

IN THE SUPREME COURT OF THE STATE OF NEVADA

ADVANTAGE MARINE, LLC, A  
NEVADA LIMITED LIABILITY  
COMPANY,  
Appellant,  
vs.  
NELLO GONFIANTINI,  
Respondent.

No. 60473

**FILED**

**APR 01 2015**

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

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying appellant's motion for a new trial. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

After a three-day jury trial, respondent Nello Gonfiantini received a favorable verdict on his claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Appellant Advantage Marine, LLC, then moved for a new trial, which the district court denied. In this appeal, Advantage argues that the district court abused its discretion in denying its motion for a new trial because the court should not have (1) allowed Van Dam to testify when he was not disclosed as an expert, (2) admitted Gonfiantini's exhibits over Advantage's objections, and (3) ruled against imposing discovery sanctions even though Gonfiantini had the engines rebuilt before Advantage could inspect them.

We conclude that the district court did not abuse its discretion in denying Advantage's motion for a new trial. *See Bass-Davis v. Davis*, 122 Nev. 442, 453, 134 P.3d 103, 110 (2006) (holding that the district court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion).

First, we conclude that the district court did not abuse its discretion in allowing Van Dam to testify as a percipient witness. See *Johnson v. Egtedar*, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996) (concluding that decisions regarding the scope of a witness' testimony are reviewed for an abuse of discretion). While we agree with Advantage that NRCP 37(c)(1) requires exclusion of undisclosed experts absent a showing of substantial justification or harmlessness, we conclude that the district court correctly determined that although Van Dam could not give *expert* testimony, the rules of civil procedure did not prevent him from testifying about things he perceived.

We further conclude that Advantage failed to preserve its arguments regarding the content of Van Dam's testimony due to the contemporaneous objection rule. See NRS 47.040; see also *Thomas v. Hardwick*, 126 Nev. 142, 155, 231 P.3d 1111, 1120 (2010) (concluding that when a trial court properly declines to give a definitive ruling on a pretrial motion, the contemporaneous objection rule requires the objecting party to object at trial in order to preserve its arguments on appeal). Advantage failed to object during trial on the grounds that Van Dam either improperly gave expert testimony as contemplated in NRS 50.275 or exceeded the scope of his expertise. Accordingly, Advantage waived these arguments on appeal.

Second, we cannot consider whether the district court abused its discretion in admitting Gonfiantini's trial exhibits, because Advantage failed to include any of the challenged exhibits in its appellant's appendix. NRAP 30(d); see *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding that this court cannot consider matters that do not properly appear in the record on appeal). Because the record does not include any of the challenged trial exhibits, it

is unclear which exhibits Advantage objected to at trial, which exhibits it is challenging on appeal, and whether its arguments regarding the exhibits have merit.

Finally, we conclude that the district court did not abuse its discretion in not imposing sanctions against Gonfiantini for spoliation of evidence. *See Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (“Where . . . discovery sanctions are within the power of the district court, this court will not reverse the particular sanctions imposed absent a showing of abuse of discretion.”). Neither sanctions nor dismissal were appropriate in this case, because the record does not indicate that Gonfiantini had the engines rebuilt with the intent to frustrate Advantage’s discovery efforts. *See Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106 (holding that “willful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence.”).<sup>1</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.



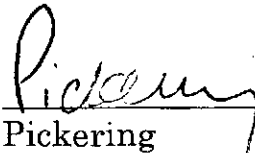
J.

Saitta



J.

Gibbons



J.

Pickering

---

<sup>1</sup>We have considered the parties’ remaining arguments and conclude that they are without merit.

cc: Hon. Patrick Flanagan, District Judge  
Robert L. Eisenberg, Settlement Judge  
Wait Law Firm  
Gunderson Law Firm  
Washoe District Court Clerk