IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RUSSELL NEVINS, M.D.; R. NEVINS, M.D., LTD., A NEVADA PROFESSIONAL CORPORATION; AND NEVADA ORTHOPEDIC & SPINE CENTER, LLP, A NEVADA LIMITED LIABILITY PARTNERSHIP,
Appellants,
vs.
MARILYN MARTYN,
Respondent.

No. 69249

FILED

DEC 27 2016

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a district court order granting a new trial in a medical malpractice action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Respondent Marilyn Martyn sued appellant Dr. Russell Nevins, his corporation, and the Nevada Orthopedic & Spine Center (collectively "Nevins") for medical malpractice. A jury found for Nevins following a nine-day trial. Martyn moved for a new trial based on juror misconduct. She supported her motion with affidavits from two jurors detailing a conversation with a third juror.[1] The third juror, Juror 219, allegedly told other jurors her mother was a doctor—a fact not disclosed on Juror 219's questionnaire or during voir dire, although in both instances she was specifically asked whether any of her family were

[1]Although the parties refer to the jurors by name, we decline to do so here.

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involved in the medical field and whether anything would cause her to favor either party.[2] The affidavits showed that jurors were surprised Juror 219 had been selected for the jury in this case despite this possible bias. The district court found the affidavits revealed Juror 219 intentionally concealed a material fact, evincing bias. Accordingly, the district court granted Martyn's motion pursuant to the holding in *Sanders v. Sears-Page*, 131 Nev. ___, 354 P.3d 201 (Ct. App. 2015) and other Nevada law.

After the district court's ruling, Nevins filed a motion for reconsideration, attaching a declaration from Juror 219 disputing the facts set forth in the earlier affidavits. Juror 219, who is originally from Uzbekistan, stated that her mother holds a doctorate degree in biology and physiology, and previously worked as a professor and in a genetics lab in the Soviet Union and then Russia. But, her mother does not hold a medical degree and does not work as a physician. Nevins sought reconsideration, urging the court to either overrule its earlier order, or order an evidentiary hearing to question the jurors. Without holding an evidentiary hearing questioning the jurors, the district court denied the motion, finding the earlier affidavits established "Juror [219] at least considered her mother to be a 'doctor.'"[3]

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[2]For instance, Juror 219 was asked whether there was "anything that you think might affect your ability to be fair and impartial to both sides of a medical malpractice case," whether any family members "ever worked or have any training" in the medical field, and whether she "identif[ied] in any way with one side or the other."

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

Nevins appeals both the grant of a new trial and the denial of reconsideration, arguing no admissible evidence supported the order granting a new trial, and Martyn failed to show any misconduct was prejudicial. Nevins argues the district court further erred by denying reconsideration in light of Juror 219's declaration, and by failing to hold an evidentiary hearing. We disagree that the district court erred by granting a new trial, but we conclude remand is warranted for an evidentiary hearing on the motion for reconsideration.

We review both the grant of a new trial and the district court's findings regarding intentional concealment for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, ___, 319 P.3d 606, 611 (2014); *Canada v. State*, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997). The presence of a biased juror on the jury panel demonstrates prejudice supporting a new trial. *Sanders*, 131 Nev. at ___, 354 P.3d at 208-09. A party moving for a new trial based on juror misconduct must present admissible evidence establishing 1) misconduct and 2) prejudice. *Bowman v. State*, 132 Nev. ___, ___ P.3d ___ (2016); *Hale v. Riverboat Casino, Inc.*, 100 Nev. 299, 305, 682 P.2d 190, 193 (1984) (abrogated on other grounds). Where the moving party alleges a juror engaged in misconduct by withholding information "touching upon his qualification," the withholding "must amount to intentional concealment" to warrant a new trial. *Hale*, 100 Nev. at 305, 682 P.2d at 193. Although juror affidavits generally may not be used to impeach a verdict, an exception is made for juror affidavits showing a juror improperly concealed information during voir dire. *Walker v. State*, 95 Nev. 321, 323, 594 P.2d 710, 711 (1979); *Walkowski*, 87 Nev. at 476, 488 P.2d at 1165.

Here, Martyn presented the affidavits of two jurors averring to what they personally witnessed of another juror during trial. Because those jurors had personal knowledge of these events, they could testify to their observations and impressions.[4] *See, e.g.*, NRS 50.025 (holding generally that a witness may testify to a matter if the witness has personal knowledge of it). This information showed Juror 219 may have harbored bias in favor of physicians and that other jurors were surprised that Juror 219, despite this apparent bias, was selected for the jury in this medical malpractice action. Yet, Juror 219 indicated on her juror questionnaire and during voir dire that no family member was involved with the medical profession and she had no reason to be biased for either party. The contrast between Juror 219's answers to the questionnaire and voir dire questions, and Juror 219's statements and actions in the

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[4]In his reply brief, without specific argument or relevant authority, Nevins asserts that the affidavits also contained inadmissible hearsay. We need not consider arguments raised for the first time in a reply brief, nor need we consider arguments unsupported by cogent argument or relevant authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006); *Weaver v. State, Dept. of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005).

However, we note a district court may consider juror affidavits "for the limited purpose of showing concealment of actual bias." *Walkowski v. McNally*, 87 Nev. 474, 476, 488 P.2d 1164, 1165 (1971). The district court could consider Juror 219's making the statements, independent of their truth, as evidence of bias, in turn suggesting she had concealed bias from the court. As juror bias is grounds for a new trial, even if the district court erred in its reasoning the court reached the correct result. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (we will affirm an order if the district court reached the right results based on incorrect grounds).

jury room, is sufficient to support the district court's findings of misconduct and concealment. And, critically, in opposing the motion for a new trial Nevins failed to present any evidence at all repudiating the affidavits. Under these facts, we cannot say the district court abused its discretion by granting the new trial.

Nevertheless, in considering Nevins' motion for reconsideration, the district court should have held an evidentiary hearing after Juror 219's declaration disputed facts upon which the motion for new trial was granted. We review the decision on a motion for reconsideration for an abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) (noting that a motion for reconsideration is reviewed for an abuse of discretion where appealed with the underlying judgment). "A district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997); *see also Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (a rehearing is proper "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached").

In *Walkowski v. McNally*, 87 Nev. 474, 476, 488 P.2d 1164, 1165 (1971), the supreme court held that when a party seeks a new trial on the basis of juror misconduct, and presents affidavits for the purpose of proving the misconduct, the district court has "a duty to determine the veracity of those affidavits." While the supreme court did not expressly *require* an evidentiary hearing, the court strongly suggested such action is proper, noting that a hearing could simultaneously test the reliability of

affidavits while giving the accused jurors the opportunity to be heard. *Id.* at 476, 488 P.2d at 1165.

Walkowski dealt specifically with a motion for a new trial, rather than a motion for reconsideration.[5] However, we hold that the reasoning in *Walkowski* is instructive because, in either situation, the veracity of the jurors' affidavits is critical to the soundness of the district court's determination in the context of conflicting juror testimony.

Here, Nevins presented an affidavit from the accused juror specifically disputing the allegations in the other two jurors' affidavits. The district court nevertheless failed to hold an evidentiary hearing, concerned that questioning the three jurors might be futile. Although the district court's decision is understandable, a hearing could have clarified what actually occurred in the jury room, and the facts regarding the basis for the claim of bias, thereby providing the district court with a better insight into determining the veracity of the jurors' affidavits.[6] Failing to hold an evidentiary hearing, therefore, was an abuse of discretion in light of Juror 219's later conflicting declaration. Accordingly, we

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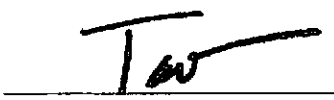
[5]As Nevins does not argue that the district court had a duty to hold an evidentiary hearing before granting the motion for a new trial, we do not address whether an evidentiary hearing was required at that stage.

[6]We make no comment on whether or not, based on the declaration of Juror 219, the district court should or should not grant a new trial based on juror misconduct, and we remand this case only for the district court to make findings of fact and conclusions of law after conducting an evidentiary hearing on the conflicting affidavits.

ORDER this matter REMANDED to the district court for proceedings consistent with this order.[7]

_____, C.J.
Gibbons



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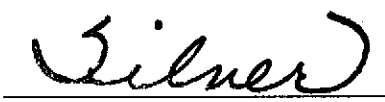

_____, J.
Silver

cc: Hon. Jerry A. Wiese, District Judge
Stephen E. Haberfeld, Settlement Judge
Maupin Naylor Braster
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Gerald I. Gillock & Associates
Eighth District Court Clerk

[7]We have carefully considered Martyn's remaining arguments and conclude they are unpersuasive. In light of our disposition, we need not address Nevins' remaining arguments.