IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEFF VANBUSKIRK, AN INDIVIDUAL; AND DENISE VANBUSKIRK, AN INDIVIDUAL,
Appellants,
vs.
STANLEY NAKAMURA, AN INDIVIDUAL; AND STEPHANIE NAKAMURA, AN INDIVIDUAL,
Respondents.

No. 74702-COA

ORDER OF AFFIRMANCE

Jeff and Denise Vanbuskirk appeal from a judgment on a short-trial jury verdict and post-trial orders denying their motions for a new trial and to set aside the judgment in a breach of contract action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.[1]

Stanley and Stephanie Nakamura contracted to purchase real property from the Vanbuskirks.[2] Section 2(C) of their purchase agreement provided various options to the parties in the event that the property's appraised value was lower than the agreed-upon purchase price. In relevant part, it stated:

> [I]f the appraisal is less than the Purchase Price, the transaction will go forward if (1) Buyer, at Buyer's option, elects to pay the difference and purchase the Property for the Purchase Price, or (2) Seller, at Seller's option, elects to adjust the Purchase Price accordingly, such that the Purchase Price is equal to

[1]Pro Tempore Judge David Barron presided over the short trial and post-trial motion practice.

[2]We do not recount the facts except as necessary to our disposition.

> the appraisal. If neither option (1) or (2) is elected, then Parties may renegotiate; if renegotiation is unsuccessful, then either Party may cancel this Agreement upon written notice in which event the [earnest money deposit] shall be returned to Buyer.

The appraised value ended up being $3,000 less than the purchase price, so the Nakamuras sent a proposed addendum to the Vanbuskirks reducing the price by that amount. The addendum did not provide an express deadline to respond. After two days without a response, the Nakamuras sent another proposed addendum reducing the price, this time with an express deadline (just over one hour from delivery). The Vanbuskirks did not respond, so the Nakamuras cancelled the agreement the following day and demanded the return of their $25,000 earnest money deposit.

The next day, the Vanbuskirks signed the original addendum and agreed to lower the price. Due to communication issues between the Vanbuskirks and their agent, the Vanbuskirks became aware of the cancellation only after they had signed the original addendum.[3] The Nakamuras ultimately refused to honor the signed addendum, and when the Vanbuskirks refused to return the earnest money, the Nakamuras filed suit alleging breach of contract. The district court initially granted summary judgment in favor of the Nakamuras, concluding that time was of the essence and that the Vanbuskirks failed to respond to the second addendum before the deadline. However, on appeal, the Nevada Supreme Court reversed and remanded the matter because genuine issues of material fact

[3]The parties were represented by real estate agents, and the purchase agreement defines "[r]eceipt" as "delivery to the party or the party's agent." The parties do not dispute that all of the relevant documents were properly delivered and received.

remained "regarding the scope of the time-is-of-the-essence provision and the reasonableness of the [four-day] delay in lowering the purchase price." *Vanbuskirk v. Nakamura*, Docket No. 67816 (Order of Reversal and Remand, May 20, 2016). The supreme court cited *Mayfield v. Koroghli*, which held that "[i]f time is not of the essence, the parties generally must perform under the contract within a reasonable time, which depends upon the nature of the contract and the particular circumstances involved." 124 Nev. 343, 349, 184 P.3d 362, 366 (2008) (internal quotation marks and footnote omitted).

The case proceeded to a short trial before a jury. The short-trial judge provided the jury with a general verdict form accompanied by interrogatories specifically addressing the two remaining issues of material fact as identified by the supreme court. Specifically, the first interrogatory asked the jury whether the general time-is-of-the-essence provision in the parties' agreement applied to Section 2(C). The second interrogatory asked the jury, if it answered "no" to the first question, whether the Vanbuskirks' four-day delay in responding to the Nakamuras' first proposed addendum was reasonable. The jury found that the time-is-of-the-essence provision did apply to Section 2(C), but it also found that the four-day delay was not reasonable. Accordingly, it returned a verdict in favor of the Nakamuras. The Vanbuskirks filed post-trial motions for a new trial and to set aside the judgment, which the short-trial judge denied.

On appeal, the Vanbuskirks argue that the short-trial judge should have granted their motion for a new trial under NRCP 49(b)[4] on

[4]We note that the Nevada Rules of Civil Procedure, including those at issue in this case, were recently amended, effective March 1, 2019. *See In re*

grounds that the jury's answers to the interrogatories were inconsistent with each other, the law, the evidence at trial, and the jury instructions. They also argue that the short-trial judge should have granted their motions for a new trial under NRCP 59(a) and to set aside the judgment under NRCP 60(b), primarily on grounds that the jury should have been provided with the supreme court's order of reversal and remand and that the jury's findings and verdict were contrary to law. Additionally, they argue that plain error warrants reversal. We disagree.

We first consider whether a new trial is warranted under NRCP 49(b). We review a district court's decisions regarding special interrogatories and verdicts for an abuse of discretion. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1110, 197 P.3d 1032, 1037 (2008). We likewise review a district court's decision to grant or deny a motion for a new trial for an abuse of discretion. *Id.* at 1110, 197 P.3d at 1037-38.

Under NRCP 49, a district court may submit to the jury written interrogatories upon one or more factual issues for which decision "is necessary to a verdict." NRCP 49(b). When the answers to the interrogatories "are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court *shall not* direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial." *Id.* (emphasis added). Because of the

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Creating a Committee to Update and Revise the Nevada Rules of Civil Procedure, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018). Because the prior versions of the rules apply to this case, those versions are cited herein.

mandatory nature of this language, the Nevada Supreme Court has identified this particular part of NRCP 49(b) as providing an exception to the general rule that failing to object to inconsistent jury verdicts before the jury is dismissed constitutes a waiver. *See Lehrer*, 124 Nev. at 1111, 197 P.3d at 1038. Where answers to interrogatories and the verdict "are logically incompatible, the terms of Rule 49(b) make it the responsibility of a trial judge to resolve the inconsistency even when no objection is made." *Id.* at 1112, 197 P.3d at 1039 (internal quotation marks and footnote omitted).

Here, the Vanbuskirks failed to object to any inconsistency in the answers or verdict prior to the jury's dismissal. Moreover, they fail to argue that the jury's answers to the interrogatories were inconsistent with *the verdict*; they argue only that the answers were inconsistent with the law, the jury instructions, and the evidence (which are not grounds for a new trial under NRCP 49(b)), and with each other. Because a party must argue under NRCP 49(b) both that the answers were inconsistent with each other *and* with the verdict to avoid waiver, the Vanbuskirks' argument is without merit, and they have waived any other challenge to the verdict on grounds of inconsistency.[5]

We next consider whether a new trial is warranted under NRCP 59(a) or plain-error review, and whether the judgment should be set aside

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[5]We note that the jury's answers are not logically inconsistent with one another or with the verdict. Even though the jury was asked to answer the second interrogatory only if it answered the first in the negative, the Vanbuskirks fail to explain how it is *logically incompatible* for both the time-is-of-the-essence clause to apply to Section 2(C) and the four-day delay in accepting the first addendum to be unreasonable. Those two propositions are not mutually exclusive; the reasonableness inquiry might not matter in light of the applicability of the time-is-of-the-essence provision, but it is still logically possible for the delay to be unreasonable.

under NRCP 60(b). The Vanbuskirks essentially make the same argument under all three grounds, which is that the short-trial judge should have provided the jury with the supreme court's order (or at least a jury instruction regarding certain facts as they were stated in the order) and that the jury's findings and verdict were contrary to law.

The Vanbuskirks fail to cite any authority in support of the specific notion that the short-trial judge was required to provide the jury with the supreme court's order. They instead argue that he was required to do so because the order constituted the law of the case. "The doctrine of the law of the case provides that when an appellate court states a principle of law, that rule becomes the law of the case and is controlling both in the lower court and on subsequent appeals, as long as the facts remain substantially unchanged." *State, Dep't of Highways v. Alper*, 101 Nev. 493, 496, 706 P.2d 139, 141 (1985). To be sure, trial courts have a duty to instruct the jury on the relevant law of the case. *See Am. Cas. Co. v. Propane Sales & Serv., Inc.*, 89 Nev. 398, 401, 513 P.2d 1226, 1228 (1973). The instructions given to the jury in this case—particularly instructions 18 and 19—adequately informed it of the principles of law set forth in the supreme court's order. Thus, there was no need to provide the order itself to the jury, and the Vanbuskirks' argument is without merit.[6]

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[6]We have also considered the Vanbuskirks' argument that the short-trial judge should have given a specific instruction on certain facts as they were set forth in the supreme court's order: that Section 2(C) did not include a specific time period or its own time-is-of-the-essence provision, and that the Vanbuskirks did not decline to exercise their option to sell at the lower price but instead invoked it. Such an instruction would have been both unnecessary and inappropriate. It would have been unnecessary because those particular facts came out at trial and are not disputed by the parties;

Finally, the Vanbuskirks' contention that the jury's findings and verdict were contrary to law is without merit. Even if, as the Vanbuskirks argue, the time-is-of-the-essence provision could not apply to Section 2(C) because there was no stated and unquestionable time for performance under that provision anywhere in the contract, the jury still found that the Vanbuskirks' four-day delay in responding was unreasonable. That was a factual question within the exclusive province of the jury. *See Mayfield*, 124 Nev. at 346, 184 P.3d at 364 ("What constitutes a reasonable time for a contract's performance is a question of fact to be determined based on the nature of the contract and the circumstances surrounding its making."). Accordingly, any error in the jury's findings or verdict was harmless. *See* NRCP 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").[7]

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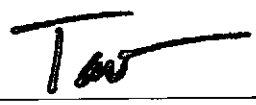
instead, the parties dispute whether the general time-is-of-the-essence provision applies to Section 2(C) and whether the Vanbuskirks' invocation of the option was legally effective. The instruction would have been inappropriate because courts have a duty to instruct juries on the law, not facts, and even though the supreme court noted certain undisputed facts in its order, the jury is the finder of fact in a civil case. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299-300, 279 P.3d 166, 172-73 (2012) (noting the absence of procedural mechanisms in Nevada law for appellate courts to engage in fact-finding); *Palmieri v. Clark Cty.*, 131 Nev. 1028, 1041, 367 P.3d 442, 451 (Ct. App. 2015) ("[T]he jury is generally the finder of fact in civil cases . . . .").

[7]We acknowledge the Vanbuskirks' contention that no evidence was adduced at trial showing that their delay in responding affected the closing date, which appeared to be a requirement set forth by the supreme court in its order. However, that appears to have been an error in phrasing, as the actual legal principles set forth in the order were that a general time-is-of-

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.



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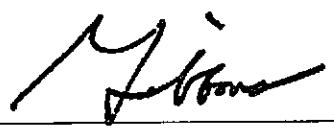

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Gibbons

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cc: Hon. Rob Bare, District Judge
Black & LoBello
Pintar Albiston LLP
Eighth District Court Clerk

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the-essence provision "does not necessarily apply to pre-closing conditions that do not affect the specified closing date," and that whether a time period is reasonable is a question of fact. *Vanbuskirk v. Nakamura*, Docket No. 67816 (Order of Reversal and Remand, May 20, 2016). The order seems to blend those two principles together when it states that the record on appeal did not show "how th[e] 4-day delay was unreasonable such that it would affect the closing date." *Id.* Accordingly, we disagree with the Vanbuskirks and conclude that the jury's finding that the delay was unreasonable is sufficient to sustain the verdict.