

IN THE SUPREME COURT OF THE STATE OF NEVADA

ILBERT MEDNICOFF, AN  
INDIVIDUAL; AND CCN, INC., A  
NEVADA CORPORATION,  
Appellants,

vs.

GEORGE F. HOLMAN, AN  
INDIVIDUAL; ROBERT L. BOLICK, AN  
INDIVIDUAL; STEWART A. GOLLMER,  
AN INDIVIDUAL; AND LAW OFFICES  
OF ROBERT L. BOLICK, LTD., A  
PROFESSIONAL CORPORATION,  
Respondents.

No. 39940

**FILED**

**AUG 26 2004**

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order granting a motion for judgment notwithstanding the verdict in favor of respondents, from an order denying appellants' motion for new trial to litigate punitive damages and from the district court's final judgment. We reverse the judgment and orders and remand this matter for a new trial. Eighth Judicial District Court, Clark County; Gene T. Porter, Judge.

FACTS AND PROCEDURAL HISTORY

The action below concerns the claims of appellants, Ilbert Mednicoff and his corporation, CCN, Inc., against their attorneys, respondents Robert L. Bolick, George F. Holman,<sup>1</sup> Stewart A. Gollmer and the Law Offices of Robert L. Bolick, Ltd., a professional corporation.

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<sup>1</sup>Holman was not licensed to practice law in Nevada. He was, however, licensed in the State of South Carolina.

Ilbert Mednicoff retained the Law Offices of Robert L. Bolick, for himself and CCN, in connection with negotiations and litigation with another corporation in which Mednicoff was a minority shareholder. The firm assigned the matter to Gollmer under the supervision of Holman and Bolick. Soon thereafter, Mednicoff entered into a business arrangement (the Interwest transaction) with respondents, which involved the same or a similar enterprise engaged in by CCN and the other corporation with whom the firm was litigating and negotiating, i.e., paid telephonic communication routes. Neither the firm nor its attorneys immediately advised Mednicoff of the rules concerning arrangements between a client and his attorneys and obtained no waiver of the conflict as required by SCR 158(1).<sup>2</sup>

Several months later, respondents notified Mednicoff of the conflict and advised him to seek independent counsel. Mednicoff did not consult with outside counsel, but signed a conflict advisement letter, acknowledging and consenting to further representation despite the conflict.

The course of the relationship between Mednicoff and the firm eventually deteriorated. Thereafter, Mednicoff and CCN filed the action below against the firm and its attorneys, alleging legal malpractice, breach of fiduciary duty, and negligent supervision of Gollmer by the firm.

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<sup>2</sup>SCR 158 states, in pertinent part:

1. A lawyer shall not enter into a business transaction with a client . . . unless:

. . . .

(c) The client consents in writing.

The complaint also sought exemplary damages in conjunction with allegations of breach of fiduciary duty, along with attorney fees and costs.

The matter proceeded to trial, during which the parties presented a substantial and complex body of evidence. After the parties rested their respective cases, the district court instructed the jury on the three causes of action, the parties presented their final arguments and the district court submitted the matter to the jury for its deliberations. The district court, however, refused to allow the jury to consider the question of punitive damages.

Although the district court decided to resolve the factual issues in the case by way of written questions (interrogatories) to the jury, the district court made no record at any time as to the form the verdict would take until after the jury concluded its deliberations. This occurred only when the court clerk read a completed special verdict form drafted by counsel for Mednicoff and CCN, which counsel submitted to the court between closing arguments.<sup>3</sup> There is no indication in the record as to when the special verdict form was provided to respondents' counsel. Respondents' counsel represents that his first opportunity to review the written form occurred after dismissal of the jury.<sup>4</sup> He further asserts that his first exposure to the verdict form occurred during its reading in open

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<sup>3</sup>Thus, the parties were unable to use the verdict form to augment their closing arguments. While this should not have been tolerated by the district court, we cannot discern from this record how this dynamic came about.

<sup>4</sup>Although this was not disputed at the oral argument of this appeal, counsel for Mednicoff and CCN stress that respondents could have objected to any defects in the verdict form upon hearing the verdict as read on the record.

court. In short, the parties agree that the district court never formally approved or settled the verdict form on the record prior to the rendition of the verdict by the jury.

With regard to the malpractice claim, the special verdict form asked the following:

Question No. 1: Were any of the defendants negligent?

Question No. 2: As to each defendant that you answered "yes" to in response to Question No. 1, was such negligence a cause of the damage to either of the plaintiffs?

Question No. 3: Without taking into consideration the reduction of damages due to the negligence of either plaintiff, if any, what do you find to be the total amount of [economic] damages, if any, suffered by each/either plaintiff caused by the incidents involved herein?

Question No. 4: Were either of the plaintiffs negligent?

Question No. 5: Was the negligence of either of the plaintiffs a cause of damage to such plaintiff?

Question No. 6: Assuming that 100% represents the total negligence and fault which was the cause of each of the plaintiffs' [sic] damage, what percentage of this 100% is due to the contributory negligence of either of the plaintiffs and what percentage of this 100% is due to the negligence and fault and wrongful conduct of the defendants and all other persons?

The questions concerning the breach of fiduciary duty cause of action were:

Question No. 7: Did defendant Robert L. Bolick or George Holman breach an [sic] fiduciary duty as to either Plaintiff?

Question No. 8: As to each defendant that you answered "yes" to in response to Question No. 7, did such breach cause damage to either of the plaintiffs?

Question No. 9: Without taking into consideration the reduction of damages due to the negligence of either plaintiff, if any, what do you find to be the total amount of damages, if any, suffered by each/either plaintiff caused by the breach?

The questions regarding the action for negligent supervision were:

Question No. 10: Did defendant Robert L. Bolick negligently supervise Defendants George Holman or Stewart Gollmer?

Question No. 11: As to each defendant that you answered "yes" to in response to Question No. 10, was such negligent supervision a cause of the damage to either of the plaintiffs?

Question No. 12: Without taking into consideration the reduction of damages due to the negligence of either plaintiff, if any, what do you find to be the total amount of damages, if any, suffered by each/either plaintiff caused by the incidents involved herein?

Question No. 13: Were either of the plaintiffs negligent?

Question No. 14: Was the negligence of either of the plaintiffs a cause of damage to such plaintiff?

Question No. 15: Assuming that 100% represents the total negligence and fault which was the cause of each of the plaintiffs' [sic] damage, what percentage of this 100% is due to the contributory negligence of either of the plaintiffs and what percentage of this 100% is due to the negligence and fault and wrongful conduct of defendant Robert L. Bolick and all other persons?

Although the allegations in the complaint in this matter refer to Mednicoff and CCN as if they were alter egos of each other, and although the parties apparently tried the case on that assumption, the verdict form listed Mednicoff and CCN as separate claimants. Under this structure, the jury apportioned the degrees of negligence in connection with the malpractice claim as follows: Mednicoff, 8 percent; CCN, 2 percent; Holman, 28 percent; Bolick, 20 percent; Gollmer, 2 percent; and the Bolick firm, 40 percent. Accordingly, the jury entered its damage findings, without reduction for the comparative negligence, as follows: \$250,000 to Mednicoff, and \$157,000 to CCN. The jury separately determined that both Holman and Bolick breached their fiduciary duty and awarded \$124,500 to CCN only. On the negligent supervision cause of action, the jury apportioned the parties' negligence as follows: Mednicoff, 15 percent; CCN, 15 percent; and Bolick, 70 percent. On this latter claim, the jury then found that CCN sustained damages, without reduction for its comparative negligence, in the amount of \$143,500, and that Mednicoff sustained zero damages.<sup>5</sup>

Prior to entry of judgment by the district court, the parties lodged post-trial motions. Mednicoff and CCN moved for a new trial to litigate their punitive damage claim. Respondents moved for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial, claiming that the district court improperly allowed Mednicoff to present

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<sup>5</sup>Subject to the discussion below, the findings apportioning negligence and assessing damages comply with the requirements of NRS 41.141(2)(b), which require that, inter alia, once the jury determines a plaintiff's entitlement to recover, it must render a general verdict stating the total amount of damages sustained without regard to his comparative negligence, and must return a special verdict apportioning fault.

trial testimony on subjects that he previously refused to discuss during discovery based upon Fifth Amendment concerns.

The district court denied the Mednicoff/CCN motion for a new trial to litigate punitive damages, finding that Mednicoff ratified the breach of fiduciary duty by signing respondents' "conflict disclosure" letter, that Mednicoff contributed to the damages he and CCN sustained, and that the evidence of the firm's conduct as adduced at trial did not warrant punitive damages. The district court, however, granted respondents' JNOV motion on grounds not lodged in the motion, concluding that Mednicoff's negligence far outweighed respondents' negligence. The ruling was accompanied by the following comment from the bench: "I'm going to change nothing other than the amount of negligence attributable to the parties."

In its final judgment, the district court concluded as follows:

[T]he Special Verdict form submitted to the jury by the Court . . . omitted factual findings as to (a) the percentages of negligence attributable to each party remaining in the action, without regard to the negligence of non-parties, (b) the relative percentages of this comparative negligence with respect to the total negligence causing damages to [Mednicoff], and (c) whether any breach of fiduciary duty by [respondents] was ratified and/or waived expressly in writing or by the subsequent conduct of [Mednicoff].

Under NRCP 49(a),<sup>6</sup> the district court resolved what it had characterized as the omitted issues. First, it proceeded to find Mednicoff 60 percent

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<sup>6</sup>NRCP 49(a) provides:

If . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party

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negligent and respondents 40 percent negligent as to the negligence causes of action. In this, contrary to the structure of the special verdict, the district court treated Mednicoff and CCN again as alter egos. This ruling completely overturned the negligence verdicts in favor of Mednicoff and CCN because the new negligence findings effectively barred their recovery under NRS 41.141(1).<sup>7</sup> Second, the district court concluded that Mednicoff, by signing the conflict disclosure letter, waived any claim for breach of fiduciary duty. Therefore, the district court entered judgment in favor of respondents on all claims. Mednicoff and CCN filed their timely notice of appeal.

### DISCUSSION

It is most unfortunate that the district court allowed closing arguments to proceed and submitted the case to the jury for deliberation without resolving the form of verdict on the record. As a result, both parties to this appeal argue that their adversaries waived numerous

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waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

<sup>7</sup>NRS 41.141 states:

1. In any action to recover damages . . . in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff . . . does not bar a recovery if that negligence was not greater than the negligence or

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issues. Mednicoff and CCN claim that respondents waived the right to contest the verdicts awarding damages in connection with the fiduciary breach claim because respondents failed to seek instructions on the issue, or object to the form of verdict at the time of its rendition. Respondents argue that the form of verdict prepared by counsel for Mednicoff and CCN improperly instructed the jury to compare negligence of non-parties in connection with the two negligence claims, and omitted language from the verdict form resolving the ratification/waiver claim, thus implicating NRCP 49(a), which allowed the district court to resolve these issues based upon the evidence. In fact, both parties must shoulder some responsibility in this matter; both sides should have insisted upon a settled verdict of record before proceeding with closing arguments and allowing the matter to stand submitted for the jury to decide. Even if the district court forced the parties to proceed to verdict without a settled verdict form, the parties could have at least objected to that procedure.

Given the above, and because we conclude that the special verdict violated NRS 41.141, this record is marked by a series of important procedural and substantive errors. We therefore, reverse the judgment below and remand this matter for a new trial.

Defects in the special verdict

The verdict form submitted by counsel for Mednicoff and CCN violated the following portions of the Nevada comparative negligence statute: NRS 41.141(1), (2)(a) and (2)(b)(2):

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gross negligence of the parties to the action  
against whom recovery is sought.

1. In any action to recover damages . . . 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.

2. In those cases, the judge shall instruct the jury that:

(a) The plaintiff may not recover if his comparative negligence . . . is 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:

(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.

(Emphasis added.)

Questions six and fifteen in the verdict form violated NRS 41.141(1) and (2) because the form requested the jury to determine “the negligence and fault and wrongful conduct of the defendants and all other persons.” Under NRS 41.141(1) and (2), the jury may not apportion the negligence of non-parties. Going further, the apportionment blanks in the verdict form did not, as contemplated in NRS 41.141, separately apportion the total negligence as between the individual plaintiffs and the defendants. To illustrate, the jury’s response to question six assesses relative fault as follows: Mednicoff, 8 percent; CCN, 2 percent; and the defendants, 90 percent; all of which total 100 percent. Thus, the verdict forms do not account for 100 percent of the total negligence as between

CCN and the defendants, and as between Mednicoff and the defendants. For example, as between CCN and the remaining defendants, the combined negligence of the parties to CCN's separate claim totals 92 percent. The apportionment findings as to the remainder of question 6 and question 15 suffer from the same infirmity. Only a different form of verdict could have cured this defect.<sup>8</sup>

It appears that trial counsel for Mednicoff and CCN attempted to utilize some form of hybrid comparative negligence formulation. This is entirely inconsistent with NRS 41.141. Because Mednicoff and CCN were required to provide a form of verdict in compliance with Nevada law, their use of an invalid verdict under these circumstances would ordinarily result in an affirmance of the judgment in favor of respondents on the negligence claims, albeit for reasons not litigated in the post-trial motions. However, because the jury did conclude that the negligence of Mednicoff and CCN was minimal in relation to that of the respondents, we will not simply affirm the judgment based upon the failure to submit a proper form of verdict.

We also note the failure of respondents to seek instructions on the issue of waiver and ratification of the conflict of interest that was the subject of the claim for breach of fiduciary duty. While this may have been fatal to their rights to a special interrogatory on the issue, it was not fatal to their defense to the claim because, given the body of evidence and the arguments of counsel, the issue was tried by consent.<sup>9</sup> On remand,

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<sup>8</sup>We will not attempt to construe the verdicts under NRS 41.141 by drawing ratios.

<sup>9</sup>See NRCP 15(b).

however, the jury instructions should include all issues litigated in the special verdict form with corresponding instructions.

We finally note that the verdicts against Mednicoff, finding that he sustained no damages, and the verdict in favor of CCN on the breach of fiduciary duty claim, could technically be affirmed, notwithstanding the defect in the verdict forms.<sup>10</sup> We conclude, however, that the entire matter should be retried, noting that the district court should resolve whether Mednicoff and CCN are separate parties with individual claims or are alter egos of one another;<sup>11</sup> and that the respondents should have an opportunity to litigate the matter with a full and complete verdict form, settled on the record prior to final arguments.<sup>12</sup>

Punitive damage claim

Because the punitive damage claim was, under NRS 42.005,<sup>13</sup> based upon allegations of fraud, we will reinstate the claim for reassessment by the district court on remand after all of the evidence has been presented.

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<sup>10</sup>The forms correctly instructed the jury on proximate cause and damages.

<sup>11</sup>This determination will govern whether the negligence of Mednicoff and CCN should be separately apportioned with the named defendants, or whether Mednicoff and CCN should be considered as one party; *i.e.*, alter egos, for the purposes of apportionment under NRS 41.141.

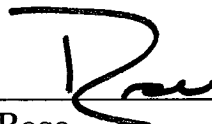
<sup>12</sup>To the extent that the parties may wish to litigate the validity of the portions of the special findings rendered in their favor on rehearing, we have considered that possibility and rejected it. This matter should be tried in its entirety, under proper procedure and, under Nevada law.


<sup>13</sup>Nevada's punitive damage statute.

CONCLUSION

This matter should be retried on all issues. Accordingly, we  
ORDER the judgment and orders of the district court  
REVERSED, and REMAND this matter to the district court for  
proceedings consistent with this order.

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

 \_\_\_\_\_, J.  
Rose

 \_\_\_\_\_, J.  
Maupin

cc: Eighth Judicial District Court Dept. 1, District Judge  
Beckley Singleton, Chtd./Las Vegas  
Peckar & Abramson  
Wait Law Firm  
Clark County Clerk