IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER O. SHELKSOHN, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF JOHNNA PULLEN-SHELKSOHN, AND AS GUARDIAN AD LITEM FOR JORDAN TAYLOR CAROLYN SHELKSOHN, A MINOR; AND LINDA NEILSON, INDIVIDUALLY,
Appellants,
vs.
YUN SZU YEH, M.D.,
Respondent.

No. 48535

FILED
SEP 08 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court judgment entered after a jury verdict in a wrongful death action and a post-judgment order denying a new trial. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.[1]

Christopher Shelksohn took his wife, Johnna Shelksohn, to the hospital when Johnna began to go into labor with the couple's first child. After a few hours, Johnna asked for pain medication through an epidural. At the time Johnna asked for the epidural, Johnna's nurse, Nannette Deakin Spector (Nurse Spector), had just gone off duty and nurse Renee Clark (Nurse Clark) had just come on duty.

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[1]The Honorable Richard Wagner, Judge of the Sixth Judicial District Court, was designated by the Governor to sit in place of the Honorable Ron Parraguirre, Justice, who voluntarily recused himself from participation in the decision of this matter. Nev. Const. art. 6 § 4.

09-21690

Before going off duty, Nurse Spector called for an anesthesiologist to give Johnna an epidural, and Dr. Yun Szu Yeh came to Johnna's hospital room to perform the procedure. After three tries, Dr. Yeh was successful in administering the epidural. As the medicine began to enter Johnna's body through the epidural, Johnna immediately began to have a seizure. As a result of the seizure, Johnna was forced to give birth to her daughter, Jordan Shelksohn, by cesarean section.

Following the birth, Johnna was in a coma for seven days before passing away and Johnna's mother, Linda Neilson, stayed by her daughter's side for the entire time.

Christopher, individually and as special administrator of Johnna's estate and Guardian Ad Litem for Jordan and Linda (collectively Shelksohn), filed a complaint against Dr. Yeh alleging medical negligence, wrongful death and negligent infliction of emotional distress (NIED). The court dismissed the NIED claims and Jordan's medical negligence claims before they were submitted to the jury. Shelksohn's claims for medical negligence and wrongful death were submitted to the jury, and the jury found for Dr. Yeh.

On appeal, Shelksohn argues that the district court: 1) abused its discretion in precluding the testimony of Nurse Spector to impeach the testimony of Nurse Clark, 2) erred in granting Dr. Yeh's motion for judgment as a matter of law in regard to Jordan's medical negligence claim, and 3) erred in granting Dr. Yeh's motion for summary judgment in regard to Christopher and Linda's NIED claims.[2] The parties are familiar

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[2]Shelksohn also argues that the district court erred in: (1) refusing to consider the NIED claims on their motion for new trial, (2) failing to establish which facts were material in granting Dr. Yeh's motion for

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with the facts, and we do not recount them in more detail here except as necessary to our disposition.

Preclusion of Nurse Spector's testimony

At trial, Nurse Spector testified that she had a conversation with Nurse Clark after the events that led to Johnna's seizure and eventual death. The court held a hearing outside the presence of the jury to determine if Nurse Spector would be allowed to testify as to the statements made to her by Nurse Clark during this conversation. During this hearing, Shelksohn's counsel argued that Nurse Clark's testimony was inconsistent with what she told Nurse Spector during this conversation. The district court did not allow Nurse Spector to testify as to Nurse Clark's statements on the grounds that Nurse Clark had not been asked if she had that conversation with Nurse Spector.

Shelksohn argues that the district court abused its discretion when it prevented them from impeaching Nurse Clark with her prior inconsistent statement through Nurse Specter's testimony. Shelksohn contends that the district court's abuse of discretion substantially prejudiced them because they were denied the opportunity to present critical evidence to the jury, which weighed heavily on Nurse Clark's

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summary judgment in regard to the NIED claims, (3) allowing Dr. Yeh's expert to testify to a speculative cause of Johnna's injuries, (4) limiting the use of a learned treatise by Shelksohn's expert, and (5) denying Shelksohn's challenges for cause during jury selection to remove three potential jurors. Additionally, Shelksohn argues that a new trial is warranted based on two instances of misconduct by defense counsel and under the doctrine of cumulative error. After careful review, we conclude that these arguments are without merit.

credibility. Shelksohn thus argues that the district court abused its discretion because the weight and credibility of witnesses is an issue that should be submitted to a jury. We agree.

A district court is afforded considerable discretion in determining the relevance and admissibility of evidence. Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004). We will not disturb a district court's evidentiary ruling absent a clear abuse of discretion. Id.

NRS 51.035 defines hearsay as "'a statement offered in evidence to prove the truth of the matter asserted.'" Crowley, 120 Nev. at 35, 83 P.3d at 286. NRS 51.035(2) states that "a statement is not hearsay if it is inconsistent with the declarant's testimony and the declarant is 'subject to cross-examination concerning the statement.'" Crowley, 120 Nev. at 35, 83 P.3d at 286. We have held that "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement . . . ." Id. Further, "[t]he previous statement is not hearsay and may be admitted both substantively and for impeachment." Id.

We conclude that the district court abused its discretion when it failed to allow Nurse Spector to testify in order to impeach Nurse Clark with her prior inconsistent statements. Nurse Clark testified that she did not remember having a conversation with Nurse Spector after the occurrence of the events that led to Johnna's seizure. Nurse Clark's failure to remember the conversation was a denial of that conversation, which made her statement to Nurse Spector during their conversation admissible as a prior inconsistent statement. Further, it is not for the district court to decide the weight and credibility of Nurse Clark's testimony. This issue is one for the jury. See Fiegehen v. State, 121 Nev.

293, 306, 113 P.3d 305, 313 (2005). Therefore, we conclude that the district court abused its discretion by not allowing Shelksohn to impeach Nurse Clark's testimony with her prior inconsistent statement and we reverse the judgment of the district court and remand this case back to the district court for a new trial consistent with this order.

Jordan's medical negligence claim

Jordan brought a medical negligence claim against Dr. Yeh claiming that she had experienced physical injury at birth as a result of her mother's seizure. Dr. Florence Jameson, Shelksohn's medical expert, testified that when Jordan was born she was "[l]imp, colorless, pale, not moving, not breathing," and therefore had to be intubated. Dr. Jameson further testified that Jordan's condition, to a reasonable degree of medical probability, was caused by the seizure that Jordan's mother had suffered. At the close of Shelksohn's case, Dr. Yeh moved the court, pursuant to NRCP 50, for judgment as a matter of law regarding Jordan's claim. After hearing arguments from both sides, the court granted Dr. Yeh's NRCP 50 motion, finding that while Jordan's condition at birth was connected to her mother's seizure, there was insufficient evidence to support a claim of physical injury.

Shelksohn argues that the district court erred by granting Dr. Yeh's NRCP 50 motion and precluding the jury from deliberating as to whether Jordan had experienced physical injury. Shelksohn argues that they made a showing as to all elements of negligence, including injury, such that the issue should have been submitted to the jury. We agree.

We apply the same standard on review as that used by the district court in evaluating a motion for judgment as a matter of law. Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 424 (2007).

> Under NRCP 50(a)(1), the district court may grant a motion for judgment as a matter of law if the

> opposing party 'has failed to prove a sufficient issue for the jury,' so that his claim cannot be maintained under the controlling law. The standard for granting a motion for judgment as a matter of law is based on the standard for granting a motion for involuntary dismissal under former NRCP 41(b). In applying that standard and deciding whether to grant a motion for judgment as a matter of law, the district court must view the evidence and all inferences in favor of the nonmoving party. To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party.

Id. at 222-23, 163 P.3d at 424. Thus, the standard of review is de novo. Id. at 223, 163 P.3d at 424.

When considering a motion for judgment as a matter of law, a district court is not allowed to weigh the credibility of witnesses or the weight of the evidence. Banks v. Sunrise Hospital, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004). Further, if evidence is presented that is conflicting, or is such that reasonable persons could draw different inferences then the question should be submitted to the jury. Id.

We conclude that the district court erred in granting Dr. Yeh's motion for judgment as a matter of law on Jordan's medical negligence claim. There was evidence presented by Shelksohn on which reasonable persons could differ and a reasonable jury could have granted relief. The issue of whether the intubation was harmful was a question of fact that should have been submitted to the jury for a decision. Therefore, we reverse the district court's order granting Dr. Yeh's motion for judgment as a matter of law and remand this case back to the district court for a new trial consistent with this order.

Medical negligence NIED claims

Shelksohn argues that the district court erred in granting Dr. Yeh's motion for summary judgment regarding Christopher and Linda's medical NIED claims. Shelksohn contends that the district court erred because the district court focused its analysis on the plaintiffs' foreseeability rather than the actor's foreseeability that his act could be negligent. We agree.

We review an order granting summary judgment de novo. Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Summary judgment is appropriate and shall be rendered forthwith when the pleading and other evidence on file demonstrate that no genuine issue of material fact remains and that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

The cornerstone of our test for a claim of NIED is foreseeability. Crippens v. Sav On Drug Stores, 114 Nev. 760, 763, 961 P.2d 761, 763 (1998). However, "it is not the precise position of [the] plaintiff or what plaintiff saw that must be examined," but the "overall circumstances must be examined to determine whether the harm to the plaintiff was reasonably foreseeable." Id. at 762-63, 961 P.2d at 763. Based on this foreseeability standard, this court formulated a three-part test for an NIED claim that requires a bystander: (1) be closely related to the victim of an accident, (2) be located near the scene of the accident, and (3) suffer a shock resulting from direct emotional impact stemming from the sensory and contemporaneous observance of the accident. State v. Eaton, 101 Nev. 705, 716, 710 P.2d 1370 1377-78 (1985), overruled on other grounds by State, Dep't of Transp. v. Hill, 114 Nev. 810, 818, 963 P.2d 480, 485 (1998)..

We conclude that the district court erred in granting Dr. Yeh's motion for summary judgment regarding Christopher and Linda's NIED claims because the district court applied a California case that did not follow Nevada's definition of foreseeability or the three-part test this court set out in Eaton. The district court's reliance on a case from California was misplaced in light of the fact that Nevada has caselaw directly on point that the district court should have used as its guide. Also, the district court's analysis, which focused solely on Christopher and Linda's ability to foresee the injury which occurred to Johnna, was erroneous in light of our definition of foreseeability in regards to an NIED claim. See Crippens, 114 Nev. at 762-63, 961 P.2d at 763. Therefore, we reverse the district court's order granting Dr. Yeh's motion for partial summary judgment as to Christopher and Linda's medical NIED claims, since the issue of foreseeability was improperly decided, and should have been submitted to the jury.

In light of the foregoing discussion, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_______________, J.
Douglas

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

_______________, D. J.
Wagner

PICKERING, J., with whom HARDESTY, C.J. agrees, dissenting:

After a nearly two-week trial, the jury deliberated for less than an hour before returning a unanimous verdict on special interrogatories. The jury found Yun Szu Yeh, M.D., not negligent in the medical care he provided the decedent, Johnna Pullen. The district court entered judgment on the jury's verdict and denied the new trial motion that followed. The majority reverses, based on its conclusion that the district court erred when it refused, on foundation and hearsay grounds, to permit Nurse Spector to testify about a statement Nurse Clark made to her.

Because I do not agree that the district court abused its discretion in excluding this evidence, or that this single evidentiary ruling denied the parties substantial justice, which is required to reverse a judgment on a jury verdict for evidentiary error, I dissent. The jury's finding of no negligence, which I would uphold, further precludes both the infant's negligence claim and Shelksohn's claim for negligent infliction of emotional distress, on which the majority also remands. Nevada's law respecting negligent infliction of emotional distress, moreover, borrows heavily from California, and I submit the district court correctly resolved the NIED claim as a matter of law based on Bird v. Saenz, 51 P.3d 324 (Cal. 2002).

For these reasons and because the other assignments of error lack merit, as the majority summarily concludes, ante n. 2, I would affirm the judgment of the district court.

The Prior Inconsistent Statement

Both Nurse Clark and Nurse Spector testified at trial as non-party witnesses. Shelksohn did not ask Nurse Clark about her

conversation with Nurse Spector, and Yeh's hearsay objection to Shelksohn's later question to Nurse Spector about what Nurse Clark had said to her was sustained. The following week the judge granted Shelksohn permission to recall Nurse Clark to lay a foundation for admitting her statement to Nurse Spector as a prior inconsistent statement. But Shelksohn still did not ask Nurse Clark about the substance of what she said to Nurse Spector. All he asked was, "Ms. Clark, did you have a conversation with Annette Spector in the elevator after this all went down?" to which she responded, "Not that I recall."

The evidence that Shelksohn wanted to admit was that Nurse Clark had said to Nurse Spector in an elevator "that Dr. Yeh had administered a big bolus of drug into Johnna Pullen and that she seized immediately." The district court held that this statement was not inconsistent with Nurse Clark's trial testimony and, further, that Shelksohn failed to establish that Nurse Clark denied making it.

Some background helps place the evidentiary issues in context. The decedent, Johnna Pullen, suffered from arthrogryposis, a condition causing curvature of her spine that made it difficult to administer the epidural anesthesia. She also suffered from preeclampsia. Dr. Yeh admitted injecting the full loading dose of anesthesic solution he drew into the syringe into her epidural space. The conflict between his testimony and Nurse Clark's was whether Dr. Yeh followed safe practice by injecting a "test dose" first, then waiting for any idiopathic reaction, before administering the balance of the loading dose.

Dr. Yeh testified that, after several tries, he was able to place the epidural needle, and that he then gave a test dose, waited for any adverse reaction, and finished by injecting the balance of the loading dose,

which is when the patient suffered a seizure. Nurse Clark testified that, because she was positioned in front of the patient she could not see Dr. Yeh administer the epidural anesthesia, but that, within ten seconds of Dr. Yeh indicating that he had placed the epidural needle, the patient went into convulsions. In Nurse Clark's experience, there normally is at least a one-to-two-minute waiting period between the time the doctor first places the needle and injects the test dose, and the time the doctor injects the balance of the loading dose. Nurse Clark testified she did not observe any waiting period in this case.

A multitude of factors go into determining whether a non-party witness's prior statement is inconsistent with her trial testimony and thus admissible as a prior inconsistent statement. United States v. Williams, 737 F.2d 594, 608 (7th Cir. 1984). For that reason, and because of the district court's superior vantage point, reviewing courts entrust the determination of inconsistency to the discretion of the trial court judge. Id.; see generally Sprint/United Management Co. v. Mendelsohn, 128 S. Ct. 1140, 1144-45 (2008) (noting that, "[i]n deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings"). Nurse Clark's trial testimony was more detailed than her one-sentence statement to Nurse Spector but this does not necessarily make them inconsistent. "To testify later in greater detail in response to detailed questions is not inconsistent, especially when the added detail was not crucial to the earlier conversation." United States v. Jacoby, 955 F.2d 1527, 1539 (11th Cir. 1992), quoting United States v. Leach, 613 F.2d 1295, 1305 (5th Cir. 1980). While the ruling could have gone either way, the district court did not abuse its discretion when it held

Nurse Clark's detailed trial testimony (that Dr. Yeh did not appear to administer a test dose, wait, and administer the balance of the anesthesia) not inconsistent with her prior statement to Nurse Spector (that he injected a "big bolus" all at once).[1]

As noted, the district court allowed Shelksohn to recall Nurse Clark to lay a better foundation for admitting her prior statement to Nurse Spector. Although Shelksohn asked Nurse Clark "who" and "where" foundational questions, he did not focus Nurse Clark on what she said to Nurse Spector, or even what she and Nurse Spector discussed. This was insufficient to establish that Nurse Clark denied making the prior statement, which was the foundation Shelksohn needed to lay.

> To satisfy the initial condition of a foundational question, the cross-examiner asks the witness whether the witness made the alleged statement, giving its substance, and naming the time, the place, and the person to whom made. The purpose of this particularity is, of course, to refresh the witness's memory of the supposed statement by

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[1]Nurse Clark also testified that she did not know how much, total, solution Dr. Yeh drew into the syringe. Her prior statement to Nurse Spector can be argued as inconsistent with this testimony but, as the district court found, if offered for this purpose, the prior statement lacked foundation and was incompetent because Nurse Clark was not positioned to see the syringe used to inject the loading dose and so lacked personal knowledge of its contents. For all that appears, if this was the intended use of the prior statement, it was double hearsay. We are stymied in meaningfully reviewing this claim in any event by the fact that Shelksohn did not include the medical records or other trial exhibits as part of the record on appeal. Cf. Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975) (the appellant has the "responsibility to provide the materials necessary for this court's review").

reminding the witness of the surrounding circumstances.

1 K. Broun, McCormick on Evidence § 37, at 158 (6th ed. 2006) (footnotes omitted).

Citing Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004), the majority equates Nurse Clark's answer, "Not that I recall," in response to Shelksohn's question, "Did you have a conversation with Annette Spector in the elevator after this all went down?" with a denial by Nurse Clark of having made the statement to Nurse Spector, thus making the prior statement admissible. I disagree.

Crowley holds that, "when a trial witness fails, for whatever reason, to remember a previous statement made by that witness, the failure of recollection constitutes a denial of the prior statement that makes it a prior inconsistent statement pursuant to NRS 51.035(2)(a)." 120 Nev. at 35, 83 P.3d at 286 (emphasis added). In Crowley, the witness was asked about her prior statement directly and she "denied telling the investigator that her husband acted inappropriately when intoxicated. Specifically, she stated that she did not 'remember ever saying anything like that.'" Id. at 35, 83 P.3d at 286. In Crowley, it was thus fair to equate the witness's claimed failure of recollection with her denying she had made the earlier statement. Here, there is no way to tell if Nurse Clark had any idea what her questioner was getting at. All the record shows is that she did not recall talking to Nurse Spector in an elevator. We are left to wonder whether, if Nurse Clark had been reminded of the subject of her conversation with Nurse Spector, or confronted with the asserted prior statement itself, what she would have said. While Nurse Clark may not remember having talked to Nurse Spector in an elevator, this is not the

same thing as Nurse Clark "fail[ing] to remember a previous statement made by" her to Nurse Spector, and it should not be held to be.

Reading Crowley to license admission of a prior inconsistent statement based on a failed recollection foundation as incomplete as that in this case, without any attempt at refreshing the witness's recollection, creates a hole in the hearsay rule that invites genuine abuse. Unlike the Federal Rules of Evidence, Nevada does not require the prior inconsistent statement to have been given under oath, subject to the penalty of perjury. Compare NRS 51.035(2) with Fed. R. Evid. 801(d)(1). Given that Nurse Clark's statement to Nurse Spector was oral, unrecorded, and not under penalty of perjury, the district court was well within its discretion in requiring Shelksohn to ask Nurse Clark about the statement directly before permitting extrinsic proof of the statement to be introduced. United States v. Marks, 816 F.2d 1207, 1210-11 (7th Cir. 1987) (citing fact the prior statements were FBI interview reports, not transcripts of testimony, as a reason for requiring traditional foundation); see United States v. Johnson, 965 F.2d 460, 465 (7th Cir. 1992) (noting that counsel's failure to have asked the witness directly whether he made the statement in question "was insufficient to focus attention on the alleged discrepancy between the trial testimony and the statement," justifying the statement's exclusion).

I recognize that Nevada's evidence code, like the Federal Rules of Evidence, has dispensed with the rule in Queen Caroline's Case that formerly required the witness be confronted with, or given the opportunity to explain, an inconsistent statement before extrinsic proof of it could be admitted. See NRS 50.135; Fed. R. Evid. 613; 1 McCormick on Evidence, supra § 37. Nonetheless, the district court retains the discretion to

require the examiner to ask the witness about her prior statement before admitting extrinsic evidence the statement was made. NRS 50.115(1)(a) (noting the district court's "control over the mode and order of interrogating witnesses and presenting evidence . . . to make the interrogation and presentation effective for the ascertainment of the truth"); see United States v. Marks, 816 F.2d 1207, 1211 (7th Cir. 1987) (noting that a district judge has discretion to require that a traditional foundation be laid "in order to avoid confusing witnesses and jurors"); Gong v. Hirsch, 913 F.2d 1269, 1274 (7th Cir. 1990) (upholding exclusion of letter where the witness was unavailable and had not been confronted with it in the deposition preserving the admitted testimony). The control the district court exercised over the mode and order of proof here was proper and unexceptionable.

For these reasons, I submit that the district court did not abuse its discretion in excluding extrinsic evidence of Nurse Clark's prior statement in this case.

Reversible Error Was Not Shown

A party "is entitled to a fair trial, not a perfect one." Rudin v. State, 120 Nev. 121, 136, 86 P.3d 572, 582 (2004). By statute, "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." NRS 47.040(1). NRCP 61 similarly provides, "No error in either the admission or the exclusion of evidence . . . is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice." The core question is how important the excluded evidence was: "[E]rror in excluding evidence that was merely cumulative of that already admitted [can] rarely be 'reversible error.'" 21

Charles A. Wright & Kenneth W. Graham, Federal Practice and Procedure: Evidence § 5035.2, at 630 (3d ed. 2005) (footnote omitted).

Nurse Clark's trial testimony established that Dr. Yeh did not appear to wait between placing the epidural and injecting the syringe's full contents into Johnna's epidural space. To establish reversible error, Shelksohn argues that excluding Nurse Clark's statement to Nurse Spector kept from the jury evidence bearing on this question: "Did Dr. Yeh administer too much medication too fast and cause Johnna to seize, slip into coma, then die." (Emphasis omitted.) But Shelksohn elicited this information through Nurse Clark, to the extent she had knowledge of it, through her testimony that Dr. Yeh did not appear to inject a test dose, then wait, before he injected the balance of the anesthetic in the syringe. The excluded statement, even if admissible, was cumulative. Indeed, this is shown by Shelksohn's closing argument to the jury. Referring to the medical chart, the testimony of Chris Shelksohn and Nurse Clark, and that of Dr. Yeh, Shelksohn argued, "There's nothing about this three-minute [test period] gap in here, and that's consistent with what Renee Clark and Chris Shelksohn said. . . . He injected the full dose right away as everybody, except Dr. Yeh, has said."

This trial lasted nearly two weeks. The exclusion of Nurse Clark's statement to Nurse Spector is the only error established as a basis for reversing the judgment on the jury's verdict. Because the excluded evidence was, at best, cumulative, I think it is unfair to the other participants in this case, including the jurors, to reverse the judgment on the jury's verdict based on speculation that the exclusion of the single statement Nurse Spector attributes to Nurse Clark denied the parties substantial justice in this case.

There is an additional basis to affirm: The district court denied Shelksohn's motion for new trial under NRCP 59 based on its rejection of this asserted evidentiary error, among others. Our precedent firmly establishes that, "[t]he decision to grant or deny a motion for new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse." Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978). In reviewing an order granting or denying a motion for new trial based on claimed evidentiary error, "[t]here is considerable deference by the appellate court to the action of the trial court. The trial court was on the spot and is better able than an appellate court to decide whether the error affected the substantial rights of the parties." 11 Charles A. Wright, et al., Federal Practice and Procedure § 2818, at 195-97 (2d ed. 1995) (footnote omitted) (construing Fed. R. Civ. P. 59). Error affecting substantial rights was not established here.

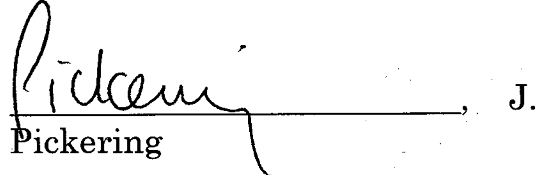
Other Negligence-Based Claims

Dismissal of Jordan's claim for medical negligence

The district court granted judgment as a matter of law under NRCP 50 as to the negligence claim by the infant, Jordan, based on a failure of proof that Jordan suffered injury caused by Dr. Yeh. Even if this issue was subject to review by the fact finder, the district court reached the correct result in light of the jury's response to the first interrogatory, in which it concluded there was no medical negligence by Dr. Yeh. For this reason, I would uphold the judgment on Jordan's negligence claim. See generally Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (holding that "if a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons".)

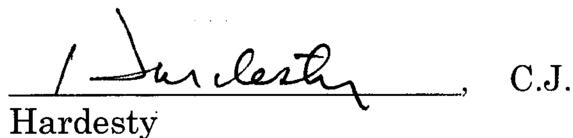
Negligent Infliction of Emotional Distress

The jury's finding of no medical negligence also precludes Shelksohn's claim for negligent infliction of emotional distress. On the merits, our law respecting negligent infliction of emotional distress is patterned after California's. State v. Eaton, 101 Nev. 705, 713 P.2d 1370, 1376 (1985) (adopting Dillon v. Legg, 441 P.2d 912 (Cal. 1968)). Even if I were to join the majority's reversal of the jury's finding of no negligence, therefore, I would uphold the district court's grant of partial summary judgment on the negligent infliction of emotional distress claim based on Bird v. Saenz, 51 P.3d 324 (Cal. 2002), which squarely applies.



_______________________, J.
Pickering

I concur:



_______________________, C.J.
Hardesty

cc: Hon. Douglas W. Herndon, District Judge
Robert F. Saint-Aubin, Settlement Judge
Shook & Stone, Chtd.
Tuverson & McBride
Eighth District Court Clerk