IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES HOCKENBERRY, M.D.,
Appellant,
vs.
ROSETTA MULLINS-SARVER,
Respondent.

No. 38836

FILED

AUG 20 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal from a final judgment[1] totaling $10,029,078.83, with interest, entered in a medical malpractice action against appellant, Dr. James Hockenberry, a general practitioner. The jury concluded that appellant breached his duty of care to respondent, Rosetta Mullins-Sarver, which caused the death and surgical removal of a substantial portion of her small intestine. The primary claim of professional negligence against appellant involved his alleged failure to timely diagnose, at least on a differential basis, a small bowel strangulation and refer the patient for surgery.

FACTUAL BACKGROUND

In May 1996, Ms. Mullins-Sarver was admitted to the Churchill County Hospital, complaining of abdominal pain. Dr. Atigadda Reddy, a gastroenterologist, examined her, conducted tests, concluded the cause of her pain was "irritable bowel syndrome with functional abdominal pain syndrome," and discharged her the same day. The critical period leading to Ms. Mullins-Sarver's permanent condition occurred in late September and early October of 1996.

[1]See NRAP 3A(b)(1).

September 29, 1996

On September 29, 1996, Ms. Mullins-Sarver returned to Churchill County Hospital with complaints similar to those documented in May of 1996: emesis and sharp mid-abdominal pain of four days duration. Following diagnostic testing and a physical examination, Dr. Timothy Hockenberry, appellant's son, concluded that Ms. Mullins-Sarver was likely suffering from "pseudo-ulcer syndrome," prescribed painkillers and sent her home.

September 30, 1996

On September 30, 1996, Ms. Mullins-Sarver visited Dr. Ken Patterson at the Indian Health Clinic in Schurz, Nevada. Dr. Patterson found a "tender abdominal mass" and referred Ms. Mullins-Sarver back to the Churchill County Hospital where, upon re-examination, Dr. Timothy Hockenberry concluded that the mass was "stool in the colon." He noted that Ms. Mullins-Sarver was able to sit up, indicating that it was unlikely she had developed peritonitis, a finding that is significant because peritonitis is a known complication of obstructive bowel disease. An x-ray examination showed no abnormalities.

Dr. Timothy Hockenberry ordered a CT scan, with contrast, to investigate possible bowel obstruction. Unfortunately, Ms. Mullins-Sarver could only tolerate one-half of the contrast solution. The CT scan showed that none of the contrast solution moved from Ms. Mullins-Sarver's stomach, leading the doctor to be concerned about a "gastric outlet obstruction or gastroparesis."[2] The CT scan report showed that:

---

[2]Surgery later revealed an obstruction in the small intestine just below the gastric outlet.

> the bowel is mild to moderately dilated with numerous fluid-filled loops distributed throughout the abdomen. This is probably partially the result of the patient having been on narcotic medication.
>
> . . . .
>
> No masses or abnormalities identified . . . .

Following the CT scan, Dr. Timothy Hockenberry turned over care of Ms. Mullins-Sarver to appellant (hereinafter Dr. Hockenberry). Ms. Mullins-Sarver remained in the hospital through the next several days to address her increasing levels of abdominal pain, for which she requested and received narcotic pain medication.

October 1, 1996

On the morning of October 1, 1996, Dr. Hockenberry examined Ms. Mullins-Sarver and found a "vague mass" in her abdomen. He attributed her pain to irritable bowel syndrome. Dr. Hockenberry also ordered a drug screen because of his concern that Ms. Mullins-Sarver was complaining of continuing pain in order to receive more narcotics. He questioned her sister, who denied that Ms. Mullins-Sarver used illegal drugs, and he did not question that statement. The drug screen was negative for illicit substances.

October 2, 1996

On October 2, 1996, Dr. Reddy consulted with Dr. Hockenberry, and again concluded that Ms. Mullins-Sarver was suffering from "irritable bowel syndrome." Dr. Reddy ordered a gallbladder ultrasound, which revealed fluid filled bowel loops, which in turn Dr. Reddy believed were indicative of a "narcotic ileus."[3] It was then agreed

---

[3]An ileus as an "obstruction of the bowel; from a failure of peristalsis . . . ." Webster's Third New International Dictionary Unabridged 1152

continued on next page . . .

that the narcotic pain medications be discontinued. Additionally, further testing showed that Ms. Mullins-Sarver's bicarbonate levels (electrolytes) were normal.

Dr. Hockenberry again examined Ms. Mullins-Sarver and found that her abdomen was soft, non-distended, but tender to touch. Later, after Dr. Hockenberry prescribed a laxative, Ms. Mullins-Sarver reported that she had a "good bowel movement," indicating that her pain was not caused by constipation. At 8:00 p.m., a nurse noted that Ms. Mullins-Sarver's abdomen was rigid and tender. Dr. Hockenberry was unable to confirm the nurses observation upon subsequent examination, i.e., he did not find a "rigid abdomen."

October 3, 1996

Ms. Mullins-Sarver refused to allow a nurse's assessment of her condition in the morning of October 3, 1996, and subsequently refused intake of contrast solution for a further x-ray examination of her upper gastrointestinal tract. The radiographs showed some "dilated small bowel," which Dr. Hockenberry again believed came from a "narcotic ileus" secondary to the narcotic pain medication. Although nurses found that Ms. Mullins-Sarver's abdomen was "distended and tender upon palpation" at 11:00 a.m., Dr. Hockenberry's 3:00 p.m. examination was negative in this regard.

Dr. Hockenberry first noted abdominal distension 5:30 p.m., after which he ordered insertion of a catheter and, at 6:30 p.m., insertion of a nasal gastric (NG) tube to decompress her abdomen. At that time, he

---

. . . continued

(16th ed. 1968). Thus, a narcotic ileus is a form of paralysis of the smooth muscles of the intestines caused by taking narcotic pain relievers.

believed Ms. Mullins-Sarver was suffering from a "narcotic bowel," rather than a small bowel obstruction. At 8:00 p.m., he detected no bowel sounds. Through the night and the next day, fluids of varying colors and gas were returned through the NG tube.

October 4, 1996

On the morning of October 4, 1996, Ms. Mullins-Sarver's abdominal distention was more pronounced. X-rays showed "air fluid levels" indicative of a bowel obstruction. Another consultant at the hospital then diagnosed an obstruction near the superior mesenteric artery, i.e., a small bowel obstruction. Dr. Hockenberry added small bowel obstruction to his differential diagnosis at this point, and the result of a gastrograph enema ruled out obstruction of the large bowel. Additionally, blood tests confirmed a considerable drop in Ms. Mullins-Sarver's blood bicarbonate between October 2 and October 4, 1996.

That afternoon, Dr. E. Scott Hutner saw the patient in consultation, at which time he noted her distended abdomen and that she was very tender to the touch upon abdominal palpation. These observations led him to include small bowel obstruction as a differential diagnosis. He then eliminated most of the other possible causes of her symptoms by reviewing her medical records and x-rays, the latter of which he found to be conclusive of a small bowel obstruction.

Shortly thereafter, Dr. Hutner ordered Ms. Mullins-Sarver's NG tube replaced with one of larger diameter and placed her on more aggressive IV fluid therapy. Dr. Hutner ordered surgery for the next

morning.[4] He delayed surgery because Ms. Mullins-Sarver was toxic, dehydrated, and needed further decompression, also hoping that the larger NG tube might resolve the obstruction.

October 5, 1996

When Dr. Hutner examined Ms. Mullins-Sarver on October 5, 1996, she remained distended. He then took her to surgery, during which he found a necrotic bowel caused by an "internal hernia with strangulation of the main artery to the majority of the small bowel." He removed all but three feet of her small intestine. Dr. Hutner was surprised at the amount of damage, because Ms. Mullins-Sarver was only eighteen-years old and, given the degree of necrosis, a much higher white blood cell count would ordinarily have been identified during her pre-operative course. He also believed that her carbon dioxide levels should have been lower for this amount of bowel death. Dr. Hockenberry was also surprised by the result of surgery, given Ms. Mullins-Sarver's lack of an elevated blood count, fever, or vomiting[5] while in the hospital.

Permanency of Ms. Mullins-Sarver's injuries

Ms. Mullins-Sarver's post-operative course in the hospital was both troubled and lengthy. She is now unable to perform the activities of daily living without becoming excessively fatigued and is dependant upon intravenous feeding for nutrition, requiring total parenteral nutrition

---

[4]Additionally, Ms. Mullins-Sarver's family resisted the surgery and desired to try a tribal ritual to attempt to heal her condition.

[5]It appears that Ms. Mullins-Sarver "spit up" several times, but Dr. Hockenberry concluded that this was not "vomiting" because of the color of the expectorant.

("TPN") 8.5 hours every day through a portable chest catheter. She also receives a variety of medications on a daily basis.

PROCEDURAL HISTORY

The Nevada Medical Screening Panel found a reasonable probability that Dr. Hutner was negligent. The Panel was unable to conclude whether Dr. Hockenberry was or was not negligent. Ms. Mullins-Sarver thereafter filed her action in district court against both doctors for medical malpractice.[6]

At trial, Dr. Hockenberry estimated that he had diagnosed thirty to forty small bowel obstructions between 1965 and 1996. Thus, he knew the symptoms that would suggest the need to consult a surgeon for a condition such as that ultimately identified in Ms. Mullins-Sarver's case. Given her history and his repeated examinations of Ms. Mullins-Sarver, small bowel obstruction was "far, far down the list" in his differential diagnosis: she was not feverish, her white blood count was normal, her urinalyses were normal, and her abdominal pain was general rather than localized.

Dr. Thomas McAfee testified on Ms. Mullins-Sarver's behalf as her trial expert, based upon a physical examination, a review of her medical records, Dr. Hutner's deposition testimony, excerpts from Harrison's Principles of Internal Medicine, and excerpts from The Merck Manual. He concluded that Dr. Hockenberry should have initially included small bowel obstruction as a part of his differential diagnosis, conducted a second CT scan when Ms. Mullins-Sarver's pain did not

[6]Dr. Hutner settled with Ms. Mullins-Sarver before trial. He did not testify at trial and while portions of his deposition testimony were read to the jury, the deposition was not entered into evidence.

diminish, and obtained additional blood analyses. He believed that, based upon the information available, Dr. Hockenberry should have obtained a surgical consult on or before October 3, 1996. Dr. McAfee also testified that surgical intervention forty-eight hours earlier than the actual surgery on October 5, 1996, would have saved enough intestine to avoid permanent intravenous feeding. For this testimony, Dr. McAfee relied upon Dr. Hutner's deposition testimony in which Dr. Hutner stated that if he performed surgery earlier, he believed he could have saved more of Ms. Mullins-Sarver's small intestine.

Dr. McAfee testified to a reasonable degree of medical probability that necrosis of the small bowel was developing as of October 3, 1996. He based this conclusion on his review of Ms. Mullins-Sarver's declining bicarbonate levels between October 2 and October 4, 1996. Additionally, Dr. McAfee testified that Ms. Mullins-Sarver did not have the signs or symptoms of peritonitis until after October 3, 1996. Therefore, because it was unlikely that the necrosis progressed to a point where peritonitis began as of October 3, 1996, the intestine could have been salvaged with an earlier surgical consult within that time frame. Dr. McAfee also concluded that the need for pre-operative preparation exacerbated the effect of the delay.

Ms. Mullins-Sarver also introduced the deposition testimony of Dr. Hutner, in which he testified that Ms. Mullins-Sarver's intestine was "at least 24 hours dead, if not 48 hours dead, if not 72 hours dead," at the time of his surgical intervention. He stated the intestine did not die instantaneously, but rather over time; first the mucosa died, then the intestinal muscle layers "until it goes all the way through to the other side

. . . ." He believed Ms. Mullins-Sarver likely would have died because of her toxicity if he operated immediately on October 4, 1996.

Dr. Hockenberry's experts, Dr. David Freeto and Dr. Richard Ingle, testified that Dr. Hockenberry's care of Ms. Mullins-Sarver was appropriate and that they would have conducted themselves similarly, given that Ms. Mullins-Sarver's symptoms were very unusual and rare for a small bowel strangulation. Dr. Freeto criticized Dr. Reddy for not fully reviewing Ms. Mullins-Sarver's records before his consultation three days before surgery. Both experts indicated they would have diagnosed irritable bowel syndrome. According to Dr. Freeto, it was reasonable to conclude that the bowel was dead for forty-eight hours as of the time of surgery.

The parties stipulated that Ms. Mullins-Sarver incurred $700,000.00 in medical bills as of the time of trial. Her economic experts calculated her cost of lifetime future medical expenses at a present value lump sum of $9,348,267.00.

At a hearing to finalize jury instructions, Ms. Mullins-Sarver's counsel argued that a "substantial factor" jury instruction was proper because there was more than one possible cause for respondent's injuries, besides the failure to diagnose; i.e., Ms. Mullins-Sarver's lack of cooperation, the information given to Dr. Hockenberry by Dr. Reddy, and Dr. Hutner's delay in surgery. Dr. Hockenberry's counsel argued that the only possible legal cause was the failure to diagnose and, thus, a "but for" instruction was proper. The district court gave the "substantial factor" instruction.

Dr. Hockenberry initially proposed "Nevada Pattern Jury Instruction 11.02," which would have instructed the jury to submit written

requests for a read-back of testimony, but later withdrew the instruction. The court went on to instruct the jury members not to consider statements or arguments of counsel as evidence, and to be governed in their deliberations by the evidence as they, not counsel, understood and remembered it.

Based upon Dr. McAfee's "48 hours" testimony, defense counsel argued to the jury that there was no proof that Dr. Hockenberry's allegedly negligent acts took place before 9:30 a.m. on October 3, 1996. Accordingly, counsel argued that, even if Dr. Hockenberry's conduct fell below the standard of care, as described by Dr. McAfee, such actions did not cause Ms. Mullins-Sarver's injuries. E.g., that, while the standard of care required Dr. Hockenberry on October 3, 1996, to include small bowel obstruction in his differential diagnosis and to consult a surgeon, any action taken at that point was too late because Ms. Mullins-Sarver's injuries and damages had already occurred.

On June 27, 2001, the jury returned a verdict in favor of Ms. Mullins-Sarver for $764,400.00 in past damages and $8,093,574.00 in future damages.

Dr. Hockenberry filed motions in the district court for judgment notwithstanding the verdict, to alter and amend the judgment and, in the alternative, for a new trial. Attached to the motion were affidavits of two jurors indicating that the court clerk refused their request for the trial transcripts of Drs. Freeto, Hockenberry, and McAfee, claiming unavailability.

At the hearing on the post-trial motions, the district judge attempted to restate the interaction between the court clerk and the jury and his own interactions with the jury. He stated that, after he returned

from the jury room, he informed both parties of the jury's request for Dr. Hutner's deposition.[7] The judge stated "if they wanted, [he] would call the jury into the Courtroom and place it on the record. They indicated that was not necessary, so I did not do it." Thomas Doyle, Esq.,[8] Dr. Hockenberry's counsel, recalled that the jury requested further information twice, once for Dr. Hutner's deposition, and once for "the people who testified having to do with causation." The district court denied that the jurors asked for material a second time and the court clerk only remembered the request for Dr. Hutner's deposition.

The district court denied Dr. Hockenberry's post-trial motions in all material respects and awarded Ms. Mullins-Sarver attorney fees of $50,000.00, under NRCP 68. The district court also awarded one year's interest on the judgment at a rate of 8.5%, for a total sum of $10,029,078.83.

Dr. Hockenberry moved for reconsideration of those orders, for relief under NRCP 60(b), and an evidentiary hearing. Attached to this motion were new affidavits from the two original jurors plus an affidavit from a third juror. The affidavits asserted that the jury proceeded to the jury room with a box of exhibits and began to deliberate; that some of the jurors were confused about certain testimony and believed there was some conflict in the testimony; that the jury first asked the court clerk if they

---

[7]The judge later submitted an affidavit that stated he informed counsel about the jury's request for further information on the allocation of an award, not for Dr. Hutner's deposition.

[8]Mr. Doyle was unable to attend the hearing. Mr. Polsenberg, appellate counsel, represented Dr. Hockenberry and related Mr. Doyle's comments.

could review transcripts; that the court clerk denied the request and told the jury that they were to rely entirely on the exhibits provided to them; that the jury requested Dr. McAfee's transcript from the district court; and that the judge refused their request. The district court denied Dr. Hockenberry's motion for reconsideration.

Dr. Hockenberry appeals, contending that: (1) Ms. Mullins-Sarver adduced insufficient proof of causation, which warrants outright reversal; (2) the district court improperly instructed the jury on causation; (3) irregularities during deliberations warrant outright reversal or a new trial; and (4) the district court's award of attorney fees was improper. We affirm the district court's final judgment, with the exception of the award of attorney fees.

DISCUSSION

Causation

To prevail in a medical malpractice action, a plaintiff must prove "(1) that the [doctor's] conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered damages."[9] NRS 41A.100 requires expert medical testimony, or medical documentation to show an "alleged deviation from the accepted standard of care . . . and to prove causation."

On appeal, we will not overturn a jury's verdict supported by substantial evidence "'unless the verdict is clearly erroneous when viewed

---

[9]Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996) (citing Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991); Orcutt v. Miller, 95 Nev. 408, 411, 595 P.2d 1191, 1193 (1979)).

in light of all the evidence presented.'"[10] We have defined substantial evidence as evidence that "'a reasonable mind might accept as adequate to support a conclusion.'"[11] "In determining whether the jury's finding was supported by substantial evidence, we must presume that the jury found evidence favorable to [Ms. Mullins-Sarver] and that all reasonable inferences were resolved in [Ms. Mullins-Sarver's] favor."[12]

Dr. Hockenberry asserts that the evidence Ms. Mullins-Sarver presented at trial was insufficient to prove his conduct departed from the accepted standard of medical care and that this departure caused the loss of Ms. Mullins-Sarver's intestine found during the ultimate surgery performed by Dr. Hutner. More particularly, even if Dr. Hockenberry differentially diagnosed small bowel obstruction at the time suggested by Ms. Mullins-Sarver's expert and obtained a surgical consult, Ms. Mullins-Sarver's injuries would still have occurred; e.g., his duty to differentially diagnose a small bowel obstruction and consult a surgeon arose too late given the patient's presentation and preoperative course and, thus, there was a lack of evidence showing a reasonable probability that surgery

---

[10]Dillard Department Stores v. Beckwith, 115 Nev. 372, 378, 989 P.2d 882, 886 (1999) (quoting Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993) (citing Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989))).

[11]McClanahan v. Raley's, Inc., 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 ((1986)).

[12]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 241, 955 P.2d 661, 666 (1998).

would have been performed earlier, in time to save enough of her small intestine to avoid the need for permanent TPN.[13]

We conclude, however, that the record contains substantial evidence to support the jury's verdict as to both the existence of negligence and causation. Ms. Mullins-Sarver's expert witness, Dr. Thomas McAfee, testified that Dr. Hockenberry (1) failed to timely differentially diagnose a small bowel obstruction, (2) failed to timely consult with a surgeon concerning the patient's condition, and (3) failed to timely ensure surgical intervention. Dr. McAfee testified that surgical intervention should have been effected forty-eight hours earlier than was done in this case to preserve a significant amount of bowel. To bolster his conclusion, Dr. McAfee also observed that, because Ms. Mullins-Sarver lacked the symptoms of peritonitis (a known complication of small bowel obstruction) two days before surgery, the necrosis of Ms. Mullins-Sarver's intestine had not yet progressed to a point that it could not have been saved via earlier surgical consult. Additionally, the surgeon testified, via deposition, that Ms. Mullins-Sarver's bowel could have been dead from twenty-four to seventy-two hours when he performed surgery on the morning of October 5, 1996, and the deposition testimony of Dr. Reddy, the consulting gastroenterologist, suggested that no bowel death occurred until "after" October 2, 1996. Finally, Dr. Hockenberry testified that he did not include small bowel obstruction in his differential diagnosis until twenty-four hours prior to surgery.

---

[13] One of Dr. Hockenberry's contentions was that the bowel damage was complete forty-eight hours before surgery. Thus, any later diagnosis and surgical referral would have been ineffective to avoid the ultimate result with this patient.

Dr. Hockenberry argues that the case against him involved a collection of fragmented speculations and contends that the testimony of Ms. Mullins-Sarver's expert must be interpreted in such a way that the jury could only find that her condition was irretrievable at the time he indicated enough bowel was salvageable via surgical intervention. We disagree. The evidence concerning the claims of negligence and causation was in substantial conflict and either side could legitimately have prevailed before the jury. The jury could legitimately conclude from the totality of the evidence, including the testimony of the experts, that Dr. Hockenberry was under a duty to differentially diagnose small bowel obstruction and consult with a surgeon at a time when Ms. Mullins-Sarver's bowel was still sufficiently viable so that permanent TPN would not have become necessary. Thus, as noted, we conclude that substantial evidence in the record supports the jury's verdict that Dr. Hockenberry's negligence caused Ms. Mullins-Sarver's injuries.

"Substantial cause" jury instruction

Dr. Hockenberry argues that the district court erred by instructing the jury on legal causation by giving a "substantial cause" jury instruction, rather than his proposed "but for" cause instruction.

In Johnson v. Egtedar,[14] we considered whether a district court properly used a "but for" instruction, rather than a "substantial factor" instruction. We concluded that the district court properly used the "but for" instruction when the theories of the case presented by both the plaintiff and defendant were mutually exclusive.[15]

---

[14]112 Nev. 428, 915 P.2d 271 (1996).

[15]Id. at 436, 915 P.2d at 276.

This case was not tried on mutually exclusive theories, as Dr. Hockenberry asserts; e.g., whether he caused Ms. Mullins-Sarver's injuries or not. Rather, both parties argued that there were several causes for Dr. Hockenberry's delay in properly diagnosing Ms. Mullins-Sarver. Dr. Hockenberry's affirmative defenses included a claim that Ms. Mullins-Sarver's "alleged damages were the result of the intervening and/or superceding conduct of others." In this connection, Dr. Hockenberry's expert criticized Dr. Reddy for not independently reviewing the medical records and radiology studies upon her consultation three days before surgical intervention. Dr. Hockenberry also testified that, following the consultation, Dr. Reddy did not suggest that small bowel obstruction was a possible diagnosis. Dr. Hockenberry's counsel commented in opening statements that Dr. Hockenberry was not at fault for Ms. Mullins-Sarver's refusal to cooperate with hospital personnel and her refusal to ingest contrast liquids necessary for diagnostic examinations. Thus, the implication was that Dr. Hockenberry's delay in diagnosis was not wholly attributable to his own actions.[16] Also, Dr. Hutner testified, via his deposition, that Ms. Mullins-Sarver was not a compliant patient and disruptions in her care were "due to some recalcitrance on her part." Additionally, evidence was presented at trial that Dr. Hockenberry's drug screening test may have delayed his diagnosis because he wrongly believed Ms. Mullins-Sarver was feigning pain to obtain narcotics. Thus, because the question for the jury was not whether Dr. Hockenberry was the sole legal cause of Ms. Mullins-Sarver's injuries, but rather whether

[16]The jury was not instructed with a comparative negligence instruction.

Dr. Hockenberry's conduct was a substantial factor among multiple factors that could have led to the delay in diagnosis, the district court properly used the "substantial factor" jury instruction.[17]

Trial irregularities

Dr. Hockenberry argues that Ms. Mullins-Sarver's counsel misstated her expert's testimony during closing argument by representing that the expert stated that surgery needed to be performed twenty-four to forty-eight hours prior to the procedure performed in the case. Although conceding that no objection was lodged and that the misstatement itself does not mandate reversal,[18] he asserts that the misstatement led to other irregularities during jury deliberations that warrant a new trial; i.e., the court clerk's ex parte denial of the jury's request for transcripts and the district court's failure to inform the parties of the jury's later request in that regard. Dr. Hockenberry contends that, because the jury was denied the opportunity to hear a readback of trial testimony, it could not resolve its confusion regarding the closing arguments and therefore "rendered a verdict without all the information it needed to render a proper verdict."

First, although the claimed misstatement did not reflect the expert's exact verbiage, it represents a fair inference from the evidence because, as conceded in Dr. Hockenberry's reply brief, "experts for both

---

[17]See also Arnesano v. State, Dep't Transp., 113 Nev. 815, 823, 942 P.2d 139, 144 (1997) ("[T]he substantial factor test is a correct statement of legal cause . . . .").

[18]Cf. DeJesus v. Flick, 116 Nev. 812, 820, 7 P.3d 459, 464 (2000) (holding that trial counsel's improper remarks "so thoroughly permeated the proceeding that . . . they tainted the entire trial and resulted in a jury verdict that was the product of passion and prejudice" thus denying the defendant a fair trial).

parties agreed that surgery would have had to have been performed 48 hours earlier to have saved enough bowel to prevent the need for TPN."[19] Second, the trial irregularities, of which Dr. Hockenberry complains, do not compel reversal, even if the final argument of Ms. Mullins-Sarver's counsel was improper.

NRCP 59(a)(1)[20] provides that a district court may grant a party's motion for a new trial if irregularities in the trial affected the substantial rights of the party and prevented him or her from receiving a fair trial. "'The decision to grant or deny a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed on appeal absent palpable abuse.'"[21]

---

[19]Dr. McAfee testified that surgery needed to occur forty-eight hours earlier to preserve a significant amount of bowel. Thus, counsel could have permissibly argued that the extent of bowel necrosis requiring permanent TPN occurred twenty-four to forty-eight hours before surgery.

[20]NRCP 59(a) states, in pertinent part:

> **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial . . . .

[21]Allum v. Valley Bank of Nevada, 114 Nev. 1313, 1316, 970 P.2d 1062, 1064 (1998) (quoting Pappas v. State, Dep't Transp., 104 Nev. 572, 574, 763 P.2d 348, 349 (1988)).

Dr. Hockenberry contends that the district court was obligated to read back any testimony requested by the jury. NRS 16.140[22] states that a jury may request a read back of testimony, and the district court may read the testimony back to the jury. Thus, even if the district court informed counsel of the jury's request, the decision to read the testimony back to the jury was left to the sound discretion of the trial judge.[23] While the court erred by not informing counsel of the jury's request, we conclude that the error was harmless. Prior to its deliberations, the district court instructed the jury to rely upon its own memory as to evidence at trial and

---

[22]NRS 16.140 states:

> After the jury has retired for deliberation, if there is a disagreement among them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the court may order the court reporter to read the portion of the testimony which they request, or any part thereof, and the court may provide any information requested on the law. This shall be in the presence of or after notice to the parties or counsel.

[23]See Pappas v. State, Dep't Transp., 104 Nev. 572, 763 P.2d 348 (1988) (district court properly exercised its discretion to deny plaintiff's motion for a new trial on grounds of irregularity when jurors requested clarification of a jury instruction from district court's secretary, the secretary did not inform the trial judge of the jury's request and the jury reached its verdict without clarification); Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986) (error for district court not to inform counsel of jury's request, but harmless error—the district court instructed the jury to refer to a jury instruction for its answer); cf. Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 16 P.3d 415 (2001) (not harmless error when judge answered jury's question incorrectly).

not to rely upon the arguments of counsel. This instruction was not erroneous, and substantial evidence supports the jury's verdict. Therefore, there was no palpable abuse in the district court's decision to deny Dr. Hockenberry's motion for a judgment notwithstanding the verdict or new trial.[24]

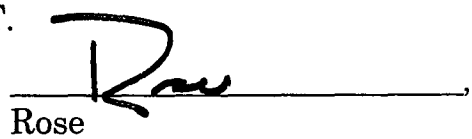
Attorney fees

The district court awarded Ms. Mullins-Sarver $50,000 in attorney fees and stated that these were not "punishment fees." On appeal, Ms. Mullins-Sarver concedes that she was erroneously awarded this relief. Thus, we reverse this portion of the judgment below.

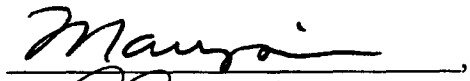
CONCLUSION

We conclude that substantial evidence supports the jury verdict, the district court properly instructed the jury using a "substantial factor" jury instruction, the district court correctly concluded that trial irregularities did not warrant judgment notwithstanding the verdict or, in the alternative, a new trial, and that the district court erroneously awarded Ms. Mullins-Sarver attorney fees. Accordingly, we

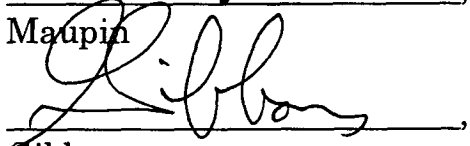
ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

---

[24]Dr. Hockenberry did not "invite" the error of which he now complains by his withdrawal of his proposed "readback" instruction.

cc: Hon. Mario G. Recanzone, Senior Judge
Beckley Singleton, Chtd./Las Vegas
Schuering Zimmerman & Scully
Robert H. Perry
Churchill County Clerk