

IN THE SUPREME COURT OF THE STATE OF NEVADA

IGT, A NEVADA CORPORATION,
Appellant,

vs.

WILD GAME NG, LLC D/B/A THE
SIENA HOTEL SPA AND CASINO, A
NEVADA LIMITED LIABILITY
COMPANY,
Respondent.

No. 51338

FILED

DEC 14 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL

This is an appeal from an order granting a new trial. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Appellant IGT contracted with the Siena Hotel, Spa, and Casino to provide gaming machines and operating systems. Siena made sporadic payments under the contracts for two years. After seeking payment, IGT filed a complaint against Siena to collect on amounts due under the contracts and to retake possession of the equipment. In its complaint, IGT pleaded alternate theories of breach of contract, quantum meruit, and unjust enrichment, and requested approximately \$3.7 million in damages. In its answer, Siena alleged that all of the equipment provided under the contracts was categorically defective and produced inaccurate data. Siena also filed six counterclaims against IGT, including claims for intentional and negligent misrepresentation, statutory unfair business practices, and tortious breach of the implied covenant of good faith and fair dealing, alleging that IGT misrepresented that its gaming machines would work with Acres's casino management system. Siena claimed over \$174 million in damages.

Prior to trial, IGT filed a motion in limine to exclude evidence of a previously litigated claim between Siena and Acres Gaming, Inc., wherein Siena sued Acres, now owned by IGT, and prevailed on a breach-of-contract claim in which Acres was held liable for the defects in the gaming system that caused inaccurate data. The district court granted the motion.

At trial, however, the district court reversed its bright-line exclusion, concluding that determinations whether to admit or exclude evidence of prior litigation between Acres and Siena would be on a question-by-question basis. After this ruling, the district court overruled most of IGT's objections to the admission of evidence of the previous Acres litigation, although the district court did exclude one report for untimeliness. At trial, the district court admitted evidence of IGT's relationship and prior dealings with Acres, evidence about the compatibility of IGT machines with Acres's casino management system, and evidence concerning IGT's knowledge of Acres's products. However, the district court did not allow Siena to make any mention of its prior suit against Acres, where Siena prevailed on a breach-of-contract claim, or of problems with the Acres casino management system. After the close of Siena's case, the district court granted IGT's motion for a directed verdict and entered an order finding that Siena failed to offer sufficient evidence to allow its claims and defenses to go to the jury.

IGT then submitted its proposed judgment on the directed verdict and Siena filed objections. Siena also filed a motion for a new trial. On January 30, 2008, the district court entered judgment for IGT. Less than one month later, the district court held a hearing on Siena's motion for a new trial and granted a new trial on Siena's claims of intentional and

negligent misrepresentation and statutory unfair business practices, as well as its claim for breach of the covenant of good faith and fair dealing. The district court upheld the directed verdict on IGT's claims and Siena's remaining counterclaims. The one-page order concluded that "granting the motion in limine relating to the Acres case resulted in prejudice to the Siena during the trial, in that Siena did not get the opportunity to fully present their case." Consequently, IGT filed the instant appeal challenging the district court's decision to grant a new trial.¹

We reverse the order granting a new trial because the district court abused its discretion both in finding that the district court's previous ruling to exclude evidence regarding the Acres suit effected substantial justice and in finding that the a fiduciary relationship or the element of reliance supported Siena's claim for breach of the covenant of good faith and fair dealing. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Standard of review

NRCP 61 provides that "[n]o error in . . . the exclusion of evidence . . . is ground[s] for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice." This court reviews a district court's denial or grant of a new trial for an abuse of discretion. Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1505, 970 P.2d 98, 122 (1998), overruled in part on other grounds by GES, Inc. v.

¹We did not consider any arguments concerning attorney fees because we lack jurisdiction to do so. By granting a new trial, the district court, at least implicitly, vacated the final judgment, and because no final judgment has been entered in this case, the attorney fees award cannot be appealed under NRAP 3A(b)(2) as a special order after final judgment.

Corbitt, 117 Nev. 265, 270-71, 21 P.3d 11, 14-15 (2001). The appellant has the affirmative obligation to prove error warranting the reversal of an order granting a new trial. Schwartz v. Estate of Greenspun, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Acres litigation evidence

IGT contends that the district court's abandonment of its previous order excluding all evidence of the Acres litigation at trial cured any potential errors and, as such, the district court erred in granting Siena a new trial on that order. However, Siena argues that it did not receive a fair trial because it was not allowed to mention its litigation with Acres, its problems with the casino management system, or to introduce evidence that it sued Acres and prevailed on a breach-of-contract claim.

We conclude that the district court abused its discretion in granting a new trial because Siena failed to establish that substantial justice was affected by the district court's previous ruling to exclude evidence. An adverse verdict alone does not prove a party's substantial rights were affected by an error. See Beattie v. Thomas, 99 Nev. 579, 586, 668 P.2d 268, 273 (1983) (citing El Cortez Hotel, Inc. v. Coburn, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (finding harmless error, despite adverse judgment, because nothing in the record rendered "the judgment inconsistent with substantial justice")). That is, although the district court granted the original motion in limine to exclude the Acres litigation evidence, not all of this evidence was excluded such that Siena was denied a fair trial. In fact, the district court admitted substantial evidence about Acres, including evidence of IGT's relationship and prior dealings with Acres at trial, evidence about the compatibility of IGT machines with the Acres casino management system, and evidence about IGT's knowledge of

Acres's products. While Siena was barred from identifying problems with the Acres casino management system and of the dispute with Acres, the record contained sufficient evidence for the jury to conclude that Siena had a dispute with Acres. Therefore, the district court's exclusion of this evidence did not affect Siena's substantial rights such that Siena was denied a fair opportunity to present its case.

Consequently, the record fails to establish that the exclusion of some of the Acres litigation evidence "so substantially affected [respondent's] rights that it could be reasonably assumed that if it were not for the alleged errors, a different result might reasonably have been expected." El Cortez, 87 Nev. at 213, 484 P.2d at 1091. Rather, the district court abused its discretion in granting a new trial based on its own perceived inconsistency in admitting or excluding the Acres litigation evidence. Thus, we conclude that the district court's order granting a new trial should be reversed.


Covenant of good faith and fair dealing


IGT also contends that the district court abused its discretion in granting a new trial on Siena's claim for tortious breach of the covenant of good faith and fair dealing because the district court ruled as a matter of law that there was no special relationship or element of reliance. Additionally, IGT argues that because there was no fiduciary relationship between it and Siena, Siena was required to show a special relationship to assert reliance and failed to do so. See Great American Ins. v. General Builders, 113 Nev. 346, 354-55, 934 P.2d 257, 263 (1997) (holding that in the absence of a fiduciary relationship between the parties, reliance between the contracting parties must be shown and can be done in the form of a special relationship). We agree for two reasons. First, Siena


abandons this claim in its answering brief and acknowledges that no fiduciary or special relationship exists between the parties. Second, there is no evidence of a special relationship between the parties. Because a fiduciary relationship or the element of reliance is required to assert a claim for tortious breach of the covenant of good faith and fair dealing and Siena failed to assert either, we conclude that the district court abused its discretion in granting a new trial on this issue.

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.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Leonard I. Gang, Settlement Judge
Lionel Sawyer & Collins/Reno
Hager & Hearne
Lathrop & Gage, LLP
Washoe District Court Clerk