IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SIDNEY STAFFORD; AND PULTE BUILDING SYSTEMS, LLC,
Appellants,
vs.
REBECCA MAGRUDER,
Respondent.

No. 66415

FILED

JUL 15 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a motion for new trial in a tort action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Following an auto collision, Rebecca Magruder filed a complaint for negligence against Sidney Stafford and his employer, Pulte Building Systems, LLC (collectively, "Pulte").[1] Prior to trial, Magruder filed a motion in limine seeking, in relevant part, to prohibit Pulte's accident reconstruction and biomechanical experts, Terry Knapp and Mark Cannon, from testifying at trial. Magruder argued that the experts' opinions were inadmissible under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). After conducting a hearing the district court denied the motion.

The jury trial was bifurcated, beginning with a liability phase to be followed by a causation/damages phase. During the liability phase of the trial, Magruder orally requested that Pulte's expert Cannon be

[1]We do not recount the facts except as necessary to our disposition.

prohibited from remaining in the courtroom while other witnesses testified. The district court denied the motion. Magruder then decided to preemptively call Cannon to testify during her case-in-chief.

At the conclusion of the liability phase, the jury returned a verdict finding both Magruder and Pulte negligent and assigning 55% fault to Magruder. Magruder then filed a motion for new trial pursuant to NRCP 59(a)(1) in which she argued that she was prejudiced by Cannon's inadmissible testimony and by the inclusion of jury instruction no. 22. Without addressing the alternate ground asserted, the district court concluded that Cannon should have been precluded from testifying and granted Magruder's motion. This appeal followed.

The principal question raised by this appeal is whether, by preemptively calling Cannon to testify, Magruder waived her previous pre-trial objection to Cannon's testimony. For the reasons set forth herein, we conclude that she did not and affirm the district court's order.

Magruder did not waive her objection to Cannon's testimony

Here, Magruder filed a pre-trial motion in limine challenging Cannon's testimony as inadmissible on the ground that Cannon lacked the requisite evidentiary foundation for his opinions and did not meet the assistance requirement set forth in *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). After the court denied that motion, Magruder herself then called Cannon to testify in what Magruder characterizes as a "preemptive strike" to point out the shortcomings of Cannon's testimony to the jury and neutralize its effectiveness before Pulte could present its defense, and before Cannon could observe Magruder's testimony. Pulte argues that once Magruder called Cannon to testify, she waived her earlier objection to the substance of his testimony as well as to his expert qualifications. We disagree.

Answering the question before us implicates two conflicting principles. On the one hand, a fully litigated pre-trial motion in limine is generally sufficient to preserve an issue for appellate review even without a subsequent renewal of that objection at trial. *BMW v. Roth*, 127 Nev. 122, 136–37, 252 P.3d 649, 659 (2011) ("where the admission or exclusion of evidence at trial is in harmony with the order in limine, the alleged error at trial is the same as the error alleged in the ruling on the motion. Therefore, because there is no new error, the motion in limine properly preserves the error claim."). *See also Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002) (in criminal cases, "[W]here an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal.").

On the other hand, it is also true that, in general, "[a] party cannot complain of evidence which the party itself has introduced or brought in." 75 Am. Jur. 2d Trial § 349. But the parties do not cite, and our own research does not reveal, any Nevada authority resolving the question of whether a civil litigant who unsuccessfully sought to exclude evidence through a pre-trial motion in limine may nonetheless preemptively introduce the contested evidence at trial without waiving the earlier objection. The closest Nevada authority is a criminal case, *Pineda v. State*, 120 Nev. 204, 88 P.3d 827 (2004), which we find instructive.

In *Pineda*, the district court ruled before trial that the defendant's prior felony convictions could be used for impeachment under NRS 50.095(1) if the defendant chose to testify. 120 Nev. at 208, 88 P.3d

at 830. The defendant testified at trial and chose to preemptively introduce the prior convictions himself during his direct examination. *Id.*

On appeal, the defendant challenged the district court's pre-trial order in limine and argued that his prior convictions should never have been admitted into evidence and that he was entitled to a new trial during which no evidence of his prior criminal convictions would be presented by either party. *Id.* In response, the State argued that the defendant waived his right to contest the ruling in limine because the defendant himself elicited the evidence, relying upon *Ohler v. U.S.*, 529 U.S. 753 (2000), in which the United States Supreme Court held that a defendant who preemptively introduces evidence of a prior conviction on direct examination following an adverse in limine ruling may not claim on appeal that the admission of such evidence was erroneous. *See id.*; *Ohler*, 529 U.S. at 760.

In resolving the appeal, the Nevada Supreme Court declined to follow *Ohler*, and instead held that the admissibility of such evidence is still subject to review on appeal "where the defendant, as a tactical matter, elects to introduce such evidence after having objected to basic admissibility via a fully litigated motion in limine." *Pineda*, 120 Nev. at 209, 88 P.3d at 831. The court reasoned that this conclusion represented a logical extension of its decision in *Richmond*, 118 Nev. 924, 59 P.3d 1249 (2002), under which the defendant's objection would have been preserved had he instead waited for the State to introduce the evidence first. *Id.*

We conclude that the court's reasoning in *Pineda* applies equally in the context of a civil action, and therefore that Magruder did not waive her previous pre-trial objection by preemptively calling Cannon during her own case-in-chief. This is especially so when one of the

motivating factors that prompted Magruder to call Cannon when she did was to prevent Cannon from first hearing the testimony of other witnesses and possibly adjusting his testimony accordingly.

Here, Magruder initially objected to the sum and substance of Cannon's testimony via pre-trial motion. Then, at trial, Magruder requested that Cannon not be allowed to hear the testimony of other witnesses before being asked to testify himself. Only after both requests were denied did Magruder decide to present Cannon's testimony in her own case-in-chief, in what appears to have been an effort not only to preemptively mitigate the harm of Cannon's testimony but also to lock it in place before Cannon could observe Magruder testify.

Under these circumstances, we conclude that Magruder did not waive her pre-trial objection when, after her objection was overruled, she preemptively chose to call Cannon to testify in her own case-in-chief in order to limit any damage that might have resulted from Cannon's testimony and to mitigate any prejudice that might have resulted from the district court's potentially erroneous denial of Magruder's initial objection. *See Pineda*, 120 Nev. at 209, 88 P.3d at 831; *see also Lawrence v. MountainStar Healthcare*, 320 P.3d 1037, 1057 (Utah Ct. App. 2014), *cert. denied sub nom. Lawrence v. MountainStar*, 329 P.3d 36 (Utah 2014) ("[Appellant's] attempt to mitigate any harm from the trial court's adverse ruling by introducing the evidence, asking her witnesses about it, and stipulating to the precise language the jury would hear did not amount to a waiver or an invited error."); *Dickerson v. Chadwell, Inc.*, 814 P.2d 687, 690–91 (Wash. Ct. App. 1991) ("Washington courts have repeatedly held that a party prejudiced by an evidentiary ruling who then introduces the adverse evidence in an effort to mitigate its prejudicial effect is not

precluded from obtaining review of the ruling."). *But see Simmons v. Garces*, 763 N.E.2d 720, 738 (Ill. 2002) (holding objection waived where party failed to object at trial and introduced evidence originally sought to be excluded on direct examination).

The district court did not abuse its discretion by concluding that Cannon's testimony was inadmissible

Pulte also asserts that, even if Magruder's objection was not waived, the district court should not have granted a new trial because Cannon's testimony was admissible and therefore the district court's initial decision to permit Cannon to testify was not erroneous.

We review a district court's decision to permit or exclude expert testimony for abuse of discretion. *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008); *Brown v. Capanna*, 105 Nev. 665, 671–72, 782 P.2d 1299, 1303–04 (1989). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

As the Nevada Supreme Court explained in *Hallmark*,

> [t]o testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

124 Nev. at 498, 189 P.3d at 650 (alterations in original). Here, the parties focus their arguments on the assistance requirement.

To meet the assistance requirement, the expert's testimony must be "relevant and the product of reliable methodology." *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (internal citations omitted). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. In determining whether an expert's opinion is based upon reliable methodology, the court considers, among other things, whether the opinion is "based more on particularized facts rather than assumption, conjecture, or generalization." *Hallmark*, 124 Nev. at 500–01, 189 P.3d at 651–52 (internal citations omitted).

Having reviewed the record on appeal, we cannot say that no reasonable judge could have concluded that Cannon did not meet the assistance requirement. Therefore, we conclude that the district court did not abuse its discretion by concluding that Cannon's testimony was inadmissible. *See Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

The district court did not abuse its discretion by granting Magruder's motion for a new trial

Under NRCP 59(a)(1), the court may grant a new trial where an aggrieved party's substantial rights have been materially affected by an "[i]rregularity in the proceedings of the court, . . . or any order of the court . . . , or abuse of discretion by which either party was prevented from having a fair trial . . . ." "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

Here, the district court reasoned that given the closeness of the jury's determination, that Magruder was 55% negligent as compared

to Pulte's 45% negligence, Cannon's testimony likely played an important role in the jury's verdict. The district court also noted Stafford's testimony that he did not see Magruder until after the collision occurred, and concluded that Cannon's testimony was the only testimony contradicting Magruder's description of the collision. Thus, the district court concluded that a new trial was warranted because Cannon's testimony materially affected Magruder's substantial rights and prevented her from having a fair trial. Under these facts, we cannot say that the district court committed a palpable abuse of discretion in granting a new trial.[2]

We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

[2]Because we conclude that the district court did not err by granting the motion for new trial based on the prejudicial effect of Cannon's testimony, we need not address the parties' arguments concerning jury instruction no. 22, the so-called "range of vision" instruction.

cc: Hon. Douglas Smith, District Judge
Jack C. Cherry, Settlement Judge
Koeller Nebeker Carlson & Haluck, LLP/Las Vegas
Cloward Hicks & Brasier PLLC
Eighth District Court Clerk