IN THE SUPREME COURT OF THE STATE OF NEVADA

MATT GYGER, GAYLE GYGER INDIVIDUALLY AND AS GUARDIAN AD LITEM AND NATURAL PARENT OF EVAN GYGER (A MINOR CHILD),
Appellants,
vs.
SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, A CORPORATION DULY AUTHORIZED TO CONDUCT BUSINESS IN THE STATE OF NEVADA,
Respondent.

No. 58972

FILED

DEC 18 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a motion for new trial in a medical malpractice action. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellants Matt and Gayle Gyger brought a medical malpractice action against respondent Sunrise Hospital after their son suffered a severe brain injury while in Sunrise's care. During voir dire, Gyger exhausted all peremptory challenges prior to one particular juror, Kerry Bilicki, being seated. Sunrise's counsel informed the court that Bilicki, a veterinarian, had previously exchanged business referrals with the husband of a paralegal of Sunrise's counsel. Bilicki said she could render a fair and impartial verdict, and the district court refused to excuse Bilicki for cause. Following a unanimous jury verdict in Sunrise's favor, Gyger filed a motion for new trial based primarily on alleged flaws in the

voir dire process. The district court denied Gyger's motion, and Gyger now appeals.

We review an order denying a motion for new trial for an abuse of discretion. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). In doing so, we give deference to a district court's findings of fact and review questions of law de novo. *Id.*

First, Gyger argues that the district court erred by failing to excuse Bilicki for cause. A juror may be excused for cause where the juror is "united in business with either party," NRS 16.050(1)(c), or where the juror is biased toward either party. NRS 16.050(1)(g).

We have defined "united in business" as "any business relation which would, within the sound discretion of the trial court, indicate that the juror might be interested, biased, influenced, or embarrassed in his verdict." *Sherman v. S. Pac. Co.*, 33 Nev. 385, 389, 111 P. 416, 418 (1910). The record reflects that Bilicki received veterinary referrals from the paralegal's husband and that the referred clients paid Bilicki. The record does not indicate what portion of Bilicki's business came from these referrals or how recently the last referral occurred. Because voir dire was not transcribed, we cannot conclude from the record on appeal that Bilicki was united in business with the paralegal's husband. *See M & R Inv. Co. v. Mandarino*, 103 Nev. 711, 718, 748 P.2d 488, 493 (1987) ("When evidence upon which the lower court's judgment rests is not included in the record, it is assumed that the record supports the district court's decision."). Furthermore, we point out that whatever relationship existed was not between a juror and a party, NRS 16.050(1)(c), but between a juror and the husband of a paralegal for a party's counsel. Finally, Bilicki repeatedly stated that she could be a fair and impartial juror. NRS

16.050(1)(g). Therefore, we conclude that the district court did not abuse its discretion by declining to dismiss Bilicki for cause.

Second, Gyger argues Bilicki engaged in juror misconduct warranting a new trial. In order to prevail on a motion for new trial based on juror misconduct, a party must show that misconduct occurred and that the party was prejudiced. *Meyer v. State*, 119 Nev. 554, 563-64, 80 P.3d 447, 455 (2003). We conclude that even if Bilicki engaged in misconduct, Gyger has failed to show prejudice.

Third, Gyger argues attorney misconduct by Sunrise's counsel warranted a new trial. Because Gyger did not object to the comments of Sunrise's counsel, we review for plain error, *Lioce*, 124 Nev. at 19, 174 P.3d at 981-82, and we cannot determine from the record on appeal that any misconduct rose to the level of plain error. *See M & R Inv. Co.*, 103 Nev. at 718, 748 P.2d at 493.

Fourth, Gyger argues that the district court unreasonably restricted voir dire by forcing the parties to "use or lose" peremptory challenges before all potential jurors were seated. We agree.

In Nevada, the method by which voir dire is conducted "'rests within the sound discretion of the district court, whose decision will be given considerable deference by this court.'" *Thomas v. Hardwick*, 126 Nev. ___, ___, 231 P.3d 1111, 1115 (2010) (quoting *Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006)). "The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict on the evidence presented and apply the facts, as he or she finds them, to the law given." *Whitlock v. Salmon*, 104 Nev. 24, 27, 752 P.2d 210, 212 (1988). NRS 16.030(6) provides that "[t]he judge shall conduct the initial examination of prospective jurors and

the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted." Also, "[e]ach side is entitled to four peremptory challenges." NRS 16.040(1). Because Gyger failed to object to the voir dire process until the second day of jury selection, we review for plain error. *See Lioce*, 124 Nev. at 19 n.32, 174 P.3d at 982 n.32 (defining plain error as that which has a prejudicial impact on the verdict when viewed in context of the whole trial).

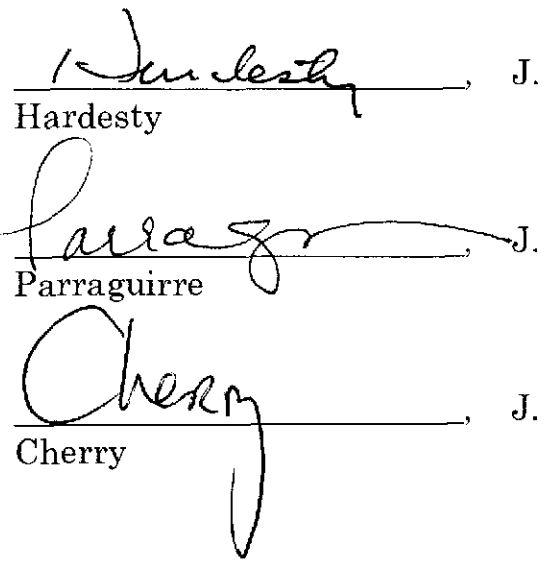
Here, the parties were permitted to question the potential jurors and were entitled to the appropriate number of peremptory challenges. However, the "use or lose" process used in this case resulted in Bilicki being seated after Gyger had exhausted all peremptory challenges. Because all peremptory challenges were exhausted, further questioning of Bilicki by Gyger's counsel would have been largely unproductive. Although we do not conclude that the district court erred by declining to excuse Bilicki for cause, it is readily apparent that, due to concerns about Bilicki's relationship to the paralegal, Gyger's counsel would have used a peremptory challenge on Bilicki if any had remained. The purpose of voir dire is to ensure that a fair and impartial jury is seated, *Whitlock*, 104 Nev. at 27, 752 P.2d at 212, and the voir dire process used in this case worked directly against this purpose by forcing the parties' attorneys to guess about the comparative fairness of potential jurors who were not yet seated. We conclude that even though the parties were permitted to question potential jurors, the purpose and effectiveness of this questioning was unreasonably restricted by the district court's voir dire process.

However, Bilicki repeatedly stated she could be a fair and impartial juror, the evidence at trial was conflicting, and the jury rendered a unanimous verdict. Therefore, although the voir dire process used in

this case unreasonably restrained the effectiveness and purpose of voir dire, we conclude this did not rise to the level of plain error. *Lioce*, 124 Nev. at 19 n.32, 174 P.3d at 982 n.32.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Cherry

cc: Hon. James M. Bixler, District Judge
Phillip Aurbach, Settlement Judge
Gerald I. Gillock & Associates
Matthew L. Sharp
Hall Prangle & Schoonveld, LLC/Las Vegas
Peter Chase Neumann
Eighth District Court Clerk