IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN F. GARRY, INDIVIDUALLY, AND AS PERSONAL REPRESENTATIVE OF FREDA GARRY, DECEASED,
Appellants,
vs.
SUNRISE HOSPITAL AND MEDICAL CENTER, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 45888

FILED

SEP 09 2008

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

ORDER OF AFFIRMANCE

Appeal from a district court judgment entered on a jury verdict in a medical malpractice action and post-judgment order awarding fees and costs. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

In 1997, Freda Garry sought treatment from Dr. James Thomas for chronic back pain. Dr. Thomas eventually recommended that Garry undergo an anterior/posterior diskectomy to fuse together several vertebrae in Garry's lower back. The fusion required the assistance of a vascular surgeon to move several major blood vessels in order to expose the spine for surgery. A risk of the procedure is that a blood clot or torn flap of the artery lining will develop, blocking blood flow to the patient's lower extremities.

Dr. Thomas performed this procedure on Garry on November 14, 1997, at Sunrise Hospital. He was assisted by Dr. Joel Grisham, a vascular surgeon. The surgery itself was successful.

When Garry awoke from anesthesia, she reported difficulty moving her left leg. An associate of Dr. Thomas checked on Garry, but

determined that the complication was neurological rather than vascular, and ordered a CT scan of Garry's spine. After Garry returned from that procedure, a nurse discovered that Garry had no pulse in her left foot, that her foot was cool, and that her big toe was mottled in appearance.

The nursing staff paged Dr. Grisham, who returned to the hospital and immediately performed an embolectomy to reestablish blood flow to Garry's leg. Although Dr. Grisham successfully reestablished blood flow, Garry sustained permanent damage to the muscles and nerves in her left leg. This eventually led to a partial amputation of her left leg at a point below the knee.

Garry and her husband filed a medical malpractice complaint against Sunrise Hospital, Dr. Thomas, Dr. Grisham, and Dr. Rimoldi, an associate of Dr. Thomas. A jury returned a unanimous verdict in favor of each defendant. The Garrys appealed, arguing that the district court erred in (1) failing to give the Garrys' requested statutory res ipsa loquitur jury instruction; (2) excluding affidavits submitted to the medical-dental screening panel from evidence; (3) granting the defendants an additional four peremptory challenges during voir dire; and (4) awarding Sunrise Hospital attorney fees.[1] We address each of these claims below.

The res ipsa loquitur instruction

Garry first argues that the district court erred in refusing to give the proffered res ipsa loquitur instruction, as codified in NRS 41A.100(1). Generally, a party is entitled to all jury instructions on her

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[1]Due to various settlement agreements reached between the Garrys and the doctors, the scope of this appeal is limited to Garry's claims against Sunrise Hospital.

case that are supported by the evidence.[2] This court reviews the decision of a district court to give or decline a proposed jury instruction for an abuse of discretion.[3]

The doctrine of res ipsa loquitur traditionally allows a presumption of negligence when an event occurs that does not ordinarily occur in the absence of negligence. In the context of medical malpractice actions, NRS 41A.100 has replaced traditional common law res ipsa loquitur doctrine.[4] Under NRS 41A.100, the presumption of negligence automatically applies when a jury determines that any of the enumerated factual predicates exist.[5] The statute provides, in pertinent part, that

> 1. Liability for personal injury or death is not imposed upon any provider of medical care based on alleged negligence in the performance of that care unless evidence consisting of expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case and to prove causation of the alleged personal injury or death, except that such evidence is not required and a rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or

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[2]Bass-Davis v. Davis, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006).

[3]Id.

[4]Id.

[5]Id. at 434, 915 P.2d at 274.

> death occurred in any one or more of the following circumstances:
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> [. . .]
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> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto . . .

Thus, in Banks v. Sunrise Hospital, this court determined that a patient was entitled to a jury instruction pursuant to NRS 41A.100(1)(d) when he underwent surgery on his rotator cuff, but due to complications in the administration of anesthesia, suffered a cardiac incident resulting in permanent brain damage.[6] This court determined that "the brain is not directly or proximately related to the rotator cuff surgery," and concluded that the district court did not abuse its discretion in giving an instruction pursuant to NRS 41A.100(1)(d).[7]

Garry argues under Banks that she was entitled an instruction pursuant to NRS 41A.100(1)(d) because she underwent surgery on her lower spine, but sustained nerve and muscle damage in her left leg due to lack of blood flow. We conclude that the district court did not abuse its discretion in refusing to give the instruction as to Sunrise Hospital. First, we discern no error in the district court's characterization of Garry's injury as a vascular injury to her iliac artery. As Garry's surgery involved a vascular component, the district court did not abuse its discretion in concluding that the injury suffered by Garry was proximately related to the treatment received. Second, as noted by the district court, it

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[6]120 Nev. 822, 827-30, 102 P.3d 52, 56-57 (2004).

[7]Id. at 833, 102 P.3d at 60.

does not appear that Garry alleged any negligence by Sunrise Hospital in performance of the surgery itself. Rather, the pertinent "treatment" at issue was the post-operative care provided by Sunrise Hospital, which involves treatment to the whole body, including the monitoring of circulation and pulses. Therefore, the district court did not abuse its discretion in concluding that the alleged injury was proximate to the treatment involved, indicating that a jury instruction under NRS 41A.100(1)(d) was not appropriate.

Exclusion of answers submitted to the medical dental screening panel

Garry next argues that the district court erred when it excluded the verified answers Drs. Thomas, Grisham, and Rimoldi and Sunrise Hospital originally submitted to the medical-dental screening panel. We disagree.

"[T]his court will not overturn the district court's exclusion of relevant evidence absent an abuse of discretion."[8] When Garry originally initiated her complaint, the now-repealed provisions of NRS Chapter 41A required a plaintiff to submit any medical malpractice complaint to the medical-dental screening panel before proceeding in district court.[9] The defending party was required to submit an answer to the complaint, and was permitted to submit affidavits in support of the answer.[10]

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[8]Hansen v. Universal Health Services, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999).

[9]See NRS 41A.016.

[10]NRS 41A.016(3), (5) (1999).

With respect to the materials submitted to the screening panel, NRS 41A.016(2) provided that

> The written findings of the screening panel are admissible in any action concerning that complaint which is subsequently filed in district court. No other evidence concerning the screening panel or its deliberations is admissible and no member of the screening panel may be called to testify in any such action.

However, while NRS 41A.016(2) indicated that parties could not present specific evidence concerning the screening panel, in Jain v. McFarland, this court determined that litigants may seek to refute or support the panel determination at trial by generally informing the jury what evidence was and was not available to the panel.[11]

Citing the New Jersey Superior Court decision of Dubler v. Stetser, this court in Jain also stated that a district court should set forth to the jury the identity of each screening panel member and his or her occupation.[12] In a separate portion of Dubler, the New Jersey court further indicated that no evidence of a statement presented to the screening panel could be admitted at trial.[13]

Relying upon Dubler and Jain, the district court ruled that Garry could not seek to admit any affidavits submitted to the screening panel into evidence. Garry argues that the district court's reliance on

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[11]109 Nev. 465, 473, 851 P.2d 450, 455 (1993).

[12]Id. at 472, 851 P.2d at 455 (citing Dubler v. Stetser, 430 A.2d 962, 963 (1981)).

[13]430 A.2d at 963.

Dubler was misguided, because Dubler dealt with a New Jersey statute which specifically provided that "'no statement or expression of opinion [submitted to the screening panel] shall be admissible in evidence either as an admission or otherwise in any trial of the action . . . .'"[14] Because NRS 41A.016(2) did not specifically exclude "materials submitted to the screening panel," Garry contends that such evidence was admissible.

Although these materials may have been admissible under Jain, the refusal to formally admit these documents does not require reversal. Here, each person who submitted an affidavit to the medical screening panel also testified at trial. Thus, any testimony submitted by these parties to the screening panel could also be elicited at trial. Although Garry argues that some trial testimony differed from statements made in the screening panel affidavits, the district court allowed Garry to make use of the affidavits for impeachment purposes without identifying them has screening panel materials. Accordingly, we conclude that Garry did not suffer any prejudice from exclusion of the screening panel affidavits at trial.

Grant of additional peremptory challenges

Garry next asserts that the district court erred in allowing defendants eight peremptory challenges, while Garry only received four. Absent Batson-type concerns regarding illegal discrimination, this court generally reviews assignments of error involving peremptory challenges for an abuse of discretion.[15]

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[14]Dubler, 430 A.2d at 963 (quoting N.J.R. Ct. 4:21-5(a) (1981)).

[15]See Frame v. Grisewood, 81 Nev. 114, 122, 399 P.2d 450, 454 (1965) (noting that "because of the inherent distinction between the

continued on next page . . .

NRS 16.040 provides that

> 1. Either party may challenge the jurors. The challenges must be to individual jurors and be peremptory or for cause. Each side is entitled to four peremptory challenges.
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> 2. If there are two or more parties on any side and their interests are diverse, the court may allow additional peremptory challenges, but not more than four, to the side with the multiple parties. If the multiple parties on a side are unable to agree upon the allocation of their additional peremptory challenges, the court shall make the allocation.

In Nurenberger Hercules-Werke v. Virostek, this court noted that in determining the number of peremptory challenges due, the court "must analyze the nature of the claim and determine which parties' interests are adverse to each other."[16]

Here, the district court determined that due to the diverse interests of the defendants, they were entitled to four additional peremptory challenges. We conclude that this decision was not an abuse of discretion under NRS 16.040. While the defendants were not openly antagonistic towards one another, they took divergent positions on several issues. Dr. Thomas testified that he gave the nurses orders to check Garry's circulatory status. The nurses at Sunrise Hospital testified that

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. . . continued

challenge for cause and the peremptory challenge, a lower court normally is given considerably more latitude when dealing with the latter than when concerned with the challenge for cause").

[16]107 Nev. 873, 883, 822 P.2d 1100, 1107 (1991).

they received no such order, but did so anyway. Similarly, Sunrise Hospital's expert testified that once Sunrise Hospital nurses contacted an associate of Dr. Thomas on the afternoon of Garry's surgery, they fulfilled their duty to monitor, indicating that Sunrise Hospital was not responsible for any subsequent injuries. Thus, in light of the divergent interests of the defendants, as indicated by the contrary positions taken by the defendants at trial, we conclude that the district court did not abuse its discretion in allotting an additional four peremptory challenges to the defendants.

Attorney fees

Finally, Garry argues that the district court erred in awarding attorney fees to Sunrise Hospital pursuant to NRS 17.115 and NRCP 68, as well as under the provisions of NRS Chapter 18. Awarding attorney fees to a prevailing party is within the district court's discretion. Absent a manifest abuse of discretion, this court will not overturn the district court's award of attorney fees on appeal.[17]

NRCP 68 provides that if an opposing party makes an offer of judgment, and

> the offeree rejects an offer and fails to obtain a more favorable judgment,
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> [. . .]
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> (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the

[17]See Nelson v. Peckham Plaza Partnerships, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994); County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

> judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.[18]

On June 17, 2004, Sunrise Hospital made Garry a $25,000 offer of judgment, inclusive of costs and attorney fees. Sunrise Hospital also made a $1,000 offer of judgment, inclusive of costs and fees, to John Garry. Because neither of the Garrys recovered any damages at trial, the district court determined that fees were appropriate under the NRCP 68 and NRS 17.115 offer of judgment scheme, and awarded Sunrise Hospital $50,000 in attorney fees.

Garry argues, in part, that the district court did not appropriately analyze the factors set forth by this court in Beattie v. Thomas[19] in determining whether an award of fees was appropriate. In Beattie, this court determined that before a district court awards fees pursuant to NRCP 68, the court must evaluate the following factors: "(1) whether plaintiff's claim was brought in good faith; (2) whether defendant's offer of judgment was reasonable and brought in good faith in both its timing and amount; (3) whether plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in

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[18]NRCP 68. NRS 17.115(4) contains similar provisions regarding fee shifting after an offer of judgment.

[19]99 Nev. 579, 668 P.2d 268 (1983).

amount."[20] While this court prefers that the district court directly evaluate these factors in writing, we will uphold an award of fees if the record demonstrates that the district court properly considered the factors and there is no abuse of discretion.[21]

Here, the district court order awarding fees stated that

> The Court finds that both Plaintiff and Defendant pursued their claims and defenses in good faith, that Defendant's offer of judgment was not unreasonable, that Plaintiff's rejection of said offer was not unreasonable and that Defendant's Request for Fees is not unreasonable. The Court does, however, feel the requested amount of attorneys [sic] fees are excessive, despite the complex nature of a medical malpractice litigation.

Accordingly, the district court awarded Sunrise Hospital $50,000 of their requested $151,000 attorney fees.

Garry argues that the district court erred in determining that the timing and amount of Sunrise Hospital's offer of judgment was "not unreasonable." Specifically, Garry points to the fact that the settlement judge determined a fair settlement value of Garry's claim against each defendant to be $750,000. Garry additionally argues that it was unreasonable for Sunrise Hospital to wait to make an offer of judgment for nearly two and a half years after Garry filed her complaint with the district court.

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[20]9Id. at 588-89, 668 P.2d at 274.

[21]Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 323, 890 P.2d 785, 789 (1995).

In response, Sunrise Hospital argues that when it made its offer of judgment, it had already obtained a partial summary judgment preventing Garry from holding Sunrise Hospital vicariously liable for the doctors' misconduct or negligence. Sunrise Hospital also contends that it knew Garry's own expert would testify that the nurses involved in this case would have fulfilled their duty to monitor Garry so long as they regularly checked the pulses in Garry's feet, and reported any problems to a doctor. Sunrise Hospital also knew that nurses responsible for Garry's care would all testify that they did so.

Based on the factors presented by Sunrise Hospital, we conclude that the district court did not abuse its discretion in determining that Sunrise Hospital's offer of judgment was not unreasonable in timing and amount. While the amount offered was significantly lower than the settlement value previously determined under former NRS 41A.059, the staff of Sunrise Hospital arguably had a stronger defense to liability than many of the doctors involved in the case. Therefore, we conclude that the district court did not abuse its discretion in its analysis of the Beattie factors, and its ultimate award of fees under NRCP 68 and NRS 17.115.[22]

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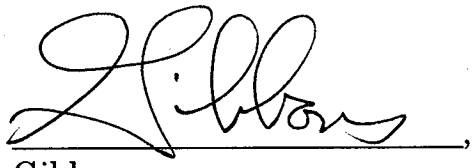
[22]We have also examined Garry's other arguments concerning the award of fees under the Nevada offer of judgment rules, including the arguments that she and her husband received a "more favorable" result than that reflected in the offer and that the offer was invalid because an offer was not made pursuant to NRS 41A.059. We conclude that both arguments lack merit.

Because we have upheld the fee award pursuant to NRCP 68 and NRS 17.115, we do not reach the question of whether the award of fees was warranted under the provisions of NRS Chapter 18.

Accordingly, for the reasons stated above, we ORDER the judgment of the district court AFFIRMED.



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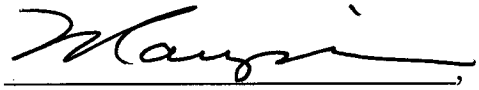

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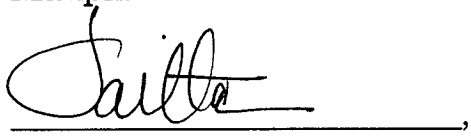

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cc: Hon. Douglas W. Herndon, District Judge
Lester H. Berkson, Settlement Judge
Law Office of Daniel Marks
Hall, Prangle & Schoonveld, LLC/Las Vegas
Horvitz & Levy, LLP
Eighth District Court Clerk