

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT R. HAGER; ROBERT E.  
HAGER; IAN A. HAGER; AND ROBERT  
R. HAGER, ON BEHALF OF HIS  
MINOR CHILDREN, RYNE HAGER  
AND CHANTAL HAGER, MINOR  
CHILDREN,  
Appellants,

vs.

MACTEC, A/K/A HARDING ESE;  
SCOTT SMITH; JULIA PIERKO; AND  
STATE OF NEVADA EX REL.  
DIVISION OF ENVIRONMENTAL  
PROTECTION,  
Respondents.

No. 48676

**FILED**

APR 30 2009

TRACIE H. LINDEMAN  
CLERK OF SUPREME COURT  
BY *J. M. P.*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment in a tort action. Ninth Judicial District Court, Douglas County; David R. Gamble, Judge.

This case arises from a directed verdict in a suit brought by a landowner, Robert R. Hager, against an environmental consulting firm contracting with the Nevada Department of Environmental Protection (NDEP) in a environmental remediation matter. Hager claims that the district court improperly directed a verdict against him on his claims for fraud and intentional interference with prospective economic advantage. He also asserts that he brought a claim in the district court for conspiracy to commit fraud, and that the district court improperly directed a verdict on that claim as well. In addition, Hager challenges two of the district court's decisions excluding evidence. Finally, he asserts that the district court improperly dismissed his children as plaintiffs for lack of standing.

We address each of these claims in turn below and conclude that they lack merit. Therefore, we affirm the judgment of the district court.

The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

Standard of review for directed verdict

NRCP 50(a) “provides for a motion for a directed verdict at the close of the evidence and before the case is submitted to the jury.” Bliss v. DePrang, 81 Nev. 599, 601, 407 P.2d 726, 727 (1965). The district court may grant such a motion whenever “the opposing party ‘has failed to prove a sufficient issue for the jury,’ so that his claim cannot be maintained under controlling law. Nelson v. Heer, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (quoting NRCP 50(a)(1)). Thus, “[t]o 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. Yet, the “credibility of witnesses and the weight of evidence, are not before the court on a motion for a directed verdict.” Bliss, 81 Nev. at 601-02, 407 P.2d at 727. Thus, “where there is testimony that is conflicting on material issues, the court should not direct a verdict.” Id. at 602, 407 P.2d at 727. This court reviews a motion for a directed verdict de novo and all of the evidence and inferences must be viewed in the nonmoving party’s favor. Bliss, 81 Nev. at 601, 407 P.2d at 727; Nelson, 123 Nev. at \_\_\_, 163 P.3d at 425.<sup>1</sup>

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<sup>1</sup>Rule 50 is part of the 2005 amendments to the Nevada Rules of Civil Procedure and applies to all proceedings brought after January 1, 2005, and “all further proceedings in actions pending on that date.” Order Amending the Nevada Rules of Civil Procedure, ADKT 276 (July 26, 2004). While Hager filed suit on December 9, 2003, Hager here appeals  
*continued on next page . . .*

## Fraud

Hager argues that the district court erred in granting a directed verdict on his fraud claim. To prove fraud, a plaintiff must show (1) a false representation by the defendant; (2) that the defendant knows to be false; (3) with the intent to cause the plaintiff to rely upon the misrepresentation; and (4) the plaintiff relies on the misrepresentation to his detriment. Chen v. Nevada State Gaming Control Board, 116 Nev. 282, 284, 994 P.2d 1151, 1152 (2000).

Hager bases his claim of fraud on two distinct theories. First, he alleges that Mactec exaggerated both the extent of the necessary cleanup and its cost. Second, he challenges certain statements Mactec made to Patrick Taylor, the eventual purchaser of Hager's Cave Rock property, at the bankruptcy court sale hearing.

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*... continued*

from the directed verdict which Mactec moved for, and the district court granted, on December 15, 2006. Thus, the amended Rule 50 applies to Mactec's motion for directed verdict, and to this appeal.

Neither Hager nor Mactec argues that amended Rule 50(a)(1) changes the law in any substantive manner relevant to this case. We do note, though, that while we have used the term "directed verdict" in this order to maintain consistency with the parties' pleadings and the proceedings below, the 2004 amendment to Rule 50 "adopt[ed] the 'judgment as a matter of law' from the 1991 amendments to the federal rule," Drafter's Note 2004 Amendment. The correct terminology that litigants and courts should use is "judgment as a matter of law" rather than "directed verdict." See also, Nelson v. Heer, 123 Nev. \_\_\_, 123 P.3d 420, 424 n4-6 (2007) (discussion of 2004 amendment to Rule 50).

With respect to Mactec's alleged exaggeration of the extent and costs of the cleanup of Hager's Cave Rock property, no testimony was introduced suggesting that Mactec made any representation to Hager regarding the scope of work required for the cleanup. Thus, Mactec did not make a misrepresentation to Hager sufficient to support a claim for fraud. Even if NDEP forced Hager to engage in unnecessary cleanup, the district court did not err in issuing a directed verdict on Hager's fraud claim based on Mactec's role in the extent and costs of the cleanup.

With respect to Hager's allegations respecting Mactec's statements to the eventual purchaser, Taylor, at the bankruptcy court sale hearing, even if true, these allegations do not support Hager's claim of fraud. Hager does not point to any misrepresentation that Mactec made to him regarding the bankruptcy sale. Accordingly, the district court did not err in issuing the directed verdict on Hager's fraud claim based on statements Mactec may have made to Taylor at the bankruptcy sale hearing.

Thus, we conclude that both of Hager's theories of fraud fail as a matter of law and accordingly, we affirm the district court's directed verdict on Hager's fraud claim.

Interference with prospective economic advantage

Hager next asserts that the district court erred in granting a directed verdict on his claim for intentional interference with prospective economic advantage. This claim requires a plaintiff to prove:

- (1) a prospective contractual relationship between the plaintiff and a third party;
- (2) knowledge by the defendant of the prospective relationship;
- (3) intent to harm the plaintiff by preventing the relationship;
- (4) the absence of privilege or justification by the

defendant; and (5) actual harm to plaintiff as a result of the defendant's conduct.

Wichinsky v. Mosa, 109 Nev. 84, 88, 847 P.2d 727, 729-30 (1993) (citing Leavitt v. Leisure Sports Inc., 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987)).

Hager alleges that during the bankruptcy sale proceedings, he negotiated a sale of the Cave Rock Property to Resorts Development, and sought approval of the sale from the bankruptcy court for \$1.4 million. Resorts in turn offered Hager a \$50,000 consulting contract, contingent on it buying the property. Hager alleges that Resorts decided not to bid on the Cave Rock property based on various statements by the Attorney General and NDEP regarding the costs a buyer of the property would need to assume. Some of those costs were based on estimates Mactec provided to the NDEP. As a result, Hager argues, he lost his prospective economic advantage of the \$50,000 consulting contract.

When discussing the directed verdict, the district court rejected Hager's argument, concluding that he had not demonstrated any intent to harm by Mactec. In LTR Stage Lines v. Gray Line Tours, this court established that the intent-to-harm prong of interference with prospective economic advantage "must be understood as requiring only an intention to interfere with the plaintiff's prospective contractual relation, and not malevolent spite by the defendant." 106 Nev. 283, 287, 792 P.2d 386, 388 (1990) (citation and internal quotation omitted). In this case, the harm to Hager was caused by Resort's failure to bid on the Cave Rock property. Even if Resort's failure to bid was based in part on the NDEP's representations regarding the scope of the cleanup required on the property, which were in turn based on Mactec's representations to NDEP,

Hager provided no evidence suggesting Mactec was aware of his prospective contractual relationship with Resorts, nor that Mactec acted with the intent to harm that prospective contractual relationship. Accordingly, the district court did not err in directing a verdict on Hager's claim that Mactec intentionally interfered with his prospective economic advantage.

#### Conspiracy to commit fraud

Hager also alleges on appeal that he brought a claim in the district court for conspiracy to commit fraud, and that the district court improperly directed a verdict on that claim as well. We conclude that this claim is without merit. In his complaint, Hager did not allege civil conspiracy between the NDEP and Mactec as a cause of action, or even allege a conspiracy between NDEP and Mactec in a subsection of the complaint.

In addition, the district court's decision on defendant's motion for directed verdict explicitly dealt solely with plaintiff's claims for fraud and for intentional interference with prospective economic advantage. Neither party nor the court suggested at the hearing for directed verdict that the parties had tried by consent a separate claim for civil conspiracy. Hager's allegations at trial that Mactec conspired with the State were simply a theory by which it wished to attribute NDEP's actions to Mactec. Even though Nevada requires only notice pleading, Hager's complaint does not support a cause of action for civil conspiracy between Mactec and NDEP. Therefore, we reject Hager's claim.

#### Evidentiary rulings

Hager also contends that the district court erred in two evidentiary rulings. "The decision to admit or exclude relevant evidence,

after balancing the prejudicial effect against the probative value, is within the sound discretion of the trial judge, and the trial court's determination will not be overturned absent manifest error or abuse of discretion." Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998), overruled in part on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001).

Hager first argues that the district court erred in excluding certain videotaped statements made by Patrick Taylor that Hager wished to introduce for impeachment purposes. The district court denied admission of this evidence because of authentication, notice, and trustworthiness concerns, and it found that the tape's prejudicial effect outweighed its probative value. It also noted that the defense would be unable to cross-examine Taylor about the tape because he had already been dismissed as a witness. Given the district court's superior ability to evaluate the credibility and trustworthiness of evidence and its control over the order of presentation of proof, the district court did not abuse its discretion in excluding the videotape.

Hager next argues that the district court abused its discretion in refusing to admit testimony of his real estate agent regarding the present day value of Hager's properties had he not been forced to sell them. Hager offered the testimony for the purpose of calculating his damages. Hager did not disclose or attempt to qualify her as an expert witness—rather he argued that her testimony as to the future value of his property was admissible lay witness testimony. The district court not only ruled that testimony by Hager's real estate agent would be expert testimony, but also excluded testimony regarding the future value of the property as speculative. The district court properly found that the agent's

testimony as to the future value of Hager's properties would have been expert testimony, and it was properly excluded as she had not been certified or disclosed as an expert witness. See NRS 50.275 (providing that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge"); NRC P 16.1(a)(2)(A)

Moreover, even if Hager's real estate agent's testimony on the future value of the Cave Rock property had been excluded in error, the testimony went to damages only. Given that we affirm there was no liability, any testimony on damages would be moot. Accordingly, we conclude that the district court did not abuse its discretion in excluding this evidence.

Dismissal of Hager's children as plaintiffs for lack of standing

Finally, Hager asserts that the district court erred when it dismissed Hager's children as plaintiffs for lack of standing. Hager's children were the beneficiaries of the Hager Family Trust, which owned the Cave Rock property.

As established in the Restatement (Second) of Trusts

Where the trustee could maintain an action at law or suit in equity or other proceeding against a third person if the trustee held the property free of trust, the beneficiary cannot maintain a suit in equity against the third person . . . .

§ 282(1) (1959). This court has also concluded when a trust is harmed, "[i]t is the trustee, or trustees, rather than the trust itself that is entitled to bring suit." Causey v. Carpenters S. Nevada, 95 Nev. 609, 610, 600 P.2d



244, 245 (1979). Accordingly, the district court did not err in dismissing the Hager children from the litigation for lack of standing.

We conclude the following: (1) the district court did not err directing a verdict on Hager's claims for fraud and intentional interference with prospective economic advantage; (2) Hager's complaint did not allege a separate claim for civil conspiracy; (3) the district court's exclusion of the Taylor videotape and the real estate agent's testimony was not an abuse of discretion; and (4) the district court did not err in dismissing the Hager children from the litigation for lack of standing. We therefore

ORDER the judgment of the district court AFFIRMED.

Hardesty, C.J.  
Hardesty

Cherry, J.  
Cherry

Saitta, J.  
Saitta

cc: Hon. David R. Gamble, District Judge  
Patrick O. King, Settlement Judge  
Hager & Hearne  
Potter Law Offices  
Lawrence D. Wishart  
Attorney General Catherine Cortez Masto/Carson City  
Maupin, Cox & LeGoy  
Douglas County Clerk