

IN THE SUPREME COURT OF THE STATE OF NEVADA

VICKIE WOLVERTON,  
Appellant,  
vs.  
ON DEMAND SEDAN SERVICES, INC.;  
AND BILLY WAYNE MANNING,  
Respondents.

No. 55556

VICKIE WOLVERTON,  
Appellant,  
vs.  
ON DEMAND SEDAN SERVICES, INC.  
AND BILLY WAYNE MANNING,  
Respondents.

No. 56277

**FILED**

OCT 27 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment on a jury verdict in a tort action and a post-judgment order denying a new trial motion. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Vickie Wolverton was injured when a vehicle owned by respondent On Demand Sedan Services, Inc. (ODS), struck and knocked over a telephone pole. The vehicle had allegedly been stolen earlier that day from ODS's employee, respondent Billy Manning. The thief who was driving the vehicle at the time of the accident was never caught. Following a trial, the jury returned a verdict in favor of respondents.

On appeal, Wolverton contends that (1) the jury was improperly instructed regarding negligence liability, (2) the district court abused its discretion in excluding impeachment evidence, and (3) the district court abused its discretion in refusing to allow her to amend the

complaint to assert a new theory of liability.<sup>1</sup> We disagree and therefore affirm the district court's judgment.

Jury instruction regarding negligence liability

At the conclusion of trial, the district court instructed the jury that it could not find respondents liable based on the fact that respondent Manning had left the keys in the vehicle's ignition. Wolverton contends that the district court abused its direction in issuing this instruction because it precluded the jury from determining whether this conduct was negligent. See Ouanbengboune v. State, 125 Nev. \_\_\_, \_\_\_, 220 P.3d 1122, 1129 (2009) (stating that we review the district court's decision to issue a particular jury instruction for an abuse of discretion). We disagree.

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<sup>1</sup>Wolverton also raises two distinct arguments regarding the district court's decision to deny her motion for new trial. First, Wolverton argues that respondents' confidential brief pursuant to EDCR 7.27 was unconstitutional because she had no chance to respond to the substantive matters included therein. Because Wolverton had ample opportunity to participate in the determination of the relevant issues, and she was not unfairly prejudiced by the ex-parte communication, Wolverton's right to due process was not violated. However, we note that we recently amended EDCR 7.27 to address these types of concerns. See In the Matter of the Amendment of the Eighth Judicial District Court Rules, ADKT 461 (Order Amending Eighth Judicial District Court Rules, June 29, 2011) (EDCR 7.27 amended effective July 29, 2011).

Second, Wolverton argues that respondents' counsel committed misconduct by: (1) mentioning that an ODS representative attended high school where one of the jurors was a teacher, (2) misrepresenting Wolverton's medical history, (3) misrepresenting the procedural history of the case, (4) snickering during trial, and (5) committing a HIPPA violation. We have reviewed these contentions and conclude that they warrant no relief.

Nevada recognizes that the owner of a vehicle “who leaves the keys in the ignition of his car is ordinarily not, as a matter of law, liable for injuries caused by the negligent operation of the vehicle by a stranger who steals the car.” See Elliott v. Mallory Electric Corp., 93 Nev. 580, 585, 571 P.2d 397, 400 (1977). Because respondents could not have reasonably foreseen the theft of the vehicle and its negligent operation, respondents did not owe a duty to Wolverton under the common law.

Nevertheless, Wolverton sought an instruction for negligence per se under former NRS 484.445,<sup>2</sup> which prohibits a driver from leaving a vehicle unattended without removing the key. However, undisputed evidence at trial established that respondent’s vehicle was stolen from a private street in a private mobile home park. The scope of former NRS 484.445 is limited to vehicles stolen from public “highways” and does not apply to vehicles left on private property. Elliott, 93 Nev. at 583, 571 P.2d at 399. Thus, the district court did not abuse its discretion in refusing to instruct the jury on Wolverton’s proposed key-in-the-ignition theory of negligence.

#### Impeachment evidence

Wolverton next argues that the district court abused its discretion in excluding evidence of a recorded statement for impeachment purposes. However, the record indicates that the district court excluded this evidence as a discovery sanction for Wolverton’s failure to turn over the recording upon which the impeachment evidence was based. See Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998) (stating

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<sup>2</sup>We note that former NRS 484.445 has been renumbered since the proceedings below; the relevant provisions now appear in NRS 484B.530.

that we review a district court's decision regarding discovery sanctions for an abuse of discretion).

Under NRCP 16.1(a)(1)(B), attorneys must provide to other parties "all tangible things" that are in possession of the party and discoverable under NRCP 26(b). Failure to comply with this rule may result in court-imposed sanctions pursuant to NRCP 16.1(e)(3)(B), such as "prohibiting the use of any . . . tangible thing which should have been disclosed."

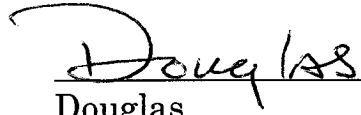
Here, the district court was concerned that the recording may not have been accurate. Because Wolverton possessed and refused to produce the recording, which is a "tangible thing," the district court acted within its discretion in excluding the evidence as a discovery sanction.

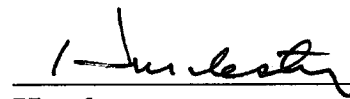
#### New theory of liability

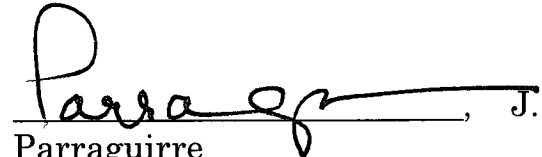
Finally, Wolverton argues that the district court abused its discretion in refusing to allow her to amend the complaint to include a claim that Manning negligently pursued the stolen vehicle, thereby causing the vehicle to crash and injure her. See Stephens v. Southern Nevada Music Co., 89 Nev. 104, 105, 507 P.2d 138, 139 (1973) (reviewing a district court's decision to deny a motion to amend for an abuse of discretion). However, the district court refused Wolverton's request to amend because there was no evidence to support her new theory of liability and because Wolverton had unduly delayed amending her complaint until after the close of discovery. See id. at 105-06, 507 P.2d at 139 (holding that "undue delay, bad faith or dilatory motive on the part of the movant" provides sufficient grounds for denying a motion to amend). Thus, we conclude the district court did not abuse its discretion in refusing

to allow Wolverton to amend her complaint to include this new theory of liability. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. David Wall, District Judge  
M. Nelson Segal, Settlement Judge  
Christensen Law Offices, LLC  
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.  
Eighth District Court Clerk