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Labarbera v. Wynn Las Vegas, LLC, 134 Nev. Adv. Op. 51 (Jul. 19, 2018)

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CIVIL PROCEDURE: CONTRACTS

Summary

The Court determined that the district court erred when it precluded the appellant from testifying by video conference from Italy and when it cited the incorrect legal standard to exclude evidence of appellant's intoxication.

Background

The Appellant is an Italian citizen. The Appellant visited Las Vegas in March and April of 2008. While staying at the Wynn Resort, the Appellant agreed to \$1,070,000 gaming credit in the form of casino markers offered by the Respondent. \$1,000,000 of this credit remains unpaid. Appellant claims he was intoxicated when he signed the agreement.

When the Appellant returned to Italy, the Respondent filed a complaint with the Clark County District Attorney's Office for passing bad checks. The District Attorney then issued a bench warrant against Appellant. Respondent filed the present civil case for breach of contract. At the outset of the civil case, the Respondent filed a motion in limine to exclude evidence of Appellant's intoxication. The district court granted the Respondent's motion. Because of the warrant, the Appellant would be arrested if he returned to Las Vegas to testify. The Appellant moved for permission to testify from Italy via video conference and an interpreter. The district court denied Appellant's motion.

The jury awarded \$1,000,000 to the Respondent in damages. The district court entered a final judgement awarding contract interest, attorney's fees, costs, and prejudgement interest totaling \$2,626,075.81.

Discussion

The district court abused its discretion by denying LaBarbera's motion to testify via video conference and an interpreter.

The Appellant argued that the district court violated Nevada Rule of Civil Procedure 43(a) by denying his motion to testify via video conference after he showed compelling circumstances making him unable to testify in person.² Respondent argued that telephonic or video conference testimony is not permissible at trial absent a showing of special circumstances according to *Barry v. Lindner*.³ The Respondent further argued that the Appellant failed to show special circumstances.

¹ By Casey Lee.

² Nev. R. Civ. P. 43(a). The rule states that "[t]he court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." *Id.*

³ 119 Nev. 661, 668, 81 P.3d 537, 542 (2003).

According to the Nevada Supreme Court Rules, “courts shall permit parties, to the extent feasible, to appear by simultaneous audiovisual transmission equipment at appropriate proceedings pursuant to these rules.”⁴ “In these rules . . . ‘[s]hall’ is mandatory.”⁵ “Appropriate proceedings” include “[t]rials . . . provided there is good cause as determined by the court in accordance with Rule 1(6).”⁶ “‘Good cause’ may consist of one or more of the following factors as determined by the court: . . . [w]hether any undue surprise or prejudice would result; . . . convenience of the parties, counsel, and the court; . . . cost and time savings.”⁷ The Nevada Supreme Court Rules supersede *Barry* because they became effective on July 1, 2013, after *Barry* was decided.⁸

The Appellant established good cause because testifying remotely from Italy would have been convenient and it would have saved cost and time. The Respondent failed to establish that Appellant’s remote testimony would cause any undue surprise or prejudice. The district court did not provide an explanation for why they denied the Appellant’s motion to testify remotely. Additionally, the Appellant’s lack of testimony was prejudicial because it conveyed to the jury a lack of interest in the case and prevented him from responding to other testimony presented at trial. Therefore, the district court abused its discretion by denying the Appellant’s motion to testify remotely.

The district court abused its discretion by excluding evidence of LaBarbera’s intoxication.

Voluntary intoxication is an acceptable defense to breach of contract if the defendant proves he or she was incompetent when the contract was formed. Intoxication may render a person incompetent where “actual intoxication dethroned his reason, or that his understanding was so impaired as to render him mentally unsound when the act was performed.”⁹ According to the Restatement of Contracts:

- [a] person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication
- (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
- (b) he is unable to act in a reasonable manner in relation to the transaction.¹⁰

Further, dicta in *Seeley* holds that a person who enters a contract while intoxicated has a duty to promptly disavow the contract when he or she regains competence.¹¹ The Court adopted both the Restatement formulation as well as a clear and convincing standard of proof.

⁴ Nev. S. Ct. R. Part IX-B(B) 2.

⁵ Nev. S. Ct. R. Part IX-B(B) 1(5).

⁶ Nev. S. Ct. R. Part IX-B(B) 4(1)(a).

⁷ Nev. S. Ct. R. Part IX-B(B) 1(6)(b)–(d).

⁸ See generally Nev. S. Ct. R. Part IX-B(B); *Barry*, 119 Nev. 661, 81 P.3d 537.

⁹ *Seeley v. Goodwin*, 39 Nev. 315, 324–25, 156 P. 934, 937 (1916) (internal quotation marks omitted).

¹⁰ Restatement (Second) of Contracts § 16 (1981).

¹¹ See *Seeley*, 39 Nev. at 323, 156 P. at 936; see also Restatement (Second) of Contracts § 16 cmt. C (1981) (“On becoming sober, the intoxicated person must act promptly to disaffirm [the contract].”).

The district court erroneously relied on *FGA, Inc. v. Giglio*,¹² which excluded evidence of intoxication in a tort case because of insufficient evidence that the parties were in fact intoxicated. Both the facts and the law in the case are too dissimilar to the present case to provide a basis for the district court to exclude evidence that the Appellant was intoxicated.

The Respondent argues that the district court's error was not prejudicial because the Appellant would not have met the high burden of a voluntary intoxication claim regardless, especially because the Appellant did not disavow the contract immediately upon regaining competence. However, the district court abuses its discretion if it applies the incorrect legal standard.¹³ Therefore, the district court abused its discretion in this case by failing to apply the *Seeley* and Restatement standards and misapplying the *Giglio* standard.

Conclusion

The Court held that the district court abused its discretion by ruling against the Appellant's motion to testify via video conference from Italy in violation of Nevada Supreme Court Rule IX-B(B) and by ruling in favor of the Respondent's motion in limine to suppress evidence of the Appellant's intoxication in violation of *Seeley*, *Giglio*, and the Restatement. The Court remanded the case for decisions on the motion to testify remotely and the motion in limine to exclude evidence of intoxication consistent with this decision.

¹² 128 Nev. 271, 278 P.3d 490 (2012).

¹³ *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007).