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Sanders v. Sears-Page, 131 Nev. Adv. Op. 50

Scott Lundy
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CIVIL PROCEDURE: JUROR BIAS

Summary

The Court held that the district court erred in deciding not to strike an empaneled juror whose background implied bias, but who promised he could remain impartial. Moreover, the Court held the district court erred in allowing challenges for cause while the juror was present, and by allowing newly discovered evidence to be entered into evidence on the final day of trial.

Background

This case arose from a personal injury claim following a 2009 car accident. Risa Sears-Page hit Toni Sanders' car when Sears-Page attempted to make a right turn from the left-hand lane. Following the crash, Sanders began experiencing worsening neck pain. Sanders, along with her husband Robert Sanders, sued Sears-Page for negligence.

Sanders' injuries

The primary issue at trial was whether the accident caused Sanders' injuries and if so, whether Sanders' medical expenses were reasonable. Prior to the 2009 accident, Sanders had experienced back and neck pain. Sanders doctors, however, claimed the 2009 accident was the cause of Sanders' neck pain, and claimed her medical treatment and expenses were reasonable and necessary. In further support of her claim, Sanders provided records and billing from Nevada Spine Clinic.

The Defendant and her experts argued that Sanders' injuries had not occurred as a result of the 2009 accident, but rather were pre-existing. The Defense claimed the doctors at Nevada Spine Clinic had pushed Sanders into having an unnecessary spine surgery in order to run up her medical expenses.

Juror 9

After trial began, Juror 9 notified the district court that he had previously been a patient at Nevada Spine Clinic. During voir dire, neither party had mentioned Nevada Spine Clinic or Dr. Ghuman, Juror 9's treating physician. The district court and counsel questioned juror 9. Juror 9 explained that he had been to Nevada Spine Clinic because of a herniated disc. There, Juror 9 was advised that back surgery would be a necessity. Juror 9 opted for a second opinion, and was told by the second physician that surgery was unnecessary.

Juror 9 explained to the district court and counsel that he could remain impartial and would fairly evaluate the Nevada Spine Clinic's doctor's opinions.

While Juror 9 was present, the district court asked counsel if either side wished to challenge Juror 9 for cause. Sanders' counsel challenged Juror 9 for cause. Sears-Page's counsel agreed there was good reason to strike Juror 9; however, the district court denied Sanders' motion to strike, and allowed Juror 9 to remain on the jury.

¹ By Scott Lundy

Exhibit 62

Prior to trial, both parties sought records from one of Sanders' prior treating physicians, Dr. Pollard; however, Dr. Pollard provided them with only partial records. During the trial, an unidentified individual delivered a box of documents to Sears-Page's counsel. The box contained a portion of Dr. Pollard's missing medical records from 2005. The records said Sanders suffered from "spinal degenerative joint disease and upper cervical area with bone spur." This contradicted Sanders' claims made at trial.

Sears-Page sought permission from the district court to enter the documents into evidence. Sanders objected, but the district court admitted the document as exhibit 62. Sears-Page's medical expert, Dr. Duke, examined exhibit 62 on the stand, and concluded that it supported his opinion, "that Sanders had a chronic, degenerative disease that predated the 2009 automobile accident and was the sole cause of her neck pain.

The jury found for Sears-Page. Sanders appeals.

Discussion

The Nevada supreme court considered 4 issues: "whether the district court erred in (1) failing to strike Juror 9 for cause, (2) inviting challenges for cause while Juror 9 was present, (3) admitting exhibit 62, and (4) allowing Dr. Duke to give undisclosed opinions based on exhibit 62."

Sanders' challenge to Juror 9 for cause

"The Nevada Constitution, like the U.S. Constitution, guarantees litigants the right to a jury trial."² An important feature of jury trials is an impartial jury. If a juror's statements imply bias, the trial court must question the juror to determine whether the juror can be impartial. A juror may be actually biased if the juror's statements indicate a state of mind that would prevent the juror from being impartial in deciding the case.³

If the trial court questions the juror, and determines the juror is truly impartial, the Nevada Supreme Court will generally give wide deference to the trial court's decision. However, deference will not be extended where failure to strike the juror was erroneous. In a situation like the one here, "if the juror's statements, taken as a whole, indicate bias, the juror must be struck."

Other jurisdictions have held that where a juror's experiences are so similar to the one being tried, so as to make it improbable for the juror to be impartial, the juror must be stricken from the jury.⁴ The Nevada Supreme Court agreed, holding, "that if a juror's 'background is replete with circumstances which would all into question his ability to be fair,'⁵ the district court should remove the juror for cause, even if the juror has stated he or she can be impartial." In

² NEV. CONST. art. 1, § 3.

³ *State v. Squaires*, 2 Nev. 226, 230-31 (1866).

⁴ See *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995); *Wolfe v. Brigano*, 232 F.3d 499 (6th Cir. 2000).

⁵ *Kirk*, 61 F.3d at 156.

determining whether to strike the juror, the district court should base its decision on objective facts regarding the juror's experiences, rather relying on the juror's promise to remain impartial.

Here, the Court held the district court abused its discretion in failing to strike Juror 9 for cause. Juror 9's experiences with Nevada Spine Clinic were similar to Sanders'. Sanders' case relied heavily on evidence provided by Nevada Spine Clinic. Juror 9's experience with Nevada Spine Clinic was likely to color Juror 9's ability to objectively assess the evidence from Nevada Spine Clinic. The district court denied Sanders' challenge to Juror 9 based on Juror 9's promise to remain impartial. However, Juror 9's statement claiming impartiality was not unequivocal, thus further evidencing Juror 9's inability to remain impartial. The district court's error is reversible because, "Juror 9's presence on the jury resulted in an unfair empaneled jury."

A party's challenge for cause while an empaneled juror is present

The Nevada Supreme Court has previously held that a district court's conduct may prejudice jurors against a party.⁶ Here, the trial judge asked both parties if they wished to challenge Juror 9 for cause, while Juror 9 was still present in the courtroom. Once Sanders said she wished to challenge Juror 9 for cause, the judge asked Juror 9 to exit the courtroom. The Court held, "the district court's process of requiring the parties to issue their challenges for cause in front of Juror 9 amounted to plain error." This error is reversible.

Exhibit 62

"A district court abuses its discretion by admitting medical expert testimony that fails to comply with Nevada's rules governing the admission of evidence." The Court held that, "the district court abused its discretion in admitting exhibit 62 because it was not properly authenticated." Furthermore, the Court held, "the district court further abused its discretion in allowing Dr. Duke to testify to an undisclosed opinion regarding exhibit 62."

Authentication

The Court held that exhibit 62 was improperly admitted because it was not authenticated. NRS 52.015(1) provides that, "authentication of a document requires evidence or some other showing 'that the matter in question is what its proponent claims.'" Relevant to this case, a document may be authenticated by a witness if the witness has personal knowledge of the document. If the witness does not have personal knowledge of the document, then the witness' testimony, alone, is not enough to authenticate the document.⁷

Here, Dr. Duke did not create the document, nor did he have personal knowledge of the document. Therefore, Dr. Duke was not capable of authenticating the document through testimony. "Because no other evidence corroborated exhibit 62, since Sanders testified she had not sought medical care for neck pain in 2005, and the exhibit was not properly authenticated, the district court abused its discretion in admitting exhibit 62." This error was not harmless.

⁶ See *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408 (1970).

⁷ See *Frias v. Valle*, 101 Nev. 219 (1985).

Undisclosed expert opinion

NRCP 16.1(a)(2) requires parties to disclose experts and the content of experts' testimony in advance of trial. The Nevada Supreme Court has previously held that a trial court erred when it allowed the plaintiff's medical experts to offer opinions based on documents not disclosed during discovery.⁸

Here, the district court allowed Sears-Page's medical expert, Dr. Duke, testify as to Sanders' pre-existing neck pains while using exhibit 62 to support his opinion. The district court erred in allowing Dr. Duke opine that exhibit 62 supported his stance that Sanders had been experiencing neck pain prior to the subject accident. This was a violation of NRCP 16.1.

Harmless error

The district court's errors regarding exhibit 62, "were not harmless in light of the record as a whole." Exhibit 62 presented a surprise to the Plaintiff, Sanders, and unfairly prejudiced her case. As such, the district court's error was reversible.

Conclusion

The Court held that the district court erred in failing to strike Juror 9 for cause, because Juror 9's statements regarding his experience at Nevada Spine Clinic evidence bias against Sanders. The district court further erred in allowing Juror 9 to be present when Sanders challenged Juror 9 for cause. The district court erred by admitting exhibit 62 into evidence without it having been properly authenticated. Finally, the district court erred when it allowed Dr. Duke to testify using exhibit 62. The Court reversed and remanded for a new trial.

⁸ See FCH1, LLC v. Rodriguez, 335 P.3d 183 (2014).