IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CONNIE SWEET,
Appellant,
vs.
HARRAH'S LAS VEGAS, INC., A NEVADA CORPORATION,
Respondent.

No. 65556

CONNIE K. SWEET,
Appellant,
vs.
HARRAH'S LAS VEGAS, INC., A NEVADA CORPORATION,
Respondent.

No. 69453

ORDER OF AFFIRMANCE

This is an appeal from a jury verdict, a district court order denying a motion for a new trial, and a district court order denying a motion for relief from judgment. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

While visiting Harrah's Las Vegas, Appellant Connie Sweet slipped and fell on what she describes as a large pool of liquid that had spilled onto a marble floor. She sued Harrah's for negligence, claiming Harrah's failed to properly inspect, maintain, and clean its floors in a manner so that its premises were reasonably safe for patrons. The case proceeded to trial, and the jury returned a verdict for Harrah's. Sweet timely moved for a new trial under Nevada Rule of Civil Procedure (NRCP) 59, which the district court denied. Sweet appealed both the denial of the new trial and the jury verdict to this court.

During the pendency of that appeal, Sweet learned of a different slip and fall suit against Harrah's, from which she garnered new information concerning her own case. Sweet again moved for a new trial, this time alleging fraud upon the court under NRCP 60(b), and the district court again denied relief. Sweet thereafter appealed the district court's ruling and this court consolidated Sweet's appeals.[1]

Sweet's NRCP 59 Motion for a New Trial

Sweet contends that she is entitled to a new trial under NRCP 59 for three reasons: (1) the district court erred when it excluded some of her proposed rebuttal evidence relating to the slip-resistant properties of certain cleaning products, resulting in the jury having heard false testimony; (2) the jury was incorrectly instructed; and (3) counsel for Harrah's committed attorney misconduct during the trial. This court reviews the denial of a motion for new trial for an abuse of discretion. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (citing *Langon v. Matamoros*, 121 Nev. 142, 143, 111 P.3d 1077, 1078 (2005)).

The district court did not err in excluding the Material Safety Data Sheets

The district court excluded Material Safety Data Sheets (MSDS) regarding the chemicals V2 and V3 because Sweet did not identify them before trial as required by NRCP 16.1(a)(3). We review a district court's decision to admit or exclude evidence for abuse of discretion, and its decision will not be overturned "absent a showing of palpable abuse[.]" *Nevada Power Co. v. 3 Kids LLC*, 129 Nev. 436, 444, 302 P.3d 1155, 1160 (2013) (quoting *M.C. Multi-Family Dev., LLC v. Crestdale Assoc., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008)).

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

In reviewing the record, we are concerned about some of the events that occurred during discovery. A plausible case can be made that Harrah's was less than forthcoming during pre-trial discovery. In response to interrogatories which directly requested information about Harrah's safety procedures, Harrah's produced documents which only identified V2 and V3 as cleaning agents, without referring to their non-slip qualities. Harrah's then produced an NRCP 30(b)(6) witness who was woefully ignorant regarding the areas of inquiry specifically outlined by Sweet in her 30(b)(6) notice.

Furthermore, the testimony of some of Harrah's witnesses regarding V2 appeared to change between the time of their depositions and the time of trial. Had Sweet sought timely pre-trial intervention from the discovery commissioner, we would likely approve of her intervention in this matter on appeal. Had the district court been asked to strike the trial testimony of Harrah's employees because of their failure to completely disclose their opinions during their deposition prior to proffering them at trial and granted that request, we would likely have affirmed the district court. But Sweet sought no such relief, and therefore neither of these questions is before us.

Rather, the question here is whether the district court palpably abused its discretion when it excluded the MSDS. We cannot conclude that it did. Sweet conceded that she did not technically comply with the deadlines imposed by NRCP 16.1(a)(3), and we cannot conclude that the district court abused its discretion by enforcing a deadline expressly imposed by the NRCP.

Sweet argues that her non-compliance should be excused because Harrah's ambushed her by failing to provide adequate discovery

responses regarding V2 and V3. But a marble porter at Harrah's, Carol Frank, testified during her pre-trial deposition that she believed that V2 had slip-resistant qualities by itself, and she identified the basis for this belief as the label of the V2 bottle. Sweet concedes that the V2 bottle characterizes V2 as having such qualities. As Sweet notes, the bottle label appears to be contradicted by the manufacturer's own MSDS data sheets, but we have no way of reconciling this discrepancy based on the appellate record alone.

Furthermore, Sweet was allowed to introduce evidence (through Thomas Jennings, for example) that V2 by itself had no slip-resistant qualities. Moreover, on cross-examination, Sweet was able to demonstrate that Frank's belief in V2's slip-resistant qualities arose from tenuous grounds, as she readily conceded. Therefore, we cannot conclude that an abuse of discretion occurred warranting reversal.

The district court did not abuse its discretion by giving jury instruction 28

Sweet argues that the district court incorrectly instructed the jury in instruction 28, which Sweet contends did not represent an accurate statement of Nevada law.

This court reviews a district court's decision to give a jury instruction for abuse of discretion. *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006). However, we review de novo whether "a proffered instruction is an incorrect statement of the law." *Cook v. Sunrise Hosp. & Med. Ctr.*, 124 Nev. 997, 1003, 194 P.3d 1214, 1217 (2008) (footnote omitted). If a jury instruction is a misstatement of the law, it only warrants reversal if it caused prejudice and "but for the error, a different result may have been reached." *Id.* at 1006, 194 P.3d at 1219 (footnote omitted); *see Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009).

Here, our review of the matter is complicated by the fact that the district court settled the jury instructions in some kind of off-the-record colloquy (the trial record doesn't clearly specify the precise procedure used), which was not memorialized. Furthermore, Sweet neither objected to the procedure for settling jury instructions, nor sought to memorialize the substance of any off-the-record discussions when the court came back into session.

When the district court resumed proceedings on the record, Sweet noted that she objected to instruction no. 28, but failed to explain or set forth any basis for the objection; this was an incomplete objection. *See Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 475-77, 635 P.2d 276, 276-78 (1981) (objections to jury instructions must be made on the record and the objecting party must state the basis for the objection).

Furthermore, the record is silent as to whether Sweet ever proposed an alternative instruction of her own in lieu of instruction no. 28. The record does indicate that (at some unknown point in time) Sweet proposed an instruction that the district court accepted and gave as instruction no. 27; whether this was submitted as an alternative to instruction no. 28, or completely independent of it, is unclear from the record. But the record does indicate that the district court considered instructions 27 and 28 to complement each other and address the same legal standard.

In the absence of a clear and complete objection, our review of the matter is limited to determining whether "plain error" occurred. *See* NRCP 51(d) (providing that a party must either make "a proper objection" or show "plain error" to preserve an instructional error for review). On

appeal, Sweet asserts that jury instruction no. 28 is incomplete and fails to track the Nevada pattern jury instruction regarding premises liability. But courts are not required to mechanically give the pattern instructions. *See Wyeth v. Rowatt*, 126 Nev. 446, 464, 244 P.3d 765, 778 (2010) ("A district court is not bound by the suggested language of the standard instructions and is free to adapt them to fit the circumstances of the case.").

Sweet also asserts that jury instruction no. 28 is incomplete, and viewed in isolation, instruction no. 28 does appear to incompletely state Nevada premises liability law. *See Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993). However, jury instructions cannot be read in isolation but must be read in conjunction with all of the other instructions given by the district court, because that is how the jury heard them. *See D & D Tire v. Ouellette*, 131 Nev. ___, ___, 352 P.3d 32, 38 (2015) (holding that "if an instruction is not technically correct, the instruction should be examined in the context of all instructions given to the jury" (quoting *Gordon v. Hurtado*, 96 Nev. 375, 380, 609 P.2d 327, 330 (1980))).

This is especially so when the district court below considered instructions 27 and 28 to complement each other. When all of the instructions are read together, they do not misstate the law of premises liability; in particular, instruction 27 provides additional definition, and instructions 27 and 28, taken together, do not misstate the law such that we can say that "plain error" occurred. Therefore, the district court did not commit plain error when it gave jury instruction 28 along with the other instructions.

The district court did not abuse its discretion by denying the motion for a new trial due to attorney misconduct

Sweet contended to the district court that attorney misconduct by Harrah's warranted a new trial. The district court made factual findings regarding the misconduct, and on appeal we must give deference to those findings. *See Lioce v. Cohen*, 124 Nev. at 1, 20, 174 P.3d at 970, 982 (2008).

Whether an attorney's comments constitute misconduct is a question of law reviewed on appeal de novo. *BMW v. Roth*, 127 Nev. 122, 132, 252 P.3d 649, 656 (2011). If such misconduct has occurred, this court next determines the proper legal standard to apply in assessing whether the misconduct warrants a new trial. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, ___, 319 P.3d 606, 611 (2014). Finally, we determine whether the district court abused its discretion in applying that standard. *Id.*

Misconduct occurred

Nevada Rule of Professional Conduct 3.4(e) prohibits attorneys from stating to juries, "a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused." In the instant case, counsel for Harrah's made several comments which arguably interjected his personal opinion as to the culpability of Harrah's. He used the verbal rhetoric, "I think" to highlight his arguments that he thought Harrah's acted reasonably, that certain jury instructions were more important than others, and that the systems Harrah's had in place to respond to spills were "very, very good." In this case, the interjection of the phrase "I think" does rise to the level of attorney misconduct, but does not constitute reversible error.

However, misconduct also occurs when an attorney deliberately attempts to appeal to the economic prejudices of the jury by

commenting on the wealth of a party. *Cf. Olson v. Richard*, 120 Nev. 240, 244, 89 P.3d 31, 33 (2004) (footnote omitted) (concluding it was improper for counsel to "inform[] the jury that his clients were not wealthy people"). During both opening and closing arguments, Harrah's suggested that Sweet gambled $500,000 a year, and during the trial elicited testimony that Sweet gambled in excess of $500,000 per year. Although ostensibly presented for the purpose of showing Sweet's familiarity with the environment in casinos, the arguments unnecessarily served the purpose of suggesting that Sweet was wealthy, a conclusion totally irrelevant to a negligence action. We conclude, as a matter of law, that this line of argument and questioning constitutes misconduct.

The misconduct does not amount to plain error

Having determined that misconduct occurred when Harrah's counsel interjected his personal opinions and impermissibly suggested Sweet was wealthy, we turn to the second step in the analytical process. In this case, Sweet did not assert a timely objection to the arguments surrounding her gambling habits. When resolving a motion for a new trial based on unobjected-to attorney misconduct, "the district court must treat the attorney misconduct issue as having been waived, unless plain error exists." *See Lioce*, 124 Nev. at 19, 174 P.3d at 982.

To decide whether plain error exists, the district court must determine "whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." *Id.* And for unobjected-to attorney misconduct, irreparable and fundamental error "is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different." *Id.* (footnote omitted). In other words, plain error

requires a party to show "that no other reasonable explanation for the verdict exists." *Id.* at 16, 174 P.3d at 980 (footnote omitted) (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)).

Below, the district court found that statements about Sweet's gambling did not constitute plain error because they were not so egregious as to impair justice nor deny Sweet of her fundamental rights, concluding that "there is no evidence to suggest that absent these allegations of misconduct, the jury would have returned a different verdict."

Here, the district court's findings regarding attorney misconduct were not without basis in the record, and were supported by substantial evidence introduced during the trial. For example, Harrah's introduced evidence that it assigned multiple porters to identify and remove spills from the marble flooring, that it trained all its employees to identify and respond to spills, and that it incentivized employees to report and respond to safety concerns. Testimony indicated that someone specifically responsible for identifying and responding to spills passed through the relevant area every 30–40 minutes throughout the night. The district court found that "both sides presented evidence to the jury concerning the scope of a hotel's duty, safety precautions, maintenance and cleaning policies, inspections, and medical experts who testified as to injury/causation." Thus, the district court properly balanced the evidence supporting the jury's verdict against the severity of the misconduct.

Of concern to us is that the misconduct in this case was repeated and persistent—it occurred during the opening argument, during trial testimony, and then again during closing argument, as part of what may have been a trial strategy implemented by Harrah's. Nevertheless, the district court found that the misconduct did not "permeate the

proceedings," and in view of the trial record and the lack of a timely objection by Sweet, we cannot conclude that this conclusion constituted an abuse of the district court's broad discretion or that the "I think" statements tainted the decision making process.

Sweet's NRCP 60(b) Motion

After learning new information during the course of discovery in another slip-and-fall case against Harrah's, *Ron v. Harrah's Las Vegas, Inc.* (hereinafter "*Ron*"), Sweet again moved for a new trial. Sweet contended that during Carol Frank's deposition in the later *Ron* case, Frank suggested that she may have been intimidated into giving false or misleading testimony during Harrah's earlier trial involving Sweet. Sweet thus argued that Harrah's committed fraud upon the court under NRCP 60(b) when Harrah's counsel intimidated this witness. Sweet also argued Harrah's committed fraud upon the court by suborning perjury of two of its other witnesses and by violating the rules of discovery in order to withhold information and deceive Sweet as to their trial strategy.

NRCP 60(b) affords relief from judgment on specified grounds, some of which are subject to a six-month time limit in which to bring the motion. NRCP 60(b) also contains a "savings clause" that permits the district court to review allegations of "fraud upon the court" outside of the six-month time frame. Such relief is not mandatory and the court "may" relieve a party from judgment "upon such terms as are just[.]" NRCP 60(b). In *NC-DSH, Inc. v. Garner*, the Nevada Supreme Court defined fraud upon the court as:

> that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases

> . . . and relief should be denied in the absence of such conduct.

125 Nev. 647, 654, 218 P.3d 853, 858 (2009) (alternation in original) (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1993)).

A party seeking to vacate based on fraud upon the court "bears a heavy burden" and must provide clear and convincing evidence establishing the attorney defrauded the court. *Id.* at 657-58, 218 P.3d at 860-61. Further, NRCP 60(b) motions based on fraud upon the court are available only "to prevent a grave miscarriage of justice." *Bonnell v. Lawrence*, 128 Nev. 394, 404, 282 P.3d 712, 715 (2012) (quoting *United States v. Beggerly*, 524 U.S. 38, 47 (1998)) (internal quotation marks omitted). A district court's denial of a motion brought under NRCP 60(b) is reviewed for abuse of discretion. *Ford v. Branch Banking & Trust Co.*, 131 Nev. ___, ___, 353 P.3d 1200, 1202 (2015).

The district court did not abuse its discretion in finding insufficient evidence of witness intimidation

The district court found insufficient evidence of witness intimidation to constitute fraud upon the court, and Sweet, relying on Carol Frank's deposition testimony in the *Ron* case, contends this was error.

The record reveals that Frank's testimony during the *Ron* case, though troubling and suspicious, is also somewhat muddled and self-contradictory—at one point she said she felt her job was threatened and that she might face retaliation at work, but then stated unequivocally no one said she would be fired; she also asserted twice that a comment made by Harrah's attorney "put the fear of [G]od in her" and that a threat of losing her job was "put out there." She then suggested that she did not give her full testimony and would have added that fellow employee Joseph

Amato was not as vigilant in monitoring spills as she thought he should have been.

In resolving these contradictions, the district court examined the record in detail and found that "any allegations of witness intimidation had no effect on the veracity of Carol Frank's testimony." Further, the district court noted that while Frank suggested during her deposition in the *Ron* case that Amato may have been less than diligent in generally performing some of his duties, she was never specifically asked about his work habits in Sweet's case, and Sweet's counsel never asked Frank whether any deficiency in Amato's work habits could have particularly affected Sweet's fall. Thus, the district court held that, because "one of the fundamental principles of witness preparation by a lawyer for both deposition and trial [is] to instruct the witness to be truthful, answer only the call of the question, and not to volunteer information," any failure to elicit further testimony about Amato's work habits was not due to witness intimidation or amount to fraud upon the court.

Although the inconsistencies in Frank's testimony are troubling, we cannot say that the district court abused its discretion in denying Sweet's motion. Fundamentally, Frank's testimony during Sweet's trial, though inconsistent in some ways with her later testimony during the *Ron* case, was not entirely favorable to Harrah's; for example, Frank admitted that the marble floors at Harrah's were slippery and that the slip-resistant qualities of V3 were exaggerated. To the extent that her testimony favored Harrah's—for example, Frank testified that V2 was slip-proof even when used by itself—much of her testimony was

corroborated by other witnesses and she was not the only witness to offer such testimony.

Sweet contends that other witnesses may have also been intimidated, but there is no evidence of that; the only evidence of any alleged fraud that has been provided to this court is Frank's testimony from *Ron*. Under the circumstances, we cannot conclude that the district court abused its discretion when it concluded that there was insufficient evidence of witness intimidation or when it denied Sweet's request for an evidentiary hearing to further investigate her allegations. Even if Sweet's allegations were true, intimidation alone does not, by itself, necessarily constitute fraud upon the court, and any intimidation that occurred likely did not affect the integrity of the verdict.

The district court did not abuse its discretion in finding insufficient evidence of discovery violations

Sweet also alleges that Harrah's committed fraud upon the court by providing discovery responses that were deceptive and incomplete. Specifically, Harrah's reported that more than 250 slip-and-falls occurred on its property during discovery in the *Ron* case, but reported only 52 such slip-and-falls to Connie Sweet.

The district court found that a portion of this discrepancy was attributable to differing stipulations entered in the different cases regarding the scope of discovery. However, Sweet argues that the differing stipulations cannot explain away the entire disparity, unless one believes that Harrah's somehow experienced only 52 slip-and-falls in the three years between May 2006 and May 2009, but then suddenly experienced nearly 200 more in only the following two years, from May 2009 to August 2011. While not impossible, the unusual disparity appears to lend some validity to Sweet's suggestion that Harrah's may have been

less than forthcoming in responding to her discovery requests. *See* NRCP 37 ("For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.").

Nonetheless, though the numbers are suspicious, the record on appeal is not compelling enough for us to conclude that fraud occurred. For example, the parties disagree on when the discovery limitations were entered into and even what their exact terms were, and the record is ambiguous. The district court found that the stipulation existed and that it explained away much of the discrepancy, and we cannot conclude that this was not based on evidence that a reasonable mind might accept as adequate to support the district court's conclusion, such as the plain reading of the relevant deposition transcripts and the declarations submitted to the court. *See Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 129 Nev. ___, ___, 312 P.3d 491, 496 (2013). The district court also concluded that if any discovery violations occurred, they did not "subvert the integrity of the court itself, or [constitute] a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases[.]" *NC-DSH, Inc.*, 125 Nev. at 651, 218 P.3d at 858 (quoting *Demjanjuk*, 10 F.3d at 352). The record before us is not such that we can conclude the district court's factual findings constituted an abuse of discretion. *See Ford*, 131 Nev. at ___, 353 P.3d at 1202.

Appeal from the Jury Verdict

"This court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." *Soper By & Through Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995) (citing *Bally's Employee's Credit*

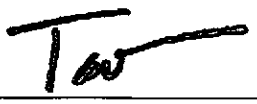
Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989)). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. ___, ___, 335 P.3d 211, 214 (2014). In determining whether substantial evidence exists, we do not revisit questions of credibility, but merely inquire whether the evidence that was most favorable to the prevailing party would have been sufficient to support the verdict had it been entirely believed by the jury and had the opposing party's contrary evidence been disbelieved. *See Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986).

In this case, had Harrah's evidence been entirely believed and Sweet's conflicting evidence been disbelieved, the evidence introduced at trial would have been sufficient for a jury to conclude that Harrah's was not negligent in cleaning and maintaining the pedestrian walkway where Sweet fell. Thus, we cannot agree with Sweet that the verdict was "clearly wrong."

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

SILVER, J., concurring in part and dissenting in part:

Although the district court did not have the benefit of the recent Nevada Supreme Court ruling in *Manning v. State*, 132 Nev. ___, 382 P.3d 908, (2016), a review of the record before this court reflects Sweet adequately preserved her objection to instruction 28 sufficient for this Court to review whether the district court erred. And, based on my review of the entire instructions given by the district court to the jury, I believe that, although the district court's instructions were accurate, they were nevertheless incomplete as to whether Harrah's breached its duty of care as set forth in *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 250, 849 P.2d 320, 322-23 (1993).

Importantly, the supreme court in *Manning* gleaned from the record the context of an appellant's proposed instruction in evaluating whether instructions given by the district court were proper. *Manning*, 132 Nev. at ___, 382 P.3d at 909. The supreme court held that the appellant in *Manning* had adequately preserved his objection, despite the fact that the appellant had failed to preserve his proposed written instruction on the record for appellate review. *Id.* at ___, 382 P.3d at 909-10. In *Manning*, the supreme court stressed that district courts "should solicit written copies of a party's proposed instructions when settling jury instructions," yet nevertheless concluded it could glean from the entire record "the nature of [the defendant's] request [for an instruction] from the context in which it was made." *Id.* at ___, 382 P.3d at 909.

The record in the present case is unclear regarding whether Sweet actually proffered a written instruction with the *Sprague* language.[2] But, similar to *Manning*, we can glean from the arguments made on the record that Sweet clearly objected to Harrah's instruction,[3] and, therefore, that objection was properly preserved. Whether a party submits a written instruction (as in *Manning*), or orally objects to an instruction (as here), it is incumbent upon the district court to ensure the jury is properly instructed on the entirety of the relevant law. *See Crawford v. State*, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005) (noting the district court is ultimately responsible for ensuring the jury is "fully and correctly instructed"). Here, the district court should have provided the jury with Nevada law regarding negligence involving foreign substances resulting from a third party, yet the district court did not instruct the jury on that crucial issue, despite that fact that the instruction containing language from *Sprague* was readily accessible within the Nevada Pattern Jury Instructions. In fact, the Nevada Pattern Jury Instruction goes even further than *Sprague*, by stating the standard also requires inspection and prevention:

> Where the foreign substance is the result of the actions of persons other than the business or its

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[2]*Sprague* states that if the presence of a foreign substance causes an injury and the substance is present as a "result of the actions of persons other than the business or its employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it." *Id.* at 250, 849 P.2d at 322-23.

[3]In particular, this can be seen from Sweet's arguments made in her motion for a new trial and the resulting district court's notes, minute order, and written order.

> employees, liability will lie only if the business had actual or constructive notice of the condition and failed to remedy it, or failed to reasonably prevent or inspect or discover the condition.

Nev. J.I. 8.6 (2011).

Because I believe, from gleaning the entire record, Sweet adequately preserved her objection, I additionally conclude that the district court reversibly erred by failing to instruct the jury regarding premise liability law involving foreign substances, as set forth in *Sprague*. Although instruction 28 was not inaccurate, and instruction 27 adequately addressed duty and foreseeability, it is important to note that Harrah's *never* contested the elements of duty or foreseeability in this negligence action. In fact, in both its arguments to the jury and throughout trial, Harrah's readily acknowledged both its duty to its patrons and foreseeability of spills in its casino. Thus, instructions 27 and 28 only restated what Harrah's admitted during trial. However, the critical question for the jury in this case was whether or not Harrah's beached its duty to Sweet, a patron, and was therefore liable under existing premise liability law *involving the presence of foreign substances caused by a third party*. In reviewing all of the district court's instructions as a whole, the jury was never instructed at all on premise liability involving foreign substances resulting from third-party negligence.

Without the *Sprague* language in any instruction, these instructions actually appear to direct a verdict for Harrah's, just as Sweet argued to the district court in her motion for a new trial. Critically, in my view, instruction 28 appears to absolve Harrah's of liability for injuries occurring on the property, regardless of whether or not Harrah's had notice of a foreign substance. I also note that while the attached juror affidavit was generally inadmissible, it does support the apparent

confusion regarding liability involving spills or negligence committed by third parties on Harrah's premises.

Accordingly, I believe the district court reversibly erred by failing to instruct the jury on the law regarding premise liability involving foreign substances, as set forth in *Sprague*, because the jury instructions as a whole were accurate, but incomplete. This error was compounded when the district court had the opportunity to correct its error of law after trial pursuant to NRCP 59(a)(7), but failed to do so. By denying Sweet's motion for a new trial after failing to provide the jury with the complete law regarding negligence involving foreign substances, the district court further abused its discretion. I do however, concur with the majority on all other issues upon which they affirm the jury's verdict.

I, therefore, respectfully dissent on the issues regarding the district court's failure to completely instruct the jury on the law of negligence, and thereafter denying Sweet's motion for a new trial.

Silver, J.

Silver

cc: Hon. Timothy C. Williams, District Judge
Jack C. Cherry, Settlement Judge
Henness & Haight
Hutchison & Steffen, LLC
Eighth District Court Clerk