

IN THE SUPREME COURT OF THE STATE OF NEVADA

JACK B. HERMES, INDIVIDUALLY  
AND AS SPECIAL ADMINISTRATOR  
OF ESTATE OF DEBORAH HERMES,  
DECEASED,  
Appellant,  
vs.  
ROBERT BERTRANDO, M.D., AND  
CONCENTRA, INC., D/B/A NEVADA  
OCCUPATIONAL HEALTH CENTERS,  
Respondents.

No. 42391

**FILED**

JUN 13 2005

ANETOM BLOOM  
CLERK OF SUPREME COURT  
*[Signature]*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order that denied a motion for new trial in a medical malpractice case. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Following the death of his wife, appellant Jack Hermes sued respondents Dr. Robert Bertrando and Concentra, Inc. for medical malpractice. A jury trial was held on the issue of standard of care as it related to the failed diagnosis of the heart ailment that led to Deborah Hermes' death. During the trial, juror Randy Hill took his daughter to see a physician concerning heart related issues. As the physician examined his daughter, Hill inquired about the standard of care for medical charting of a heart exam and EKGs. Juror Hill did not relay any information to other jurors regarding the conversation until after deliberations were concluded and the verdict had been entered. Hill thereafter communicated this information to two other jurors, who in turn submitted affidavits that Hermes used in support of his motion for a new trial.

Hermes presents two issues for this court's review. Whether the district court abused its discretion by denying a new trial motion for juror misconduct, and whether juror affidavits containing hearsay were admissible to establish the purported misconduct.

#### Juror affidavits

Juror affidavits are admissible to demonstrate juror misconduct.<sup>1</sup> Such affidavits do not run afoul of NRS 50.065(2)(a) unless a juror testifies regarding his mental processes in reaching a verdict. In this case, the jurors' mental processes were not invaded. The district court determined that the information contained in the affidavits was reliable, despite the issue of hearsay, because the jurors were likely trustworthy in this instance. We agree. The affidavits simply state that the conversation took place and then make the supposition that Hill was one of the strong voices during deliberations. As the affidavits addressed the facts of the alleged misconduct and not how the jury arrived at its decision, the district court's use of the affidavits was proper.

#### Juror misconduct

Hermes sought a new trial under NRCP 59(a)(2) based on the alleged misconduct of juror Hill. Specifically, Hermes contends that juror Hill's conversation with his daughter's physician about the standard of care for charting of a heart exam and EKG during the medical malpractice trial, where standard of care was the central material issue, constitutes misconduct. Hermes argues that the misconduct was prejudicial because Hill's conversation may have resulted in variations from the testimony

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<sup>1</sup>Barker v. State, 95 Nev. 309, 312, 594 P. 2d 719, 721 (1979).

presented at trial and that the new information obtained by Hill was not subject to the scrutiny of cross-examination. We do not agree.

Hermes has failed to sufficiently establish misconduct. “[I]n reaching their verdict, jurors are confined to the facts and evidence regularly elicited in the course of the trial proceedings.”<sup>2</sup> Jurors are prohibited from relating facts or evidence to fellow jurors based on their own knowledge or investigation; such an act can constitute misconduct in and of itself.<sup>3</sup> However, “[n]ot every incidence of juror misconduct requires the granting of a motion for new trial,”<sup>4</sup> and a new trial need not be granted if no prejudice occurred.<sup>5</sup> The question of misconduct and any resulting prejudice is ultimately a question of fact for the district court, and this court will not disturb the determination of the district court absent an abuse of discretion.<sup>6</sup>

Hermes failed to establish that the juror, Hill, conducted an independent outside investigation. In this case, Hill sought advice in the process of seeking treatment for his daughter. The misconduct, if any

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<sup>2</sup>State v. Thacker, 95 Nev. 500, 501, 596 P.2d 508, 509 (1979).

<sup>3</sup>Meyer v. State, 119 Nev. 554, 564, 80 P.3d 447, 455 (2003); Thacker, 95 Nev. at 502, 596 P.2d at 509 (quoting Barker, 95 Nev. at 312, 594 P.2d at 721).

<sup>4</sup>Barker, 95 Nev. at 313, 594 P.2d at 721.

<sup>5</sup>Tanksley v. State, 113 Nev. 997, 1003, 946 P.2d 148, 151 (1997).

<sup>6</sup>Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 452, 686 P.2d 925, 931 (1984); see also Walker v. State, 95 Nev. 321, 323, 594 P.2d 710, 712 (1979).

occurred, was in the juror's failure to report to the district court his interaction with his child's physician.

Moreover, any misconduct by a juror must be prejudicial in order to warrant granting a new trial.<sup>7</sup> The burden of proof is on the party claiming prejudice.<sup>8</sup> The nature of the influence must be examined to determine if there is presumptive prejudice.<sup>9</sup> "Jurors' exposure to extraneous information via independent research or improper experiment is . . . unlikely to raise a presumption of prejudice."<sup>10</sup> The information must be examined "in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict."<sup>11</sup> The same rationale applies to intrinsic misconduct. The party must demonstrate there is a reasonable probability that the misconduct affected the verdict.<sup>12</sup> This must be proven by admissible evidence, without investigation into the deliberative process.<sup>13</sup> Therefore, "only in extreme circumstances will intrinsic misconduct justify a new trial."<sup>14</sup>

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<sup>7</sup>Tanksley, 113 Nev. at 1003, 946 P.2d at 151.

<sup>8</sup>State v. Hopkins, 896 P.2d 373, 375 (Kan. 1995).

<sup>9</sup>Meyer, 119 Nev. at 564, 80 P.3d at 455.

<sup>10</sup>Id. at 565, 80 P.3d at 456.

<sup>11</sup>Id.


<sup>12</sup>Id.

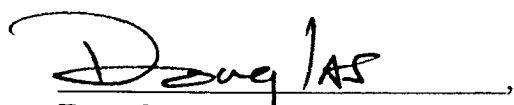
<sup>13</sup>Id.

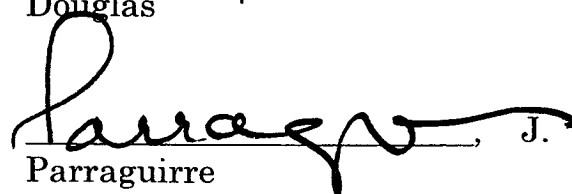
<sup>14</sup>Id.

We conclude that Hermes has shown no prejudice from the juror's contact with his daughter's physician. The juror in question did not share any of the information with his fellow jurors until deliberations had concluded, and, importantly, the verdict was unanimous. Because no prejudice has been demonstrated we conclude that Hermes argument lacks merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Brent T. Adams, District Judge  
Kenneth E. Lyon III  
Whitehead & Whitehead  
Wait Law Firm  
Washoe District Court Clerk