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FOR PUBLICATION
IN THE SUPREME COURT OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

FELIX FITIAL,
Plaintiff-Appellee

v.

KIM KYUNG DUK
Defendant-Appellant.

OPINION AND ORDER

Cite as: *Fitial v. Kim*, 2001 MP 09
Appeal No. 99-019/Civil Action No. 94-1106
Submitted on the briefs July 12, 2000

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice, ALEXANDRO C. CASTRO, Associate Justice, and TIMOTHY H. BELLAS, Justice *Pro Tem*

DEMAPAN, Chief Justice:

¶1 Appellant Kim Kyung Duk (“Kim”) appeals the Superior Court’s Order denying his motion for new trial (“Order”).¹ We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,² and 1 CMC § 3102. We hold that the trial court properly denied Kim’s motion for a new trial. Therefore, we affirm the decision of the trial court.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The issue before this Court is whether the trial court should have granted Kim’s motion for new trial. Specifically, on appeal Kim raises three grounds for a new trial: (1) the verdict was against the clear weight of the evidence, (2) one juror was related to a member of Fitial’s prosecution team, and (3) denying Kim a continuance deprived him of a fair trial. We review a court’s ruling on such a motion for manifest or gross abuse of discretion.³ See *Santos v. Nansay Micronesia, Inc.*, 4 N.M.I. 155, 160, 167 (1994) (requiring substantial evidence to support challenge to verdict as against weight of evidence); *Commonwealth v. Hanada*, 2 N.M.I. 343, 350 (1991) (involving juror misconduct); *Guerrero v. Guerrero*, 2 N.M.I. 61, 67 (1991) (involving motion for continuance). A

¹ Generally, an order denying a motion for a new trial is not appealable as such. See Charles A. Wright, Arthur R. Miller & Mary Kay Kane, 11 Federal Practice and Procedure: Civil 2d § 2818 (1995). However, courts do not stand on technicalities in this matter and if an appeal is erroneously taken from the denial of the motion for new trial, instead of from the judgment, the court will treat the appeal as being from the judgment. *Id.* In this matter, the Court will therefore treat Kim’s appeal as being from the judgment.

² N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

³ Kim erroneously identifies the standard of review as being an abuse of discretion standard. Defendant/Appellant Opening Brief at 1.

trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principals of law and practice to the substantial detriment of a party or litigant. *See State v. Galanal*, 917 P.2d 370, 385 (1996).

FACTS AND PROCEDURAL BACKGROUND

¶3 The trial court's Order recites the following facts:

¶4 On the night of February 5, 1991, at Kim's request, Appellee Felix F. Fitial ("Fitial") undertook night watch duties at Kim's commercial building, which was under construction in Chalan Kanoa, Saipan. (Order at 1). While inspecting the second floor of the building, Fitial saw what appeared to be a piece of steel reinforcement bar protruding from the edge of the building. *Id.* Concerned that the object might fall to the ground and injure someone, Fitial reached out with one hand to remove it. *Id.* The object was actually a live electrical wire, which severely electrocuted Fitial. *Id.* Fitial tried to free himself with his other hand, but it was also locked onto the live electrical wire. *Id.* A few moments later, Fitial was thrown back about five feet from the object and lay unconscious. *Id.* As a result of the electrocution, both of his arms had to be amputated. *Id.*

¶5 Fitial subsequently filed suit against Kim. (Order at 2). Kim went through four substitutions of trial counsel during the course of the proceedings. *Id.* At the pre-trial conference in September 1998, the trial court denied Kim's request for a continuance of the trial. *Id.*

¶6 There were two Felix Fitials at trial. Felix Repeki Fitial ("Mr. Fitial") is plaintiff Fitial's uncle. Defendant/Appellant Opening Brief at 20. Kim notes Mr. Fitial assisted plaintiff Fitial's legal team during the jury selection process and during the trial, and sat at counsel's table during trial. *Id.* During *voir dire*, although juror Cecilia Repeki Sablan ("Ms. Sablan") indicated she was

somehow related to Mr. Fitial, she did not know how she was related, and stated she did not believe the relationship would affect her ability to be fair to both sides. *Id.* Only after trial did the parties learn that Ms. Sablan is Mr. Fitial's second cousin. *Id.*

¶7 After a week-long trial in October 1998, the jury returned a verdict in favor of Fitial for \$3.5 million. (Order at 2). Kim then filed a motion for new trial, arguing (1) the jury verdict was inconsistent with the evidence, (2) one of the jurors failed to disclose that she was closely related to a member of Fitial's trial team, (3) the court erred in denying Kim's request for continuance, and (4) the verdict amount was excessive. *Id.*

¶8 In denying the motion, the trial court first rejected Kim's argument that the evidence established there was a barricade outside Kim's building, and pointed to conflicting evidence which the jury properly considered in rendering its verdict. (Order at 3). The trial court next stated that a juror cannot be faulted for failing to disclose information which she was not asked, and Kim did not challenge Ms. Sablan for cause during *voir dire*. *Id.* at 4. Lastly, the trial court noted that when Kim requested a continuance, both parties had already completed discovery during the lawsuit's pendency of nearly four years, and both parties had represented they were prepared for trial. *Id.* at 6. The court further found Kim's former counsel moved to withdraw in July 1998, three months before trial, and the motion was granted in August 1998, two months before trial. *Id.* Moreover, Kim's former counsel had indicated his intent to withdraw as early as April 1998, five months before trial. *Id.* Therefore, the court reasoned that any prejudice to Kim was due to his own lack of diligence in using this time to seek new counsel. *Id.*

¶9 In his appeal, Kim does not challenge the trial court's refusal to grant a new trial based on an excessive damages award, as was previously asserted in Kim's motion for a new trial. This timely appeal followed.

ANALYSIS

I. **The Trial Court Did Not Commit Manifest or Gross Abuse Of Discretion In Denying Kim's Motion for New Trial On The Ground That The Verdict Was Not Supported By The Evidence.**

¶10 This Court may not consider an issue raised for the first time on appeal unless: (1) the issue is one of law not relying on any factual record; (2) a new theory or issue has arisen because of a change in law while the appeal is pending; or (3) plain error occurred and an injustice might otherwise result. *See Yang v. Angel House*, App. No. 98-036 (N.M.I. Sup. Ct. March 31, 2000) (Opinion at 2 n. 2). Even if an issue is purely legal, this Court will not automatically entertain such an issue if it is raised for the first time on appeal. *See Commonwealth v. Suda*, App. No. 98-011 (N.M.I. Sup. Ct. Aug. 16, 1999) (Opinion at 12-13) (finding no plain error and consequently declining to review due process argument not presented before trial court).

¶11 In this matter, Kim has failed to provide the legal analysis necessary to support the new arguments presented in his appeal. Moreover, Kim's arguments do not satisfy any of the three standards for new issue appellate review. Specifically, as Fitial points out, Kim's grounds for a new trial are different from those raised in the trial court. Brief of Appellee at 3. According to the trial court's Order, the only argument Kim raised below was that the evidence suggested there was an eight-foot high barricade from the outer edge of the building; if Fitial had to overcome this barricade before encountering a live wire, then he would have been a trespasser and Kim would not be liable for his injuries. (Order at 3). On appeal, however, Kim presents the following novel arguments.

¶12 According to Kim, during his closing, Fitial suggested that the live wire was there because Kim had illegally tapped a power line owned by the Commonwealth Utilities Corporation ("CUC"). Defendant/Appellant Opening Brief at 8. Kim complains that there was no evidence to support an illegal tap, and the jury should have been instructed not to consider this suggestion. *Id.* at 9-10. Kim

does not provide any case law to support his argument. *Id.* As Fitial points out, Kim did not object to this comment about an illegal wire tap during trial, and both parties and the trial court recognized that statements made during closing arguments were not evidence. Brief of Appellee at 9-10.

¶13 Kim next argues that the evidence established that a CUC power line, not Kim, was the cause of Fitial's injury. Defendant/Appellant Opening Brief at 9. However, he cites no examples to show that the clear weight of the evidence supports this contention, nor does he explain why he would not be liable for a hazard that was on his property.

¶14 Additionally, Kim claims the evidence shows that Fitial was not an invitee or employee and that there were no other incidents that would have put him on notice of Fitial's presence on the property. Defendant/Appellant Opening Brief at 10. This Court agrees with the response provided to this line of reasoning by Fitial. Namely, that the trier of fact had already resolved the conflicting evidence as to whether Kim did not know Fitial, or whether Kim in fact hired Fitial to guard the building. Brief of Appellee at 4-5.

¶15 According to Kim, even if Fitial was invited onto the property, Kim is only liable if he created an unreasonable risk of harm to Fitial. Defendant/Appellant Opening Brief at 12. As construction sites are inherently dangerous, Kim argues Fitial was contributorily negligent in voluntarily entering the site in the dark, without a flashlight, a hard hat and construction boots. *Id.* at 12. Kim's argument essentially asks that this Court weigh factual evidence already adjudicated by the trial court and reach a different, more favorable, conclusion. That is not the proper function of an appeal, nor is it proper grounds for a new trial. *See* 1 CMC § 3103; *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 345 (1996).

¶16 Further, Kim states that if Fitial was an invitee, then he exceeded the scope of his invitation by going up to the second floor of the building to handle or take materials. Defendant/Appellant

Opening Brief at 11-12. The scope of Fitial's invitation was not discussed at trial. Consequently, Kim had no reason to raise the issue of the scope of any invitation he made to Fitial to be on the property, and this issue may not now be raised on appeal. *See* 1 CMC § 3103; *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 345 (1996).

¶17 Finally, Kim cites the "Step in the Dark" rule, which states that when an invitee enters upon unfamiliar premises, proceeds into a place of impenetrable darkness and falls, then as a matter of law he has not exercised ordinary care for his own safety and is therefore guilty of contributory negligence. Defendant/Appellant Opening Brief at 15-16. Again, Kim's novel argument represents a different position than he asserted in his original motion for a new trial. Memorandum of Points and Authorities in support of Kim's motion for new trial at 8.

¶18 The Commonwealth Rules of Civil Procedure permit a new trial for all or any parties, on all or part of the issues, "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." Com. R. Civ. P. 59(a)(1). A new trial may be granted if the jury's verdict is against the clear weight of the evidence. *See Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 602 (9th Cir. 1983). However, this Court will not second-guess the trial court's evaluation of a witness' credibility, *see Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 9), nor will it reweigh evidence presented to the trial court. *See* 1 CMC § 3103; *Commonwealth v. Delos Reyes*, 4 N.M.I. 340, 345 (1996). Additionally, we will not consider an issue for which the proponent cites no legal authority. *See Roberto v. De Leon Guerrero*, 4 N.M.I. 295, 297-98 (1995).

¶19 As Kim has raised distinctive issues on appeal which were not made in the motion for a new trial and has cited no legal authority to support the new allegations, we will not reweigh evidence. We, therefore, find that the trial court properly denied Kim's motion for new trial on the ground that

the verdict was not supported by the evidence.

II. The Trial Court Did Not Commit Manifest Or Gross Abuse Of Discretion In Denying Appellant's Motion For New Trial On The Ground Of Juror Bias.

¶20 A juror may be disqualified under Commonwealth Rules of Civil Procedure, Rule 47 if she “is related to any party or such party’s counsel so as to clearly disqualify” her. *See* Com. R. Civ. P. 47(d)(2). Here, the trial court observed that the purpose of this rule is to eliminate potential jurors who may be prejudiced against or align themselves with a particular party. *See* Order at 5, E.R. at 5. Kim argues that the trial court improperly rejected his argument that juror Cecilia Repeki Sablan’s familiar relationship with the plaintiff’s trial assistant, Mr. Fitial, resulted in juror bias and was grounds for a new trial. We disagree. As the trial court properly stated, “a juror cannot be faulted for failing to disclose information for which he or she was not asked.” *See Dall v. Coffin*, 970 F.2d 964, 969 (1st Cir. 1992); *Fitial v. Kim*, Civ. No. 94-1106 (N.M.I.Super.Ct. June 25, 1999) (Order at 4); Excerpts of Record (“E.R.”) at 4.

¶21 Specifically, the trial court noted that during *voir dire* examination, Ms. Sablan revealed to Mr. Atalig that she was somehow related to the Plaintiff. (Order at 4). Despite Ms. Sablan’s revelation, Mr. Atalig did not attempt to exercise a peremptory challenge against her, nor did he attempt to excuse her for cause. *Id.* The law on this matter is clear. In order to obtain a new trial based on the allegation of jury bias, “a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*[.]” *Dall v. Coffin*, 970 F.2d 964, 969 (1st Cir. 1992).

¶22 Moreover, a party seeking a new trial on the ground of non-disclosure by a juror during *voir dire* must do more than raise a speculative allegation that the juror’s possible bias may have influenced the trial outcome. *See McDonough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845,

850 (1984); *Dall v. Coffin*, 970 F.2d 964, 969 (1st. Cir. 1992). A party must first demonstrate that the juror failed to honestly answer a material question on *voir dire*, then show that a correct response would have provided a valid basis for a challenge for cause. The party seeking a new trial must also prove that he suffered actual prejudice or bias due to the juror's non-disclosure. *See id.* This burden of proof cannot be sustained as a matter of speculation; actual prejudice or bias must be a "demonstrable reality." *Id.* No such demonstration has been presented by Kim to support his allegation of jury bias. Indeed, he points to no evidence to meet his burden of proof that Ms. Sablan's relationship with Mr. Fitial was close enough that Ms. Sablan was incorrect or even untruthful in stating that she could be fair to both sides. We conclude that the trial court did not commit manifest or gross abuse of discretion in denying appellant's motion for new trial on the grounds of juror bias.

III. The Trial Court Did Not Commit Manifest Or Gross Abuse Of Discretion In Denying Appellant's Motion For New Trial On The Ground Of Denial Of Continuance.

¶23 A trial court has broad discretion in deciding to grant or deny a motion for continuance. *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), *amended on other grounds*, 764 F.2d 675 (1985). When reviewing whether a trial court abused its discretion in denying a motion for a continuance, we must determine whether there was a "manifest or gross abuse of discretion." *See Hwang Jae Corporation v. Marianas Trading and Development Corporation*, 4 N.M.I. 142, 146 (1994) (citing *Robinson v. Robinson*, 1 N.M.I. 81, 86 (1990)). Analyzing the circumstances of the individual case determines whether denying a continuance constitutes an abuse of discretion. *Id.* at 146 (citing *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), *amended on other grounds*, 764 F. 2d 675 (1985)). We consider four factors in reviewing a denial of a motion for continuance:

- (1) The movant's diligence in his efforts to ready his defense prior to the hearing on the motion;
- (2) The likelihood that a continuance would have satisfied the need for one;
- (3) The extent a continuance would have inconvenienced the court and opposing party; and
- (4) The extent of harm movant might have suffered due to the denial.

See Guerrero v. Guerrero, 2 N.M.I. 61, 75 (1991); *Hwang Jae Corporation v. Marianas Trading and Development Corporation*, 4 N.M.I. 142, 146 (1994). No single factor is dispositive. *Hwang Jae Corporation v. Marianas Trading and Development Corporation*, 4 N.M.I. 142, 146 (1994). Instead, we weigh each one to determine whether the denial was arbitrary or unreasonable. *Id.* However, if the movant cannot show prejudice by the denial, we will not reverse the trial court's ruling. *Id.* After a review of these four factors, we determine that the trial court did not abuse its discretion in denying Kim's motion for a continuance and, therefore, did not commit manifest or gross abuse of discretion in denying appellant's motion for new trial on the grounds of denial of continuance.

A. Kim Was Not Diligent In Preparing Defense

¶24 Kim claims that, although his former counsel had "casually mentioned" withdrawing from the case as early as April 1998, he did not formally do so until August 1998. Defendant/Appellant Opening Brief at 27. As such, Kim contends it was premature to seek new counsel until he was sure his former counsel would withdraw. *Id.* at 28. Once counsel did withdraw, Kim points out he quickly sought and obtained new counsel in September 1998. *Id.*

¶25 In rejecting Kim's argument, the trial court found that Kim's counsel moved to withdraw in July 1998, three months before trial and determined that Kim should have begun seeking new counsel as of that date. (Order at 6). Kim responds that he did not need to begin his search until plaintiff Fitial signed a waiver allowing Kim's former counsel to formally withdraw. We disagree

with Kim’s argument that he was diligent in seeking new counsel.

¶26 In reaching our conclusion, we examine the efforts of Kim in seeking substitute counsel under the diligence test factor. *Guerrero v. Guerrero*, 2 N.M.I. 61, 76 (1991) (movant had “more than sufficient time...to seek other counsel in this matter” when counsel filed motion to withdraw month and a half before trial); *Deleon Guerrero v. Nabors*, 4 N.M.I. 31, 34 n.2 (1993)(movant nondiligent even where counsel renewed motion to withdraw on day of trial).

¶27 We find that Kim’s reliance on only one case to support his argument, *Bierstein v. Whitman*, 50 A.2d 334 (1947), is misplaced.⁴ Specifically, in that case, the plaintiff was an out-of-state resident embroiled in a malpractice case who was abandoned by his counsel, who withdrew his appearance without leave of court. The new attorney, who was retained just a few days prior to trial, was unprepared to proceed on the date of trial, and none of the witnesses were present. Plaintiff’s requested continuance was denied by the court and plaintiff’s new counsel was forced to proceed. Subsequent to his cross-examination of defendant, plaintiff’s counsel asked that the trial be continued to the following day to allow plaintiff to present additional witnesses. Plaintiff’s request was denied and then, on defendant’s motion, compulsory non-suit was entered. It was held on appeal that the trial court abused its discretion in denying plaintiff’s request for a continuance.

¶28 The aforementioned facts are distinguishable from the instant case. Here, Kim knew for five and a half months that his counsel intended to withdraw. (Order at 6 n.6). Kim’s counsel then moved to withdraw as counsel three months before trial. (Order at 6). The motion was subsequently granted by the trial court two months before trial. *Id.* Moreover, Kim’s new counsel, Mr. Atalig,

⁴ *Bierstein* has been negatively distinguished by the subsequent cases of *Princess Hotels Intern v. Hamilton*, 473 A. 2d 1064 (1984) (not an abuse of discretion to deny defendant’s request, made four days prior to scheduled, nonjury trial, for 30-day continuance to change attorneys, where defendant learned two months before notice of trial was received that his retained counsel would not be able to represent him) and *Snyder v. Port Authority of Allegheny County*, 393 A. 2d 911 (1978) (although plaintiff changed counsel only three days before case was listed for trial, it was not unreasonable to grant only a one-week continuance, rather than the requested continuance until next trial list).

represented to the court that he was both willing and able to represent appellant at trial, except for a scheduling conflict. *Id.* As such, we agree with Fitial that any prejudice suffered by Kim as a result of the denial of the continuance was due to his own lack of diligence in seeking new counsel once he learned of his previous counsel's intent to withdraw.

B. A Grant Of Continuance Would Not Have Met Kim's Need

¶29

Significantly, Kim's attorney, Mr. Atalig, told the trial court that he was ready to go to trial, and only asked for a continuance to resolve a scheduling conflict. (Order at 6). Indeed, Mr. Atalig clearly told the trial court that "we're actually prepared to go" and that "we're prepared to proceed except that there's a conflict in this case with my calendar." *Id.* In his brief, however, Kim argues that the denial of continuance deprived him of the opportunity to amend his answer to plead a statute of limitations affirmative defense.⁵ Defendant/Appellant Opening Brief at 29-30. Even if the continuance had been granted, it is uncertain whether Kim's need would have been satisfied. Specifically, this jurisdiction and the analogous federal rule call for such affirmative defenses to be raised in responsive pleadings or else, with narrow exceptions, they are waived.⁶ We fail to see how a grant of continuance by the trial court would have met Kim's need to assert an affirmative defense which he had not asserted throughout the pendency of a matter that was approaching its fourth year

⁵ Kim's previous attorney failed to set forth the statute of limitations defense in any of the pleadings. No mention of this omission was made by Kim's counsel at the pre-trial hearing.

⁶ See Com. R. Civ. P. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively...statute of limitations...and any other matter constituting an avoidance or affirmative defense."); *Rogolofoi v. Guerrero*, 2 N.M.I. 468, 478 (1992)(Affirmative defenses under Rule 8(c) must be set forth in responsive pleadings or else they are waived); *Davis v. Huskiepower Outdoor Equipment Corp.*, 936 F.2d 193, 198 (5th Cir. 1991)("Rule 8(c) characterizes a statute-of-limitations defense as an affirmative defense that is waived unless pleaded by the defendant. Since [defendant] failed to raise this defense in its pleadings, [defendant] waived it")(citation omitted); *Haskell v. Washington Township*, 864 F.2d 1266, 1273 (6th Cir. 1988)("Pursuant to Rule 8(c) of the Federal Rules of Civil Procedure, a defense based upon a statute of limitations is waived if not raised in the first responsive pleadings."); *Winmar Co., Inc. v. Teachers Insurance & Annuity Assn. Of America*, 870 F.Supp. 524, 533 (S.D.N.Y. 1994)("Failure to raise a statute of limitations defense in the answer to the complaint constitutes a waiver of the defense.").

anniversary.

C. Inconvenience To Court And Plaintiff

¶30 To grant the continuance would have inconvenienced not only the court, but the plaintiff. *United States v. 2.61 Acres of Land, More or Less*, 791 F.2d 666, 671 (9th Cir. 1985). As the trial court noted, discovery had been completed and both parties had stated to the court that they were prepared to adjudicate this matter at trial. (Order at 6). In addition, plaintiff filed his complaint in this matter approximately four years before the continuance motion was heard.

D. Any Harm Or Prejudice Resulted from Kim's Lack of Diligence

¶31 To warrant a reversal, Kim would have to demonstrate that he has suffered harm or prejudice. Kim has failed to demonstrate the requisite harm or prejudice. As Fitial pointed out, all of Kim's witnesses were able to appear and testify at trial. Brief of Appellee at 22. Moreover, Kim's attorney represented to the trial court that he was prepared to go to trial. We agree with the trial court that any prejudice Kim suffered as a result of the denial of the continuance was the result of his own lack of diligence in procuring new counsel and cannot be the grounds for a continuance. (Order at 6); *Guerrero v. Guerrero*, 2 N.M.I. 61 (1991); *Hwang Jae Corporation v. Marianas, Trading and Development Corporation*, 4 N.M.I. at 148. As such, we find that the record in this case does not support Kim's assertion that the trial court abused its discretion in denying the motion for continuance.

CONCLUSION

Based on the foregoing, we AFFIRM the trial court's Order denying appellant's motion

for new trial.

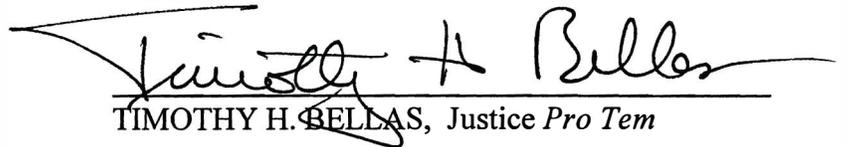
DATED this 10 day of July 2001.



MIGUEL S. DEMAPAN, Chief Justice



ALEXANDRO C. CASTRO, Associate Justice



TIMOTHY H. BELLAS, Justice *Pro Tem*