IN THE SUPREME COURT OF THE STATE OF NEVADA

WALTER VRANESH,

Appellant,

vs.

MICHAEL MUSHKIN, AND MICHAEL R. MUSHKIN, ESQ., CHTD.,

Respondents.

No. 35156

ORDER OF AFFIRMANCE

This is an appeal from an order denying a motion for a new trial under NRCP 59 or relief from judgment under NRCP 60(b).

This case has an extensive procedural history. Appellant, Walter Vranesh, was a shareholder in a family-owned corporation. Vranesh alleged that goods, services, employees and assets were being diverted to a separate corporation closely held by other family members. Vranish called a board meeting of the corporate officers to protest the actions, however, his protests were ignored and he was removed from all corporate offices and positions.

Thereafter, Vranesh retained the services of respondent, Michael Mushkin, who filed an action in February 1984. Following four years of discovery, the district court dismissed Vranesh's suit on a motion for summary judgment because all of Vranesh's claims were derivative in nature and no shareholder derivative action had been filed. Although Mushkin was no longer representing Vranesh at the time of the dismissal,

Mushkin was representing Vranesh when the statute of limitations for a derivative suit had run.

As a result of Mushkin's representation of Vranesh in that matter, Vranesh filed an attorney malpractice suit in July 1987. On November 16, 1992, following a 5-day trial, a jury found for Mushkin on a vote of 6-2.

Mushkin made a motion for fees and costs pursuant to NRS 17.115 and NRCP 68.[1] Vranesh then motioned for judgment notwithstanding the verdict or, in the alternative, a new trial or amended judgment. On January 25, 1993, the district court, concluding that the jury had manifestly disregarded the court's instructions, granted Vranesh's motion for a new trial pursuant to NRCP 59. Subsequently, the district judge, the Honorable William P. Beko, recused himself, asserting that he was no longer impartial and stating that "the court was convinced that [Vranesh] has proved by a preponderance of evidence, [his] allegations of [Mushkin's] malpractice."

Mushkin appealed the order granting a new trial. On March 31, 1994, this court reversed the district court and, on remand,[2] ordered

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[1]Mushkin had made a $15,000.00 offer of judgment prior to trial which Vranesh rejected.

[2]The Honorable Peter I. Breen undertook review of the case on remand.

the district court to consider the application for fees under Beattie v. Thomas and to award statutory costs.[3]

On remand, the district court set a hearing for the consideration of the award of costs and attorney fees. This took place on June 17, 1994. Vranesh believed that representations made to the court in support of the attorney fees application were false and contradicted Mushkins' trial testimony. Therefore, on June 20, 1994, Vranesh filed a second motion, pro per, seeking a new trial on all issues or relief from the judgment. In the alternative, Vranesh asserted that consideration of these facts should result in relief from costs and fees associated with the earlier judgment. On June 22, 1994, Mushkin filed an affidavit in response. On July 6, 1994, Vranesh asserted in his reply that Muskin's affidavit was replete with additional deceptions and constituted a fraud upon the court.

On July 21, 1994, the district court reviewed the Beattie factors and concluded that, while the offer of judgment (i.e., $15,000) had been made 3 weeks prior to trial and did not allow "a substantial amount of time for reflection," it was a reasonable offer made in good faith. Additionally, the court concluded that Vranesh had engaged in a pattern of bad faith marked by secretiveness and bitterness in post-trial proceedings. The court awarded Mushkin attorney's fees in the amount of $34,500.00 plus costs in the amount of $14,993.38 but did not issue a

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[3]See Mushkin v. Vranesh, No. 24420 (Nev. Mar. 31, 1994) (order of remand and reversal of order granting a new trial); see also Beattie v. Thomas, 99 Nev. 579, 668 P.2d 268 (1983).

decision on Vranesh's second motion for a new trial. Vranesh failed to appeal the award of attorney fees and costs.

Five years later, Mushkin was trying to collect the fees and costs judgment when he discovered that the district court never entered an order disposing of Vranesh's second motion for a new trial. As a result, the fee and cost award was arguably not a final judgment that could be collected.

Mushkin then filed a formal opposition to the second motion for a new trial and requested a ruling on the motion. On September 20, 1999, without additional argument, the district court denied Vranesh's second motion for a new trial concluding that the case had been pending before the district court for years and needed to be put to rest. The district court order did not address the merits of the motion. Vranesh, with counsel, now appeals the denial of the second motion for a new trial.

As a preliminary matter, respondent Mushkin asserts that Vranesh failed to submit a timely notice of appeal under NRAP 4(a)(1).[4]

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[4]NRAP 4(a)(1) states, in pertinent part (emphasis added):

> "In a civil case in which an appeal is permitted by law from a district court to the Supreme Court the notice of appeal required by Rule 3 shall be filed with the clerk of the district court. A notice of appeal filed after the oral pronouncement of a decision or order but before the entry of a written judgment or order shall have no effect. A notice of appeal must be filed after the entry of a written judgment or order, and no later than thirty (30) days after the date of service of written notice of the entry of the judgment or order appealed from."

Mushkin argued that Vranesh's notice of appeal, filed November 15, 1999, was beyond the thirty days allotted by NRAP 4(a)(1). Vranesh asserts that his appeal was timely filed because it was filed within thirty days of the receipt of the notice and the thirty-day period did not commence until actual receipt in this case because the notice of entry of order was sent to the wrong address.

The filing of a timely notice of appeal is jurisdictional and untimely appeals will not be considered.[5] We conclude that we have jurisdiction to hear the appeal on these issues. Specifically, a review of the record indicates that that facts pertaining to this issue are not in dispute insofar as it is clear that a copy of the district court's order denying Vranesh's motion for a new trial was not mailed to his counsel's correct address. Therefore, the thirty-day period did not commence until the notice was received by counsel, and the appeal was filed within thirty days of that date.

Vranesh contends that the district court erred when it denied his second motion for a new trial under NRCP 59. Specifically, Vranesh argues that he is entitled to a new trial based upon the jury's failure to adhere to the jury instructions during the malpractice trial, newly discovered evidence relating to allegations of perjured testimony offered by Mushkin in the malpractice trial, and Mushkin's conviction for possession

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[5]Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983) (internal citations omitted); see also Moran v. Bonneville Square Assoc., No. 36433 (Nev. Jun. 27, 2001) and Chapman Industries v. United Insurance, 110 Nev. 454, 874 P.2d 739 (1994).

of an illegal substance (marijuana). In the alternative, Vranesh contends that he is entitled to relief from judgment pursuant to NRCP 60(b) because Mushkin offered perjured testimony in the malpractice trial.

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.'[6] A verdict or other decision cannot be set aside where no irregularity or error is shown and the decision obtained is justified by the evidence adduced.[7]

NRCP 59(a)(5) empowers the district court to grant a new trial if there has been a "[m]anifest disregard by the jury of the instructions of the court." Vranesh had asserted in his first motion for a new trial that it was impossible for the jury to have properly applied the evidence at trial to the court's instructions and still have reached a verdict in favor of Mushkin. This court concluded that it was not impossible for the jury to reach a verdict in favor of Mushkin given the evidence adduced at trial.[8]

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[6]Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978) (distinguished on other grounds); see also Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993) (overruled on other grounds).

[7]Scott v. Haines, 4 Nev. 860, 862 (1868).

[8]Mushkin v. Vranesh, No. 24420 (Mar. 31, 1994) (order of remand and reversal of order granting a new trial).

Our previous decision controls and the law of the case precludes additional review of this issue.[9]

Vranesh also alleged in his second motion for a new trial that he had newly discovered evidence demonstrating Mushkin committed perjury in the malpractice trial and that he was entitled, therefore, to a new trial pursuant to NRCP 59(a)(4). We conclude, based upon the record, that while the information contained in the Mushkin affidavit in support of his request for attorney fees may be in conflict with his trial testimony, this is insufficient to support a finding that Mushkin committed perjury in the malpractice action. Much of the information contained in the affidavit could have been, or was, subject to cross-examination in the malpractice trial. Moreover, the assumption that any differences reflect perjury during the malpractice trial as opposed to misrepresentations made in support of the application for attorney fees is speculative. As such, we cannot conclude that this information would lead to a different result in the underlying suit. Moreover, to the extent that the issues could have been raised through a more extensive cross-examination of the discrepancies between Mushkin's trial testimony and the trial exhibits, it could have been discovered or produced at the malpractice trial with reasonable diligence.[10]

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[9]See LaForge v. State, University System, 116 Nev. 415, 419-20, 997 P.2d 130, 133 (2000) (citing Executive Management v. Ticor Title Ins. Co., 114 Nev. 823, 835, 963 P.2d 465, 473 (1998)).

[10]See NRCP 59(a)(4); see also Whise v. Whise, 36 Nev. 16, 24, 131 P. 967, 969 (1913).

Vranesh also contends that he was entitled to a new trial under NRCP 59(a)(2) as a result of the newly discovered evidence of Mushkin's alleged drug addiction as evidenced by Mushkin's conviction for possession of a controlled substance. Mushkin was convicted of possession of a controlled substance on January 28, 1994, as a result of activities which occurred on December 5 and 6, 1992 – one month after the conclusion of the malpractice trial. Vranesh argues that Mushkin's alleged drug use alone was sufficient to warrant a new trial. Vranesh asserts that if Mushkin was convicted of the possession of a controlled substance for events occurring one month after the malpractice trial, it is reasonable to assume that he was using such substances during the malpractice trial and his representation of Vranesh in the underlying lawsuit. Therefore, such use was a potential factor in Mushkin's alleged misrepresentation of Vranesh in the underlying suit as well as for impeachment in the malpractice action.

We conclude that the district court did not err in denying Vranesh's motion for a new trial on the basis of newly discovered evidence relating to the drug conviction. There is insufficient evidence to demonstrate Mushkin was under the influence of any illegal substances during the course of his representation of Vranesh. The time between the conviction and the underlying representation is too great for it to have more than speculative value. Moreover, while the possession of marijuana conviction occurred after trial, the record reflects information regarding the charges was available during the trial and could have been discovered with due diligence.

Vranesh further argues that he is entitled to relief from judgment pursuant to NRCP 60(b) based on allegations that Mushkin perjured himself during the course of the malpractice trial. The district court has wide discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b).[11] Thus, the court's determination will not be set aside absent an abuse of discretion.[12]

We conclude that the district court did not err in denying Vranesh's motion for relief from judgment under NRCP 60(b). We note that Vranesh supported his allegations with references to the record that support a contention that that Mushkin was incorrect and/or dishonest regarding the information he submitted to the district court in his affidavit filed in support of fees and costs. Such a discrepancy between the information contained in Mushkin's affidavit and testimony offered at trial may be grounds for challenging the award of attorney fees under NRCP 60(b), but it is not sufficient to establish perjury amounting to fraud for purposes of granting a new trial on the malpractice action. Nor can we consider this argument in regard to the award of attorney fees and costs because Vranesh has not appealed that award. The allegation that the fee award was obtained by fraud must first be raised in the district court.[13]

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[11]Stoeklein v. Johnson Electric, Inc., 109 Nev. 268, 271, 849 P.2d 305, 307 (1993) (citing Union Petrochemical Corp. v. Scott, 96 Nev. 337, 338, 609 P.2d 323 (1980)).

[12]Id.

[13]Nevada Power Co. v. Haggerty, 115 Nev. 353, 365 n.9, 984 P.2d 870, 877 n.9 (1999) (citing Montesano v. Donrey Media Group, 99 Nev. 644, 650, n.5, 668 P.2d 1081, 1085 n.5 (1983)).

Finally, while the age of a case is not a reason for denying a motion for a new trial, we are satisfied from the district court's discussion of the issues in its order awarding attorney fees and costs that it had read and considered Vranesh's second motion for a new trial and concluded that additional argument was unnecessary despite the five year delay in the entry of a formal order.[14] Accordingly we,

ORDER the judgment of the district court AFFIRMED.[15]

Young, J.
Young

Agosti, J.
Agosti

Becker, J.
Becker

cc: Hon. Peter I. Breen, District Judge
Frank J. Cremen
Mushkin & Hafer
Clark County Clerk

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[14]See Vranesh v. Mushkin, No. A258029 (July 21, 1994) (order awarding attorney's fees and costs).

[15]We have considered Vranesh's claims related to issues of res judicata, due process violations and judicial delay in addition to both party's assertions regarding the necessity of sanctions pursuant to NRAP 28(a)(3) and (e). We conclude that these claims lack merit and do not warrant further discussion.