IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM SMITH,
Appellant,
vs.
SUNRISE HOSPITAL, D/B/A SUNRISE HOSPITAL AND MEDICAL CENTER,
Respondent.

No. 44026

FILED

DEC 20 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature] CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment and an order denying a new trial in a medical malpractice action. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant William Smith is an osteoporotic paraplegic who was treated for a urinary tract infection at respondent Sunrise Hospital. Smith alleged that Sunrise personnel injured him during an x-ray procedure, causing his hip fracture. He filed a medical malpractice action against Sunrise and a jury trial was held on the issue of liability. The jury returned a verdict in favor of Sunrise. Smith moved the district court for a new trial and judgment notwithstanding the verdict claiming that the evidence presented did not support the jury verdict. The district court denied the motions. Smith appeals, arguing that the district court abused its discretion by denying the motion for new trial, or in the alternative, for judgment notwithstanding the verdict.

The decision to grant or deny a new trial under NRCP 59 rests with the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.[1] A verdict or other decision cannot be set

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[1]Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (distinguished on other grounds).

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aside where no irregularity or error is shown and the decision obtained is justified by the evidence adduced.[2] "This court presumes that a jury follows the district court's instructions."[3] Granting a new trial is appropriate only if the court determines that, had the jurors properly applied the district court's instructions, it would have been impossible for them to reach the verdict that they reached.[4] Thus, this court will not disturb the jury's verdict, "unless [the verdict] is so flagrantly improper as to indicate passion, prejudice, or corruption in the jury."[5]

Similarly, our review of an order denying a motion for judgment notwithstanding the verdict (JNOV) is extremely deferential. On review, this court will view the evidence "'in a light most favorable to the nonmovant, and that party must be given the benefit of every reasonable inference from any substantial evidence supporting the verdict.'"[6] A motion for JNOV may be granted only where there can be but "'one reasonable conclusion as to the proper judgment.'"[7] In considering such a motion, the district court is not allowed to consider the credibility of

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[2]Scott v. Haines, 4 Nev. 426, 427 (1868).

[3]Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001).

[4]Jaramillo v. Blackstone, 101 Nev. 316, 317-18, 704 P.2d 1084, 1085 (1985).

[5]Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001) (quoting Stackiewicz v. Nissan Motor Corporation, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984)).

[6]Smith's Food & Drug Cntrs. v. Bellegarde, 114 Nev. 602, 605, 958 P.2d 1208, 1211 (1998) (quoting NEC Corp. v. Benbow, 105 Nev. 287, 290, 774 P.2d 1033, 1035 (1989)).

[7]Bates v. Chronister, 100 Nev. 675, 678, 691 P.2d 865, 867 (1984) (quoting 5A Moore's Federal Practice § 50.07[2] (1984)).

witnesses or the weight of the evidence.[8] If there is conflicting evidence presented with regard to any material issue of fact, JNOV is inappropriate.[9]

We conclude that no abuse of discretion occurred. The jury was presented with an alternative theory that Smith's injury was not the result of negligent transfer. The jury was thus entitled to find for Sunrise after being presented with different potential theories of causation concerning the injury. It is the function of the jury to determine the weight and credibility it will assign to the evidence presented.[10]

At trial, Dr. Paul France opined within a reasonable biomedical probability that the injury could not have occurred the way Smith suggested. Although Smith now contests the admissibility of the France testimony, he failed to raise the issue in the district court and it is now waived. This court does not generally consider issues raised for the first time on direct appeal.[11]

Therefore, substantial evidence supports the jury's determination, and the district court did not abuse its discretion by denying the motion for new trial, or in the alternative for JNOV. The jury was free to disregard Smith's recounting of the gurney incident based on the trial testimony presented. Given Dr. France's testimony, the standard practice testimony of Sunrise's employees, and the jury's ability to

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[8]Air Service Co. v. Sheehan, 95 Nev. 528, 530, 594 P.2d 1155, 1166 (1979).

[9]Dudley v. Prima, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968).

[10]Quintero v. McDonald, 116 Nev. 1181, 14 P.3d 522 (2000).

[11]City of Elko v Zillich, 100 Nev. 366, 370, 683 P.2d 5, 7-8 (1984).

disregard Smith's recounting of the gurney incident, substantial evidence supports an alternative theory.

Because alternative theories of possible causes were presented for the jury to consider, the presumption of negligence under the res ipsa loquitor instruction was not triggered. The fracture could have occurred absent the hospital's negligence and it was not speculation for the jury to give more weight to the evidence presented by Sunrise.[12] Therefore, we conclude that no abuse of discretion occurred and

ORDER the judgment of the district court AFFIRMED.

_______________, C.J.
Becker

_______________, J.
Douglas

_______________, J.
Rose

cc: Hon. Stewart L. Bell, District Judge
Harrison Kemp & Jones, LLP
Kathleen A. Murphy Jones
Hall, Prangle & Schoonveld, LLC/Las Vegas
Rodolf & Todd
Clark County Clerk

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[12]We have considered Smith's other arguments including improper consideration of the res ipsa loquitor instruction, presentation of medical testimony to a reasonable degree of medical certainty, and whether there was only one reasonable conclusion the jury could reach and conclude that the alternative theories presented to the jury render them without merit.