

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAMELA HENNAGAN,
INDIVIDUALLY, AND AS GUARDIAN
AD LITEM FOR JORDAN HENNAGAN,
A MINOR,
Appellant,
vs.
LESLIE ZAK, M.D.,
Respondent.

No. 39982

FILED

AUG 27 2004

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a final judgment and an order denying a new trial, entered by the Eighth Judicial District Court, Clark County, Nevada; Michael L. Douglas, Judge.

Pamela Hennagan, individually and on behalf of her minor son, Jordan Hennagan, appeals from the court's final judgment and its order denying her motion for a new trial on her claims of medical malpractice against respondent, Leslie Zak, M.D. Hennagan claims entitlement to a new trial based upon post-verdict revelations that the jury re-played the entirety of a videotaped deposition that was edited by agreement of the parties and played in its edited form at trial.¹ We reverse and remand for a new trial.

¹Hennagan also lodges claims of error in connection with district court rulings permitting the reading of a non-designated expert witness's deposition into evidence, and allowing an expert witness to testify at trial as to matters that exceeded the scope of his expert designation and deposition testimony. We have considered these assignments of error and find them to be without merit because no abuses of discretion have been demonstrated.

FACTS AND PROCEDURAL HISTORY

Pamela Hennagan filed the action below against Valley Hospital Medical Center and Dr. Zak, claiming medical malpractice in connection with the serial induction of labor and delivery of Hennagan's infant son, Jordan. Dr. Zak performed the delivery of Jordan, who was born with serious brain injuries, at Valley Hospital.

During discovery, the parties deposed several expert witnesses, including Dr. Patrick Barnes, one of Hennagan's experts. Dr. Barnes' deposition was taken via videotape, during which Valley Hospital was referred to twice as a party, once at the outset when recording the case caption and second, when Valley Hospital's counsel introduced himself.

Hennagan ultimately entered into a negotiated settlement with Valley Hospital and the case proceeded to trial against Dr. Zak only. As a housekeeping measure before formal presentation of evidence, the parties discussed the admission of Dr. Barnes' video deposition. Hennagan's counsel suggested they "fast-forward" through the portions of the deposition during which Valley Hospital was referenced as a party. The district court offered to briefly instruct the jury that the case initially involved additional parties, which had settled, and that the only matter before the jury involved Hennagan and Dr. Zak. Dr. Zak's counsel expressed resistance to the court's solution, stating that "some reference to another party . . . could potentially create error." Ultimately, the parties agreed to play the deposition for the jury, fast-forwarding through the references to Valley Hospital. Although the district court did not admit the videotape as an exhibit, the bailiff provided the videotape to the jury with the other exhibits.

During deliberations, the jury requested the video deposition of Dr. Barnes. Without consulting the judge, court staff supplied the tape and a video cassette player. Thus, in contravention of the agreement between the parties, the jury viewed Dr. Barnes' deposition in its entirety.

The jury returned a verdict in favor of Dr. Zak. At that point, the district court permitted voir dire of the jurors regarding: (1) whether they had been contacted by any outside parties about the case during the trial; (2) whether they had read any of the recently published articles about the "medical malpractice crisis"; and (3) whether the current "medical malpractice crisis" influenced their verdict. The jury responded in the negative to each of the questions.

The district court then confirmed with counsel that Dr. Barnes' deposition improperly "went to the jury room and the jurors replayed the item." The court asked whether "either side wish[ed] to poll the jury as to effect this had or did not have." Counsel for both parties properly declined this opportunity and neither party lodged an objection.²

Hennagan filed a motion for a new trial based upon the jury's exposure to the un-redacted videotape. Hennagan argued that the references to Valley Hospital denied her a fair trial because of the distinct and anticipated possibility that the jury might speculate concerning the settlement. Although conceding that the parties' entered into the agreement to omit portions of the videotape based upon mutual concerns that the jury might speculate about the settlement, Dr. Zak argued that

²NRS 50.065(2)(a) ("A juror shall not testify concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith.").

no prejudice occurred because Dr. Barnes was Hennagan's expert and the issues at trial were clearly restricted to the discrete claims of negligence against Dr. Zak. The district court denied Hennagan's motion, finding that Hennagan failed to establish prejudice. Hennagan filed her timely notice of appeal.

DISCUSSION

A district court may grant a motion for a new trial if the substantial rights of an aggrieved party have been materially affected, which may include, among other things, irregularity in the proceedings of the court or the jury or misconduct by the jury.³ We review a district court's denial of a motion for a new trial for abuse of discretion and "will not disturb the district court's decision on appeal absent palpable abuse."⁴

NRS 16.130, in pertinent part, states, "[u]pon retiring for deliberation the jury may take with them all papers, except depositions."⁵ We have previously held that "[i]n a civil case, when an improper item is brought into the jury room, and that item has the tendency to influence the verdict in contravention of legal proofs and the court's instructions at trial, it is reversible error."⁶

³NRC P 59(a).

⁴Woosley v. State Farm Ins. Co., 117 Nev. 182, 188, 18 P.3d 317, 321 (2001).

⁵Emphasis added. We note that, under the proscriptions of NRS 16.130, the tape should not have been provided to the jury. However, absent a tape player, no error from this could have been demonstrated.

⁶Dugan v. Gotsopoulos, 117 Nev. 285, 290, 22 P.3d 205, 208 (2001).

In its denial of Hennagan's motion for a new trial, the district court generally placed the burden on Hennagan to demonstrate prejudice. This was error. Because the issue presented in the application for a new trial was the jury's access to an improper item, the district court should have determined if the videotape deposition played in its entirety with the references to the settled party would have any "tendency to influence the verdict."⁷ We conclude that the replay of the tape in its entirety had such a tendency.

Dr. Barnes' deposition referenced Valley Hospital as a party to the action on two occasions: first, at the outset of the deposition when reciting the case caption and second, during counsel introductions. Although these references were minimal, they implicate our decision in Moore v. Bannen,⁸ at least to a degree. In Moore, we held that the district court may not inform the jury of either the settlement itself or the amount paid.⁹ Although the videotape, as replayed to the jury, did not explicitly discuss the existence and/or terms of the settlement with Valley Hospital, it invited speculation about whether a settlement had occurred and, thus, whether other parties were at fault and whether the settlement fully compensated Hennagan. This speculation was precisely what the parties sought to avoid by playing the tape without the references to Valley Hospital's status as a party. The court's staff entirely eviscerated this precaution by supplying the jury with the videotape and tape player without consulting the district court or the parties.

⁷Id.

⁸106 Nev. 679, 799 P.2d 564 (1990).

⁹Id. at 680-81, 799 P.2d at 565.

Dr. Zak now argues that Hennagan suffered no prejudice and that the replay of the full tape during deliberations had no tendency to affect the outcome. We acknowledge Dr. Zak's contention that, in hindsight, the replay actually benefited Hennagan because Dr. Barnes was one of Hennagan's experts. However, we must also acknowledge that Dr. Zak's counsel voiced his own concerns about the redacted portions of the videotape. The agreement to redact, vigorously promoted by Dr. Zak, certainly implies that, from her counsel's prospective viewpoint at the beginning of trial, the redacted information would have a tendency to affect the outcome in some way.

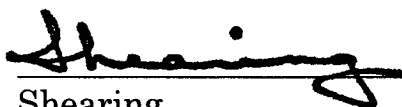
The court staff frustrated a very important and reasonable prophylactic measure agreed to by the parties, and the parties all agree that the measure was designed at the time of its creation to prevent error in the proceedings. Thus, we must conclude that the display of the entire videotape had a tendency to influence the ultimate verdict. Accordingly, we also conclude that the district court erred in its denial of Hennagan's motion for a new trial.¹⁰

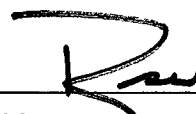
¹⁰Dr. Zak argues that Hennagan waived her right to claim the primary error on appeal, claiming that both sides were notified, prior to the reading of the verdict, that the videotape had been sent to the jury for viewing, and that Hennagan failed to object to the viewing or seek a mistrial before rendition of the verdict. This statement is outside the record. The court minutes and the transcript only demonstrate that the district court advised the parties of the improper viewing after the verdict was read. Dr. Zak further argues waiver for failure by Hennagan to poll the jury at the district court's invitation concerning what effect, if any, the viewing would have had on the ultimate decision. We agree with Hennagan that, had she accepted this invitation, such an interrogation would have been in direct violation of NRS 50.065(2)(a).

CONCLUSION

The district court did not properly address the claims of error in denying Hennagan's motion for a new trial. Applying the correct standard that the item improperly provided to the jury had a tendency to influence the outcome, the district court should have granted the application. We, therefore,

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial.



_____, C.J.
Shearing


_____, J.
Rose

cc: Eighth Judicial District Court Dept. 11, District Judge
Burris & Thomas, P.C.
Cobeaga Tomlinson, LLP
John H. Cotton & Associates, Ltd.
Clark County Clerk

MAUPIN, J., dissenting:

I agree that the district court applied an erroneous standard in denying appellant's motion for a new trial. However, applying the correct standard, I cannot conclude that the jury's exposure to the entire videotaped deposition had any tendency to influence the ultimate verdict. First, the video contains but two brief references to Valley Hospital. Second, because no mention of a settlement was made, Moore v Bannen¹ is not really implicated. Third, Dr. Barnes was one of Hennagan's experts; thus, Hennagan actually benefited from the improper replay of the videotape. Fourth, the case was tried on the sole issue of whether Dr. Zak's care fell below the standard of care. Fifth, Dr. Zak did not defend the matter on a theory that Valley Hospital was negligent. Sixth, we have not been provided with a record of the entire body of testimony presented for the jury's consideration. Accordingly, I cannot conclude that the district court, having heard the entirety of the evidence, erred in finding two relatively obscure references in the videotape merited a new trial. Thus, under the proper standard for review of such matters, I would uphold the verdict in favor of Dr. Zak.


Maupin, J.
Maupin

¹106 Nev. 679, 799 P.2d 564 (1990).