

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FORUM SHOPS, LLC,
Appellant,
vs.
BRUCE JAY GREENBERG, AN
INDIVIDUAL,
Respondent.

No. 78448-COA

FILED

APR 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Forum Shops, LLC, appeals from a district court order granting respondent's motion for a new trial in a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

In 2014, respondent Bruce Jay Greenberg tripped and fell while walking through the Forum Shops at Caesars Palace and fractured his hip.¹ Four months later, Greenberg filed a complaint against Forum Shops, LLC (Forum), alleging a single cause of action for negligence. The case ultimately proceeded to a jury trial which lasted nine days.

At trial, immediately before closing arguments, the district court judge read to the jurors a complete and accurate set of the jury instructions from the bench. Once the case was submitted to the jury, the district court provided each juror with a courtesy copy of the jury instructions to aid in deliberations. Fairly early in the deliberations, the jurors noticed that their courtesy copies of the jury instructions were incomplete. Specifically, the instruction packets contained duplicates of jury instructions 26 and 27, while instructions 33 and 34 had accidentally

¹We do not recount the facts except as necessary to our disposition.

been omitted.² The district court judge conferred with the parties to discuss a remedy.³ After consideration of the matter, and with the parties' agreement, the district court corrected the clerical error and reinstructed the jurors on jury instructions 33 and 34. Another copy of the complete and accurate jury instructions was given to the jury. These jury instructions were the same as the instructions given by the district court judge before closing arguments. The jury returned to the deliberation room and, approximately six hours later, rendered a special verdict in favor of Forum, finding that Forum was not negligent.

Greenberg timely moved for a new trial pursuant to former NRCP 59(a),⁴ which Forum opposed. At the hearing on the motion for a new trial, the district court judge determined that the clerical error in the courtesy copies amounted to an irregularity in the court's proceedings and concluded that a new trial was warranted. The district court then reduced its findings and conclusions to a written order. This appeal followed.

²Instruction 26 states, among other things, that "[a] property owner is not an insurer of . . . safety," while 27 instructs the jury that "it may be reasonable for a customer . . . to walk and not constantly watch where he or she is going." Instructions 33 and 34 address subsequent similar incidents and a mall owner's duty of care, respectively.

³Judge Gloria Sturman presided over the trial as well as pre- and post-trial motion practice, while Judge Ronald Israel presided over jury deliberations.

⁴The Nevada Rules of Civil Procedure were amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. 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, Dec. 31, 2018). All orders in this case were entered before March 1, 2019. Accordingly, we cite the prior version of the Nevada Rules of Civil Procedure herein.

On appeal, Forum argues that the district court abused its discretion when it granted Greenberg's motion for a new trial pursuant to NRCP 59(a)(1). Specifically, Forum contends that the district court erred because it failed to articulate how the procedural irregularity of giving incomplete courtesy copies of jury instructions, which was subsequently corrected by the district court prior to verdict, materially affected Greenberg's substantial rights. In other words, Forum argues that the district court applied the incorrect legal standard because it failed to address prejudice as a result of the procedural irregularity. Greenberg nevertheless urges this court to affirm the district court's decision and find prejudice because the foreperson's notes to the district court judge suggest that "the jury backtracked from the agreed-upon decision" and reached an impasse after being reinstructed on jury instructions 33 and 34. We agree with Forum and therefore reverse.

"The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court," *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) (internal quotation marks omitted), and this court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion, *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 814, 357 P.3d 387, 395 (Ct. App. 2015) (citing *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008)). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *BMW*, 127 Nev. at 133, 252 P.3d at 657 (quoting *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010)); see also *Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007) (providing that "the district court abuses its discretion if it applies an incorrect legal standard").

Former NRCP 59(a) enumerated several grounds for granting a new trial, including, as relevant here, “[i]rregularity in the proceedings of the court” which prevented either party “from having a fair trial.” However, even if one of NRCP 59(a)’s grounds for a new trial has been established, a new trial is not warranted unless it is shown that the ground “materially affected the substantial rights of the aggrieved party.” *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 263-64, 396 P.3d 783, 786 (2017) (alterations omitted). Thus, in order to succeed on a motion under NRCP 59(a)(1), the moving party must establish that (1) there was an irregularity in the court’s proceedings, and (2) the irregularity materially affected a substantial right—i.e., resulted in prejudice. *Cf.* NRCP 61 (Harmless Error) (explaining “[t]he court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties”).

Here, the record indicates that the district court granted Greenberg’s motion for a new trial based only on the procedural irregularity related to the jury instructions, and without also considering how this irregularity materially affected Greenberg’s substantial rights causing prejudice. Although the district court’s order states that “the Court verbally granted the Motion for New Trial . . . because irregularities in the proceedings impacted Greenberg’s substantial rights and prevented [him] from having a fair trial,” such a statement is simply a recitation of the legal standard. The district court failed to explain either at the hearing on the motion for a new trial or in its order how the irregularity in the proceedings—giving jurors incomplete courtesy copies of the jury instructions—materially affected Greenberg’s substantial rights, and how or why the trial was unfair to him as a result.

Although under certain circumstances it might be proper to remand a similar matter to the district court to determine whether the procedural irregularity affected the moving party's substantial rights, such remand is not required here because the record does not support a finding of prejudice. Thus, additional fact finding on this issue is not warranted. Specifically, the district court's order indicates that the jury was properly instructed on the law when the district court judge read to the jurors a complete and true copy of the jury instructions prior to closing arguments. *Cf. D & D Tire, Inc. v. Ouellette*, 131 Nev. 462, 471, 352 P.3d 32, 38 (2015) (providing that in civil matters, "if an instruction is not technically correct, the instruction should be examined in the context of all instructions given to the jury in deciding whether the jury was sufficiently and fairly instructed" (internal quotation marks omitted)).

The record also demonstrates that once the jurors discovered the error in the courtesy copies, the foreperson promptly notified the district court. The district court then reinstructed the jurors on the missing instructions, and provided the jury with another complete and accurate copy of the instructions to use during the remainder of deliberations, which continued for approximately six more hours. *See id.* Thus, the jurors could not have substantially relied on the incomplete instructions in reaching their verdict. Further, it appears that all the parties are in agreement that the error involving the courtesy copies was timely corrected. It should be noted that the courtesy copies did not contain any erroneous instructions, only two missing ones. And more importantly, the parties agreed with the

district court's decision to correct any procedural irregularity by properly reinstructing the jury, without objection.⁵

Greenberg's argument that he was prejudiced by these events is unpersuasive. As noted above, the record shows that the jury was properly instructed on the law more than once—first, from the bench prior to closing arguments, and second, after the error in the courtesy copies was discovered and corrected. Thus, the jury was sufficiently instructed on the law. *See Ouellette*, 131 Nev. at 471, 352 P.3d at 38. Further, jurors are free to change their minds during deliberation, and a jury's decision is not final until it has been submitted to and accepted by the trial court. *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 194, 42 P.3d 808, 810 (2002) (providing that "a jury's decision is . . . impermanent until it has been submitted to and accepted by the trial court").

Therefore, because neither the district court's oral pronouncement nor its written order made specific findings addressing both irregularity and *prejudice* as required by NRCP 59(a), we conclude that the district court abused its discretion when it granted a new trial based on the procedural irregularity without considering the prejudice caused by it. We also conclude that because the jury was correctly instructed on the law


⁵Greenberg did not raise an objection or move for a mistrial upon discovery of the error. Only after the jury rendered its verdict did Greenberg move for a new trial. *See Gray v. Robinson*, 91 P.2d 194, 197-98 (Cal. Dist. Ct. App. 1939) (explaining "where such irregularity is relied upon, the moving party must show affirmatively that both he and his counsel were ignorant of the facts constituting the irregularity charged until the rendition of the verdict, since it is settled that a party may not remain quiet, taking his chances upon a favorable verdict, and, after a verdict against him, raise a point of which he knew and could have raised during the progress of the trial").

multiple times during trial, and because the district court timely, and without objection, corrected the error, a finding of prejudice cannot be supported. Consequently, the error in initially providing the jurors with incomplete courtesy copies of the jury instructions was harmless, as it did not materially affect Greenberg's substantial rights and prevent him from receiving a fair trial.

Accordingly, we

REVERSE the district court's order granting a new trial and REMAND this matter with instructions to the district court to reinstate the judgment on the jury's verdict consistent with this order. *See Pink v. Busch*, 100 Nev. 684, 691, 691 P.2d 456, 461 (1984)("[U]pon reversal, where the material facts have been fully developed at trial and are undisputed such that the issues remaining are legal rather than factual, we will . . . remand the case to the lower court with directions to enter judgment in accordance with [our order].").⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

⁶Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered them and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Gloria Sturman, District Judge
Persi Mishel, Settlement Judge
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