IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICIA A. WENDLAND, EXECUTRIX OF THE ESTATE OF BONNIE S. ROBERTSON, DECEASED; AND ELLEN DOLESE, AS PERSONAL REPRESENTATIVE FOR AUNA C. VAN OTTEN, DECEASED,
Appellants,
vs.
MATHIAS FOBI, M.D.; AND WILLIAM SCHOFIELD, M.D.,
Respondents.

No. 40085

FILED

APR 21 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment, pursuant to a jury verdict, in a medical malpractice action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellants brought the malpractice suit below, alleging that respondents' malpractice caused the wrongful death of Bonnie Robertson. Appellants seek reversal and remand for a second trial, arguing that the district court should have excluded certain medical screening panel findings; failed to give an appropriate curative instruction; and erroneously excluded certain deposition testimony. We affirm .

Jurisdiction of screening panel

Appellants contend that the district court abused its discretion when it allowed Dr. Fobi to introduce a screening panel finding arising from an initial complaint filed by the appellants, over which the screening

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panel had no jurisdiction. We review district court decisions concerning the admissibility of evidence for an abuse of discretion.[1]

First, appellants assert that a letter from the Nevada Department of Business and Industry, Division of Insurance, confirms that the panel did not have jurisdiction over Dr. Fobi. The letter, however, stated that the panel did not have sufficient information to determine whether it had jurisdiction over Dr. Fobi. Appellants cured this defect by amending the jurisdictional statement, which the panel accepted.

Second, appellants assert that the panel did not have jurisdiction over Dr. Fobi because Dr. Fobi was not licensed at the time of surgery. NAC 41A.040(1)(f) provides that every medical malpractice complaint must contain "[a] statement of jurisdiction, to the extent known, that each respondent named in the complaint is a physician licensed pursuant to chapter 630 or 633 of NRS." (Emphasis added.) The Legislature phrased this language in the present tense. Dr. Fobi received his license to practice in Nevada on March 16, 1995. Thus, at the time appellants filed their complaint with the screening panel, Dr. Fobi was licensed and, therefore, subject to the panel's authority.

The screening panel found no reasonable probability of malpractice by Dr. Fobi, and he introduced this finding at trial, since NRS 41A.016(2) (1999) permitted parties to introduce screening panel findings to a jury.[2] We conclude that the district court did not abuse its discretion in allowing the screening panel findings to be introduced at trial.

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[1]Matter of Parental Rights as to N.J., 116 Nev. 790, 804, 8 P.3d 126, 135 (2000).

[2]Repealed by 2002 Nev. Stat., ch.3, § 69, at 25.

Waiver

Next, appellants contend that the district court abused its discretion when it permitted Dr. Fobi and Dr. Schofield to rely upon the screening panel findings as conclusive evidence of liability. Appellants argue that Dr. Fobi's and Dr. Schofield's counsel made several improper statements during opening and closing arguments. Dr. Fobi and Dr. Schofield argue that appellants failed to object to these statements at trial and, therefore, waived their argument on appeal.[3] Appellants insist that they preserved their objections in their motion in limine.

In Richmond v. State, we held that "where an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal."[4] Upon review of appellants' motion in limine, we conclude that the motion did not adequately preserve appellants' arguments for appeal. Appellants' only claim in the motion was that the district court should reverse the January 1997 screening panel finding as to Dr. Fobi because the Division determined in February 1997 that it had no jurisdiction over him. The motion in limine did not address the admission of the screening panel findings as conclusive evidence of any liability claim. Accordingly, appellants failed to fully brief their objection to the presentation of the screening panel findings as evidence of liability, and the district court did not make a definitive ruling as to the admissibility of the panel findings as evidence. Rather, the district court narrowly

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[3]Ringle v. Bruton, 120 Nev. 82, 94-5, 86 P.3d 1032, 1040 (2004).

[4]118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002).

pre-trial ruling to appellants' argument concerning the jurisdictional defect in the complaint. Consequently, to preserve the contention for appeal, it was incumbent upon appellants to lodge a contemporaneous objection. As appellants failed to do so, they have waived their argument on appeal.

Jury Instructions

At the outset, we note that the district court properly instructed the jury in accordance with NRS 41A.069, which set forth how juries were to consider panel findings under the former statutory construct governing malpractice actions.[5].

Appellants contend that, pursuant to Barrett v. Baird,[6] the district court should have sua sponte supplemented the statutorily mandated instruction by emphasizing to the jury that the screening panel process is only summary in nature, and that the jury should not give undue weight to the panel findings. Appellants, however, did not object to the instruction given, or proffer any additional instructions. Moreover, appellants attempted to impeach the panel's conclusion with their own experts and to emphasize the limited nature of the panel proceedings, including the fact that the panel did not have the opportunity to consider certain evidence. The district court also instructed the jury as to their responsibility to weigh the evidence. We have previously recognized that, with these safeguards, there is little "concern that jurors will 'overvalue' the panel findings."[7] Accordingly, we conclude that appellants have failed

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[5]2002 Nev. Stat., ch.3, § 2, at 25.

[6]111 Nev. 1496, 1503, 908 P.2d 689, 695 (1995).

[7]Id. at 1505, 908 P.2d at 696.

to demonstrate that the district court abused its discretion concerning the submitted jury instructions.

Use of deposition testimony at trial

Appellants contend that NRCP 32(a)(2) permits a party to use a deposition for any purpose and, therefore, argue that the district court abused its discretion when it sustained Dr. Schofield's objection to the presentation of Dr. Fobi's deposition testimony at trial. Appellants claim that this ruling precluded them from explaining why they originally commenced proceedings in California, and why they ultimately sought recourse within the Nevada court system.

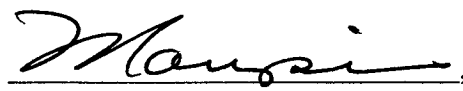
NRCP 32(a) plainly provides that deposition testimony may only be used at trial against any party who was present at the taking of the deposition. Dr. Fobi was deposed in December 1995 in connection with the California suit, to which Dr. Schofield was not a party. It was only after Dr. Fobi's deposition that appellants decided they would need to include Dr. Schofield as a party defendant, dismissed the California suit and refiled in Nevada. Also, Dr. Fobi was not designated as an expert against Dr. Schofield. Finally, appellants fail to explain how they were prejudiced because the jury did not know why the case initially was filed in California and then refiled in Nevada.

Notwithstanding the above, NRCP 32(a)(2) provides that a deposition may be used for impeachment of the deponent or any other purpose subject to evidentiary limitations. The presentation of deposition testimony at trial conceivably implicates the hearsay rule. The traditional definition of "hearsay" is an out-of-court statement offered to prove the truth of its contents, the probative value of which is dependent

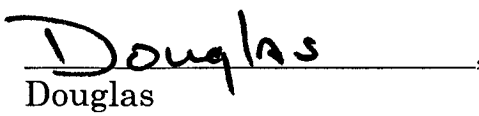
upon the credibility of a witness that cannot be cross-examined."[8] Dr. Fobi's deposition could fall under the prior inconsistent statement exception to the hearsay rule.[9] However, Dr. Fobi never explicitly contradicted his earlier deposition testimony during his testimony at trial. Further, Dr. Fobi was available at trial for cross-examination. We, therefore, conclude that any error committed by the district court with regard to Dr. Fobi's California deposition was harmless. Accordingly, appellants' argument is without merit.

Because we conclude that appellants' arguments are without merit, we

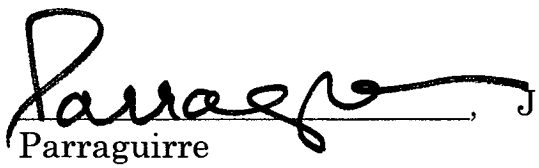
ORDER the judgment of the district court AFFIRMED.



Maupin, J.



Douglas, J.



Parraguirre, J.

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[8]Crowley v. State, 120 Nev. 30, 36, 83 P.3d 282, 287 (2004) (Maupin, J., concurring).

[9]NRS 51.035(2)(a).

cc: Hon. Mark R. Denton, District Judge
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