IN THE SUPREME COURT OF THE STATE OF NEVADA

CRAIG MCKINNEY,
Appellant/Cross-Respondent,
vs.
RICK MARTINEZ, PERSONALLY AND IN ANY RELATED CORPORATE CAPACITY; SHANNON MARTINEZ, PERSONALLY AND IN ANY RELATED CORPORATE CAPACITY; AND FIRE EXTINGUISHER SERVICE CENTER, LLC,
Respondents/Cross-Appellants.

No. 49172

FILED

FEB 26 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from district court post-judgment orders partially granting a motion for judgment notwithstanding the verdict and denying a motion for a new trial in a contract action. Third Judicial District Court, Churchill County; Noel E. Manoukian, Judge.

Appellant/cross-respondent Craig McKinney worked for Fire Extinguisher Service Center, LLC (FESC), owned by Rick and Shannon Martinez. FESC and the Martinezes are respondents/cross-appellants in this appeal (collectively, respondents). While McKinney worked at FESC, he entered into a contract with Rick to take over the payments on a 1997 Dodge pickup truck. After FESC fired McKinney, he stopped making payments on the truck, and Rick sold the truck at a loss. McKinney sued respondents, alleging several claims, including breach of contract and unjust enrichment regarding the truck. A jury found in favor of respondents on all claims. After trial, McKinney moved for judgment notwithstanding the verdict on the claims regarding the truck and for a new trial based on juror misconduct. The misconduct was based on Rick's

alleged business relationship with John Mackay, the jury foreman. The district court partially granted McKinney's motion for judgment notwithstanding the verdict, directing a verdict for McKinney on the truck claims and found that juror misconduct had occurred, but denied his motion for a new trial.

McKinney now appeals, arguing that the district court erred when it denied his motion for a new trial despite finding juror misconduct. Respondents cross-appeal, arguing: (1) the district court erred in directing a verdict for McKinney on the truck claims because McKinney failed to move for judgment notwithstanding the verdict after the close of evidence as required by NRCP 50(a), and (2) the district court erred in finding juror misconduct.

We conclude that: (1) the district court erred in granting McKinney's motion for judgment notwithstanding the verdict because McKinney failed to make the motion at the close of evidence as required by NRCP 50(a); and (2) the district court properly found that juror misconduct occurred, but erred in denying McKinney's motion for a new trial based on juror misconduct. Accordingly, we reverse the district court's judgments in McKinney's appeal and respondents' cross-appeal and remand this matter to the district court.

The parties are familiar with the facts and procedural history of this case, and we do not recount them further except as necessary for our disposition.

I. The district court properly found that juror misconduct occurred, but erred in denying McKinney's motion for a new trial based on the juror misconduct

We review the district court's denial of a motion for a new trial for abuse of discretion, and "this court will not disturb that decision absent palpable abuse." Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 424-25

(2007) (quoting Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996)). There are two types of juror misconduct: jurors acting contrary to their instructions or oaths, such as when they make a decision based on bias or prejudice or lie during voir dire, and third-party attempts to influence the jury. Id. Intrinsic influences, such as improper discussions among jurors or one juror harassing another, are generally inadmissible to prove jury misconduct. Id. at 562, 80 P.3d at 454. A juror cannot testify regarding anything that affected his emotions, his decision regarding the verdict, or his mental processes. NRS 50.065(2)(a). To prove jury misconduct, a party must produce objective evidence of "overt conduct without regard to the state of mind and mental processes of any juror." Meyer v. State, 119 Nev. 554, 563, 80 P.3d 447, 454 (2003). Regarding a juror's voir dire responses, a juror must intentionally conceal the truth regarding his qualifications to constitute misconduct. Hale v. Riverboat Casino, Inc., 100 Nev. 299, 305, 682 P.2d 190, 193 (1984), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 507, 746 P.2d 132, 135 (1987).

For jury misconduct to warrant reversal, a party must prove that juror misconduct occurred and that it was prejudicial. Meyer, 119 Nev. at 563-64, 80 P.3d at 455. There must be "a reasonable probability or likelihood that the juror misconduct affected the verdict." Id. at 564, 80 P.3d at 455. "[T]he district court's factual inquiry is limited to determining the extent to which jurors were exposed to the extrinsic or intrinsic evidence." Id. at 566, 80 P.3d at 456. The test is "whether the average, hypothetical juror would be influenced by the juror misconduct." Id.

A. The district court properly found that juror misconduct occurred

The district court ruled that the jury foreperson, Mackay, had a business relationship with Rick prior to trial, and Mackay's failure to disclose this relationship constituted "a significant impropriety." The district court found that Cea's Soap and Suds, the bar that Mackay owned, was next door to FESC, and Mackay contracted with FESC to maintain his fire extinguishers. Mackay never mentioned during extensive voir dire that he knew Rick, despite other jury members disclosing connections with the attorneys' offices and the parties. As jury foreperson, Mackay advocated that McKinney get no damages for any of his claims. The district court stated that Mackay should not have served on the jury. We conclude that substantial evidence supports the district court's finding of facts and its conclusion that juror misconduct occurred.

During voir dire, Mackay identified himself as a local bar and grill owner. Several other jurors volunteered, in response to the court's questions, that they knew the attorneys or the parties through church, professional contacts, and other situations. Mackay never spoke during this time.

After trial, McKinney's attorney learned from a witness, Vern Hasenkamp, that Rick told Hasenkamp that he won the trial because he had influence on the jury through the jury foreman. Counsel obtained an affidavit from Hasenkamp, and moved for a new trial based on juror misconduct. The district court held a hearing, during which Mackay testified that he volunteered to be the jury foreman, and he has owned Jack's Tavern for 20 years and Cea's Soap and Suds for two years. Mackay said he never met Rick prior to trial, and although he knew that FESC was servicing his businesses, he did not know that Rick was servicing his equipment.

James Chrislock, a trial witness, explained that as an FESC employee, he serviced the fire suppression equipment at Jack's Place, owned by Mackay. In June and December of 1999 and May 2000, Chrislock serviced the equipment at Jack's Place and instructed Mackay on using the equipment. Each time, Mackay signed the invoice.

Rick testified that FESC serviced Cea's Soap and Suds. Cea's was next door to FESC, although the entrances to the buildings faced in different directions. Rick worked on Jack's Place's fire equipment approximately five months before trial. He claimed that when he serviced the equipment at Jack's place, he did not interact with Mackay. Rick stated that he did not know who Mackay and his wife, Cea, were until after the trial.

At the hearing, Hasenkamp attempted to recant almost everything he stated in his affidavit. He said that he did not remember stating that everything in the affidavit was true, did not remember signing it, and that he was angry with Rick when he wrote it, so the affidavit was not entirely true.

We conclude that the evidence supports the district court's factual findings, and therefore, this court should not disturb them. Meyer, 119 Nev. at 561, 80 P.3d at 453. The testimony of Chrislock and Rick supports the district court's determination that Mackay had a business relationship with FESC. The district court discounted Hasenkamp's in-court testimony and instead relied on his affidavit, which supported the finding that Rick and Mackay knew each other and that Mackay failed to disclose this during voir dire. Also, Mackay's silence during voir dire supports the district court's finding of juror misconduct supporting the conclusion that Mackay intentionally concealed his relationship with Rick. See Canada v. State, 113 Nev. 938, 941, 944 P.2d 781, 783 (1997) (holding

that the district court erred in not finding intentional concealment when juror failed to disclose numerous major crimes of which he and his family were victims). The evidence is extrinsic because it does not involve the thought processes or deliberations of the jury. NRS 50.065; Meyer, 119 Nev. at 563, 80 P.3d at 454. Therefore, McKinney established the misconduct with proper, objective evidence. As such, we conclude that the district court properly found that juror misconduct occurred.

B. The district court erred in denying McKinney's motion for a new trial because the juror misconduct was prejudicial

The issue that remains is whether "there is a reasonable probability or likelihood that the juror misconduct affected the verdict." Meyer, 119 Nev. at 564, 80 P.3d at 455. The district court found that Mackay and FESC had a debtor-creditor relationship, which is grounds for Mackay's disqualification, but that a new trial was not warranted because it was able to amend the verdict as a matter of law. However, as will be discussed, the district court erred in amending the verdict. Thus, the question remains whether the misconduct was prejudicial. We conclude that the district court erred in denying McKinney's motion for a new trial because the relationship between Mackay and FESC was a valid basis for a challenge for cause, and therefore, it was prejudicial and warranted a new trial.

Prejudice is presumed in certain cases. If a juror fails to answer a material question on voir dire honestly, a new trial is warranted if the honest answer "'would have provided a valid basis for a challenge for cause.'" Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1061 (9th Cir. 1997) (quoting McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984)). If a juror has a debtor-creditor relationship with a party or is "united in business with either party," the relationship is grounds for a challenge for cause under NRS 16.050(1)(c). "United in business" means

"any business relation which would, within the sound discretion of the trial court, indicate that the juror might be interested, biased, influenced, or embarrassed in his verdict." Sherman v. S. P. Co., 33 Nev. 385, 389, 111 P. 416, 418 (1910). Bias for or against either party is also a valid basis for a challenge for cause. NRS 16.050(1)(g). Bias can be implied in certain circumstances, including the existence of certain relationships between a juror and the defendant. Coughlin, 112 F.3d at 1062.

Had Mackay disclosed his business relationship with FESC, it would have evidenced possible bias of the jury foreman in favor of respondents, providing a valid basis for a challenge for cause under NRS 16.050. Also, Mackay's intentional concealment of his relationship with Rick prevented McKinney from exploring Mackay's possible bias or exercising a challenge. Therefore, Mackay's intentional concealment of his relationship with Rick involving the material matter of actual bias, was grounds for a challenge for cause, and constituted misconduct warranting a new trial. As such, we conclude that the district court erred in denying McKinney's motion for a new trial.

II. The district court erred in partially granting McKinney's motion for judgment as a matter of law

Respondents argue that the district court erred in granting McKinney judgment as a matter of law on the truck claims because McKinney did not properly move for judgment as a matter of law at the close of evidence as required by NRCP 50(a), and the district court did not view the evidence in the light most favorable to respondents. We agree with respondents' arguments. The district court improperly considered McKinney's NRCP 50(b) renewed motion for judgment as a matter of law

since he did not move for judgment as a matter of law at the close of evidence pursuant to NRCP 50(a).[1]

A judgment notwithstanding the verdict is called a judgment as a matter of law pursuant to NRCP 50. Grosjean v. Imperial Palace, 125 Nev. ___, ___, 212 P.3d 1068, 1077 (2009). Judgment as a matter of law is proper when the evidence, viewed in the light most favorable to the party against whom the motion is made, is so overwhelming that, as a matter of law, the verdict must be for the moving party. M.C. Multi-Family Dev. v. Crestdale Assocs., 124 Nev. ___, ___, 193 P.3d 536, 542 (2008). This court will not weigh witness credibility or the evidence, and will reverse a judgment as a matter of law if a reasonable jury could have found for the nonmoving party. University System v. Farmer, 113 Nev. 90, 95, 930 P.2d 730, 734 (1997). This court reviews an order granting judgment as a matter of law for abuse of discretion. See Grosjean, 125 Nev. at ___, 212 P.3d at 1077.

To make an NRCP 50(b) renewed motion for judgment as a matter of law, the movant must first make a NRCP 50(a) motion for judgment as a matter of law after the close of evidence. NRCP 50(a) and (b); Lehtola v. Brown Nevada Corp., 82 Nev. 132, 136, 412 P.2d 972, 975 (1966).

The record does not reveal that McKinney made an NRCP 50(a) motion for judgment as a matter of law at the close of evidence. McKinney's attorney later stated that he mistakenly did not make the

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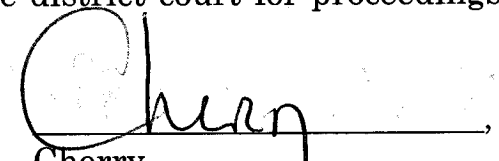
[1]Respondents also argue that the district court erred in holding all respondents liable when only Rick was a party to the contract. However, because we conclude that the district court erred in directing the verdict, we need not reach the liability issue.

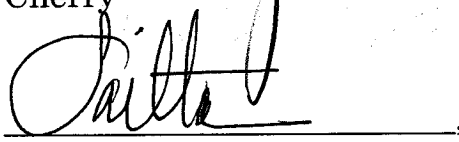
motion on the record, but rather had a conversation in chambers with the judge and opposing counsel. McKinney's counsel thought this discussion satisfied NRCP 50(a). He stated that the judge said it was a jury question, and the conversation ended. In its order, the district court found "that in the interest of justice, Plaintiff's Motion should be considered on its merits."

Under NRCP 50 and Lehtola, 82 Nev. at 136, 412 P.2d at 975, the district court did not have the authority to consider an NRCP 50(b) post-verdict motion for judgment as a matter of law absent an NRCP 50(a) motion for judgment as a matter of law at the close of evidence. Therefore, we conclude that the district court erred in partially granting McKinney's judgment as a matter of law on the truck claims.

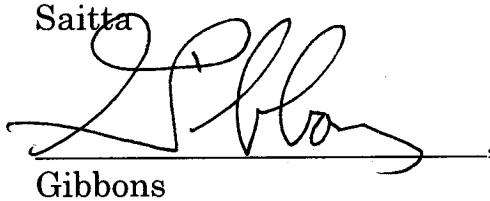
We ORDER the judgment of the district court REVERSED and REMAND this matter to the district court for proceedings consistent with this order.[2]



_____, J.
Cherry



_____, J.
Saitta



_____, J.
Gibbons

[2]This matter shall be assigned to a different district judge in the Third Judicial District to hear the proceedings on remand.

cc: Chief Judge, Third Judicial District
Hon. Noel E. Manoukian, Senior Judge
Lester H. Berkson, Settlement Judge
Martin G. Crowley
Story Law Group
Churchill County Clerk