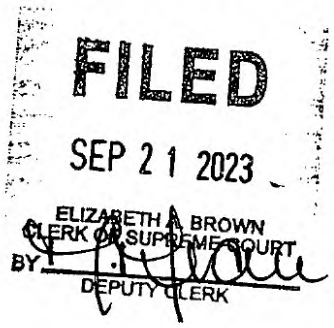
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NP TEXAS LLC, A NEVADA LIMITED LIABILITY COMPANY,
Appellant,
vs.
JOHN BEARDEN, AN INDIVIDUAL; CARL MURRIETA, AN INDIVIDUAL; AND KARIN JOHNSON, AN INDIVIDUAL,
Respondents.

No. 85395-COA



ORDER OF AFFIRMANCE

NP Texas LLC dba Texas Station Gambling Hall and Hotel (Texas Station) appeals from a final judgment following a short trial. Eighth Judicial District Court, Clark County; Maria A. Gall, Judge.[1]

Respondents John Bearden, Carl Murrieta, and Karin Johnson (collectively, respondents) each contracted food poisoning a few hours after consuming "sour" bacon at Texas Station's buffet.[2] Respondents each went to the hospital later that night and were diagnosed with food poisoning.

Two days later, Murrieta returned to Texas Station and filled out an incident report. A Texas Station employee marked surveillance footage for preservation that depicted respondents entering the buffet, but the employee did not preserve any other footage. Texas Station classified the incident as a "guest illness," which, under Texas Station's policies and procedures, did not require saving surveillance footage of events.

[1]Craig B. Friedberg, Pro Tempore Judge, presided as the short trial judge in this case.

[2]We recount the facts only as necessary for our disposition.

23-31054

Approximately one week after Murrieta reported the event, respondents' attorney sent an evidence preservation letter to Texas Station requesting the preservation of relevant surveillance video footage from the day of the incident. However, because Texas Station's surveillance system automatically overwrites video every seven days, the only surveillance video that remained was the preserved footage of respondents entering the buffet.

Respondents filed a civil complaint alleging negligence, negligence per se, and negligence via res ipsa loquitur, claiming that Texas Station had unsafe food handling procedures and served tainted food. The case originally proceeded through court-annexed arbitration, after which an arbitrator found in favor of Bearden, but against Johnson and Murietta. Thereafter, Texas Station requested a trial de novo, and the case entered the short trial program.

Prior to trial, respondents filed a motion for sanctions for spoliation of evidence related to the destruction of the surveillance footage, specifically the footage that depicted them in the buffet (possibly identifying what they ate) and using the casino restroom facilities afterwards after the sudden onset of symptoms. The short trial judge granted the motion and permitted an adverse inference instruction to establish that respondents ate at the buffet, what they ate at the buffet, and their symptoms after eating at the buffet. Texas Station thereafter filed a motion in limine to exclude evidence of prior incidents of guest illness that occurred after eating in the Texas Station buffet area, which Texas Station had disclosed during discovery. The short trial judge granted Texas Station's motion in part and excluded a third of the prior incidents for being too dissimilar or too remote in time.

Following a one-day short trial, the jury found in favor of all three respondents on their negligence claims. The district court subsequently entered a final judgment on the jury verdict, which Texas Station appealed. On appeal, Texas Station contends that the short trial judge abused his discretion in two ways: (1) by admitting prior incidents of food-related illness, which were also improperly used at trial to prove the existence of a hazard rather than notice of a hazard, and (2) by giving the jury an adverse inference spoliation instruction. Additionally, Texas Station contends that the jury manifestly disregarded the jury instructions when it found liability absent evidence of causation.[3]

As a preliminary matter, we note that Texas Station's briefing did not provide any citations to the short trial record, nor did Texas Station include the trial transcripts in the record on appeal. In the absence of a complete record, this court cannot fully evaluate all of the issues raised on appeal. Although short trials typically are not formally reported and thus do not have transcripts unless paid for by the parties, *see* NSTR 20, it is an appellant's obligation to provide the "portions of the record essential to determination of the issues raised in appellant's appeal." NRAP 30(b)(3). While it is unknown in this case if the short trial was recorded or reported, "the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection," which

---

[3]Texas Station also argues that the jury's verdict was improperly influenced by passion or prejudice, resulting in an award of excessive damages. However, Texas Station does not cogently argue why the jury's verdict was excessive or improper, and therefore we decline to consider this claim. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

"shall be served on the respondent, who may serve objections or proposed amendments within 14 days after being served." NRAP 9(d); *see also Bunker v. Clark Cty. School Dist.*, No. 83624-COA, 2023 WL 3013352, at *2 (Nev. App. Apr. 19, 2023) (Order of Affirmance) (addressing appellant's obligation to provide a statement of evidence under NRAP 9(d) in an appeal from a short trial that was not recorded or reported). Here, Texas Station failed to provide either a transcript or a statement of the evidence in accordance with NRAP 9(d), resulting in a deficient record on appeal. Therefore, we presume that the missing portion of the short trial record supports the lower court's decisions. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007); *see also Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal.").

Texas Station first argues that the short trial judge abused his discretion in admitting prior incidents of food-related illness at Texas Station's buffet because the prior incidents were irrelevant and unduly prejudicial. This court reviews a decision to admit or exclude evidence for an abuse of discretion. *Nev. Indep. v. Whitley*, 138 Nev. 122, 127, 506 P.3d 1037, 1043 (2022). Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Further, "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, *knowledge*, identity, or absence of mistake or accident." NRS

48.045(2) (emphasis added). However, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).[4]

Here, Texas Station concedes on appeal that prior incidents may be admissible to establish notice. *Cf. S. Pac. Co. v. Watkins*, 83 Nev. 471, 486, 435 P.2d 498, 508 (1967) ("[W]here a dangerous or hazardous, continuing condition is in issue . . . and there has been other evidence admitted of that condition, evidence of prior accidents at that place, though not exactly similar, may be admitted to show notice to the person responsible for that condition."). Texas Station summarily contends that the prior incidents were improperly used at trial to prove the *existence* of a hazardous condition in the buffet rather than only notice of the condition.[5]

---

[4]In this case, we need not address undue prejudice because Texas Station does not cogently argue why the prior incidents' probative value was substantially outweighed by the danger of unfair prejudice, particularly where the short trial judge exercised his discretion to exclude incidents that were remote in time and dissimilar and Texas Station concedes that the reports could be admitted for the purpose of notice. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[5]Texas Station relies on *Southern Pacific Co. v. Watkins*, 83 Nev. 471, 484-86, 435 P.2d 498, 506-08 (1967) and *Galloway v. McDonalds Restaurants of Nevada, Inc.*, 102 Nev. 534, 536-37, 728 P.2d 826, 827-28 (1986), to contend that evidence of prior incidents may not be used to prove the existence of a hazard. In *Watkins*, the Nevada Supreme Court permitted prior incidents to be used to establish notice, but also expressly stated that "[t]his pronouncement leaves open the question of admissibility of prior accidents to establish the dangerous condition itself. We shall deal with that question when presented to us." 83 Nev. at 486, 435 P.2d at 508. In *Galloway*, the court concluded that "because prior similar accidents may be admitted to show notice, evidence showing the absence of similar accidents should be deemed admissible to negate such notice." 102 Nev. at

However, because Texas Station failed to provide this court with a record of the short trial proceedings, we are unable to evaluate Texas Station's claim that evidence of prior incidents was used for any improper purpose at trial, and we therefore presume that the evidence was properly presented. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135. Further, Texas Station has not demonstrated that the alleged improper evidence affected the outcome of the trial. *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.").

Texas Station next argues that the short trial judge abused his discretion when he provided an adverse inference jury instruction because the surveillance footage was not intentionally spoliated and because the jury instruction unfairly painted Texas Station in a bad light. A short trial judge "has broad discretion to settle jury instructions, and [his] decision to give or decline a proposed jury instruction is reviewed for an abuse of that discretion." *Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). When evidence is negligently lost or destroyed without the intent to harm another party, an adverse inference instruction is permitted. *Id.* at 449, 134 P.3d at 107.

Although Texas Station admitted that it failed to preserve surveillance footage of respondents, it argues that because it did not *intentionally* overwrite or delete the footage, there was no spoliation of evidence. However, spoliation can occur when records are destroyed automatically pursuant to company policy. *See Reingold v. Wet 'N Wild Nev., Inc.*, 113 Nev. 967, 970-71, 944 P.2d 800, 802 (1997) (concluding that

---

536, 728 P.2d at 828. Neither case addressed the admissibility of prior incidents to establish the presence of a hazardous condition.

Wet N' Wild spoliated records relating to prior accidents because it routinely destroyed records at the end of each season), *overruled on other grounds by Bass-Davis*, 122 Nev. 442, 134 P.3d 103. Because the surveillance footage was destroyed due to Texas Station's policy that overwrites surveillance footage every seven days, the footage was negligently lost.[6] Therefore, under the circumstances of this case, the short trial judge did not abuse his discretion in providing an adverse inference instruction. *Bass-Davis*, 122 Nev. at 447, 134 P.3d at 106. To the extent that Texas Station contends the instruction "unfairly" painted it in a bad light, the absence of trial transcripts or a statement of the evidence under NRAP 9(d) again precludes this court from determining whether the instruction was improperly used in any way. Thus, we presume the adverse inference instruction was used appropriately. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

Lastly, Texas Station argues the jurors must have manifestly disregarded the jury instructions because they found that Texas Station was liable with "no evidence" of the food source that caused their illnesses. Respondents assert that they established Texas Station's buffet likely caused their illnesses due to the timing of their symptoms in relation to their consumption and their hospital diagnoses of food poisoning.[7]

---

[6]Texas Station argues that it had no duty to preserve the footage because its internal policies and procedures did not require it. However, the duty to preserve evidence is determined by applicable legal principles rather than a litigant's individual policies. *See Bass-Davis*, 122 Nev. at 450, 134 P.3d at 108 ("The duty to preserve springs from a variety of sources, including ethical obligations, statutes, regulations, and common law.").

[7]In its reply brief, Texas Station conceded that circumstantial evidence of causation *was* presented, then argued for the first time that this circumstantial evidence was insufficient as a matter of law under *Wilson v. Circus Circus Hotels, Inc.*, 101 Nev. 751, 710 P.2d 77 (1985), because it did

A jury "manifestly disregards" its instructions, thereby warranting a new trial, when "the jury, as a matter of law, could not have reached the conclusion that it reached." *Brascia v. Johnson*, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989). The pertinent question is whether, "had the jurors properly applied the instructions of the court, it would have been *impossible* for them to reach the verdict which they reached." *Weaver Bros., Ltd. v. Misskelley*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982) (emphasis added).

Texas Station acknowledges in its reply brief that respondents did present some circumstantial evidence of causation, but Texas Station contends that this circumstantial evidence was negated by Texas Station's own medical expert. Although the evidence presented was apparently contradictory as to causation, this court does not reweigh the evidence or witness credibility on appeal. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007). The jury could have found respondents' causation evidence

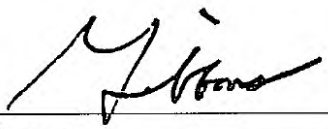
---

not exclude other extrinsic causes of their food-related illnesses. Because Texas Station raised this argument for the first time in its reply, it is waived. *Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (concluding that an issue raised for the first time in an appellant's reply brief was waived). Even on the merits, however, *Wilson* would not mandate reversal. In *Wilson*, the defendants had suggested other specific alternative sources of the plaintiff's food poisoning that could have equally caused plaintiff's illness, and the supreme court noted that a jury's verdict might be based on speculation or conjecture if the other cases are all equally probable. *Wilson*, 101 Nev. at 755, 710 P.2d at 79-80. Here, unlike in *Wilson*, Texas Station has not argued on appeal that any other extrinsic source could have caused respondents' illnesses, or that those potential other sources are as equally probable as respondents' illnesses originating from Texas Station's buffet. Therefore, even considering *Wilson*, Texas Station failed to demonstrate that the circumstantial evidence in this case was insufficient as a matter of law.

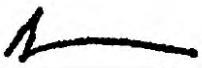
credible, notwithstanding Texas Station's contrary expert testimony, and thus it was not "impossible" as a matter of law for the jury to conclude that Texas Station was liable for respondents' illnesses. *Misskelley*, 98 Nev. at 234, 645 P.2d at 439. Further, the jury was properly instructed as to causation, and jurors are presumed to follow the instructions they are given. *Krause Inc. v. Little*, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001). Therefore, there is no indication that the jury manifestly disregarded its instructions, and Texas Station is not entitled to relief.

Because Texas Station fails to demonstrate any basis for reversal, we

ORDER the judgment of the district court AFFIRMED.[8]



_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Maria A. Gall, District Judge
Pyatt Silvestri
Lasso Injury Law, LLC
Eighth District Court Clerk

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.