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Preserving Issues for Appeal in the Nevada State District Courts Under Nevada's New 2019 Rules of Civil Procedure

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PRESERVING ISSUES FOR APPEAL IN THE NEVADA STATE DISTRICT COURTS UNDER NEVADA’S NEW 2019 RULES OF CIVIL PROCEDURE¹

Micah Echols² and Tom Stewart³

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¹ This article was originally presented as a continuing legal education topic that analyzed error-preservation under Nevada’s old rules of civil procedure and before the creation of the Nevada Court of Appeals. However, the article has been updated to include citation to Court of Appeals opinions, where appropriate, and an analysis of the recently revised 2019 Nevada Rules of Civil Procedure.

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INTRODUCTION

Practicing attorneys are aware of the age-old rule of appellate practice that new issues cannot be raised for the first time on appeal.⁴ But, how are these issues properly raised, and preserved, in the district courts so that they are preserved for an appeal before the Nevada Court of Appeals or the Nevada Supreme Court? This article provides guiding principles based upon Nevada case law and the newly-revised 2019 Nevada Rules of Civil Procedure⁵ to answer these questions on preserving error for an appeal in Nevada’s state courts.

1. PRESERVING CLAIMS AND DEFENSES.

At the outset of litigation, it is clearly the best policy to expressly state what claims the plaintiff is asserting and what defenses the defendant is making in the initial pleadings or through amendment. If this practice is not followed, any error arising out of claims and defenses may still be preserved under certain circumstances.

When a claim or defense is not expressly stated in a pleading, “by the parties’ express or implied consent, it must be treated in all respects as if raised in the pleadings.”⁶ But, there generally can be no trial by consent of a particular claim or defense if the issue is not raised until after the trial.⁷

⁴ See *Old Aztec Mine, Inc. v. Brown*, 623 P.2d 981, 983–984 (Nev. 1981).

⁵ The Nevada Rules of Civil Procedure were substantially amended effective March 1, 2019. See *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018).

⁶ NEV. R. CIV. P. 15(b)(2). Rule 15(b)(2) further provides that “[a] party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.” *Id.*

⁷ *Idaho Res., Inc. v. Freeport-McMoran Gold Co.*, 874 P.2d 742, 744 (Nev. 1994) (“[W]e conclude that it was error for the district court to raise an estoppel issue here which had not been either pleaded or litigated by the parties.”). This also clarifies that the language in NEV. R. CIV. P. 54(c) (“Every [non-default] final judgment should grant the relief to which each party is entitled, even if the party has not demanded such relief in its pleadings.”) does not

Despite the limitations on raising defenses, certain statutory defenses do not need to be expressly stated as an affirmative defense and are not waivable.⁸ Indeed, defenses must be affirmatively stated to avoid waiver: “[A]llegations must be pleaded as affirmative defenses if they raise ‘new facts and arguments that, if true, will defeat the plaintiff’s . . . claim, even if all allegations in the complaint are true.’”⁹

2. PRESERVING ISSUES ARISING OUT OF CHALLENGES TO DISCOVERY ORDERS.

Nevada appellate courts review discovery orders on a very limited basis, whether as an interlocutory petition for extraordinary relief or as an appeal from a final judgment.¹⁰ The issues presented to the appellate court must first be raised before the Discovery Commissioner and cannot be raised for the first time in the district court, regardless of the vehicle used to challenge the discovery order.¹¹

3. PRESERVING ISSUES IN DISPOSITIVE MOTIONS THAT ARE NOT OTHERWISE RAISED IN THE PLEADINGS.

Preservation of issues raised at trial by express or implied consent (that are not otherwise raised in the pleadings) equally applies to dispositive motions.¹² Of course, issues that are raised both in the pleadings and then properly raised again at summary judgment will be preserved for appeal, absent some exception.

allow for relief to be granted on grounds that were never litigated at trial. *See Idaho Res., Inc.*, 874 P.2d at 744.

⁸ *See Clark County Sch. Dist. v. Richardson Constr., Inc.*, 168 P.3d 87, 92 (Nev. 2007) (“[W]e conclude that, although CCSD did not assert the statutory damages cap below, the limitation cannot be waived.”).

⁹ *Id.* at 94 (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 350 (2d Cir. 2003)).

¹⁰ NEV. R. APP. P. 17(b)(13) (presumptively assigning “[p]retrial writ proceedings challenging discovery orders or orders resolving motions in limine” to the Nevada Court of Appeals); *see also Clark Cty. Liquor & Gaming Licensing Bd. v. Clark*, 730 P.2d 443, 447 (Nev. 1986) (extending discretionary review of discovery orders in extraordinary petitions only (1) “when the trial court issues blanket discovery orders without regard to relevance”; and (2) “when the discovery order requires disclosure of privileged information.”); *Diversified Capital Corp. v. City of N. Las Vegas*, 590 P.2d 146, 151 (Nev. 1979) (“Our trial courts are afforded reasonable discretion in controlling the conduct of discovery and its decisions are reversed only where a clear abuse appears.”).

¹¹ *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 252 P.3d 676, 680 (Nev. 2011) (“All objections are to be presented to the commissioner so that he or she may consider all the issues before making a recommendation, so as not to ‘frustrate the purpose’ of having discovery commissioners.”).

¹² *See Baughman & Turner, Inc. v. Jory*, 729 P.2d 488, 489 (Nev. 1986) (extending Rule 15(b) trial-by-consent rule to summary judgment proceedings when there was no objection).

4. PRESERVING ISSUES FOR APPEAL THROUGH MOTIONS IN LIMINE.

In prior case law, the Supreme Court permitted the filing and decision on a motion in limine, without any further action at trial, to preserve a party's position with respect to an evidentiary ruling at trial.¹³ More recently, however, the appellate courts have required more under certain circumstances.

In *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, the Supreme Court limited its prior position on issue-preservation by motion in limine.¹⁴ The *Roth* Court confirmed that, when a trial court's oral ruling at trial is consistent with the previous order in limine, the objecting party's motion in limine is sufficient to preserve error without any further objection.¹⁵ However, the *Roth* Court went on to explain that, when the order in limine is violated at trial, the affected party cannot simply rely upon its position previously made in the motion in limine proceedings: "[W]hen 'the opposing party violates the terms of the initial ruling, objection must be made when the evidence is offered to preserve the claim of error for appeal.'"¹⁶ An objection must be made because the violation of an order in limine constitutes a "new error."¹⁷ Citing to the Fifth Circuit Court of Appeals, the Nevada Supreme Court explained, "The courts cannot adopt a rule that would permit counsel to sit silently when an error is committed at trial with the hope that they will get a new trial because of that error if they lose."¹⁸

5. PRESERVING ISSUES FOR APPEAL ARISING OUT OF JURY SELECTION (VOIR DIRE).

During jury selection there is a potential for error if the parties' right to a fair and impartial trial is affected. In resolving these issues, the appellate courts have placed responsibilities on both counsel and the trial judge to preserve issues for appeal that arise during jury selection. For example, in *Jitnan v. Oliver*, the Nevada Supreme Court considered whether the district court erred by denying a challenge for cause to remove a prospective juror.¹⁹ Ultimately, the Court determined that the district court erred by not removing the

¹³ See *Richmond v. State*, 59 P.3d 1249, 1254 (Nev. 2002) ("We, therefore, hold that where an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal.").

¹⁴ *Bayerische Motoren Werke v. Roth*, 252 P.3d 649, 660–61 (Nev. 2011).

¹⁵ *Id.* at 659 ("[W]here the admission or exclusion of evidence at trial is in harmony with the order in limine, the alleged error at trial is the same as the error alleged in the ruling on the motion. Therefore, because there is no new error, the motion in limine properly preserves the error claim." (internal citation omitted)).

¹⁶ *Id.* (citation omitted).

¹⁷ *Id.*

¹⁸ *Id.* (citing *United States Aviation Underwriters v. Olympia Wings, Inc.*, 896 F.2d 949, 956 (5th Cir. 1990)).

¹⁹ See *Jitnan v. Oliver*, 254 P.3d 623, 625 (Nev. 2011).

prospective juror for cause.²⁰ The Court based its decision upon the prospective juror’s inconsistent responses regarding whether he could be impartial and the district court’s failure to articulate on the record the basis for its ruling.²¹ Due to the inconsistencies in the prospective juror’s responses, the Supreme Court held, “that the voir dire of prospective juror no. 40 exemplifies a situation where a district court must set forth, on the record, findings explaining the basis of its ruling.”²²

The Court’s admonition for creating a clear record for appeal in all cases is especially important: “Without an explanation of the reasons or bases for a district court’s decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation.”²³ The Court’s selection of citations to illustrate its admonition equally demonstrates counsel’s role in creating an adequate record for appeal.²⁴ Moreover, the duty to request transcripts and provide them to the Supreme Court on appeal rests uniquely with the appellant.²⁵ With regard to a record of the voir dire proceedings, the Supreme Court has specifically cautioned, “Not having voir dire transcripts hamstrings our review.”²⁶

6. PRESERVING ISSUES FOR APPEAL THROUGH OBJECTIONS AT TRIAL.

In recent years, the Nevada appellate courts have emphasized the need for a contemporaneous objection to preserve issues arising out of alleged attorney misconduct at trial.²⁷ However, counsel’s duty to object to offending evidence or testimony extends generally to preserve issues for appellate review.²⁸ The

²⁰ *See id.* at 629.

²¹ *See id.*

²² *Id.*

²³ *Id.*

²⁴ *See Lioce v. Cohen*, 174 P.3d 970, 982 (Nev. 2008) (specific on-the-record findings “enable[] our review of [the district court’s] exercise of discretion”); *Rosky v. State*, 111 P.3d 690, 695 (Nev. 2005) (requiring findings “facilitate[s] proper appellate review” and fosters “synergy between the trial and reviewing courts [so] that appellate courts can develop a uniform body of precedent”); *Las Vegas Novelty v. Fernandez*, 787 P.2d 772, 776 (Nev. 1990) (requirement that a district court state reasons for permanent injunction is “intended primarily to facilitate appellate review”).

²⁵ *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P.3d 131, 135 (Nev. 2007) (citing NEV. R. APP. P. 30(b)(3)).

²⁶ *Thomas v. Hardwick*, 231 P.3d 1111, 1115 (Nev. 2010).

²⁷ *See Lioce*, 174 P.3d at 980; *Grosjean v. Imperial Palace, Inc.*, 212 P.3d 1068, 1079 (Nev. 2009); *Gunderson v. D.R. Horton, Inc.*, 319 P.3d 606, 612 (Nev. 2014) (“An attorney’s failure to object constitutes waiver of an issue, unless the failure to correct the misconduct would constitute plain error.”); *Michaels v. Pentair Water Pool & Spa, Inc.*, 357 P.3d 387, 395 (Nev. App. 2015) (same).

²⁸ *See Lioce*, 174 P.3d at 980 (“We restate the requirement that in our advocacy system, the parties’ attorneys are required to competently and timely state their objections.”).

failure to timely object at trial waives the issues for appeal, absent plain or constitutional error.²⁹

7. PRESERVING ISSUES FOR APPEAL ARISING OUT OF UNRECORDED BENCH CONFERENCES AND IN-CHAMBERS CONFERENCES AT TRIAL.

During jury trials it is common for the trial judge to hold bench conferences while the jury is present in the courtroom. Yet, these bench conferences are often unreported because the trial judge needs to instruct counsel without allowing the jurors to hear what is discussed.³⁰ What if there is some instruction or statement from the district court that forms the basis of an issue on appeal? Does the absence of a record completely preclude appellate review of such an issue? Generally, counsel cannot return to his or her table and restate what was just discussed since the bench conference was purposely held outside the hearing of the jury.³¹ However, nothing prevents counsel from restating the proceedings and objections at the next available opportunity outside the presence of the jury.

In Nevada, the precedent addressing this preservation issue is largely based upon criminal law, in which bench conferences must be recorded.³² But, although the appellate courts have not explicitly extended the bench-conference reporting requirement to civil cases, the guiding principles on counsel's role in preserving error can, nonetheless, be applied to civil cases.³³ If possible, the bench conferences should be recorded and later be made a part of the appellate

²⁹ *Bridges v. State*, 6 P.3d 1000, 1007 (Nev. 2000) (“Given that Bridges failed to timely object and preserve these issues for appeal, he is not entitled to relief absent plain or constitutional error.”); *Nevada State Bank v. Snowden*, 449 P.2d 254, 255 (Nev. 1969) (“[U]nless specifically objected to at trial, objections to a substantive error in the absence of constitutional considerations are waived and no issue remains for this court’s consideration.”).

³⁰ *See Daniel v. State*, 78 P.3d 890, 897 (Nev. 2003) (Nev. SUP. CT. R. 250(5)(a) and due process require a district court to record all sidebar proceedings in a capital case either contemporaneously with the matter’s resolution, or the sidebar’s contents must be placed on the record at the next break in trial.); *see also Preciado v. State*, 318 P.3d 176, 178 (Nev. 2014) (reasoning that due process requires recording all criminal bench conferences because, “[m]eaningful appellate review is inextricably linked to the availability of an accurate record of the lower court proceedings regarding the issues on appeal; therefore, a defendant is entitled to have the most accurate record of his or her district court proceedings possible”).

³¹ *Cf. Preciado*, 318 P.3d at 178 (a bench conference’s contents “must be placed on the record at the next break in trial”).

³² *See id.* In the context of criminal proceedings, in both capital and non-capital cases, the absence of bench and in-chambers conferences in the record raises due process concerns, subject to a harmless error analysis. *See Daniel*, 78 P.3d at 897; *see also Preciado*, 318 P.3d at 178.

³³ *See, e.g., Boyack v. Eighth Judicial Dist. Court*, 439 P.3d 956, 2019 WL 1877402, at *3 (Nev. Apr. 25, 2019) (unpublished disposition) (“The lack of a record memorializing the district court’s ‘comment’ or ‘directive’ during the bench conference seriously impairs our ability to review the district court’s oral ruling.”).

record.³⁴ If the recording of bench conferences is simply not available, counsel should insist upon making a record at the next available opportunity outside the presence of the jury.

Although the burden is placed upon the district court to record bench conferences during criminal trials, in civil cases, the presumptions are just the opposite, which makes counsel's role in preserving issues for appeal even more important. For civil cases, the Supreme Court has articulated that the duty to request transcripts and include them in the appellate record rests uniquely with the appellant.³⁵ And, "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision."³⁶ With respect to in-chambers conferences in civil cases, the Nevada Supreme Court has specifically recognized the difficulty of preserving error: "[W]e note that the source of the problem lies in the practice of holding conferences regarding instructions in judges' chambers and off the record."³⁷ Yet, the Court reiterated the prerequisite for appellate review that "conferences regarding instructions should be on the record."³⁸

While it is possible to re-create portions of the district court record by affidavit,³⁹ doing so requires approval from the district court and is subject to the memories of the parties present.⁴⁰

8. PRESERVING ISSUES FOR APPEAL THROUGH OFFERS OF PROOF.

When testimony or evidence is disallowed at trial, an objection is generally insufficient to preserve error since the disallowed evidence is not

³⁴ See *Whitehead v. Nevada Comm'n on Judicial Discipline*, 893 P.2d 866, 895 (Nev. 1995) ("[S]idebar conferences between lawyers and judges at trial are contemporaneously confidential although they may later appear as part of the transcript . . ."), *superseded by constitutional amendment on other grounds as stated in Mosley v. Nevada Comm'n on Judicial Discipline*, 22 P.3d 655, 657 n.1 (Nev. 2001).

³⁵ *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 172 P.3d 131, 135 (Nev. 2007) (citing NEV. R. APP. P. 30(b)(3)).

³⁶ *Id.*

³⁷ *Carson Ready Mix, Inc. v. First Nat'l Bank of Nevada*, 635 P.2d 276, 278 (Nev. 1981).

³⁸ *Id.*

³⁹ NEV. R. APP. P. 10(c) provides that, "[i]f any difference arises about whether the trial court record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record conformed accordingly. Questions as to the form and content of the appellate court record shall be presented to the clerk."

⁴⁰ *Shugart v. Shugart*, 541 P.2d 1101, 1101 (Nev. 1975) ("[T]he statement of the evidence or proceedings was not submitted to the district court for settlement and approval and, therefore, may not be considered as a part of the record on appeal."); see *Blackman v. Mikulich*, 548 P.2d 645, 646 (Nev. 1976) ("[W]hen this court is not favored with a transcript of the proceedings in the district court and the appellants have failed to submit a settled and approved statement of the evidence taken in the proceedings below, this court is not able to decide under the facts whether the judgment of the trial court was erroneous or that it was not based upon substantial evidence.").

contained within the record.⁴¹ As such, moving counsel is required to present an offer of proof in the district court to concretely demonstrate what the evidence would have shown had it been admitted.⁴² Otherwise, the appellate court is impermissibly left to speculate what the disallowed evidence might have shown—which the court will not do.⁴³

A proper offer of proof does not permit counsel to speculate as to what the evidence might show; instead, the actual evidence should be presented.⁴⁴ If, however, the disallowance of evidence has been the subject of pretrial proceedings, the duty to present an offer of proof at trial to preserve issues for appeal may be excused.⁴⁵ The Supreme Court has also noted that an effective offer of proof will often persuade the trial court to allow the fact finder to hear the disallowed evidence.⁴⁶

9. PRESERVING ISSUES FOR APPEAL DURING THE SETTLING OF JURY INSTRUCTIONS.

The settling of jury instructions is often a key area of potential error. To preserve any potential error, the settling of jury instructions should be done on the record; otherwise, the Supreme Court has very little or nothing to review.⁴⁷

Under the new rules of civil procedure,

A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection. If a party relies on any statute, rule, caselaw, or other legal authority to object to a requested instruction, the party must cite or provide a copy of the authority.⁴⁸

⁴¹ See *Foreman v. Ver Bruggen*, 398 P.2d 993, 995 (Nev. 1965) (affirming the trial judgment, “because the record does not contain the information necessary for us to rule upon the assigned error”).

⁴² *Burgeon v. State*, 714 P.2d 576, 579 (Nev. 1986) (“If appellant desired to preserve for our review the testimony that he reasonably expected the jury to hear, absent the adverse ruling of the trial court, a detailed offer of proof was essential.”); see also NEV. REV. STAT. § 47.050 (2020).

⁴³ *Burgeon*, 714 P.2d at 579.

⁴⁴ *Las Vegas Convention & Visitors Auth. v. Miller*, 191 P.3d 1138, 1151 (Nev. 2008) (“Offers of proof must be specific and definite; counsel’s mere conjecture as to what the evidence might reveal does not suffice.”).

⁴⁵ See *Bronneke v. Rutherford*, 89 P.3d 40, 44 (Nev. 2004) (“Since the district court heard at the pretrial hearing the evidence that Bronneke intended to produce regarding the informed-consent claim, an offer of proof was unnecessary.”).

⁴⁶ See *Burgeon*, 714 P.2d at 579.

⁴⁷ *Carson Ready Mix, Inc. v. First Nat’l Bank of Nevada*, 635 P.2d 276, 277 (Nev. 1981) (“We have therefore held that when the record does not contain the objections or exceptions to instructions given or refused, we would not consider appellant’s claim of error with regard to those instructions.”).

⁴⁸ NEV. R. CIV. P. 51(c)(1). Further,

[a]n objection is timely if . . . a party objects at the opportunity provided under [NEV. R. CIV. P.] 51(b)(2) [to settle instructions while the district court allows “the parties an opportunity to object on the record and out of the jury’s hearing before the instructions and arguments are delivered”]; or . . . a party was not informed of an instruction or action on a request before that opportunity to

Nevada case law supports this notion and prohibits generalized objections to proposed jury instructions: “A general objection, however, is not sufficient to preserve the issue on appeal, unless there is plain error.”⁴⁹ To properly preserve a jury-instruction issue, counsel does not need to give “a discourse on the applicable law,”⁵⁰ but must, at a minimum, provide “a citation to relevant legal authority in support of the objection.”⁵¹ Additionally, counsel should offer an alternative jury instruction to preserve the objection for appeal.⁵²

10. PRESERVING ISSUES FOR APPEAL ARISING OUT OF JURY VERDICT FORMS.

At the same time jury instructions are settled, counsel must present to the district court judge a proposed verdict form, which can take the form of a general verdict, a special verdict, or a general verdict with written interrogatories.⁵³ Determining which verdict form should be used may itself create an issue on appeal at the time the jury verdict form is settled on the record.⁵⁴

Whenever a district court receives proposed special verdict forms and interrogatories, the Supreme Court has clarified that “the district court should give the special verdicts or interrogatories or explain on the record the reason for refusing them.”⁵⁵ Without this required explanation, the Supreme Court is “more inclined to reverse a general verdict where, as here, the party

object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

NEV. R. CIV. P. 51(c)(2).

⁴⁹ *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 194 P.3d 1214, 1217 (Nev. 2008). Plain error “is only present when it is plain and clear that no other reasonable explanation for the verdict exists.” *Ringle v. Bruton*, 86 P.3d 1032, 1041 (Nev. 2004); *see also Parodi v. Washoe Med. Ctr., Inc.*, 892 P.2d 588, 590 (Nev. 1995) (“[P]lain error is error . . . [that] ‘had a prejudicial impact on the verdict when viewed in context of the trial as a whole’” (quoting *Libby v. State*, 859 P.2d 1050, 1054 (Nev. 1993))).

⁵⁰ *Cook*, 194 P.3d at 1216–17.

⁵¹ *Id.* (stating this fulfills the requirements of NEV. R. CIV. P. 51(c)).

⁵² *See Etcheverry v. State*, 821 P.2d 350, 351 (Nev. 1991) (“This court has previously held that ‘[t]he failure to object or to request special instruction to the jury precludes appellate consideration.’” (quoting *McCall v. State*, 540 P.2d 95, 95 (Nev. 1975))).

⁵³ *See* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2501 (3d ed. 2008) (“Most jury-tried civil cases . . . are resolved, and always have been, by a general verdict in which the jury finds for the plaintiff or for the defendant. [Rule 49], however, makes available two very different procedures as discretionary alternatives to the general verdict for use in appropriate cases[:].” the special verdict and the general verdict with interrogatories.); *see also* NEV. R. CIV. P. 49.

⁵⁴ *See Skender v. Brunsonbuilt Constr. & Dev. Co.*, 148 P.3d 710, 716 (Nev. 2006) (“This court has suggested that a special verdict form be used when a case presents more than one theory of liability or defense.”). *But see* *FGA, Inc. v. Giglio*, 278 P.3d 490, 496 (Nev. 2012) (“We now adopt the sound reasoning of the Connecticut courts and clarify that the general verdict rule is inapplicable in cases where overlapping factual theories support a single theory of recovery.”).

⁵⁵ *Allstate Ins. Co. v. Miller*, 212 P.3d 318, 332 (Nev. 2009).

complaining of error associated with a claim or theory timely requested special verdicts or interrogatories and the district court denied them without stating its reasoning on the record.”⁵⁶ The absence of a clear reason for the district court’s ruling on rejected verdict forms hampers the appellate court’s review.⁵⁷ Thus, the Court reiterated the general requirement to present an adequate record on appeal: “[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.”⁵⁸

Even after the jury verdict form is settled, potential error in relation to the jury verdict must be preserved for appellate review.⁵⁹ For example, if the jury fails to answer the special interrogatories, the affected party must make a request to the district court for their completion before the jury is excused; otherwise, the issue is waived on appeal.⁶⁰ Additionally, if a party believes that there are inconsistencies in the jury’s verdicts, counsel must raise that objection before the jury is excused to allow the district court to determine whether the jury should correct any inconsistencies; otherwise, the objection is subject to waiver of appellate review.⁶¹ Despite this broad waiver rule, it is not absolute when the inconsistency is obvious or subject to a simple calculation for which the trial judge has a responsibility to resolve, “even when no objection is made.”⁶²

11. PROPERLY RAISING CHALLENGES TO THE SUFFICIENCY OF THE EVIDENCE.

Whenever conflicting evidence is presented at trial, the appellate courts will generally decline to disturb the district court’s factual findings.⁶³ On

⁵⁶ *Id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See Allum v. Valley Bank of Nevada*, 970 P.2d 1062, 1069 (Nev. 1998).

⁶⁰ *See Scott v. Chapman*, 291 P.2d 422, 423 (Nev. 1955) (“The authorities seem to be practically unanimous on the proposition that any error resulting from failure of the jury to answer special interrogatories is waived unless the party at the time the verdict is returned calls the matter to the attention of the court and makes proper and timely request that the jury be directed to answer the special interrogatories.”).

⁶¹ *See Eberhard Mfg. Co. v. Baldwin*, 628 P.2d 681, 682 (Nev. 1981) (“Had the parties timely entered objection when the verdicts were returned, the trial court could have determined the validity of the objections. If it found merit in them, the court could have further instructed the jury and sent it back for additional deliberation.”); *Cramer v. Peavy*, 3 P.3d 665, 670 (Nev. 2000) (“[W]e have formulated the policy that ‘failure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury’ constitutes a waiver of the issue of an inconsistent verdict.”).

⁶² *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032, 1038–39 (Nev. 2008) (quoting *Schaafsma v. Morin Vermont Corp.*, 802 F.2d 629, 634 (2nd Cir. 1986)).

⁶³ *E.g.*, *Sheehan & Sheehan v. Nelson Malley & Co.*, 117 P.3d 219, 223 (Nev. 2005).

occasion, however, there is no evidence to support the fact finder’s decision, and reversal is warranted.⁶⁴

Generally, a challenge to the sufficiency of the evidence in a jury trial must be made at the close of the plaintiff’s case under NRCP 50(a).⁶⁵ After the jury trial, NRCP 50(b) allows for a challenge to the sufficiency of the evidence to be renewed.⁶⁶ However, “[a] party may not gamble on the jury’s verdict and then later, when displeased with the verdict, challenge the sufficiency of the evidence to support it.”⁶⁷

Instead, a challenge to the sufficiency of the evidence must follow the sequence outlined in NRCP 50(a) with a motion made at the close of the plaintiff’s case and then a renewed motion under NRCP 50(b) after trial.⁶⁸ The stated exception to this rule is when there is “plain error in the record or if there is a showing of manifest injustice.”⁶⁹

⁶⁴ See *Avery v. Gilliam*, 625 P.2d 1166, 1168 (Nev. 1981) (“Although it has long been the rule that where there is a conflict in the evidence this court will not disturb the verdict or decision below, we have not hesitated to do so where there is no substantial conflict in the evidence on any material point and the verdict or decision is manifestly contrary to the evidence.”).

⁶⁵ NEV. R. CIV. P. 50(a)(1) states that,

[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . resolve the issue against the party; and . . . grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

NEV. R. CIV. P. 50(a)(2) provides that “[a] motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.”

⁶⁶ NEV. R. CIV. P. 50(b) provides that, if the court does not grant a motion made under NEV. R. CIV. P. 50(a), “the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion.” As a result,

[n]o later than 28 days after service of written notice of entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged — the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under [NEV. R. CIV. P. 59].

NEV. R. CIV. P. 50(b). Importantly, however, “[t]he time for filing the [NEV. R. CIV. P. 50(b)] motion cannot be extended under [NEV. R. CIV. P. 6(b)].” NEV. R. CIV. P. 50(b).

⁶⁷ *Price v. Sinnott*, 460 P.2d 837, 841 (Nev. 1969).

⁶⁸ See *id.* (“It is solidly established that when there is no request for a directed verdict, the question of the sufficiency of the evidence to sustain the verdict is not reviewable.”); NEV. R. CIV. P. 50(b).

⁶⁹ *Price*, 460 P.2d at 841.

12. RAISING NEW ISSUES IN MOTIONS FOR RECONSIDERATION.⁷⁰

Despite the very high standard to prevail on a motion for reconsideration, sometimes it is worth filing such a motion to preserve new arguments or evidence for appellate review.⁷¹

The Nevada Supreme Court has clarified that it will consider new issues raised for the first time in a district court motion for reconsideration when: (1) the notice of appeal is filed after the resolution of the reconsideration proceedings, including the written order; (2) the reconsideration filings are included as part of the record; and (3) the district court elects to consider the reconsideration arguments on their merits.⁷² If any one of the three conditions is not met, the new issues raised on reconsideration are not properly preserved for an appeal.

13. EXCEPTIONS TO THE PROHIBITION AGAINST RAISING ISSUES FOR THE FIRST TIME ON APPEAL.

In Nevada appellate courts, it is well established that issues cannot be raised for the first time on appeal.⁷³ The basic theory behind this principle is that attorneys should not be able to reinvent their case on appeal.⁷⁴ However, when this legal principle is cited, it almost always carves out an exception for subject matter jurisdiction arguments.⁷⁵ The lack of subject matter jurisdiction is by far the strongest exception to raising issues for the first time on appeal because, “whether a court lacks subject matter jurisdiction ‘can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred

⁷⁰ “Motions for reconsideration” are typically those made “to alter or amend a judgment,” which now must be made “no later than 28 days after service of written notice of entry of judgment.” NEV. R. CIV. P. 59(e); *see also* AA Primo Builders, LLC v. Washington, 245 P.3d 1190, 1194 (Nev. 2010) (citations omitted) (“[R]egardless of its label . . . a motion to reconsider, vacate, set aside, or reargue [a final judgment] will ordinarily be construed as [a] Rule 59(e) motion . . .”).

⁷¹ *See* Moore v. City of Las Vegas, 551 P.2d 244, 246 (Nev. 1976) (“Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.”).

⁷² *See* Arnold v. Kip, 168 P.3d 1050, 1054 (Nev. 2007).

⁷³ *See* Old Aztec Mine, Inc. v. Brown, 623 P.2d 981, 983–84 (Nev. 1981) (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”); DeChambeau v. Balkenbush, 431 P.3d 359, 364 (Nev. App. 2018) (Silver, C.J., concurring) (“[A]ppellants here conceded at oral argument that they never objected to the [issue before the district court]. As a result, I believe that appellants are now precluded on appeal from challenging the district court’s order . . .”).

⁷⁴ *See* Schuck v. Signature Flight Support of Nevada, Inc., 245 P.3d 542, 545 (Nev. 2010) (“We decline to reverse summary judgment to allow Schuck to reinvent his case on new grounds.”).

⁷⁵ *See Old Aztec Mine, Inc.*, 623 P.2d at 983–84 (“A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.”).

by the parties.”⁷⁶ In fact, “if the district court lacks subject matter jurisdiction, the judgment is rendered void.”⁷⁷

In the appellate court’s discretion, it can choose to consider issues raised for the first time on appeal when there are constitutional issues.⁷⁸ However, when the issues are not raised in the district court and not sufficiently developed in the appellate court briefing, the appellate court will often decline to consider the constitutional issues.⁷⁹

The appellate court can also consider issues raised for the first time on appeal that constitute plain error. The determination of plain error is often limited to controlling authority that is not applied by the district court, such as a governing statute.⁸⁰

14. TIME CALCULATION: ANOTHER IMPORTANT ISSUE-PRESERVATION CONSIDERATION UNDER THE 2019 NEVADA RULES OF CIVIL PROCEDURE.

Nevada’s recently revised rules of civil procedure differ in many ways from their prior version.⁸¹ However, perhaps the biggest error-preservation-related change in the new rules is the change to time calculation under NRCP 6,⁸² in which Nevada “adopt[ed] the federal time-computation provisions in FRCP 6(a).”⁸³ This change removed the prior distinction between judicial and non-judicial days and, instead, “simplif[ie]d time computation and facilitat[ed]

⁷⁶ *Landreth v. Malik*, 251 P.3d 163, 166 (Nev. 2011) (quoting *Swan v. Swan*, 796 P.2d 221, 224 (Nev. 1990)).

⁷⁷ *Id.*

⁷⁸ *Levingston v. Washoe County*, 916 P.2d 163, 166 (Nev. 1996) (“[I]ssues of a constitutional nature may be addressed when raised for the first time on appeal.”).

⁷⁹ *See In re Candelaria*, 245 P.3d 518, 522 n.5 (Nev. 2010) (“These [constitutional] arguments were not made in [the] district court or developed with sufficient authority on appeal, and consequently, we will not substantively address them in this opinion.”).

⁸⁰ *Lee v. Ball*, 116 P.3d 64, 67 n.11 (Nev. 2005) (“The ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where a statute which is clearly controlling was not applied by the trial court.” (quoting *Bradley v. Romeo*, 716 P.2d 227, 228 (Nev. 1986))).

⁸¹ *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522, *supra* note 5; *see also* Jay Young, *The Changes Coming to the Nevada Rules of Civil Procedure: An Overview*, NEVADA LAW BLOG (Jan. 8, 2019), <http://nevadalaw.info/the-changes-coming-to-the-nevada-rules-of-civil-procedure-an-overview/>.

⁸² Importantly, NEV. R. CIV. P. 6(a)(1) now provides guidance for “computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time”

[w]hen the period is stated in days or a longer unit of time . . . exclude the day of the event that triggers the period; . . . count every day, including intermediate Saturdays, Sundays, and legal holidays; and . . . include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

NEV. R. CIV. P. 6(a).

⁸³ *See, e.g., In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522, *supra* note 5.

‘day-of-the-week’ counting.”⁸⁴ This new time calculation is especially important for subject-matter-jurisdictional events whose timeliness cannot be waived or extended, such as a notice of appeal,⁸⁵ or a potential tolling motion, such as a renewed motion for judgment as a matter of law,⁸⁶ a motion to amend or add findings,⁸⁷ a motion for a new trial,⁸⁸ or a motion to alter or amend a judgment.⁸⁹

CONCLUSION

Although not exhaustive, the explanations, rules, and case citations provided herein will hopefully provide attorneys practicing in Nevada’s state courts with the knowledge and information to properly preserve issue should their cases proceed on appeal to the Nevada Supreme Court or the Nevada Court of Appeals.

⁸⁴ *Id.* In revising NEV. R. CIV. P. 6, the Supreme Court summarized the changes to time calculation as follows:

To compensate for the shortening of time periods previously expressed as less than 11 days by the directive to count intermediate Saturdays, Sundays, and legal holidays, many of the periods have been lengthened. In general, former periods of 5 or fewer days are lengthened to 7 days, while time periods between 6 and 15 days are now set to 14 days. Time periods of 16 to 20 days were set to 21 days, and periods longer than 30 days were retained without change. The use of 7-, 14-, and 21-day periods enables ‘day-of-the-week’ counting.

Id.

⁸⁵ NEV. R. APP. P. 4(a)(1); *Rust v. Clark County Sch. Dist.*, 747 P.2d 1380, 1382 (Nev. 1987) (“[T]he proper and timely filing of a notice of appeal is jurisdictional.”); *see Walker v. Scully*, 657 P.2d 94, 94 (Nev. 1983) (“[T]he district court lack[s] [the] authority to extend the thirty-day period within which [a party] could file his notice of appeal.”).

⁸⁶ NEV. R. CIV. P. 50(b) (requiring the motion be filed “[n]o later than 28 days after service of written notice of entry of judgment” and providing that “[t]he time for filing the motion cannot be extended under [NEV. R. CIV. P.] 6(b).”).

⁸⁷ NEV. R. CIV. P. 52(b) (providing that “[o]n a party’s motion filed no later than 28 days after service of written notice of entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The time for filing the motion cannot be extended under [NEV. R. CIV. P.] 6(b).”).

⁸⁸ NEV. R. CIV. P. 59(b) (“A motion for a new trial must be filed no later than 28 days after service of written notice of entry of judgment.”).

⁸⁹ NEV. R. CIV. P. 59(e)–(f) (requiring a motion for new trial to be filed within 28 days, which cannot be extended under NEV. R. CIV. P. 6(b)); *see also AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1192 (Nev. 2010) (NEV. R. CIV. P. 59(e) motion must be timely filed in order to properly toll filing of notice of appeal).