

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY MARSH LINDE AND ZACHARY
LINDE, A MINOR, BY AND THROUGH HIS
GUARDIAN AD LITEM, PEGGY L. MARSH,

No. 35778

Appellants,

vs.

KEN FUJII,

Respondent.

FILED

SEP 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

qR This is an appeal from a judgment in favor of ~~respondent~~ ^{appellants} in a personal injury action and an order awarding costs and attorney fees.

Appellant, Mary Linde, argues that the district court abused its discretion by: (1) denying her motion for a continuance so that evidence from her wrist surgery, which occurred a week before the scheduled trial, could be presented and adequately discovered by respondent, Ken Fujii; (2) not permitting her treating surgeon, Dr. Steven Dow, to testify; (3) not permitting her expert witness, Dr. Michael Krieger, to use Dr. Dow's surgical report or the pathologist's report when testifying; (4) denying her motion to retax costs for duplicate juror information, an independent medical examination, and a consulting fee; and (5) awarding attorney fees to Fujii. Linde also contends that the district court erred by improperly instructing the jury as to: (1) the parties' stipulation regarding her surgery, and (2) her failure to mitigate damages. Finally, Linde contends that the district court made prejudicial remarks to the jury.

Because we agree with Linde that the district court abused its discretion when it denied her motion for a continuance, we reverse the district court's judgment and need not address Linde's remaining arguments. As a result, we also

reverse the district court's order awarding costs and attorney fees to Fujii.

Linde argues that the district court abused its discretion by denying her motion for a continuance because her wrist surgery, which occurred a week before the scheduled trial, would have provided relevant evidence on the causation of her injuries that would have clarified the issue for the jury. Linde further argues that a continuance would not have prejudiced Fujii because it would have given him adequate time to undertake whatever discovery he deemed necessary.

Second Judicial District Court Rule 13(1) provides, in pertinent part: "No continuance of a trial in a civil or criminal case shall be granted except for good cause." A district court's denial of a motion for a continuance may not be set aside on appeal unless it is clearly erroneous and not supported by substantial evidence.¹

On January 10, 2000, the district court denied Linde's motion for a continuance without making any findings. NRCP 52(a) provides that findings of fact and conclusions of law are unnecessary for decisions of any motion. Nonetheless, this court has noted that this rule underscores the importance of some findings for the record on the hearing of a motion.² In the absence of a transcript on the hearing on a motion by the district court, this court must examine the record to determine whether the district court committed an abuse of discretion.³

¹Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294-95, 948 P.2d 704, 705-06 (1997).

²United States v. McLean, 78 Nev. 60, 62, 368 P.2d 872, 873 (1962).

³Cf. Schouweiler v. Yancey Co., 101 Nev. 827, 831, 712 P.2d 786, 789 (1985) (in the absence of findings of fact and
continued on next page . . .

Our review of the record shows that in her motion for a continuance, Linde argued that she constantly suffered from carpal tunnel syndrome in both wrists and that this condition went directly to the issue in this case - the scope of her injuries following a rear-end automobile collision. Moreover, she argued that she would suffer significant prejudice if the trial date were not vacated because her permanent health status would be uncertain until after surgery.

Fujii contends that Linde did not have good cause for a continuance, the pretrial proceedings had already been delayed, and this continuance would only have prejudiced him further. Noting that four years had elapsed since the accident, Fujii questioned why Linde waited until five days before trial to schedule her hand surgery, especially since Dr. Krieger had recommended that Linde undergo surgery thirteen months earlier. Fujii further argued that Linde scheduled the surgery to delay the trial in an effort to allow Dr. Dow to testify using Dr. Krieger's surgical and pathology reports while denying Fujii the time for adequate discovery.

Although the timing of Linde's surgery may have been inopportune, because the surgery's outcome was directly material to a key issue in this case, we conclude that the district court abused its discretion when it denied Linde's motion for a continuance. The long-term extent of Linde's injuries and their relationship to the accident were crucial to determining liability and damages. We are not persuaded by Fujii's argument that a continuance would have prejudiced him. A continuance would have provided Fujii adequate time to

. . . continued

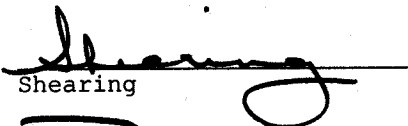
conclusions of law, this court must examine the record to determine whether a district court abused its discretion).

conduct discovery relevant to the surgery and prepare his defense. Thus, no evidence supports denying the continuance.

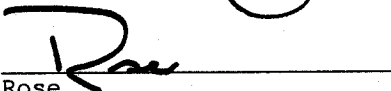
Because the district court improperly denied Linde's motion for a continuance, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order. Because our reversal ~~negates~~ ^{renders}

qce ~~any recovery of fees and costs premature, Fujii's success on his claims,~~ we also reverse the district court's order granting Fujii costs and attorney fees.


Shearing

J.


Rose

J.

cc: Hon. Steven P. Elliot, District Judge
Hawkins Folsom Muir Kelly & Vallas
Allison MacKenzie Hartman Soumbeniotis & Russell
Washoe County Clerk

AGOSTI, J., dissenting:

I dissent. In my opinion, the district court did not abuse its discretion in denying appellant's motion for a continuance. Nor was the district court's refusal to allow Dr. Dow to testify an abuse of discretion.

The accident occurred on February 10, 1996. Appellant's vehicle was rear-ended by respondent's vehicle. Appellant estimated that respondent was driving at the rate of ten miles per hour at impact.

Appellant, in proper person, filed her complaint alleging negligence nearly two years later on February 6, 1998, and amended the complaint over three years later on May 5, 1999. Appellant, herself an attorney, remained in proper person until she hired a lawyer to represent her in this case nearly four years after the accident and one month prior to trial. Appellant's trial was set for January 18, 2000. Fifteen days before the trial was set to commence, she filed a motion to vacate the trial date because she had scheduled surgery for January 13, 2000.

The majority has correctly cited the standard: we are not to disturb a trial judge's decision to deny a continuance unless the decision was clearly erroneous and not supported by substantial evidence.¹

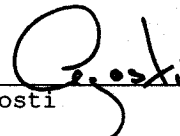
A review of appellant's motion and respondent's opposition demonstrates that the trial judge's decision was a proper exercise of judicial discretion. The accident was four years prior to the trial date. Dr. Krieger, thirteen months before trial, recommended she have surgery. She delayed and did not schedule surgery until five days before trial.

¹Summerfield v. Coca Cola Bottling Co., 113 Nev. 1291, 1294-95, 948 P.2d 704, 705-06 (1997).

The majority finds it significant that appellant had argued that her permanent health status would be uncertain until after the surgery. I am not persuaded this renders the judge's denial of her motion clearly erroneous. Often plaintiffs proceed to trial with surgery indicated but as yet unperformed. The jury is able to evaluate this evidence in determining what, if any, future medical damages to award.

Likewise, the judge's decision that Dr. Dow should not testify nor could his notes and report be referred to by Dr. Krieger was proper. Dr. Dow was not timely disclosed as an expert.

I would affirm the district court's decision in all respects.



Agosti J.