IN THE SUPREME COURT OF THE STATE OF NEVADA

PETER DIXON,
Appellant,
vs.
RICHARD POSADAS AND ISRAEL CONTRERAS,
Respondents.

No. 43284

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 order entered on a jury verdict in a personal injury action.[1] Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

In this appeal, appellant Peter Dixon asserts that the district court made three mistakes constituting reversible error: (1) the court permitted respondents to present evidence and make comments regarding his past injuries and accidents, or "prior bad acts," without having previously held a hearing on the admissibility of such evidence; (2) the court refused to instruct the jury that such evidence could only be used to determine whether Dixon's injuries were incurred in the alleged vehicular accident with respondents; and (3) the court revealed to the jury, in violation of former NAR 20, an award arising from court-annexed arbitration, in favor of respondents. Respondents disagree and urge this court to grant them double costs and attorney fees under NRAP 38 for having to defend against this assertedly frivolous appeal.

[1]Pursuant to NRAP 34(f), we have determined that oral argument is not warranted in this case.

Character evidence

Dixon first argues that the district court erred in permitting the use of negative character evidence in the form of prior bad acts, without holding an admissibility hearing in line with this court's holding in Taylor v. Thunder.[2] NRS 48.045(2) prohibits the use of evidence of other wrongs or acts to prove the character of a person in order to show that he acted in conformity therewith, but also notes that such evidence may be admissible for other purposes. And, as Dixon points out, other jurisdictions have held that evidence regarding prior claims in personal injury cases is generally not admissible to prove litigiousness, unless those claims are shown to have been fraudulent.[3] However, prior injury claims may be admissible as admissions against interest used to show that a party has made statements inconsistent with his present position.[4] In addition, a party may properly be cross-examined "as to previous injuries, claims and actions to show that his present physical condition is not the result of the injury presently sued for, but was caused in whole or in part by an earlier or subsequent injury or a pre-existing condition."[5]

In Taylor, this court extended rules governing the admissibility of prior bad act evidence in criminal cases to civil proceedings. As a result, before prior bad act evidence is used, the district

---

[2]116 Nev. 968, 13 P.3d 43 (2000).

[3]See, e.g., Outley v. City of New York, 837 F.2d 587, 592 (2d Cir. 1988); Lewis v. Voss, 770 A.2d 996, 1007-08 (D.C. 2001); Middleton v. Palmer, 601 S.W.2d 759, 762-63 (Tex. Civ. App. 1980).

[4]Middleton, 601 S.W.2d at 762-63.

[5]Id. at 763.

court must hold the type of hearing specified in Petrocelli v. State,[6] on the record and outside the presence of the jury, to determine whether prior bad act evidence is relevant, proven by clear and convincing evidence, and has probative value that is not substantially outweighed by the danger of unfair prejudice.[7]

Here, the district court heard arguments outside the presence of the jury regarding whether the fraudulent nature of other injury claims could be admitted as prior bad acts. Ultimately, the court held that prior bad acts evidence would not be admissible, since respondents had not met their burden under Taylor. Nevertheless, the court determined that evidence pertaining to subsequent accidents and prior injuries was admissible because it related to causation. Thus, even though no formal Petrocelli hearing was held, the court substantially complied with the holding in Taylor by discussing the factors outside the presence of the jury and ultimately ruling prior bad acts inadmissible.[8]

Despite the court's ruling, Dixon argues, the court permitted the jury to see evidence and hear testimony regarding prior bad acts, including statements regarding claims of prior injuries and accidents made during voir dire, opening arguments, cross-examination of Dixon, and closing arguments.

---

[6]101 Nev. 46, 692 P.2d 503 (1985).

[7]Taylor, 116 Nev. at 973, 13 P.3d at 46.

[8]Cf. McNelton v. State, 115 Nev. 396, 405, 990 P.2d 1263, 1269 (1999) (recognizing that, in the criminal context, the reversal of a conviction based on the improper failure to hold a Petrocelli hearing is not necessary if (1) sufficient evidence in the record demonstrates that the evidence is admissible, or (2) the result would have been the same if the evidence had not been admitted).

Although Dixon asserts that respondents were required, in a Petrocelli hearing, to prove the "two dozen previous accidents involving Mr. Dixon" by clear and convincing evidence and to show that they fit one of the uses of prior bad act evidence, the accidents themselves are not evidence of "other wrongs," were not used as prior bad act evidence, and were largely admitted by Dixon to have occurred. Further, Dixon was properly questioned about other injuries to his neck and back on cross-examination. And Dixon has not pointed to any instance in which respondents' counsel outright suggested that the other injuries were false or that Dixon was litigious. Accordingly, no prior bad act evidence was improperly admitted.[9]

Jury instruction regarding previous injuries evidence

Dixon asserts that the court compounded the above "error" by refusing to give curative instructions to the jury.

The decision whether to give a proposed jury instruction is within the district court's discretion.[10] In this case, the court did not abuse its discretion because the evidence relating to Dixon's other injuries

---

[9]See also Land Resources Dev. v. Kaiser Aetna, 100 Nev. 29, 34, 676 P.2d 235, 238 (1984) ("'If the evidence is relevant, reversal is appropriate only where its prejudicial effect so outweighs its probative value that admission constitutes a clear abuse of discretion.' Evidence is considered relevant where it '. . . has some tendency in reason to establish a proposition material to the case.'") (quoting F/V American Eagle v. State, 620 P.2d 657, 672 (Alaska 1980) and citing NRS 48.015-48.035).

[10]Atkinson v. MGM Grand Hotel, Inc., 120 Nev. __, __, 98 P.3d 678, 680 (2004).

was properly admitted. Accordingly, the district court's refusal to give the proposed curative instruction does not constitute reversible error.[11]

Arbitration award as evidence

Dixon argues that the district court improperly and unconstitutionally allowed the arbitration award to be revealed to the jury because, when the case was filed in 2000, NAR 20(A) required the award to be sealed upon a request for a trial de novo. Before the matter proceeded to trial, however, NAR 20 was amended. Effective June 27, 2003, NAR 20(a) mandated that "the arbitration award shall be admitted as evidence in the trial de novo."[12]

Generally, changes made to a court's lawfully promulgated procedural rules apply to cases pending at the time that such changes become effective.[13] And rules concerning evidence are considered procedural under this doctrine, and apply to pending cases unless

---

[11]See Carr-Bricken v. First Interstate Bank, 105 Nev. 570, 573, 779 P.2d 967, 969 (1989) (noting that district court error is not reversible error unless a party will be denied substantial justice); Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 667-68, 448 P.2d 46, 50 (1968) (stating that in reviewing error, the record must be reviewed as a whole, and no prejudice is presumed).

[12]See In the Matter of the Development of Alternatives to Traditional Litigation for Resolving Legal Disputes, ADKT 126 (Order Amending Rule 20 of the Nevada Arbitration Rules, April 28, 2003).

[13]See Niven v. Siqueira, 487 N.E.2d 937, 941 (Ill. 1985); Hrouda v. Winne, 491 N.Y.S.2d 749, 751 (App. Div. 1985); see generally 73 Am. Jur. 2d Statutes § 247 (2001); 20 Am. Jur. 2d Courts § 53 (1995); see also Baxter v. Hamilton, 51 P. 265, 266 (Mont. 1897) ("It is fundamental that a person has no vested right to have a controversy determined by existing rules of evidence.").

otherwise specified.[14] Accordingly, the district court properly admitted the arbitration award to be read into evidence at trial.

Sanctions

Respondents assert that this appeal is frivolous and request that this court award them double costs and attorney fees under NRAP 38. Appellant made no argument in response. Under NRAP 38, if this court determines that an appeal has frivolously been taken, it may award single or double costs, and "such attorney fees as it deems appropriate to discourage like conduct in the future." Because this appeal itself was not frivolous, we deny respondents' request for sanctions.

For the above reasons, no reversible error was demonstrated in this case. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Stewart L. Bell, District Judge
Robert E. Glennen III
Hafen, Porter & Storm, Ltd.
Clark County Clerk

[14]Niven, 487 N.E.2d at 941; Hrouda, 491 N.Y.S.2d at 751.