERICA BARTELLO, AN
INDIVIDUAL,
Appellants,
vs.
SEAN FITZGERALD,
Respondent.

No. 79698-COA

FILED

JAN 29 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Hillsboro Enterprises Inc, et al. appeal a district court judgment, entered upon a jury verdict, in a wrongful termination and conversion action. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Appellants Erica Bartello and Vince Bartello owned, controlled, and operated Hillsboro Enterprises Inc, Mobile Billboards, LLC, and EBVB Holdings Inc., LLC (collectively, Appellants).¹ EBVB owns the building where Hillsboro and Mobile Billboards operate.

Respondent Sean Fitzgerald was previously employed as a fleet mechanic for some of the Appellants. His responsibilities included washing and repairing trucks and vans, maintaining and cleaning the building, auto electrical, and welding/fabricating. Fitzgerald used his own personal tools from his toolbox to perform his duties.

¹We do not recount the facts except as necessary to our disposition.

Part of this dispute arises from some ambiguity surrounding Fitzgerald's employment. When he was first hired, his employment offer was conveyed to him by the Bartellos, who explained that the trucks he would repair were Hillsboro's property, but the Bartellos kept those trucks at their personal residence. To access them, the Bartellos gave him a key to their property. Fitzgerald never formally confirmed with the Bartellos that they were his employer, and he would later admit that he did not believe they were. Fitzgerald completed his employment documentation with "Kimmi," who handled human resources and office management matters for both Hillsboro and Mobile Billboards and acted as his immediate supervisor. At trial, he testified that he initially assumed that Hillsboro was his employer because his first paycheck came from Hillsboro. However, a few days after Fitzgerald suffered a workplace injury, Fitzgerald received checks from Mobile Billboards, leading him to believe he was a Mobile Billboards employee instead.

Sometime later, Fitzgerald suffered a serious work-related injury that amputated a part of one his thumbs while he repaired one of the trucks. Fitzgerald immediately reported his injury to Kimmi. The injury prevented Fitzgerald from engaging in any serious work-related activity, and prohibited him from getting his bandaging wet. The Bartellos provided Fitzgerald with a workers' compensation claim number.

After Fitzgerald suffered his injury, Vince Bartello appeared to become upset with him, as evidenced by a series of text messages. In one instance, Vince texted Fitzgerald asking why Fitzgerald had not washed the trucks. Fitzgerald explained that he could not get his hand wet and he needed help. In response, Vince told Fitzgerald that he could not come back to work until he could complete the tasks and duties Vince hired him to perform. In another text message, Vince accused Fitzgerald of using the

company card to buy \$4,000 worth of items at Home Depot. Fitzgerald maintained that he never had access to the company card.

Later, the two engaged in a verbal confrontation when Vince told Fitzgerald that he was going to open his locked toolbox to review his time sheet over some discrepancy in Fitzgerald's hours. Fitzgerald was upset that Vince was going through his toolbox, but Vince told Fitzgerald that he could do whatever he wanted because it was on his property. Vince found a bottle of painkillers inside Fitzgerald's toolbox, and he suggested that the painkillers were the reason for Fitzgerald's partial thumb amputation workplace injury (although an examining physician concluded that Fitzgerald was not under the influence of any substance when the injury occurred). Fitzgerald told Vince that he would bring his timesheet and a doctor's note in the next day and that Vince should not have looked inside his toolbox without his permission. Vince then told Fitzgerald that he wanted the key to his home back, and warned that if Fitzgerald was ever on his property, he would call police. Vince also threatened Fitzgerald that if he did not bring his key in the next day, he would sell the tools in the toolbox to buy new locks for the building. Vince also said he would not give Fitzgerald back the toolbox until Fitzgerald set up some mutually agreed time that would work for both of them.

Sometime later, Fitzgerald and his father attempted to retrieve his box of tools from one of the office buildings. When they arrived at the building, they used the speaker box to talk to a receptionist, who explained that they were not allowed to have the toolbox at the time. Erica Bartello eventually came outside to speak with Fitzgerald, and a verbal confrontation ensued. Fitzgerald and his father remained outside the building, so the Bartellos called for police assistance. Police officers arrived and gave Fitzgerald a trespassing warning card but did not arrest anyone.

A few days later, an unidentified attorney (who Fitzgerald believes worked on behalf of Appellants) called Fitzgerald to tell him that he could retrieve his tools. When Fitzgerald arrived, both the Bartellos were there along with another person identified only as a "law clerk." When Fitzgerald checked his toolbox, he believed that many of his tools were missing. He told the Bartellos and their "law clerk" about the missing items, but the Bartellos refused to discuss the missing items. Fitzgerald later sent a list to the Bartellos with all the items missing from the toolbox, and he attached online pricing for the objects. The Bartellos never returned the missing items to Fitzgerald.

It is unclear when Fitzgerald officially stopped working for the Appellants. Regardless, at some point he was terminated, and he brought suit alleging retaliatory discharge and conversion against all the Appellants.

To prove his lost wages at trial, Fitzgerald presented evidence that after his termination he began working as a security guard, making five dollars an hour less than he would have with the Appellants and was only working part time. A year after starting as a security guard, he earned a raise to make one dollar an hour less than he would have if he remained employed with the Appellants and received no raises. Three years after his termination with the Appellants, he earned one dollar more per hour than he would have if he was still employed with the Appellants and did not receive any raises. At trial, he testified that he lost \$56,217.98 in lost wages.

The jury found in Fitzgerald's favor, awarding \$56,000 for the retaliatory discharge claim and \$3,111.16 for the conversion claim for a total amount of \$59,111.16. The special verdict form separated the Appellants individually for the conversion claim, allowing the jury to assign individual liability to each defendant. The jury did not find Erica or EBVB

liable for the conversion claim. However, the special verdict form did not separate the Appellants for the retaliatory discharge claim, and so the jury assigned liability to all defendants. The Appellants now appeal.

First, the Appellants argue that the jury had insufficient evidence to find liability and award damages on several grounds. In general, we do not review issues raised for the first time on appeal. *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.”). Specifically, “[i]t is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable.” *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969); *see also* NRCP 50(a). However, we may review the jury verdict for plain error or if the verdict resulted in a manifest injustice. *Price*, 85 Nev. at 607, 460 P.2d at 841. Under this standard, this court will reverse only when there is “no substantial conflict in the evidence upon any material point, and the verdict or decision [is] against such evidence upon such point, or where the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence.” *Id.* at 608, 460 P.2d at 842.

Here, the Appellants failed to move for a directed verdict pursuant to NRCP 50(a) below, and thus, have waived any sufficiency-of-the-evidence arguments on appeal. Furthermore, the Appellants cannot demonstrate either plain error or that a manifest injustice occurred because there was substantial evidence for the jury to assign liability and award damages. Each side presented evidence at trial that contradicted evidence presented by the other side, and it was the jury’s responsibility to evaluate and resolve the conflicting evidence and decide questions of credibility.

Second, the Appellants claim that jury instruction no. 26 erroneously instructed the jury to find corporate liability if it found that the corporations committed “any legally wrongful act causing damages,” which they contend misstates the law. Jury instruction no. 26, states:

An officer, agent, or employee of a corporation or business entity who commits a legally wrongful act causing damages in the course of acting on behalf of the corporation or business entity is individually liable for his or her conduct regardless of whether the business entity may also be found liable for the conduct. The corporation or business entity and the individual officer, agent, or employee may be sued jointly for the legally wrongful act.

The Appellants claim that the jury improperly found the Bartellos individually liable because of the instruction. We review a district court’s decision to give a jury instruction for abuse of discretion, but we review *de novo* whether the instruction accurately describes Nevada law. *D & D Tire v. Oullette*, 131 Nev. 462, 470, 352 P.3d 32, 37 (2015). In civil cases, even if an instruction is not technically correct, we review for harmless error and must view the instruction in the context of all the instructions given to determine whether the jury was sufficiently and fairly instructed. *Id.* at 471, 352 P.3d at 38. Reversal is warranted only when “but for the error, a different result may have been reached.” *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008).

Although the instruction could have been more precisely worded, when read in context, the jury instruction does not incorrectly state the law. Appellants contend that it exposes corporations to liability for all legally wrong acts committed by anybody employed by a corporation. They argue that, because the instruction states that the corporation may be jointly sued along with the employee who committed the acts, it effectively imposes strict liability upon corporations for any act by any employee,

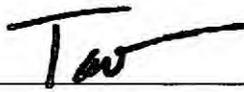
including potentially criminal acts that the corporation could not foresee and had nothing to do with. But the instruction states that the corporation is only liable for acts committed by the employee "in the course of acting on behalf of the corporation."

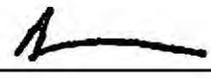
Additionally, the instruction must be viewed in context along with all other instructions given. Here, every other instruction given to the jury relates specifically to tort claims. Thus, when viewed in the context of all instructions given to the jury, jury instruction no. 26 only references legally wrongful acts involving torts committed by an employee "in the course of acting on behalf of the corporation." Even though instruction no. 26 could appear overly broad when viewed in isolation, it is not incorrect when properly viewed in context. The Appellants have not demonstrated that a different result would have been reached if the instruction narrowly referred to "tort claims" instead of the more broad "any legally wrongful act" when viewed in context with the totality of the jury instructions.

Therefore, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Cristina D. Silva, District Judge
Hurtik Law & Associates
Kemp & Kemp
Eighth District Court Clerk