

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LAS VEGAS PAVING CORPORATION,
A NEVADA CORPORATION; AND
BRADLEY SCHNEIDER,
Appellants,
vs.
JAMAR COLEMAN,
Respondent.

No. 66242

FILED

AUG 11 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

AMENDED ORDER OF AFFIRMANCE

Appellants Las Vegas Paving Corp. and Bradley Schneider (collectively "LVP") appeal the district court's grant of Respondent Jamar Coleman's motion for a new trial. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

We presume that the parties are familiar with the underlying facts of this appeal, and therefore only a brief summary will be presented here. Coleman was riding his bicycle along a frontage road when he was struck by a tractor-trailer truck and seriously injured. Eyewitness testimony suggested that the truck may have been owned and operated by Las Vegas Paving Corp. and other evidence suggested that the truck may have been driven by Schneider, although critical portions of the GPS data had been deleted and were missing. At trial, LVP defended the action primarily by asserting that the truck that caused Coleman's injuries was not one of its trucks, although it also asserted that if one of its trucks was involved, the driver was not negligent.

The jury returned a verdict in favor of LVP. Thereafter, Coleman filed a motion for new trial pursuant to NRCPC 59(a)(2) and (7),

which the district court granted. The district court's order granting Coleman's motion identified four independent errors that warranted a new trial. First, the district court found that it abused its discretion in allowing the jury to hear the opinion testimony of LVP's rebuttal expert Brian Jones. Second, the district court found that it abused its discretion by giving a negligence per se jury instruction based upon NRS 484B.210(2) that was not supported by the evidence. Third, the district court found that it abused its discretion in refusing to give a "rebuttable presumption" jury instruction based upon missing GPS data that would have indicated the precise location of Schneider's truck at the time of the collision. Fourth, the district court found that attorney and party misconduct on the part of LVP and its trial counsel adversely affected Coleman's ability to have a fair trial. On appeal, LVP alleges that the district court erred on all four grounds, but for the reasons discussed below we need address only one.

Appellate courts in Nevada review orders granting a motion for a new trial for an abuse of discretion. *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 v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011). In determining whether such an abuse of discretion occurred, this court must view the evidence and all inferences most favorably to the party against whom the motion is made. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009).

NRCP 59(a) specifies the grounds upon which a court may grant a motion for a new trial. The district court's order in this case was based upon both NRCP 59(a)(2) and NRCP 59(a)(7). NRCP 59(a)(2) and

(7) provide that a new trial may be granted based upon: “(2) Misconduct of the jury or prevailing party; . . . or, (7) Error in law occurring at the trial and objected to by the party making the motion.”

In granting Coleman’s motion for new trial based on NRCP 59(a)(7), the district court concluded, among other things, that it should not have allowed LVP’s expert witness Brian Jones, an accident reconstructionist, to testify at trial in rebuttal to evidence presented by Coleman. This court reviews a district court’s decision to allow expert testimony for abuse of discretion. *Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014); *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). “We review claims of prejudice concerning errors in the admission of evidence based upon whether the error substantially affected the rights of the appellant. This demonstration is made when the appellant demonstrates from the record that, but for the error, a different result ‘might reasonably have been expected.’” *Id.* at 505, 189 P.3d at 654 (internal citations omitted).

At trial, Coleman interposed a timely objection to the testimony of Brian Jones, arguing that his testimony failed to meet the requirements of NRS 50.275 as set forth in *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650-51 (2008). LVP responded that Jones was proffered by LVP as an expert in accident reconstruction whose testimony would rebut an animation prepared by Coleman’s own accident reconstruction expert. Coleman’s objection was that Jones’ testimony went beyond the scope of rebuttal and therefore represented an entirely new expert opinion that should have been disclosed during discovery pursuant to NRCP 16.1, but was not. The district court overruled the objection and permitted Jones to testify. Subsequently, after the trial

concluded, the district court reviewed the evidence as a whole and concluded that it erred in permitting the jury to hear Jones' testimony, and the error likely contaminated the jury's verdict. On appeal, LVP contends that this constituted an abuse of discretion. We disagree.

The parties agree, and the record confirms, that a portion of Jones' testimony (specifically, his theory that the timing intervals of a nearby traffic light precluded the possibility that a LVP truck was involved in the collision) had never been previously disclosed during discovery pursuant to NRCP 16.1. In response to Coleman's trial objection, LVP argued to the district court that Jones should be allowed to testify nonetheless because the testimony was proffered as rebuttal evidence in response to animations created by Coleman's experts, and therefore did not fall within NRCP 16.1. LVP makes the same argument on appeal, asserting that the district court "failed to recognize the critical distinction between an expert used by a party to satisfy a burden of proof, and an expert used by an opposing party to demonstrate that a plaintiff cannot carry its burden of proof (i.e., a *rebuttal* expert)." LVP thus argues that Jones' testimony was not required to have been disclosed prior to trial under *Williams v. Eighth Judicial Dist. Court of State, ex rel. County of Clark*, 127 Nev. ___, ___, 262 P.3d 360, 367-68 (2011).

Coleman's animations, however, were limited to depicting the physics of the collision between Coleman and the truck. Part of Jones' trial testimony did challenge the validity of the animation's presentation of the physics of the collision, but other portions of his trial testimony clearly exceeded the scope of the animations by presenting a new, alternative theory of causation for the collision wholly outside of any theory advanced by Coleman: that the available GPS data, coupled with

the light cycle of the nearby traffic signal, excluded the possibility that a LVP truck caused the collision. This was something not referenced in any way within the animations prepared by Coleman's expert witness. Indeed, during oral argument before this Court, LVP conceded that this portion of Jones' testimony exceeded the scope of proper rebuttal expert testimony. Therefore, this portion of Jones' testimony constituted a new expert opinion that should have been included within Jones' expert reports pursuant to NRCP 16.1, but was not. *See Sanders v. Sears-Page*, 131 Nev. ___, 354 P.3d 201 (Ct. App. 2015) (undisclosed expert opinions are generally inadmissible at trial).

After Jones testified, LVP's counsel argued during closing summation that, based upon the light cycle information, the collision must have been caused by a truck operated by another company rather than LVP. Apart from Jones' testimony, no other evidence presented at trial identified the light timing intervals with precision. Therefore, Jones' testimony played a substantial role in LVP's trial strategy.

Under these circumstances, the district court did not abuse its discretion by concluding that the jury should not have heard expert opinion testimony from Brian Jones that, LVP concedes, exceeded the scope of proper rebuttal testimony and furthermore was never disclosed during discovery as required by NRCP 16.1. The admission of this testimony almost certainly prejudiced the jury because it was the crucial evidence that supported LVP's contention – one that played a significant role in its closing argument to the jury – that the light timing interval precluded the involvement of a LVP vehicle. Consequently, the erroneous admission of Jones' testimony “substantially affected the rights of the appellant” and “but for the error, a different result might reasonably have

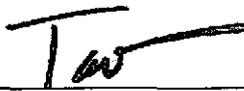
been expected" had the jury not heard Brian Jones' testimony regarding the light cycle. *Hallmark*, 124 Nev. at 505, 189 P.3d at 654. We therefore affirm the district court's grant of a new trial on this ground.

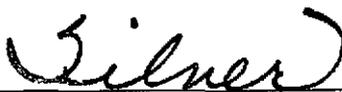
Because we must affirm the district court's order with respect to the testimony of Brian Jones, we need not address the other grounds relied upon by the district court and cited by LVP on appeal.¹

We therefore,

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Nancy L. Allf, District Judge
Lansford W. Levitt, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Reisman Sorokac
Marshall Law Office
Eighth District Court Clerk

¹We also decline to address the district court's findings that LVP trial counsel Phillip R. Emerson committed attorney misconduct.