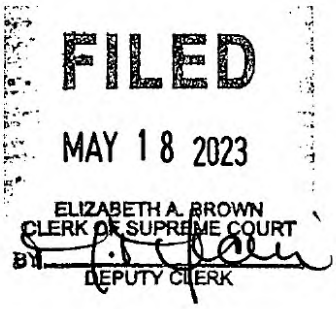
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HAROLD SMEDAL, III, AN INDIVIDUAL,
Appellant,
vs.
THE WINNEMUCCA HOTEL, LLC, A NEVADA LIMITED LIABILITY CO., D/B/A HOLIDAY INN EXPRESS WINNEMUCCA,
Respondent.

No. 83966-COA



ORDER OF AFFIRMANCE

Harold Smedal, III, appeals from a jury verdict in favor of the Winnemucca Hotel (the Hotel) and an order awarding the Hotel costs. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Smedal resides in Walnut Creek California.[1] In July 2015, Smedal, then 72 years old, and his spouse stayed in the Winnemucca Hotel[2] on the way to Salt Lake City where they planned to visit their daughter. They spent one night in the Hotel, and the following morning, Smedal planned to take a shower in the bathtub shower combination. Smedal did not see a bathmat in the bathroom, but he did observe what appeared to be texture on the bottom of the bathtub. Smedal turned on the water, placed one foot inside the tub, and lost his balance. As he fell, he tried to grab onto the shower curtain but ultimately fell onto his outstretched left arm. Smedal's spouse drove him to the hospital after the fall where doctors discovered that Smedal fractured his humeral head (part of the shoulder) in

[1]We recount the facts only as necessary for our disposition.

[2]The Winnemucca Hotel does business as the Holiday Inn Express Winnemucca.

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four places. The hospital in Winnemucca was not able to treat Smedal and informed him that he needed to either return to Reno for medical treatment or seek medical treatment as soon as he arrived in Salt Lake City.

Once Smedal arrived in Salt Lake City, he was admitted to the hospital and had a reverse shoulder replacement the following morning. After a brief recovery period in Salt Lake City, Smedal and his wife returned to California, and Smedal began receiving medical care from an orthopedic surgeon in the area. Smedal had two additional surgeries to repair his shoulder and has been left with limited range of motion in his shoulder. Following the final surgery, Smedal filed this lawsuit and alleged negligence in that the Hotel breached a duty to protect him from what he claimed was an unreasonably slippery bathtub by failing to install handholds inside the shower, not placing a bathmat in the room, and not lessening the slipperiness of the shower.

The case proceeded to a jury trial. During voir dire, the district court denied five of Smedal's for-cause challenges. Smedal used his peremptory strikes to remove four of these potential jurors from the panel, but the fifth was seated on the jury. During trial, the district court sustained the Hotel's objection to testimony by one of Smedal's experts that it is common knowledge that people slip and fall in bathtubs. A discussion ensued, but Smedal did not proffer what further testimony the expert would have provided. At the conclusion of the trial, the jury found in favor of the Hotel and found no comparative negligence.

Following the jury verdict, the Hotel requested attorney fees and costs. The district court denied the Hotel's motion for attorney fees, but granted the motion for costs and awarded the Hotel $163,146.15.

On appeal, Smedal raises three issues. First, the district court abused its discretion when it denied five of Smedal's for-cause challenges.

Second, the district court abused its discretion when it restricted the testimony of one of Smedal's expert witnesses. Finally, Smedal claims that since the district court abused its discretion, this court should grant a new trial and vacate the district court's award of costs to the Hotel.[3] We disagree and address each issue in turn.

The district court did not abuse its discretion when it denied five of Smedal's for cause challenges to potential jurors

Smedal argues that two of the potential jurors demonstrated both actual and inferred bias, two potential jurors demonstrated actual bias, and one potential juror demonstrated implied bias, so the district court abused its discretion by denying Smedal's challenges. The Hotel responds that none of the challenged potential jurors demonstrated any form of bias, and the jury was impartial.

We apply an abuse of discretion standard when reviewing a district court's denial of a challenge for cause. *Jitnan v. Oliver*, 127 Nev. 424, 426, 254 P.3d 623, 625 (2011). A district court has broad discretion when ruling on for cause challenges because "it 'is better able to view a prospective juror's demeanor than a subsequent reviewing court.'" *Id.* at 431, 254 P.3d at 628 (quoting *Leonard v. State*, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001)). To determine if a prospective juror should have been removed for cause, we look to see if "the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and

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[3]The district court awarded costs under NRS 18.020(3) (awarding costs to the prevailing party where the plaintiff sought to recover more than $2,500). Since we are not granting a new trial, and Smedal raises no other argument as to the award of costs, we do not vacate the award of costs. *Cf. Baker v. Noback*, 112 Nev. 1106, 1112, 922 P.2d 1201, 1204 (1996) (vacating an award of costs to the prevailing party after the court reversed the order dismissing the complaint).

his oath." *Id.* at 431, 254 P.3d at 628-29 (internal quotation marks omitted). Additionally, "a juror's statements must be taken as a whole when deciding whether to dismiss for cause due to bias." *Khoury v. Seastrand*, 132 Nev. 520, 525, 377 P.3d 81, 85 (2016). Even if a potential juror should have been excused for cause, the error is harmless as long as the jurors that served were fair and impartial. *Jitnan*, 127 Nev. at 434, 254 P.3d at 630; *Sayedzada v. State*, 134 Nev. 283, 293, 419 P.3d 184, 194 (Ct. App. 2018).

Of the five potential jurors that were not dismissed for cause, only one served on the jury because Smedal used his peremptory challenges to excuse four of these potential jurors. "[T]he erroneous denial of a challenge for cause of a prospective juror, followed by a party's use of a peremptory challenge to remove that juror, does not deprive the party 'of any rule-based or constitutional right' so long as the jury that sits is impartial." *Jitnan*, 127 Nev. at 434, 254 P.3d at 630 (quoting *United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000)). Therefore, we begin by discussing the only arguably biased juror who ultimately became a member of the jury in this case: juror number two.

Smedal argues that juror number two demonstrated implied bias because she was the second cousin of a testifying witness (the front desk receptionist at the Hotel the morning Smedal fell). The Hotel responds that juror number two was not positive she was related to the witness, and even if she was related, the relationship is so distant that it does not fall under the scope of kinship bias as a matter of law.

The record supports that juror number two was not confident she was related to the witness. During voir dire, she stated "[o]ne of the witnesses might be my cousin's daughter." She went on to state that her cousin's daughter had moved away, so she was not sure if it was her as she only saw her cousin's daughter "maybe once a year." Finally, juror number

two stated that her possible relationship would not influence her ability to be objective.

Implied bias depends on the juror's background or relationship to the parties and is limited to a narrow set of specific situations. *Sayedzada*, 134 Nev. at 290, 419 P.3d at 191-92. The Legislature has identified most circumstances establishing implied bias in NRS 16.050. *Id.* The closest statutory form of implied bias that Smedal seemingly argues is contained in NRS 16.050(1)(b) (stating that challenges for cause may be made for "[c]onsanguinity or affinity within the third degree to either party"). Not only does Smedal not discuss the statute in his brief with regard to this juror, but the relationship between the witness and the juror does not fall within the statute. First, the statute only applies to a juror's relationship with a party, not with a witness. The party in this case is a corporation, and the witness was no longer employed by the corporation.[4] Additionally, Smedal made no argument that a former employee of a corporation is a party. This court does not supply an argument on behalf of the parties and only reviews the issues the parties present. *Senjab v. Alhulaibi*, 137 Nev. 632, 633-34, 497 P.3d 618, 619 (2021); *Pelkola v. Pelkola*, 137 Nev. 271, 273, 487 P.3d 807, 809 (2021).

Second, a first cousin's children are not within the third degree of consanguinity; so, assuming the witness was truly related to juror number two, and was a party, the witness (first cousin's daughter) would fall beyond the third degree of consanguinity.[5] *See Consanguinity/ Affinity*

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[4]The witness was unsure exactly when she started working but testified that she worked for the Hotel for a little over a year from sometime in 2014 to the end of 2015.

[5]Smedal does state that a "veniremember's relationship as a double first cousin once removed to a government witness" is a valid reason for a for cause challenge. However, the case that Smedal relies on is only persuasive

Chart, Nevada Commission on Ethics, https://ethics.nv.gov/uploadedFiles/ethicsnvgov/content/Resources/New%20Consanguinity%20and%20affinity%20chart.pdf.pdf (last visited May 11, 2023). Finally, we note that Smedal failed to challenge or ask the district court to inquire of juror number two if she was related to the witness during the witness's appearance and testimony at trial. This was important since juror number two was not certain that she was related to the witness during voir dire. Smedal thus failed to establish that juror number two was indeed related to the witness when the witness appeared at the trial, or that the witness was a party to the case. Accordingly, we conclude that Smedal has not established implied bias; therefore, the district court did not abuse its discretion when it denied Smedal's for cause challenge to juror number two.

As discussed above, Smedal successfully used peremptory challenges to remove the four other jurors that he contended were biased, and Smedal does not contend that any other empaneled juror was biased. Since the jury that sat was impartial, Smedal was not prejudiced even if any one of his other for cause challenges was denied in error. *See Jitnan*, 127 Nev. at 434, 254 P.3d at 630; *see also Sayedzada*, 134 Nev. at 293, 419 P.3d at 194. Therefore, we conclude that reversal is not warranted.

The district court did not abuse its discretion when it limited the testimony of one of Smedal's expert witnesses

Smedal argues that the district court abused its discretion when it sustained an objection to the testimony of one of his expert witnesses, Dr. Bakken, because the testimony was within the scope of Dr. Bakken's

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authority and appears to be limited to criminal cases. *See Conway v. Polk*, 453 F.3d 567, 586 (4th Cir. 2006) (stating that "close kinship between a juror and a participant in a criminal trial constitutes a classic form of juror partiality").

expertise and was necessary for Smedal to show actual notice. The Hotel responds that Smedal's proffer during trial was insufficient and did not preserve the issue for appeal; further, the testimony was improper because it is common knowledge that wet bathtubs are slippery.

We review the exclusion of expert testimony for an abuse of discretion. *See FCH1, LLC v. Rodriguez*, 130 Nev. 425, 432, 335 P.3d 183, 188 (2014); *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046, 881 P.2d 638, 640 (1994). A district court abuses its discretion when its decision is clearly erroneous. *See Bautista v. Picone*, 134 Nev. 334, 336, 419 P.3d 157, 159 (2018).

At the outset, we note that Smedal did not raise the actual notice argument below that he now raises on appeal. Therefore, this court need not consider his argument. *See Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (recognizing that, in order to properly preserve an objection, a defendant must object at trial on the same grounds he asserts on appeal); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").[6]

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[6]We acknowledge that Smedal is correct that "an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." NRS 50.295. However, an expert witness may not offer a legal conclusion. *Pundyk v. State*, 136 Nev. 373, 376, 467 P.3d 605, 608 (2020). The district court sustained the objection because Dr. Bakken's testimony was "taking from the province of the jury." Smedal argues that Dr. Bakken was prevented from testifying that the Hotel had actual notice that slippery bathtubs are hazards to guests. Even if we consider the merits, we note that the Nevada Supreme Court has treated actual notice as a legal conclusion in limited circumstances before. *See generally Iliescu v. Steppan*, 133 Nev. 182, 394 P.3d 930 (2017). Accordingly, we conclude that the district court acted within its discretion when it restricted Dr. Bakken's testimony to the extent it was a legal conclusion.

If the trial court sustains an objection and prevents the jury from hearing evidence, "it is the responsibility of the party against whom the objection is sustained to make an offer of proof that specifies what the party expects to prove by the proffered testimony." *Burgeon v. State*, 102 Nev. 43, 47, 714 P.2d 576, 579 (1986). An offer of proof is required for appellate review. *Foreman v. Ver Brugghen*, 81 Nev. 86, 90, 398 P.2d 993, 995 (1965). Additionally, appellate courts are not suited to make factual determinations. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well suited to make factual determinations in the first instance.").

The record does not contain an offer of proof specifying what Smedal intended to prove with Dr. Bakken's testimony. The Hotel argues, and Smedal agrees, that Smedal had to prove that the bathtub in Smedal's room was unreasonably dangerous.[7] However, Smedal did not proffer at trial, and does not explain on appeal, how Dr. Bakken's testimony would have demonstrated that the bathtub was unreasonably dangerous or slippery or what the Hotel should have done differently.[8] Instead, Smedal argues that Dr. Bakken's testimony would have revealed that the Hotel had actual notice that slippery bathtubs are a threat to guests. This argument fails to explain how the Hotel would have known that the bathtub in question was unreasonably dangerous, even if it is "common knowledge" that "people will

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[7]We note that there was testimony that a bathmat was inside the bathroom, but Smedal did not use it, and the bottom surface of the bathtub was textured.

[8]We note that Smedal provided another expert witness who testified that the coefficient of friction in the bathtub was less than ice, which gave the jury enough information to weigh if the bathtub was unreasonably dangerous or slippery.

slip and fall in a tub," or how the result of the trial would have been different. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."). Therefore, we conclude the district court did not abuse its discretion by excluding this portion of Dr. Bakken's testimony.[9]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[10]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

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[9]Additionally, even if the district court abused its discretion, Smedal has failed to argue how this affected his substantial rights and the jury might have reasonably reached a different result. *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778; *cf.* NRCP 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

[10]Insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same 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. Michael Montero, District Judge
Kidwell & Gallagher, Ltd.
Claggett & Sykes Law Firm
Lewis Roca Rothgerber Christie LLP/Las Vegas
Pyatt Silvestri
Humboldt County Clerk