

**IN THE COURT OF APPEALS FOR THE STATE OF NEVADA**

JENNIFER O'NEAL,

Appellant,

VS.

SHARNA HUDSON; GERALD  
LYLES,

Respondents.

No. 70446

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**APPELLANT’S OPENING BRIEF**

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## **RULE 26.1 DISCLOSURE STATEMENT**

Pursuant to NRAP 26.1, the Appellant hereby certifies that there are no persons or entities that must be disclosed, other than the Appellant and her undersigned counsel, as set forth herein. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Dated this 10<sup>th</sup> day of October, 2017.

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**1. JURISDICTIONAL STATEMENT:**

Pursuant to Nevada Constitution, Article 6, section 4, the Supreme Court has appellate jurisdiction over the within appeal in that it arises from a civil action before the District Court.

The district court entered a final judgment on the short trial jury verdict for the Respondent, which is a final order subject to direct appellate review under NRAP 3 and 4.

**2. STATEMENT OF ISSUE PRESENTED FOR REVIEW:**

a. Whether the short trial judge erred in denying the Appellant's post-trial motion for judgment notwithstanding the verdict or the alternative motion for new trial.

**3. Routing Statement:** This case should be assigned to the Court of Appeals under NRAP 17(b) as it does not fit the criteria set forth in NRAP 17(a) for appeals to be presumptively assigned to the Supreme Court.

#### **4. STATEMENT OF THE CASE**

Jennifer O’Neal filed her complaint for damages on December 18, 2013. App., 1, Complaint. O’Neal sought recovery for her personal injuries incurred from a rear-end collision on September 24, 2012. Id. O’Neal’s vehicle was struck by a vehicle owned by Respondent Sharna Hudson and driven by Gerald Lyles at the time of the accident. Id. The Respondents filed their answer on December 18, 2013. App., 5, Answer to Complaint

The case was tracked through the district court’s arbitration program. An arbitration was held on April 2, 2015, whereupon the arbitrator entered his decision and subsequent award in favor of O’Neal. App., 9, Arbitration Decision and Amended Arbitration Award.

The Respondent filed a request for trial de novo and the matter was then tracked into the district court’s short trial program. A short trial was conducted before a jury on February 5, 2016, before the short trial judge, the Honorable Robert A. Goldstein. App., 26, Judgment on Jury Verdict-Short Trial Program.

The jury found in favor of the Respondents and against O’Neal’s complaint for negligence. App., 26, Judgment. The short trial judgment on the jury verdict was filed on March 23, 2016. Id.

On March 24, 2016, Appellant filed a timely motion for judgment notwithstanding the verdict and motion for new trial directly with the short trial judge. App., 30, Plaintiff's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motion for New Trial. The Respondents filed a timely opposition to the motion on April 6, 2016. App., 43, Defendants' Opposition to Plaintiff's Motion for Judgment Notwithstanding the Verdict.

The short trial judge filed his order denying O'Neal's post-trial motion on April 25, 2016. App., 51, Order.

Appellant O'Neal timely filed her notice of appeal to this Court on May 19, 2016. App., 54, Notice of Appeal.

## **5. STATEMENT OF THE FACTS:**

The underlying short jury trial was not recorded, so there is no trial transcript to refer to for appellate purposes. Pursuant to NRAP 9(d), when a transcript of a trial is unavailable, the appellant *may* elect to prepare a statement of the evidence for inclusion in the record. However, the Appellant O'Neal has opted to not file a discretionary statement of the evidence and, instead, for purposes of this appeal, the Appellant will rely on the filed record of the proceedings as submitted in the Appellant's Appendix.

Appellant O'Neal filed her pre-trial memorandum with the short trial judge on January 22, 2016, which set forth her relevant factual background. App., 16, Plaintiff's Pre-Trial Memorandum.

The filed pre-trial memorandum indicates the following:

"Plaintiff O'Neal was involved in a motor vehicle collision on September 24, 2012, wherein she was rear-ended by Defendant driver Gerald Lyles. Mr. Lyles was cited by the LVMPD for driving too close, which was the direct cause of the collision. Ms. O'Neal's vehicle, a 2008 Jeep Patriot, suffered rear end damage from the impact.

Ms. O'Neal did delay treatment for several months, due to her inherent fear of doctors and medical treatment in general. However, by January, 2013, she finally reported for treatment with Dr. Peter Randall, a chiropractor. Dr. Randall diagnosed various forms of soft tissue injuries, including cervical sprain/strain; low back sprain/strain; muscle spasms; rib pain; sprain of the right wrist and right foot. She was placed on a course of conservative treatment from January, 2013 to May, 2013, wherein she was discharged. She also received additional treatment with Family Doctors of Green Valley between February 2013 and May, 2013.

The Plaintiff incurred the following medical damages:

1. Dr. Randall:	\$4,909
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2. Family Doctors of Green Valley: \$1,637

3. MRI's with Las Vegas Radiology: \$1,650

Total Medical Damages: \$8,196.00

There appears to be no dispute regarding the fact of liability or the nature of the underlying collision, however, the Defendants have disputed Plaintiff's damages given her delay in treatment for several months. Again, this delay can only be explained by Plaintiff's fear, whether rational or not, of seeking treatment. This will be elaborated upon by Plaintiff at trial.

Overall, this is a very simple auto accident injury claim, wherein Plaintiff has incurred reasonable medical billing and treatment. The evidence presented at the time of hearing will support Plaintiff's negligence claim and that the Defendants' breached their duty of care in directly causing the collision which injured Plaintiff." App., 16, Excerpted from Plaintiff's Pre-Trial Memorandum.

The filed Arbitration Decision and Award found for O'Neal and awarded her medical specials of \$5,797.33 and pain and suffering damages of \$3,500 against the Respondents. App., 9-10, Arbitration Decision and Amended Arbitration Award. Pursuant to Nevada Arbitration Rule 20(A), the filed arbitration decision and award was admitted at the February 5, 2016, short trial, as a filed exhibit.

In the Respondent's filed pre-trial memorandum, the Respondents admitted that they were not contesting liability at the short trial, rather they were contesting O'Neal's damage claims, including the nature and extent of her claimed damages. App., 22, Defendants' Pre-Trial Memorandum, filed 1/27/16.

Given that the Respondents did not contest liability at the short trial, O'Neal presented only herself and her treating medical provider, Dr. Peter Randall, D.C., as her trial witnesses. App., 17-18, Plaintiff's Pre-Trial Memorandum. The Respondents presented no witnesses to testify at the jury trial.

Despite the fact that the Respondents were not contesting liability and O'Neal and her treatment provider did testify regarding the accident and her treatment related damages, the jury found against O'Neal and in favor of the Respondents on the sole negligence claim. App., 28, Judgment.

The parties did submit a joint exhibit book, as required by the short trial rules, which included, in part, the following exhibits from O'Neal (as designated in her filed Plaintiff's Pre-Trial Memorandum, App., 17):

- a. treatment records and billing from Dr. Peter Randall, D.C.
- b. treatment records and billing from Family Doctors of Green Valley
- c. treatment records and billing from Las Vegas Radiology.

The Respondents also submitted proof that O'Neal's property damage claim

for her damage car was resolved and paid for by the Respondent's carrier. App., 22, Defendants' Pre-Trial Memorandum-Exhibit List.

Thus, the jury had before it the necessary testimony from O'Neal and her treatment provider; supportive exhibits for her medical treatment and the concession by the Respondents that they were liable for the collision. Despite all this, the jury still found against O'Neal.

Appellant O'Neal submitted and filed with the short trial judge her timely post-trial motion to reverse the jury's decision or grant a new trial on March 24, 2016. App., 30, Plaintiff's Motion for Judgment Notwithstanding the Verdict, or New Trial.

After consideration of both O'Neal's post-trial motion and the Respondents' filed opposition, the short trial judge entered a summary order denying the motion. App., 51, Order. The order denying the motion contained no findings of fact or explanation regarding the decision. Id.

## **6. ARGUMENT:**

### **Standards of Review:**

The Supreme Court reviews a district court's denial of judgment notwithstanding the verdict de novo. Dudley v. Prima, 84 Nev. 549, 551, 445 P.2d 31, 32 (1968). The Court will review the record for any substantial evidence to support a jury's verdict, as part of this de novo review. *Id.* The Court will reverse the denial of a judgment notwithstanding the verdict "if the final judgment is unwarranted as a matter of law." University System v. Farmer, 113 Nev. 90, 930 P.2d 730, 734 (1997).

A decision regarding the denial of a motion for new trial is reviewed for an abuse of discretion. Southern Pacific Transportation Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978).

A motion for judgment notwithstanding the verdict is a challenge to the jury verdict, which is reviewed for "any substantial evidence to support the jury verdict." Dudley v. Prima, 445 P.2d 31, 32 (Nev. 1968); see also, Valucar v. Coachmen Recreational Vehicle Company, 281 P.3d 1201 (Nev. 2009). A judgment notwithstanding the verdict will be considered improper when there is a conflicting question of fact and the jury could decide either way. *Id.*

Pursuant to NRCp 59, a new trial may be granted based on the following grounds, in part:

1. Irregularity in the proceedings of the court or jury, or abuse of discretion by which either party was prevented from having a fair trial;
2. Misconduct of the jury or the prevailing party;
3. Accident or surprise;
4. Newly discovered evidence
5. Manifest disregard by the jury of the instructions of the court

A jury verdict will be overturned if it is clearly wrong from all the evidence presented. Allstate Insurance Company v. Miller, 212 P.3d 318, 324 (Nev. 2009).

In this case, the short trial jury heard evidence as follows:

1. The Respondents admitted liability for the underlying auto collision on September 24, 2012.
2. The Respondents failed to offer any witnesses in the matter.
3. The Respondents only contested O'Neal's damages at the short trial.
4. At the short trial, the parties admitted their joint exhibit book, which admitted all of the O'Neals' medical treatment, billing and records before the short trial jury.
5. At trial, O'Neal presented the uncontroverted testimony of her treating medical

provider, Dr. Peter Randall, in support of her damage claims.

6. O'Neal also prevailed at the arbitration, wherein the arbitrator found liability and damages against the Respondents and awarded the sum of over \$9,200 to O'Neal. This arbitration award was part of the joint exhibits submitted at trial.

7. At trial, O'Neal testified as to the mechanism of the accident; her injuries; her treatment and her outstanding medical bills directly related to the accident. Dr. Randall also testified as to O'Neal's treatment for the September 24, 2012, accident.

The Respondents contended in their filed Opposition to O'Neal's post-trial motion that they did contest the causation of O'Neal's damage claims and whether they were related to the underlying auto collision. App., 45-48, Defendants' Opposition to Plaintiff's Motion. The Respondents argued that, while the jury did have O'Neal's testimony and her treatment records in evidence, the jury made their own determination regarding O'Neal's credibility and whether her medical bills were related to the accident or not. Id. The Respondents' argued that there was substantial evidence to support the jury's verdict to award O'Neal nothing for her damage claims. Id.

O'Neal contends that she proved each and every element of her case by a preponderance of the evidence. O'Neal proved liability and causation, as well as damages proximately caused by the Respondents' conceded negligent conduct.

The Respondents argued in their filed Opposition to the post-trial motion that the evidence showed O'Neal had a four month gap in treatment from the September, 2012, accident to when she first started treating. App., 44-45, 48, Defendants' Opposition. O'Neal concedes the four month gap in treatment between the accident and when she started treating with Dr. Randall, however there was no admitted trial evidence of any intervening accident which could have caused the injuries she sustained and documented with Dr. Randall's records

The jury verdict was not supported by any substantial evidence, in fact the jury's verdict ignored the clear evidence presented by the testimony of O'Neal and Dr. Randall. O'Neal presented substantial evidence which supported her medical damage claims of \$8,696 (\$4,909 with Dr. Randall, \$1,637 with Family Doctors of Green Valley and \$2,150 with Las Vegas Radiology) and that the Respondents' negligence was the proximate cause of those damages.

The jury essentially committed misconduct and manifestly ignored the trial evidence and its court ordered obligations. O'Neal had the burden to prove that she sustained damage, that the Respondents were negligent and that such

negligence was the proximate cause of the damages she sustained. The jury was instructed on the foregoing burden in the jury instructions. App., 36-42, Plaintiff's Motion, exhibits- Attached Instructions from Trial.

In this case, the jury manifestly disregarded its sworn duties and ruled for the Respondents, despite the nature and extent of O'Neals proven damages and their concession of liability. The Respondents presented no conflicting evidence to indicate that the accident did not happen and no evidence presented by the Respondents that O'Neal failed to sustain any damages.

O'Neal agrees that a jury is given wide latitude in reaching its decision. However, where, as in this case, the jury so clearly ignored the evidence presented in favor of O'Neal's negligence claim *and* when it was presented with no conflicting actual evidence or testimony at trial from the Respondents, then NRCP 59 supports the granting of a new trial, at a minimum. As a matter of law, if a jury could not have reached its conclusion, then this irregularity in the jury proceedings supports the granting of a new trial. Fox v. Cusik, 91 Nev. 218, 220, 533 P.2d 466, 467 (1975).

This was not a case where the jury was presented with any defense witnesses, as the Respondents called none at trial, nor any conflicting evidence at trial. Instead, the Respondents challenged O'Neal's medical treatment and



whether it was related to the accident by utilizing cross-examination only. The Respondents filed Opposition to the post-trial motion concedes this contention when it argued that the jury's verdict was appropriate considering the alleged inconsistencies in O'Neal's testimony and her treatment history, without noting or relying on any evidence or testimony presented by the Respondents at trial. App., 47-49, Defendants' Opposition.

Based on a de novo review, the jury's verdict was not supported by substantial evidence, instead, the jury exhibited a flagrant disregard of the entire substance of O'Neal's case. O'Neal met her required burden of proof as to each element of her negligence claim. The jury's verdict could not have been properly reached based on the nature and extent of evidence presented by O'Neal at trial.

For these reasons, the short trial judge committed error in denying O'Neal's post-trial motion. The jury's verdict should be set aside and a new trial ordered.

## 7. CONCLUSION:

For all the foregoing reasons, Appellant O'Neal moves the Court to grant this appeal and set aside the jury verdict. The matter should be remanded for a new trial.

Dated this 10<sup>th</sup> day of October, 2017.

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## **8. CERTIFICATE OF COMPLIANCE WITH NRAP 28.2 AND NRAP 32:**

As undersigned counsel for the Appellant, I hereby certify as follows:

1. I have prepared and read the foregoing opening brief;
2. To the best of my knowledge, information and belief, the brief is not frivolous or interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
3. I certify that the brief complies with all applicable Nevada Rules of Appellate Procedure, including the requirement of Rule 28(e) that every assertion in the brief regarding matters in the record be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found; and
4. I certify that the brief complies with the formatting requirements of Rule 32(a)(4)-(6) and the page and/or type volume limitations stated in Rule 32 (a)(7).
5. I hereby further certify that this brief complies with the typeface and type style requirements of Rule 32(a)(4)-(6) as it utilizes times new roman type face with a 14 point type style. Further, this brief is in compliance with the type-volume

limitations as it contains as a word count of 3004 words in the countable sections of the brief.

Dated this 10<sup>th</sup> day of October, 2017.

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**9. CERTIFICATE OF SERVICE:**

I hereby affirm that on this 10<sup>th</sup> day of October, 2017, I mailed via first class U.S. Mail a copy of the foregoing brief to the Respondent at the address below:

James W. Howard, Esq.  
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/s/Kirk T. Kennedy  
Law Office of Kirk T. Kennedy

