IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIEN SCHWIMER, AN INDIVIDUAL; AND JOSEPH NICHOLSON, AN INDIVIDUAL,
Appellants,
vs.
NEVADA PROPERTY 1, LLC, D/B/A COSMOPOLITAN RESORT & CASINO, A/K/A THE COSMOPOLITAN OF LAS VEGAS, A FOREIGN LIMITED LIABILITY COMPANY,
Respondent.

No. 80049-COA

FILED

APR 22 2021

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

ORDER OF REVERSAL AND REMAND

Brien Schwimer and Joseph Nicholson (appellants) appeal from a district court final judgment in a tort action in favor of Nevada Property 1, LLC, d/b/a Cosmopolitan Resort & Casino, a/k/a The Cosmopolitan of Las Vegas, A Foreign Limited Liability Company (the Cosmopolitan). Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Appellants sued the Cosmopolitan for negligence; negligent hiring, training, and/or supervision; and respondeat superior after they were allegedly beaten and assaulted at the hotel.[1] The case was assigned to the court annexed arbitration program. The parties attended a non-binding arbitration after which the arbitrator found in favor of the Cosmopolitan. Appellants filed a timely request for a trial de novo, and the matter was set for a short trial.[2]

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

[2]As this was a short trial, no transcript of the trial exists. *See generally* NSTR 20 ("There shall be no formal reporting of the proceedings

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unless paid for by the party or parties requesting the same."). However, because the dispositive issue on appeal involves a pretrial ruling by the short trial judge, for which we have: (1) the expert's report; (2) the relevant pleadings below; (3) the written order excluding the expert's report and opinions; and(4) adequate briefing on appeal, we address the merits of the parties' arguments on appeal. *See* NRAP 30(b).

The dissent suggests that we are impermissibly relying on the parties' briefs and guessing about what occurred at the short trial (including the possibility that other witnesses may have provided testimony that would have also addressed the excluded expert's testimony) in concluding that the short trial judge abused his discretion in excluding the expert testimony. While it is true that we do not know for certain what happened at the short trial, beyond the pretrial rulings and the verdict, the one fact we do know is that the appellants' expert did not testify based on an erroneous pretrial ruling. We also know that the expert evidence that was excluded was directly relevant to the appellants' case, which is the reason appellants identified the expert in the first place.

Unlike *Paz v. Rent-A-Center*, Docket No. 77520 (Order of Affirmance, April 9, 2021) and *Fernandez v. Las Vegas Metro Police Dept.*, Docket No. 80951 (Order of Affirmance, March 17, 2021), cited by the dissent, this is not a case where the district court found that the expert disclosure was untimely or a case where the alleged errors on appeal were dependent on the trial testimony of other witnesses requiring a trial transcript to resolve. Nor is this a case where the short trial judge decided that the expert did not have the appropriate credentials to testify under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). Here, the short trial judge's rationale for excluding the expert was unreasonable, erroneously based on a misreading of the expert's report or a misunderstanding of the expert's breach of duty testimony. Finally, we would note that counsel have a duty of candor to the tribunal, and if the excluded expert actually testified at the short trial, or other witness testimony sufficiently addressed the expert's excluded opinions, the parties were required to disclose such information in their appellate briefs. *See* RPC 3.3. We have no reason to question the factual presentations made by either party, and frankly, both parties' recitations of the facts regarding the exclusion of appellants' expert were fairly consistent, and we can draw no inference that expert opinion was presented at the short trial in any form.

In advance of trial, appellants disclosed an expert report that addressed crime statistics, the foreseeability of the incident based on these statistics, the duty that the Cosmopolitan owed to its patrons, an opinion that the duty was breached, and the reasons for all of the conclusions. Specifically, the expert report provided information about criminal activity in the area surrounding the hotel, additional security risks, the level of security deployed by the hotel at the time of the incident, and the level of security required to protect patrons. Thus, in addition to discussing the foreseeability of the incident at issue, the expert also postulated in his report that the hotel breached its duty of care: "a deficient deployment completely REMOVED the West 3 from the DAY patrol cycle thereby creating a deterrence vacuum on the 54th floor. This constituted a major breach of customary security procedures and fell significantly BELOW the standard of care for commercial properties operating in such a criminally-active sector," and "[f]ailing to conduct this assessment fell below the standard of care for maintaining a safe, secure and risk-acceptable environment for guests, employees and visitors . . . ."

Prior to trial, the Cosmopolitan moved to exclude the expert report, as well as the expert's testimony, arguing that the expert's opinions—based primarily on insufficient crime statistics in his report—lacked foundation, and therefore, failed to establish that Cosmopolitan owed appellants a duty under Nevada's innkeeper statute, NRS 651.015. The short trial judge ultimately found the Cosmopolitan owed appellants a duty as a matter of law.[3] However, the judge excluded the appellants'

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[3]We presume the short trial judge found that the Cosmopolitan owed the appellants a duty of care under the innkeeper statute, NRS 651.015, which requires such duty to be determined by the court as a matter of law.

expert report and expert from testifying at trial because the judge found the expert failed to address in his report "whether that duty of care was breached." The jury returned a verdict in favor of the Cosmopolitan. This appeal followed.

On appeal, appellants argue that the district court abused its discretion in excluding their expert's report and testimony at trial because the expert did in fact address duty and breach of duty in his report.[4] On the other hand, the Cosmopolitan argues that because the short trial judge determined that the Cosmopolitan owed appellants a duty as a matter of law, the expert's opinions were irrelevant, moot, and properly excluded by the short trial judge. We agree with appellants.[5]

We review the exclusion of expert testimony for an abuse of discretion. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046, 881 P.2d 638, 640 (1994). A district court abuses its discretion "when the judicial action is arbitrary, fanciful, or unreasonable, or where no reasonable

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Thus, the issue of whether or not the crime statistics cited by appellants' expert were sufficient to support a duty owed under the innkeeper statute became moot once the short trial judge determined that Cosmopolitan owed a duty to appellants.

[4]On appeal, appellants also argue that their expert's report would have been admissible under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). The Cosmopolitan argues otherwise. We decline to review this issue on appeal because neither party argued below the admissibility of the expert's testimony under *Hallmark*. *See Montesano v. Donrey Media Grp.*, 99 Nev. 644, 650 n.5, 668 P.2d 1081, 1085 n.5 (1983) (noting the court need not consider arguments raised for the first time on appeal).

[5]Insofar as the parties raise arguments that are not specifically addressed herein, we have considered them and conclude that they either do not present a basis for relief or need not be addressed given our disposition of this appeal.

[person] would take the view adopted by the trial court." *Imperial Credit v. Eighth Judicial Dist. Court*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014) (internal quotations and citations omitted). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Further, to the extent that an expert's testimony is subject to challenge, the court must determine if the challenged testimony goes "to the weight of the evidence" versus "its admissibility." *Nev. Power Co. v. 3 Kids, LLC*, 129 Nev. 436, 443, 302 P.3d 1155, 1159 (2013), *as modified* (July 24, 2013).

We conclude that the short trial judge erroneously excluded the expert's report and testimony based on the sole finding that the "report fails to address whether that duty of care was breached and therefore the report and opinions are excluded from trial." The report addressed the Cosmopolitan's duty to keep its patrons safe in relation to the obvious crime problem in the area as well as breach of its duty in this case by providing inadequate security. Indeed, the report emphasized "breach," "duty of care," and "standard of care." As such, the short trial judge abused his discretion in excluding the expert's report on the sole basis of failing to address breach of the duty of care. In this case the jury should have been given the opportunity to hear the security expert's testimony, whether by report

and/or oral testimony,[6] and weigh such evidence accordingly in reaching its verdict.[7]

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____________________, C.J.
Gibbons

_____________________, J.
Bulla

TAO, J., dissenting:

I respectfully dissent. Schwimer waited until after the jury returned its verdict to file his appeal (as opposed to seeking interlocutory pre-trial relief immediately when the trial court decided to exclude the expert). That means we're confronted with an appeal alleging trial error, not an appeal directly from an isolated pre-trial ruling. The definition of a trial error is an error "which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented." *Arizona v. Fulminante,* 499 U.S. 279, 307-08

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[6]We note that in the short trial format parties are encouraged to use expert reports in lieu of oral testimony in court. NSTR 19(a).

[7]To the extent that there are proper evidentiary challenges to appellants' expert's report or his opinions, these can be addressed on remand.

(1991). To review a trial error, we must review not merely the particular ruling being challenged in isolation as if nothing else happened, but rather we must review the entirety of the trial to determine whether the verdict was legitimate despite any error or whether it was the product of the supposed error. Even when a trial error occurs, it is "harmless" and does not warrant reversal if the jury would have reached the same verdict had the error not occurred. *Cortinas v. State,* 124 Nev. 1013, 1025, 195 P.3d 315, 323 (2008).

The problem is that neither party provided us with a transcript of the trial (apparently none exists), so we have no idea what happened during the trial. Without a transcript of the trial, we cannot know any of the following:

> Whether the pre-trial order was actually complied with at trial, or whether the judge might have changed his mind in response to the events of trial and subsequently allowed the testimony, meaning the evidence was never excluded;
>
> Whether, despite the pre-trial order, the other party may have opened the door to the testimony, thereby allowing it in, meaning that the evidence was not actually excluded;
>
> Whether, despite the pre-trial order, the same expert evidence came in through other witnesses or evidence, meaning that any error was harmless and played no role in the jury's deliberations; and
>
> Whether the barred evidence may have been cumulative to other evidence and therefore any error from the pre-trial ruling was harmless and played no role in the jury's deliberations.

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It is precisely to answer these questions that our appellate rules require a party wishing to appeal a short trial verdict (or indeed any trial verdict) to provide "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). When we have an incomplete record, the rule we're supposed to follow is that the appellant bears the burden of supplying the complete record and "we necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007).

What we're absolutely not supposed to do is base our decision upon unverified assumptions created just by reading the briefs without looking at the actual record. Courts are supposed to rule on evidence and law, not upon guesses without any basis in any written record. Quite to the contrary,

> On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom. *Toigo v. Toigo,* 109 Nev. 350, 350, 849 P.2d 259, 259 (1993) (citing *Lindauer v. Allen,* 85 Nev. 430, 433, 456 P.2d 851, 853 (1969)). We will generally not consider on appeal statements made by counsel portraying what purportedly occurred below. *Wichinsky v. Mosa,* 109 Nev. 84, 87, 847 P.2d 727, 729 (1993) (citing *Lindauer,* 85 Nev. at 433, 456 P.2d at 852-53).

Mack v. Estate of Mack, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009). Note the supreme court's warning: it's not just that we won't <u>rely</u> upon counsel's descriptions of what happened below; it's that we're not even supposed to <u>consider</u> them. We "cannot properly consider matters not appearing in th[e] record." *Johnson v. State,* 113 Nev. 772, 776, 942 P.2d 167, 170 (1997). Yet without a transcript, arguments of counsel are all we have; there is no record to consider. And if we must ever guess at what happened below in

the absence of a record, the long-established and well-settled rule is that our guesses must weigh against, not in favor of, the appellant seeking reversal. *Cuzze*, 123 Nev. at 603, 172 P.3d at 135.

When a party wishes to appeal from a short trial, there are multiple ways to provide a record. Under the short-trial rules of the 8th Judicial District Court, parties conducting short trials are permitted, but not required, to request transcripts of the trial. *See* Rule 20. Because short trials are designed to minimize time and expense, many parties, like those involved in this appeal, choose not to bear the expense of having the trial transcribed. But even then, the rules provide a second alternative way of creating a record: in lieu of a trial transcript, NRAP 9(d) permits the parties to submit an agreed-upon statement of the relevant facts of the events below. As a third alternative, a party seeking to challenge a pre-trial ruling need not wait for trial, but instead can file an immediate interlocutory petition for writ of mandamus or prohibition, which we can resolve without the need to wait for the ultimate verdict.

Here, Schwimer did none of these things. Yet the majority reverses anyway. The majority concludes that the trial judge's pre-trial order barring expert witness Nichter from testifying was erroneous. Maybe reasonable minds could agree or disagree with that conclusion. But where the majority goes astray is in the next step it takes: concluding that the pre-trial order necessarily infected the trial and therefore the entire trial must be reversed. Without a transcript of the trial, that's nothing more than a guess—an educated guess perhaps—but still a guess we're not supposed to make.

It's a guess we didn't make in *Paz v. Rent-A-Center*, Docket No. 77520 (Order of Affirmance, April 9, 2021), when we unanimously concluded

that the district court erred in a pre-trial order preventing an expert witness from testifying, but that the error was harmless because the expert's opinions were nonetheless introduced anyway through other evidence and witnesses. Similarly, in *Fernandez v. Las Vegas Metro Police Dept.*, Docket No. 80951 (Order of Affirmance, March 17, 2021), the appellant challenged the district court's pre-trial exclusion of certain evidence but failed to provide a transcript of the trial, leading us to observe that:

> appellants failed to provide this court with a sufficient record on appeal. Specifically, appellants did not provide a copy of the traffic accident report, the transcript or order from the evidentiary hearing, or the transcript from the trial itself. Thus, the record is bare, and we necessarily presume that any missing portions of the record support the district court's decision. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) ("[W]e necessarily presume that the missing portion supports the district court's decision.").

Id. at *5. In footnote 4, we went further to pointedly add:

> We note that it is an appellant's burden to provide the "portions of the record essential to determination of issues raised in appellant's appeal." NRAP 30(b)(3). Moreover, where, as was apparently the case here, the proceedings were not reported or recorded, "the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the respondent, who may serve objections or proposed amendments within 14 days after being served." NRAP 9(d). In this case, appellants failed to utilize this option, resulting in a deficient record on appeal, even though this was a short trial with different rules.

Yet in this case, confronted with the same gap in the record as in *Fernandez* (a pre-trial ruling but no trial transcript and no attempt obtain a statement pursuant to NRAP 9(d)) the majority applies a very different approach, and by doing so it apparently assumes what we just saw happen in *Paz* (the trial court erred in excluding an expert's testimony but the error was harmless because the same evidence came in through other witnesses) cannot possibly happen here.

The majority justifies the disparate result by noting that the parties do not argue otherwise in their briefs, but this flatly violates the idea that we aren't supposed to rely upon the briefs and will "not consider on appeal statements made by counsel portraying what purportedly occurred below." *Mack*, 125 Nev. at 91, 206 P.3d at 106. The majority also theorizes that the contents of witness lists and pre-trial disclosure suggest that it's extremely unlikely that the scenario we just saw in *Paz* could have happened here, because other witnesses seem unqualified to cover the excluded evidence. Maybe not, maybe so. But without a transcript of what those witnesses were permitted to say, this line of reasoning actually makes things worse, because now we're not just making one guess that the error occurred at trial, we're also adding the next guess that no other witness or evidence fixed it. The entire point of requiring a record is so that we don't have to engage in such guesswork at all.

Instead of guessing at the answers to these questions, I would apply the same principle we have long applied to other cases: that "it is an appellant's burden to provide the portions of the record essential to determination of issues raised in appellant's appeal[,]" (*Fernandez,* at 5 *n.4), and when there is no transcript of the trial whose verdict we are asked to reverse, "we necessarily presume that any missing portions of the record

support the district court's decision." (*Cuzze*, 123 Nev. at 603, 172 P.3d at 135).

_______________________, J.
Tao

cc: Hon. Linda Marie Bell, Chief Judge, Eighth Judicial District Court
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Eighth District Court Clerk