IN THE SUPREME COURT OF THE STATE OF NEVADA

DEAN YOUNT; SHIRLEY YOUNT; AND JASON YOUNT,
Appellants,
vs.
BLISS ENTERTAINMENT, LLC,
Respondent.

No. 57023

FILED

DEC 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court post-judgment order granting a motion for a new trial in a contract action. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellants Dean Yount, Shirley Yount, and Jason Yount entered into an asset purchase and sale agreement with respondent Bliss Entertainment to purchase Bliss Nightclub. The Younts paid Bliss a down payment and executed a promissory note, in Bliss's favor, for the remainder of the purchase price. The promissory note was secured by the furniture, fixtures, and equipment of the nightclub. Following the transfer of ownership, the Younts made a single partial payment on the promissory note. After the Younts had removed or sold some of the fixtures and equipment, they instructed Bliss to retrieve it from their home. Bliss retained the property, and at the time of trial, had not disposed of it by private or public sale.

Bliss filed suit against the Younts less than a year later. It alleged that the Younts breached the contract when they failed to make payments on the promissory note. The Younts filed a counterclaim seeking damages for Bliss's retention of collateral in contravention of Nevada's Uniform Commercial Code, NRS Chapter 104. Following a jury

trial, the jury found that the Younts were liable to Bliss for breach of contract in the amount of $1 but were also entitled to an offset of $1 because of Bliss's improper retention of the collateral. Bliss moved for additur, and/or a new trial, and/or attorney fees. Over the Younts' objection, the district court granted Bliss's motion for a new trial on the issue of damages.

The court determined that the jury had disregarded the jury instructions because it was impossible for it to find that the Younts had breached the contract, yet only award Bliss $1 in damages. Further, the district court noted that awarding each party $1 in damages was not supported by the evidence because the Younts conceded that the entire amount of the $145,000 note was still outstanding and Bliss conceded that the collateral was worth between $12,000 and $350,000. This appeal followed. The Younts present two arguments on appeal: (1) Bliss waived its right to raise inconsistencies in the special verdict because it failed to raise them before the jury was discharged; and (2) the district court abused its discretion in granting Bliss's motion for a new trial on the issue of damages because it improperly determined that the jury ignored instructions regarding the award of damages.

We reverse the district court's order granting a new trial on damages. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

Bliss waived its right to raise issues with the special verdict because it failed to raise them before the jury was discharged

The Younts contend that the district court improperly granted Bliss's motion for a new trial because Bliss failed to raise any inconsistencies in the special verdict before the jury was discharged. The

Younts argue that Bliss waived its right to raise the issues in a motion for a new trial.

"One of this court's 'primary objective[s]' is to promote the 'efficient administration of justice.'" Cramer v. Peavy, 116 Nev. 575, 582, 3 P.3d 665, 670 (2000) (alteration in original) (quoting Eberhard Mfg. Co. v. Baldwin, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981)). The efficient administration of justice requires a party to address any concerns or inconsistencies with the jury's verdict before the jury is discharged. Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 1111, 197 P.3d 1032, 1038 (2008) (clarifying that the parties have the duty to object to inconsistent jury verdicts). This court's policy favoring the efficient administration of justice states that "'failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury' constitutes a waiver of the issue of an inconsistent verdict." Cramer, 116 Nev. at 583, 3 P.3d at 670 (quoting Eberhard, 97 Nev. at 273, 628 P.2d at 682).

In its motion for a new trial, Bliss argued that the amount awarded was so low that the jury must have disregarded the jury instructions. However, because Bliss did not raise this issue before the jury was discharged, the district court did not question the jurors in order to clarify if such an error in calculation occurred. While our dissenting colleague suggests this should not be considered because it was not raised below, such is not the argument that Bliss made to this court. Rather, citing to Lehrer McGovern Bovis, 124 Nev. at 1112, 197 P.3d at 1039, Bliss argued that because the verdicts were irreconcilable, it was not required to ask the district court to poll the jury. As discussed below, we disagree with Bliss's assessment of the inconsistency in the verdict and the

instructions; thus, Bliss's Leher McGovern Bovis argument fails. As a matter of judicial economy and respect for the time invested in producing the verdict, Bliss was required to pursue an appropriate interrogation of the jury. Cramer, 116 Nev. at 583, 3 P.3d at 670. Therefore, the right to raise the issue in a motion for a new trial was waived, and the district court erred in allowing Bliss to raise these issues in its motion for a new trial. Bliss's waiver of inconsistencies in the jury verdict, however, is only one reason why we are reversing the district court's grant of a new trial on damages. We also conclude that the district court abused its discretion in its interpretation of the special verdict filled out by the jury and that, in fact, the special verdict is not irreconcilably inconsistent internally or with the jury instructions.

The district court abused its discretion in granting Bliss's motion for a new trial

The Younts contend on appeal that the district court abused its discretion in granting a new trial on the issue of damages because it effectively substituted its judgment for the jury's as to the weight of the evidence. The Younts also argue that the jury properly followed the district court's instructions and could have reasonably reached the verdict it did.

A district court's decision to grant a motion for a new trial rests within its sound discretion. Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996). We will not disturb the district court's decision "absent palpable abuse." Id.

NRCP 59(a) provides that a new trial may be granted "to all or any of the parties and on all or part of the issues for . . . [m]anifest disregard by the jury of the instructions of the court." The ultimate question for the district court is whether it is "able to declare that, had the

jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982). The district court should assume that the jury followed its instructions. Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001). Further, it is unnecessary to ascertain how the jury reached its ultimate verdict; just that it was possible for it to do so. M & R Investment v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729, 731 (1989). The amendment of NRCP 59, which removed "'insufficiency of the evidence'" as a valid ground for a new trial, supports this standard. Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989). As such, a district court should only grant a new trial if the jury erred as a matter of law and not "if the question only concerns the weight of the evidence." Id. In cases where the jury has returned an inconsistent verdict, the district court must "attempt to clarify the verdict" and should interpret the verdict in a way that would not require a new trial, if possible. Carlson v. Locatelli, 109 Nev. 257, 263, 849 P.2d 313, 316-17 (1993).

Here, the jury returned a verdict finding that the Younts were liable to Bliss for breach of contract and that Bliss was liable to the Younts for its improper retention of collateral. Bliss was awarded $1 in damages and the Younts were awarded $1 as an offset. Although it is possible that the jury disregarded the instructions, it is also possible that the jury calculated any offset it wished to award before entering the amount of damages Bliss should recover on the special verdict form. Such an award made it clear that the jury intended for both parties to simply walk away from the transaction. Jury Instruction No. 17 clearly stated that if the jury found that Bliss had retained the collateral for an unreasonable

period of time, Bliss would be deemed to have accepted the "collateral in total satisfaction of the debt owed on the loan as to the value of that collateral, and the Younts would be entitled to an offset." Jury Instruction No. 20 further instructed the jurors to "award damages in an amount that will reasonably compensate [the aggrieved] party for all of the loss suffered by the party and proximately caused by the conduct upon which you base your findings of liability." The latter instruction could have been interpreted by the jury to mean that it should determine the overall loss that Bliss suffered from the Younts' default on the promissory note. Consequently, the jury could have decided that Bliss's losses should be reduced by the value of the collateral that it retained.

Several witnesses testified as to the value of the collateral that Bliss recovered from the Younts. Jason Yount testified that he did not sell any of the collateral from the bar. Therefore, if the jury believed his testimony, the value of the collateral could be valued at $160,000, the amount apportioned to collateral in the asset purchase agreement. A local bar owner testified that a portion of the equipment was overvalued and that, rather than being worth $70,000, it was in fact worth $12,000. Travis Trentham, Bliss's former owner, testified that when he remodeled the club, several months before selling it to the Younts, he spent approximately $350,000 on furniture, fixtures, and equipment. He explained that the furniture, fixtures, and equipment were valued at $160,000 on the asset purchase agreement because the total purchase price needed to be allocated among various categories, and that the total sale price was only $195,000. He also stated that when he came to pick up the equipment, after the Younts defaulted on the note, a majority of the equipment and fixtures were destroyed or missing. Ultimately, Trentham

estimated that the items he picked up from the Younts were approximately worth between $12,000 and $15,000. Trentham stated that additional furniture and fixtures remained in the nightclub but were either severely damaged or destroyed.

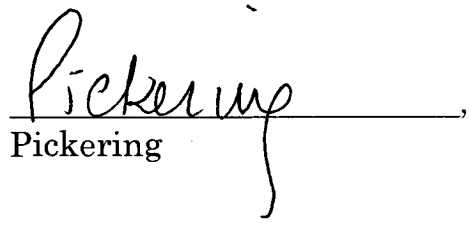
Determining the value of the collateral retained by Bliss was a question of fact left to the jury. See Winn v. Sunrise Hospital & Medical Center, 128 Nev. ___, ___, 277 P.3d 458, 462 (2012) (recognizing that questions of fact are "to be decided by the jury"); see also Oliver-Mercer Elec. Co-op., Inc. v. Davis, 696 N.W.2d 924, 926 (N.D. 2005) ("Determining the fair market value of collateral is a question of fact."). The jury was required to weigh the credibility of each witness and determine what value to assign to the collateral. It would not be within the discretion of the district court to decide that the jury undervalued the collateral, thereby replacing its judgment for that of the jury. See Brascia, 105 Nev. at 594, 781 P.2d at 767.

In order to save the verdict, it would have been reasonable to assume that the jury followed Jury Instructions Nos. 17 and 20 and determined that any damages due to Bliss were reduced because of its improper retention of the collateral. The evidence presented at trial supported a finding that the outstanding amount due on the promissory note was $145,000, plus interest, and the value of the collateral ranged anywhere from $12,000 to $350,000. Thus, if the jury determined that the collateral was worth an amount equivalent to the amount outstanding on the promissory note, then the award was proper. Adopting this interpretation of the jury's verdict would have allowed the verdict to stand.

Because this view of the jury's decision would allow the verdict to stand, the district court should have adopted that interpretation and saved the verdict. See Carlson, 109 Nev. at 263, 849 P.2d at 316-17 ("Where possible, the verdict should be salvaged so that no new trial is required."). Therefore, the district court abused its discretion when it granted Bliss's motion for a new trial on damages, because the verdict could have been reasonably interpreted in a way to salvage it and avoid a new trial. For the foregoing reasons, we

ORDER the district court's order granting a new trial REVERSED AND REMAND this matter with instructions to the district court to reinstate the judgment on the jury's verdict.

_____, J.
Saitta



_____, J.
Pickering

cc: Hon. Steven P. Elliott, District Judge
Margo Piscevich, Settlement Judge
Law Offices of Mark Wray
Hardy Law Group
Washoe District Court Clerk

HARDESTY, J., dissenting:

Because the majority relies on an issue not raised in the district court, and I find no "palpable abuse" by the district court in its order granting a new trial, I dissent.

First, the majority has reached an issue that should not be considered on appeal. The Younts argue for the first time on appeal that Bliss failed to raise any inconsistencies in the special verdict before the jury was discharged. See Cramer v. Peavy, 116 Nev. 575, 583, 3 P.3d 665, 670 (2000) (stating that "failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury" extinguishes a party's right to later raise the issue of an inconsistent verdict (internal quotations omitted)). However, the Younts' argument fails because it was not raised in the district court. See In re AMERCO Derivative Litigation, 127 Nev. ___, ___ n.6, 252 P.3d 681, 697 n.6 (2011) ("[W]e decline to address an issue raised for the first time on appeal."). The district court was never provided an opportunity to consider whether Bliss had waived its ability to challenge the special verdict for inconsistencies by failing to raise such a challenge before the jury was discharged. Therefore, I conclude that this argument cannot be considered on appeal.

Moreover, this is not a matter of inconsistent verdicts and did not have to be addressed before the jury was discharged. Neither party argued the verdict was inconsistent, rather Bliss argued in its motion for new trial that the respective damages verdicts were not supported by sufficient evidence. The fact that the respective damages verdicts are not supported by sufficient evidence does not necessarily render them inconsistent with each other. Thus, even if we were to consider the

Younts' argument that Bliss waived its right to challenge the verdict, I would conclude it would not apply to the circumstances here.

Second, a district court's decision to grant a motion for a new trial rests within its sound discretion, and this court will not disturb that decision "absent palpable abuse." Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996); see also NRCP 59(a). On this record, I conclude that the district court's grant of a new trial is not a "palpable abuse" of discretion. Thus, I would affirm the district court's conclusion that a new trial on damages is required because there is no clear offset and thus it appears that the jury manifestly disregarded the jury instructions.

The determination of the Younts' offset under the security agreement was critical to the entry of a proper judgment in this case. The jury found that the Younts were liable for breach of contract and that Bliss was liable to the Younts for an offset regarding the collateral retained by Bliss from the nightclub. The jury instructions required the jury to provide an amount of damages owed to each party based on the breach of contract and the offset of collateral retained by Bliss. The jury ultimately found the Younts liable for $1 in damages for the breach of contract, and that Bliss was liable to the Younts for an offset of $1 for the collateral retained by Bliss.

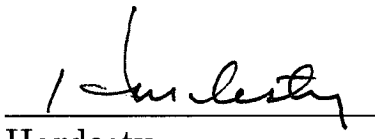
The district court found this award to be completely unsupported by the evidence presented at trial and the jury instructions given. The court saw the evidence presented in this case, the demeanor of the witnesses, and the clarity of the testimony provided, and the court compared the evidence to the jury's verdict. The parties had executed a security agreement that provided that if the Younts defaulted on

payments owed on the promissory note, Bliss could repossess the nightclub furniture, fixtures, and equipment as collateral to satisfy any outstanding obligation owed on the note. The evidence at trial showed that the Younts owed $145,000 plus interest pursuant to the promissory note. None of the required monthly payments of $3,225.44 were paid. Therefore, Bliss's damages were clearly in excess of $1.

The evidence also included testimony of the value of the collateral when it was purchased by the Younts and the value of collateral obtained by Bliss after the nightclub closed. As shown by the evidence, the value of the collateral was worth between $10,000 and $350,000; however, after the Younts defaulted and because a majority of the collateral was destroyed or missing, the furniture, fixtures, and equipment retrieved by Bliss were estimated to be worth at least approximately $10,000 to $12,000,[1] clearly exceeding the $1 offset awarded by the jury. The district court correctly concluded that the jury's damages awards failed to take into account the actual amount the Younts still owed on the promissory note to Bliss and the value of the collateral obtained by Bliss as an offset. Thus, there was no clear offset value provided by the jury on which to base a judgment in the case, and the district court acted within its discretion when it granted a new trial on damages.

[1]Although the parties dispute the estimated worth of the equipment, the record reflects that Trentham testified that the equipment's estimated value was $10,000 to $12,000.

For the foregoing reasons, I would affirm the district court's order granting Bliss's motion for a new trial on damages.



_____, J.
Hardesty