

1 CASE NO. 5299

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5  
6 IN THE SEVENTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR THE COUNTY OF LINCOLN

8 LEO A. STEVENS, )  
9 Plaintiff, )  
10 v. )  
11 LOM THOMPSON, individually )  
12 and as Executor of the Estate )  
13 of THOMAS L. CLAY, deceased; )  
14 ALICE C. SIMKINS, aka )  
15 CONNIE SIMKINS, et al., )  
16 Defendants. )

CASE NO. 5299

17 MOTION OF LOM THOMPSON, INDIVIDUALLY AND AS EXECUTOR OF THE  
18 ESTATE OF THOMAS L. CLAY, DECEASED, FOR A NEW TRIAL

19 COMES NOW the Defendant Lom Thompson, individually  
20 and as Executor of the Estate of Thomas L. Clay, deceased, by  
21 and through his undersigned counsel, and moves this Court  
22 pursuant to NRCP 59(a) (1)(2) for a new trial on the grounds  
23 that there was irregularity in the proceedings of the jury, and  
24 misconduct of the jury.

25 This Motion is based upon the following Points and  
26 Authorities, the Affidavit of Raymond B. "Bud" Carter", and  
27  
28

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1 upon such oral testimony to be adduced at the hearing hereon.

2 DATED this 19 day of January, 1987.

3 LAW OFFICES OF JOHN &  
4 ELIZABETH FOLEY

5  
6 BY: *[Signature]*

7 JOHN P. FOLEY, ESQ.  
8 601 So. Rancho, Al  
9 Las Vegas, Nevada 89106  
10 Attorney for Defendants

11 POINTS AND AUTHORITIES

12 Nevada Rule of Civil Procedure 59(a)(1)(2) provides  
13 as follows:

14 "New trials; amendment of judgments.

- 15 (a) Grounds. A new trial may be granted to
- 16 all or any of the parties and on all or part
- 17 of the issues for any of the following causes
- 18 or grounds materially affecting the substantial
- 19 rights of an aggrieved party: (1) Irregularity
- 20 in the proceedings of the court, jury, master,
- 21 or adverse party, or any order of the court,
- 22 or master, or abuse of discretion by which either
- 23 party was prevented from having a fair trial;
- 24 (2) Misconduct of the jury or prevailing party."

25 Counsel for Lon Thompson did not have the opportunity  
26 to speak with a Mr. Raymond B. "Bud" Carter (see his affidavit  
27 being filed herewith), until January 15th, 1987, at approxi-  
28 mately 5:00 p.m. Counsel for Lon Thompson has not had a chance

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1 to investigate this matter any further than to speak with Mr.  
2 Carter on the phone. Time constraints under Rule 59(a) is that  
3 the Motion for New Trial shall be served not later than ten  
4 (10) days after service of written notice of the entry of the  
5 judgment.

6 Notice of Entry of Judgment was served on the Defen-  
7 dants on January 7th, 1987. The ten (10) days would not expire  
8 until January 17th, which is a non-judicial day. The next  
9 judicial day will be on January 20th, 1987, as January 19th,  
10 1987, is a legal holiday and thus a non-judicial day.

11 Said Defendants may have additional information in  
12 the form of Affidavits or testimony to present to the Court.

13 Defendants submit that the attached Affidavit demon-  
14 strates the jurors were in a hurry to reach a verdict, and  
15 therefore did not properly consider the evidence submitted.

16 This conduct on the jury's part would violate their  
17 solemn testimony on voir dire that they intended to give the  
18 case all the attention necessary to reach a fair and impartial  
19 verdict based upon the evidence.

20 The Supreme Court of Nevada in the case of McNally v.  
21 Walkowski, 85 Nev. 696, 462 P.2d 1016, carved out an exception  
22 to the "Lord Mansfield's Rule", and it stated,

23 "This is the precise argument advanced  
24 by McNally on this appeal. McNally con-  
25 tends that the jurors were not truthful  
26 when examined on voir dire, that they  
27 intentionally concealed their bias and  
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1 prejudice, and that as a result he was  
2 denied his constitutional right to a fair  
3 trial. The right to trial by jury, if it  
4 is to mean anything, must mean the right  
5 to a fair and impartial jury. (citing cases).  
6 A litigant is therefore entitled to a jury  
7 composed of 12 impartial jurors; although  
8 a civil case may be decided by the vote of  
9 three-fourths of that number, a party has  
10 the right to have that decision, whether  
11 for or against him, based on the honest  
12 deliberations of 12 such individuals.  
13 (citing cases). It is fundamental that  
14 a prospective juror is not the judge of  
15 his own qualifications. And to that  
16 end that a party may intelligently exer-  
17 cise challenges, it is the duty of a  
18 juror on voir dire examination to fully,  
19 fairly, and truthfully answer all questions  
20 directed to him. Therefore, a juror's  
21 intentional concealment of a material  
22 fact relating to his qualification to be  
23 a fair and impartial juror in the case may  
24 require the granting of a new trial."

25 McNally v. Walkowski, 85 Nev. 696, at 700.

26 The procedure in McNally v. Walkowski, supra, was  
27 that after the trial, the trial court initially denied the  
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1 Plaintiff's Motion for New Trial, applying "Lord Mansfield's  
2 Rule" strictly and not considering the affidavit. The Supreme  
3 Court reversed in the case cited above. The case came to the  
4 Supreme Court again two years later in Walkowski v. McNally, 87  
5 Nev. 474, 488 P.2d 1164. The later opinion reflects what took  
6 place on remand. There it is stated,

7 "The judge of the district court, upon  
8 remand, not only received and considered  
9 the jurors' affidavits, but allowed  
10 McNally to file a renewed motion for a  
11 new trial, and conducted an extensive  
12 hearing into the conduct of the jurors  
13 during deliberations.

14 Although our remand to the trial court  
15 appeared to limit the scope of its inquiry  
16 to receiving and considering the affi-  
17 davits of the five jurors, that court had  
18 a duty to determine the veracity of those  
19 affidavits. Furthermore, by conducting a  
20 hearing to test the reliability of the  
21 affidavits it also afforded the accused  
22 jurors an opportunity to be heard. See  
23 State of Nevada v. St. Clair, 16 Nev. 207  
24 (1881).

25 However, the hearing revealed matters not  
26 covered in the affidavits, nor at the voir  
27 dire examination. Upon remand, in determining  
28

1 whether any juror had, upon voir dire, in-  
 2 tententionally concealed a matter of potential  
 3 bias or prejudice, the trial judge was limited  
 4 to considering the facts set forth in the  
 5 jurors' affidavits as those facts were veri-  
 6 fied at the hearing."


7 Walkowski v. McNally, 87 Nev. 474, at 476.

8 CONCLUSION

9 Inasmuch as there is a terrific problem of communica-  
 10 tion due to the distances involved between counsel and appro-  
 11 priate witnesses, and the fact that counsel for Defendant Lon  
 12 Thompson, individually and as Executor of the Estate of Thomas  
 13 L. Clay, deceased, only recently learned of the testimony of  
 14 Mr. Carter, it is only fair that a hearing be held to determine  
 15 the truth of the attached Affidavit by impaneling the jurors,  
 16 which should be done as quickly as possible.

17 RESPECTFULLY SUBMITTED,

18 LAW OFFICES OF JOHN &  
 19 ELIZABETH FOLEY

20  
 21 BY:   
 22 JOHN P. FOLEY, ESQ.  
 23 601 So. Rancho, Al  
 24 Las Vegas, Nevada 89106  
 25 Attorney for Defendants  
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 27  
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1 STATE OF NEVADA )

2 ) SS: AFFIDAVIT OF RAYMOND B. CARTER

3 COUNTY OF Lincoln )

4  
5  
6 RAYMOND B. "BUD" CARTER, being first duly sworn  
7 according to law, upon oath deposes and says:

8 1. That he has personal knowledge of the facts  
9 contained herein and is competent to testify thereto if so  
10 required.

11 2. On or about December 16, 1986, your affiant was  
12 serving on a jury in Lincoln County with a Mr. Higby. During  
13 the course of the deliberations, one of the jurors made the  
14 remark that "we have to find the defendant guilty so we can go  
15 home." One of the jurors stated that her husband was waiting  
16 outside for her.

17 3. At that time, Mr. Higby stated to all present  
18 that it is the same situation in Lon Thompson's case. Lon  
19 Thompson shouldn't have been on trial. We wanted to go home,  
20 so thats why they voted him guilty.

21 Raymond B. "Bud" Carter  
22 RAYMOND B. "BUD" CARTER

23 SUBSCRIBED & SWORN to before me  
24 on this 20 day of January, 1987.

25 Mara L. Condie  
26 NOTARY PUBLIC

27   
28

FILED AND RECORDED AT REQUEST OF  
Lon Thompson  
JAN. 20, 1987  
AT 40 MINUTES PAST 2 O'CLOCK  
A. M. IN BOOK 73 OF OFFICIAL  
RECORDS, PAGE 403 LINCOLN  
COUNTY, NEVADA.

FRANK HILLER  
COUNTY RECORDER  
By Mara Condie, Deputy

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