IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH GUASCH; JOSEPH GUASCH, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF SYLVIA LARUE GUASCH; ESTATE OF SYLVIA LARUE GUASCH; JOSEPH GUASCH, AS NATURAL PARENT AND GUARDIAN OF AMY GUASCH, A MINOR; AND AMY GUASCH, A MINOR,
Appellants,
vs.
NARESH SINGH, M.D.,
Respondent.

No. 36748

FILED

MAR 0 6 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellants Joseph Guasch, the Estate of Sylvia Guasch, and Amy Guasch appeal from a judgment in a medical malpractice action following a jury trial in favor of respondent Naresh Singh, M.D. and from an order denying their new trial motion. Appellants raise various arguments challenging the district court's order denying their motion for a new trial. We conclude that appellants waived their arguments for appeal.

Appellants first contend that the district court abused its discretion by denying appellants a new trial in light of alleged violations of NRS 41.141(3), stating that a settling defendant's comparative negligence or amount of settlement must not be admitted into evidence or considered by the jury. In particular, appellants contend that Dr. Singh elicited testimony from appellants' expert and made statements and arguments in violation of NRS 41.141(3). In response to appellants' contention, Dr. Singh argues that appellants failed to preserve the issue for appeal. We agree. Regarding the cross-examination of appellants' expert, appellants

contend that they objected and the objection was addressed at a sidebar; however, the record does not reveal that an objection was made, but merely notes that a brief discussion was held off the record. This, we conclude, is insufficient to preserve an issue for appellate review.[1]

Next, appellants contend that the district court abused its discretion in giving the "but for" instruction instead of the "substantial factor" instruction regarding causation. In his answering brief, Dr. Singh argues that appellants waived this issue for appeal because appellants failed to object at trial.[2] We agree. Appellants admit that they offered the "but for" instruction, without offering the "substantial factor" instruction. Because appellants failed to apprise the district court of the issue of law involved, we conclude that appellants are precluded from appellate review regarding this issue, including a plain-error review.[3]

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[1]See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

[2]See 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 for 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.").

[3]See 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); see also Barnes v. Delta Lines, Inc., 99 Nev. 688, 691, 669 P.2d 709, 710 (1983) (same).

Having concluded that appellants waived their arguments on appeal, we[4]

ORDER the judgment of the district court AFFIRMED.[5]

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

_____, Sr.J.
Young

cc: Hon. Mark R. Denton, District Judge
Brenske & Christensen
John H. Cotton & Associates, Ltd.
Clark County Clerk

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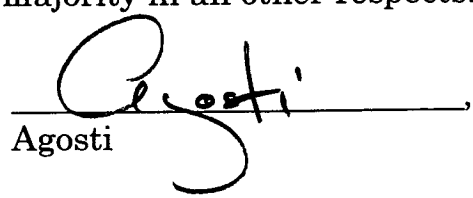
[4]The Honorable Myron E. Leavitt, Justice, did not participate in the decision of this matter.

[5]The Honorable Cliff Young, Senior Justice, having participated in the oral argument and deliberations of this matter as a Justice of the Nevada Supreme Court, he was assigned to participate in the determination of this appeal following his retirement. Nev. Const. Art. 6, § 19; SCR 10. The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

AGOSTI, C.J., concurring:

By way of response to Justice Maupin's concurrence, the record in this case is devoid of any objection, clear or otherwise, to the questions posed to appellant's expert by respondent's counsel. It is a dangerous practice to stretch, as Justice Maupin would, to create a record so that an issue of interest may be addressed. To infer an objection from a record such as exists in this case would create an area so gray that almost any issue could fit within it for purposes of an appeal. This suggested approach does not benefit the orderly address of truly contested and properly preserved issues. Neither the law nor the bar is served by engaging in such intellectual gymnastics for the purpose of getting to an issue. I therefore concur wholeheartedly with the majority's conclusion that the record is insufficient to preserve this issue for appellate review.

I also concur with the majority in all other respects.



Agosti, C.J.

MAUPIN, J., concurring:

While I concur in the result reached by the majority, I would consider the merits of appellants' claim that a violation of NRS 41.141(3) occurred when defense counsel elicited evidence concerning the conduct of one or more non-settling defendants.

Appellants originally commenced the wrongful death action below, sounding in medical malpractice, after obtaining a favorable finding by a medical legal screening panel against six physicians. Appellants received settlements totaling $1.97 million with five of the defendants, and appellants proceeded to trial against respondent. During trial, respondent's counsel cross-examined appellants' expert in such a way as to suggest that none of the decedent's treating physicians, which included the settling defendants, committed malpractice; i.e., that the decedent received "optimal" care from all of her medical providers. Appellants contend on appeal that this line of questioning violated the Nevada "comparative negligence" statute, NRS 41.141.[1]

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[1]NRS 41.141 provides, in pertinent part:

> 1. In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or his decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought.
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> 2. In those cases, the judge shall instruct the jury that:
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> (a) The plaintiff may not recover if his comparative negligence or that of his decedent is

continued on next page . . .

Although the trial record contains no clear objection by appellants to the line of questioning, it appears that some concern over this issue was expressed at an unreported sidebar conference. Also, appellants lodged and litigated a motion for a new trial based upon the propriety of this defense strategy. Appellants' primary argument on appeal deals with the line of inquiry, and the record is sufficient from a standpoint of the evidence admitted for us to resolve the application of NRS 41.141(3) in this context. In my view, there was no error in the line of questioning.

. . . *continued*

> greater than the negligence of the defendant or the combined negligence of multiple defendants.
>
> (b) If the jury determines the plaintiff is entitled to recover, it shall return:
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> (1) By general verdict the total amount of damages the plaintiff would be entitled to recover without regard to his comparative negligence; and
>
> (2) A special verdict indicating the percentage of negligence attributable to each party remaining in the action.
>
> 3. If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

Discussion

Appellants contend that respondent was prohibited under NRS 41.141(3) from introducing any evidence concerning the culpability or non-culpability of non-parties at trial. Appellants also contend that the only way they could have responded to the premise of the defense that none of the treating physicians were negligent was to (1) elicit evidence of the negligence of the settled defendants and (2) demonstrate the extent of the misconduct by admitting the amounts of the settlements.

A literal reading of NRS 41.141(3), as well as our decision in Moore v. Bannen,[2] absolutely prohibits evidence of the fact of, or the amount of settlements with, persons or entities not parties to the trial proceedings. This does not, however, prevent admission of evidence inculpating or exculpating non-parties to the trial. NRS 41.141(3) only prevents a "comparative fault" or apportionment analysis of the evidence as to non-parties, and NRS 41.141(2) two only allows "apportionment" of fault by the jury as between parties and non-parties.[3] These provisions, when read together, do not prevent a party defendant at trial from establishing that no negligence of any kind occurred or that the entire responsibility for a plaintiff's injuries rests with others. Appellants were free, in my view, to respond at trial by proving that all or any of the settled defendants were negligent (without mentioning the fact that settlements were effected), that the negligence of the defendant at trial

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[2]106 Nev. 679, 799 P.2d 564 (1990).

[3]See Warmbrodt v. Blanchard, 100 Nev. 703, 692 P.2d 1282 (1984) (holding that district court erred in instructing the jury to consider and apportion negligence of non-parties to the trial via special verdict).

was part of a pattern, or that decedent's injuries were caused by a sequence of negligent events, which included misconduct by the defendant.

I would note that appellants' counsel in this case ably presented a case of negligence against respondent and demonstrated, at least inferentially, that the overall care provided decedent, including that of Dr. Kaner, was mismanaged. However, the jury adopted the approach taken by the defense. We must defer to that decision.

 , J.

Maupin