

IN THE SUPREME COURT OF THE STATE OF NEVADA

NELSON PACIFIC CORPORATION,
PREDECESSOR TO GWN, INC., D/B/A
DELTA INDUSTRIES; AND GARY
NELSON AND LINDA NELSON,
HUSBAND AND WIFE,
Appellants,

vs.

SOUTHWEST BUILDERS &
DEVELOPMENT, INC., A NEVADA
CORPORATION; AND L & L
PLUMBING, INC.,
Respondents.

NELSON PACIFIC CORPORATION,
PREDECESSOR TO GWN, INC., D/B/A
DELTA INDUSTRIES; AND GARY
NELSON AND LINDA NELSON,
HUSBAND AND WIFE,
Appellants,

vs.

SOUTHWEST BUILDERS &
DEVELOPMENT, INC., A NEVADA
CORPORATION; AND L & L
PLUMBING, INC.,
Respondents.

No. 35825

DEC 11 2002

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JANETTE H. FLOON
CLERK OF SUPREME COURT
J. Richards
DEPT. DEPUTY CLERK

No. 36081

ORDER OF AFFIRMANCE

Appellants Nelson Pacific Corporation, predecessor to GWN, Inc., d/b/a Delta Industries, and owners Gary and Linda Nelson (collectively "Delta") appeal from a judgment in a contract dispute following a jury trial. On appeal, Delta raises various arguments, which challenge the jury's verdict and Delta's post-trial motion in favor of respondents Southwest Builders & Development, Inc. (Southwest) and L & L Plumbing, Inc. We conclude that all of Delta's contentions lack merit.

Delta first contends that the district court erred in giving an instruction to the jury concerning recovery of extra-contractual damages for breach of the implied covenant of good faith and fair dealing. In response to Delta's contention, Southwest argues that Delta waived any challenge to the extra-contractual-damages instruction. We agree. Delta failed to object to the instruction at trial and failed to raise the issue in its post-trial motion for a new trial, thus failing to apprise the district court of the issue of law involved—the law on tortious, bad-faith breach.¹ Accordingly, we conclude that Delta is precluded from appellate review regarding this issue, including a plain-error review.²

Delta next contends that a new trial is warranted because prejudicial conduct and comments of Southwest's and L & L Plumbing's counsels throughout the trial proceedings permeated the trial, causing the jury to be influenced by passion and prejudice in reaching its verdict. In its answering brief, Southwest argues that because Delta did not present its attorney misconduct argument to the district court in its post-trial motion for a new trial, Delta's argument on appeal should be deemed

¹See NRCP 51 ("No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."); see also Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (holding that "when the record does not contain the objections or exceptions to instructions given or refused," appellate review is precluded); Otterbeck v. Lamb, 85 Nev. 456, 460, 456 P.2d 855, 858-59 (1969) ("If no objection to an instruction is made, there is no compliance with Rule 51 and the error is not preserved for appellate consideration.").

²See Tidwell v. Clarke, 84 Nev. 655, 660-61, 447 P.2d 493, 496 (1968) (holding that a plain-error review is appropriate only when appellant apprises the trial court of the issue of law involved).

waived as being improperly raised for the first time on appeal.³ We agree. Notwithstanding, we conclude that under a plain-error review, the alleged instances did not amount to misconduct that permeated the trial and tainted the jury's verdict.⁴

Delta next argues that the district court erroneously permitted Southwest's expert Thomas Cargill, an economist, to testify in rebuttal when Southwest did not disclose the expert. But Southwest listed Cargill in its amended witness list dated October 14, 1999, and although he was not listed as an expert witness, the list noted that Cargill had a Ph.D. and that he worked in the Department of Economics at the University of Nevada Reno. Therefore, we conclude that the district court did not abuse its discretion in allowing Cargill to testify as a rebuttal witness.⁵

Delta next contends that the district court abused its discretion when it allowed Southwest's counsel to use deposition testimony of another witness to refresh Mr. Nelson's recollection. However, Southwest's counsel used the proper procedure to refresh Mr. Nelson's

³See Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

⁴See DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000) (holding that a new trial is warranted where attorney misconduct permeates the trial to the extent that it produced a verdict based on passion and prejudice); see also Canterino v. The Mirage Casino-Hotel 117 Nev. 19, 24-25, 16 P.3d 415, 418-19 (2001), opinion modified on rehearing, 118 Nev. ____, 42 P.3d 808 (2002).

⁵See Otis Elevator Co. v. Reid, 101 Nev. 515, 523, 706 P.2d 1378, 1383 (1985) (reviewing a district court's decision to allow an undisclosed expert witness to testify under an abuse-of-discretion standard).

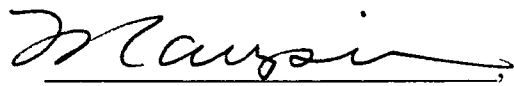
recollection; and when Southwest's counsel attempted to admit the deposition testimony, Delta's counsel objected and the court sustained the objection. Thus, we conclude that the district court did not abuse its discretion regarding this issue.⁶

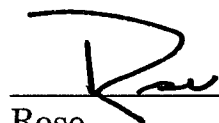
Finally, Delta argues that the district court erroneously denied its motion to dismiss Southwest's lien because Southwest included profits. We disagree. NRS 108.222(1) provides that a general contractor, who performs services and supplies materials to be used for construction of a building, has a lien upon the premises in the amount pursuant to the contract. We conclude that Delta's contention lacks merit because pursuant to the contract between Delta and Southwest, Southwest was to receive \$60,000 in addition to reimbursement for materials and labor.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 _____, C.J.
Young

 _____, J.
Maupin

 _____, J.
Rose

⁶See Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998) (noting that the district court's determination regarding the admission of evidence will not be disturbed on appeal unless manifestly wrong), modified on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 21 P.3d 11 (2001).

cc: Hon. Steven P. Elliott, District Judge
Carucci, Thomas & York
Jack D. Campbell
Lyle & Murphy
Washoe District Court Clerk