

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY, A POLITICAL  
SUBDIVISION OF THE STATE OF  
NEVADA,  
Appellant,  
vs.  
MARY BARTSAS,  
Respondent.

No. 37944

FILED

NOV 21 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order of the district court granting a new trial pursuant to NRCP 59.

Appellant Clark County filed an eminent domain action against Respondent Mary Bartsas to condemn a portion of her property. Clark County's initial appraiser valued the property at \$2,894,000.00, which included severance damages. Prior to trial, Clark County's initial appraiser retired, and Clark County obtained a second appraisal. The second appraiser valued the property at \$987,000.00, which excluded severance damages. At trial, both appraisals were admitted into evidence in addition to an appraisal procured by Bartsas. During trial, Clark County sought to procure the testimony of its initial appraiser because he had stated during his deposition that he was no longer of the opinion that Bartsas was entitled to severance damages. However, the district court refused to allow the testimony because Clark County had failed to list him as a witness in its pretrial memorandum.

The jury returned a verdict of \$987,000.00, finding that Bartsas was not entitled to severance damages. Thereafter, Bartsas filed a motion for new trial, asserting among other things, that she was surprised at trial by Clark County's initial appraiser's change of opinion.

The district court granted Bartsas' motion for a new trial unless Clark County consented to additur in the amount of \$1,907,000 to the \$987,000 verdict for a total award of \$2,894,000, which included severance damages. Clark County now appeals the district court's order granting a new trial.

Clark County contends that the district court abused its discretion by granting a new trial because Bartsas was not surprised. Clark County notes that the first appraiser never testified as to his revised opinion at trial so that there was no surprise testimony or any resulting prejudice to Bartsas.

NRCP 59(a) provides for a new trial based on, among other things, "surprise which ordinary prudence could not have guarded against."<sup>1</sup> Surprise during trial, by a major change in theory of recovery or introduction of a new theory of defense, undisclosed until after trial is underway, is a long-established ground for granting a motion for a new trial.<sup>2</sup> The grant or denial of a new trial based upon a claim of surprise is within the sound discretion of the district court.<sup>3</sup> This court will not disturb the district court's decision to grant a new trial absent a palpable abuse of that discretion.<sup>4</sup>

After carefully reviewing the record, we conclude that the district court erred in granting a new trial. Considering that Clark

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<sup>1</sup>NRCP 59(a)(3).

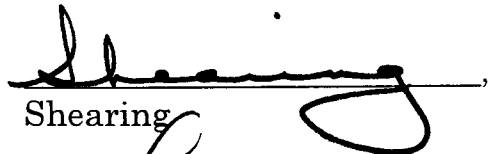
<sup>2</sup>See Sanford v. Crittenden Memorial Hosp., 141 F.3d 882, 886 (8th Cir. 1998).


<sup>3</sup>Havas v. Haupt, 94 Nev. 591, 593, 583 P.2d 1094, 1095 (1978).

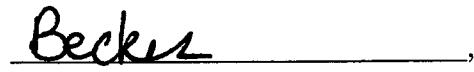
<sup>4</sup>Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996).

County's initial appraisal was admitted into evidence at trial (the initial appraiser was not allowed to testify that he changed his mind), Bartsas stipulated to the admission of Clark County's second appraisal at trial, and she had the opportunity to cross-examine the second appraiser, we conclude that she was not surprised by Clark County's theory of valuation. We further conclude that no other alternate grounds existed for granting Bartsas' motion for new trial. Accordingly, we

ORDER the district court's order granting a new trial REVERSED and instruct the district court to reinstate the jury verdict.

 \_\_\_\_\_, J.  
Shearing

 \_\_\_\_\_, J.  
Leavitt

 \_\_\_\_\_, J.  
Becker

cc: Hon. Mark R. Denton, District Judge  
Michael K. Mansfield  
Netzorg & Caschette  
Clark County Clerk