

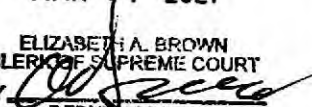
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TOMAS DE JESUS FERNANDEZ; AND
MARIA ORELLANA VARGAS,
Appellants,
vs.
LAS VEGAS METROPOLITAN POLICE
DEPARTMENT,
Respondent.

No. 80951-COA

FILED

MAR 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Tomas de Jesus Fernandez and Maria Orellana Vargas appeal from a district court final judgment in a tort action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

In 2017, appellants Fernandez and Vargas were traveling westbound on Desert Inn Road and approached an intersection.¹ Las Vegas Metropolitan Police Department (LVMPD) officers were directing traffic at the intersection because of a marathon. According to the arbitrator's findings of fact, as Fernandez approached the intersection, one of the officers, Detective Michael Fortunato, made a "stopping" hand signal at Fernandez before he entered the intersection.² However, because the traffic signal at the intersection was allegedly still operational and showed a green light for Fernandez, he proceeded into the intersection. After entering the intersection, a taxicab collided with Fernandez's vehicle.

Officer Rawley Campbell investigated the accident, but he did not interview Detective Fortunato. Following his investigation, Officer

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

²Because Fernandez was the driver of the vehicle and Vargas the passenger, we primarily reference Fernandez herein.

Campbell completed a traffic accident report, which, according to the arbitrator's findings, stated that "Fault was not determined due to the contributing factor of manual intersection direction was being conducted by officers in the intersection." Neither Officer Campbell, Detective Fortunato, nor any LVMPD officer issued Fernandez a citation following the accident.

Appellants initiated the instant action against LVMPD, but did not name any individual police officers as parties. The case proceeded to court annexed arbitration where the arbitrator found for appellants. LVMPD filed a timely request for a trial de novo, and the matter was set for a short trial.

Prior to trial, both parties submitted motions in limine. LVMPD sought to preclude the admission of the accident report and any testimony regarding Officer Campbell's determination of fault, whereas appellants sought admission of the report and the officer's testimony regarding the same. In a ruling from the bench, the short trial judge excluded the traffic accident report, testimony related to the non-issuance of a traffic citation, and Officer Campbell's statements regarding fault. The short trial judge failed to enter a written order. Ultimately, the jury found for LVMPD, concluding that appellants had not proven LVMPD was negligent. This appeal followed.

Appellants argue that the short trial judge abused his discretion in excluding the traffic accident report and Officer Campbell's statements contained therein, as well as testimony pertaining to the non-issuance of a traffic citation. Specifically, appellants contend that because the police are a party to the suit, the traffic accident report and Officer Campbell's statements should have been admitted as statements of a party opponent pursuant to NRS 51.035(3)(a) or for impeachment purposes. Additionally, appellants contend that the short trial judge erred in precluding any

questioning or reference to Detective Fortunato's and Officer Campbell's decision not to issue a citation to Fernandez as there is no rule of evidence barring questioning the officers on the matter. LVMPD argues that the short trial judge properly excluded Officer Campbell's post-accident traffic report and his opinions as to the cause of the accident contained therein pursuant to *Frias v. Valle*, 101 Nev. 219, 698 P.2d 875 (1985). We agree with LVMPD that the short trial judge did not abuse his discretion and therefore affirm.³

"We review a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538-39 (2010) (internal quotation marks omitted).

"It is the function of the trier of fact to decide who and what caused an accident." *Frias*, 101 Nev. at 221, 698 P.2d at 876. Thus, generally, an officer's conclusions, based largely on third-party statements "and a cursory inspection of the scene, [do] not qualify him [or her] to testify

³LVMPD argues that this court lacks jurisdiction to hear the instant appeal because the district court failed to issue a written order on the evidentiary issues. We conclude that this argument is without merit, as interlocutory orders are reviewable on appeal from a final judgment. *See, e.g., Consol. Generator-Nev., Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (providing that "interlocutory orders entered prior to the final judgment may properly be heard by this court"); *see also* NRAP 3A(b)(1) (authorizing an appeal from a final judgment). Here, Fernandez is appealing from a final judgment; therefore, this court has jurisdiction to review interlocutory rulings subsumed by the final judgment.

as to who was at fault.” *Id.* Furthermore, “[e]vidence of the traffic citation [is] also inadmissible.” *Id.*

We conclude that the short trial judge did not abuse his discretion in excluding certain evidence and determining that *Frias* controls. Here, similar to *Frias*, Officer Campbell was not present when the accident occurred and his accident report is founded on facts that are capable of being presented to the jury at trial. *See, e.g., Ingram v. Tucson Yellow Cab Co.*, 642 P.2d 868, 872 (Ariz. Ct. App. 1981) (providing that it is improper for a witness “to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury” (citations and internal quotation marks omitted)). Additionally, the short trial judge properly excluded evidence of LVMPD’s non-issuance of a traffic citation to Fernandez as *Frias* prohibits the admission of such evidence. Therefore, we detect no abuse of discretion.

Nevertheless, appellants contend that the court abused its discretion because LVMPD was a party to the instant action and that Officer Campbell’s statements were thus statements of a party opponent and therefore admissible under NRS 51.035(3)(a). Assuming that the statements were admissible under this exception, the rule only permits the admission of such evidence—it does not mandate it, because the statements could possibly be excluded for other reasons. Thus, excluding such evidence is not inherently an abuse of discretion and appellants cite no authority indicating that such exclusion amounts to an abuse of discretion. *Edwards v. Emperor’s Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not supported by relevant authority). Although the record is silent, the short trial judge also

could have excluded this evidence as being unfairly prejudicial or misleading pursuant to NRS 48.035.

Here, the district court's reasoning is unknown because appellants failed to provide this court with a sufficient record on appeal. Specifically, appellants did not provide a copy of the traffic accident report, the transcript or order from the evidentiary hearing, or the transcript from the trial itself. Thus, the record is bare, and we necessarily presume that any missing portions of the record support the district court's decision. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (“[W]e necessarily presume that the missing portion supports the district court's decision.”).⁴

Likewise, we are unable to determine if Officer Campbell's statements should have been permitted for impeachment purposes. Appellants argue that they should have been able to cross-examine the witnesses with Officer Campbell's statements in order to challenge LVMPD's narrative that Fernandez was at fault. However, without a trial transcript indicating who testified at trial, as well as what the witnesses testified to, we are unable to determine whether appellants were entitled to use Officer Campbell's statements for impeachment purposes.

⁴We note, even though this was a short trial with different rules, that it is an appellant's burden to provide the “portions of the record essential to determination of issues raised in appellant's appeal.” NRAP 30(b)(3). Moreover, where, as was apparently the case here, the proceedings were not reported or recorded, “the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the respondent, who may serve objections or proposed amendments within 14 days after being served.” NRAP 9(d). In this case, appellants failed to utilize this option, resulting in a deficient record on appeal.

Even assuming (without granting) that the short trial judge abused his discretion in excluding the evidence at issue, we conclude that any such error was harmless. “To establish that an error is prejudicial, the movant must show that the error affects the party’s substantial rights so that, but for the alleged error, a different result might reasonably have been reached.” *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); *cf.* NRCP 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”).

Here, as mentioned above, appellants failed to include a trial transcript. Again, there is no indication as to what testimony was presented at trial, what the short trial court’s reasons for exclusion were, and whether the alleged error would have made any difference in the outcome. In other words, this court cannot determine whether, and to what extent, appellants were prejudiced by the short trial judge’s allegedly erroneous rulings. *See, e.g., McClendon v. Collins*, 132 Nev. 327, 333, 372 P.3d 492, 496 (2016) (concluding that an error was harmless where the appellant failed to include a trial transcript). Therefore, because appellants failed to provide a sufficient record for this court to review, we hold that the error, if any, was harmless.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.⁵


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁵Insofar as appellants raise arguments that are not specifically addressed herein, we have considered the same and conclude that they do not provide a basis for relief.

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 24
Janet Trost, Settlement Judge
Peralta Law Group
Gonzalez & Flores Law Firm
Marquis Aurbach Coffing
Eighth District Court Clerk