IN THE SUPREME COURT OF THE STATE OF NEVADA

SUSAN HOY, AS GUARDIAN AD LITEM FOR AZRAEL HARRISON,
Appellant,
vs.
FLOWER MARIE CASTELLON; AND FLOR CABRERA, A/K/A FLOR OLVERA,
Respondents.

No. 84521

FILED

NOV 30 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a motion for a new trial after a jury verdict in a negligence matter. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.[1]

This case involves a two-year-old boy who nearly drowned in an above-ground pool at his home and sustained severe injuries as a result. His aunt, Flor Cabrera, lived at the home, and his grandmother, Flower Castellon, owned the home and pool but did not live at the home. The child's guardian ad litem, appellant Susan Hoy, maintained the present suit against respondents Cabrera and Castellon on behalf of the minor child.

[1]Post oral argument we received an Erratum filed 9/12/2023 to correct a misstatement made by Castellon's counsel during oral arguments. Hoy filed a Response on 9/13/2023. Both the Erratum and Response thereto contained additional arguments. While Castellon fails to cite to any rule that permits uninvited supplemental argument, the Nevada Rules of Professional Conduct 3.3(a)(1) states that "[a] lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Under these circumstances we elect to consider both the Erratum and the Response, and conclude that neither affect the outcome of our order.

Prior to trial, the district court resolved several competing motions for summary judgment. In pertinent part, the district court determined that (1) the pool was subject to the Southern Nevada Pool Code (Pool Code), (2) there was no secondary access barrier around the pool as required by the Pool Code, (3) neither Cabrera nor Castellon ever installed the same, (4) the duties under the Pool Code were non-delegable, (5) the minor child was within the class of persons the Pool Code was designed to protect, and (6) the minor child's injuries were of the type the Pool Code was designed to prevent.

At trial, the parties proposed competing verdict forms. The district court modified Castellon's form and submitted verdict forms to the jury with a compound question as to duty and breach as it pertained to the negligence per se cause of action. The district court also submitted a compound question of duty and breach under the combined theories of negligence and premises liability.

The jury returned a unanimous verdict in favor of Cabrera and Castellon, answering "no" on the compound questions, without reaching the questions on causation and damages. Hoy then moved for a new trial which the district court denied.

On appeal, Hoy asserts that the district court should have settled the verdict forms on the record, that they did not see or agree to the actual verdict forms submitted to the jury before the court began instructing the jury, and that the verdict forms were improper. Respondents assert that Hoy failed to preserve her objection to the forms and, alternatively, that the verdict forms did not constitute error.

Here, we agree with Hoy that the district court should have settled the verdict forms on the record. *Allstate Ins. Co. v. Miller*, 125 Nev.

300, 322, 212 P.3d 318, 332 (2009) ("[T]he final settling of jury instructions, special verdicts, and special interrogatories in all criminal and civil jury trials must be done on the record."). Additionally, Hoy's objection to the verdict forms was timely because it was made prior to the return of the verdict and discharge of the jury.[2] *See Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 702, 962 P.2d 596, 603 (1998) ("The time to raise inconsistencies or irregularities in the form of a verdict is at trial.").

We further hold that Hoy's objection to the verdict form adequately apprised the district court on the issue of sending the terms "duty" and "breach" to the jury. *See Johnson v. Egtedar*, 112 Nev. 428, 435, 915 P.2d 271, 275 (1996) (An objection to a jury instruction that is "only slightly more than a 'general objection'" preserves the issue under NRCP 51 if it "adequately apprised [the court] of the issue of law involved and [the court] was given an opportunity to correct the error."); *see also Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1014 n.10, 363 P.3d 1168, 1175 n.10 (2015) (Douglas, J., dissenting) (reviewing verdict forms under the same standard as jury instructions); *Allstate Ins. Co.*, 125 Nev. at 322, 212 P.3d at 332 (extending its holding on general verdict forms and special interrogatories to "jury instructions, special verdicts, and special interrogatories").[3] Therefore, we hold that the challenge to the verdict form was sufficiently preserved.

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[2]The record does not support Cabrera's assertion that the parties stipulated to the verdict form and jury instructions.

[3]We likewise disagree with Castellon's assertion that Hoy invited error with Jury Instruction no. 26, because the instruction is an accurate statement of law, and thus does not invite error. *See* 5 Am. Jur. 2d Appellate Review § 623 (2023 update) ("A party who induces or 'invites' an error cannot be heard to later complain about that error.").

We now turn to Hoy's argument that the compound questions of "duty" and "breach" require a new trial. Courts may grant a new trial on the grounds that an "error in law occur[ed] at the trial and [was] objected to by the party making the motion." NRCP 59(a)(1)(G). "The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court, and this court will not disturb that decision absent palpable abuse." *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996). However, the court reviews de novo whether the proffered instructions and forms are an incorrect statement of the law. *See Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331. An erroneous verdict form warrants reversal "if it caused prejudice and but for the error, a different result may have been reached." *Id.* (internal quotation marks omitted).

Here, the verdict form, as it pertains to the combined theories of negligence and premises liability, had a compound question that asked whether respondents owed a duty and whether they breached the duty.[4] Even when considered alongside the jury instructions, the verdict form erroneously presented the question of duty to the jury. *See Turner v. Mandalay Sports Entm't, LLC*, 124 Nev. 213, 220-21, 180 P.3d 1172, 1177 (2008) (explaining that whether a duty exists is a question of law to be determined by the district court); *Cf. Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 245, 955 P.2d 661, 669 (1998) (holding the jury instructions

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[4]The verdict form asked: "Do you find by a preponderance of the evidence that DEFENDANT FLOWER CASTELLON owed the Plaintiff a duty and that she breached that duty either under the theory of negligence or under the theory [sic] premises liability?" The verdict form also asked the same question about Cabrera, with minor non-substantive grammatical changes.

and interrogatories were not prejudicially misleading when read in totality). Therefore, the district court erred by sending compound questions that included the issue of duty to the jury, because duty is a question of law for the court. *Turner*, 124 Nev. at 220-21, 180 P.3d at 1177.

The district court also erred in issuing a verdict form that included a compound question regarding duty and breach as applied to the negligence per se cause of action. "A negligence per se claim arises when a duty is created by statute." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828, 221 P.3d 1276, 1283 (2009). "A civil statute's violation establishes the duty and breach elements of negligence when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is intended to protect." *Id.*

Prior to trial, the district court found that (1) Castellon owed a non-delegable duty to the minor child with respect to implementing a secondary access barrier to the above ground pool, (2) neither respondent had installed a secondary access barrier to the above ground pool as mandated by the Pool Code,[5] (3) that the minor child was within the class of persons the Pool Code was designed to protect, and (4) that the type of injury he sustained was the type of injury the Pool Code was designed to prevent.

In light of the court's rulings, the only questions remaining for the jury on the negligence per se claim were (1) causation and (2) damages.

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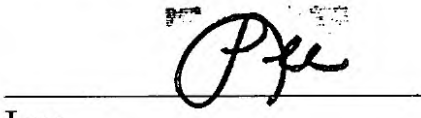
[5]Because this determination required the district court to interpret the Pool Code, it was well within the purview of the district court to find that the pool wall itself was not a secondary access barrier within the definition of the Pool Code.

Notwithstanding, the court improperly submitted the question of duty and breach to the jury. This constitutes reversible error. *See Fed. Ins. Co. v. Coast Converters, Inc.*, 130 Nev. 960, 971, 339 P.3d 1281, 1288 (2014) (determining that the district court erred by sending a question of contract interpretation to the jury because contract interpretation is a question of law).

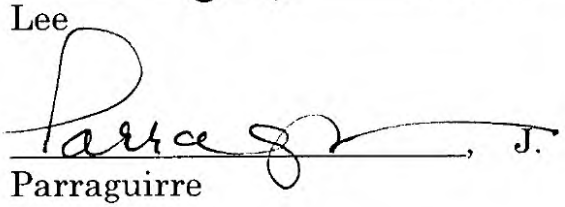
"[B]ut for the error[s] [discussed], a different result may have been reached." *See Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331 (internal quotations omitted).[6] We therefore

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

_____, J.
Herndon



_____, J.
Lee



_____, J.
Parraguirre

[6]Hoy also raises the issue of misconduct by respondents' attorneys during opening and closing argument. We do not reach the merits of this claim because we reverse on other grounds.

cc: Chief Judge, Eighth Judicial District Court
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