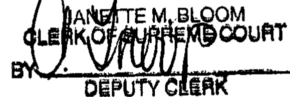
IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM R. MICHAEL,
Appellant,
vs.
JERRY KIEFER, INDIVIDUALLY AND JUDITH KIEFER, INDIVIDUALLY AND AS HUSBAND AND WIFE,
Respondents.

No. 46226



JUL 2 0 2007
JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, upon a jury verdict, in a personal injury action. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

On May 6, 1998, appellant William Michael and respondent Jerry Kiefer were involved in a motor vehicle accident on South Las Vegas Boulevard.[1] As a result of the accident, Kiefer and his wife Judy filed a negligence action against Michael on April 26, 2000. A jury ultimately returned a unanimous verdict in favor of Kiefer, finding that Michael was 70 percent negligent, and assessing Kiefer's total damages to be $707,400. Because Michael did not file an amended notice of appeal from any post-trial rulings, the scope of this appeal is limited to that judgment.

On appeal, Michael argues that (1) the district court failed to properly qualify Kiefer's accident reconstructionist as an expert and allowed the reconstructionist to offer improper expert testimony; (2) the district court unfairly excluded Michael's expert accident reconstructionist's testimony while allowing Kiefer's expert to testify; (3)

[1]The parties are familiar with the facts of this case; we do not recite them here except as necessary to our decision.

07-15856

counsel for Kiefer inappropriately appealed to the emotions of the jury in opening and closing arguments; (4) the jury's damage award was not supported by substantial evidence, and (5) the cumulative effect of inappropriate comments by the district court and other alleged errors mandates reversal. For the reasons stated below, we affirm.

Michael first asserts that the district court erred in failing to qualify Kiefer's accident reconstructionist, William Morrison, as an expert witness. Michael further argues that the testimony offered by Morrison was inappropriate expert testimony. We disagree. "A clear abuse of discretion must exist in order for this court to disturb the district court's admission of expert testimony."[2] In this case, Kiefer questioned Morrison extensively regarding his qualifications as an expert, and Morrison's own testimony made it clear that he was testifying as an expert witness, even if the district court never formally qualified him as such.[3] While accident reconstructionist testimony is properly excluded when it is based on "assumption, speculation and conjecture" or where the reconstructionist failed to conduct any reasonable investigation,[4] such testimony generally is admissible if the reconstructionist has special knowledge, skill,

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[2]United Fire Insurance Co. v. McClelland, 105 Nev. 504, 509, 780 P.2d 193, 196 (1989).

[3]See Scovill Mfg. Co., Inc. v. Town of Wake Forest, 293 S.E.2d 240, 246 (N.C. Ct. App. 1982) (holding that when a witness was never formally qualified as an expert witness, but was offered as an expert and asked numerous questions about his qualifications without objection, the issue of the expert's qualification was not properly preserved for appeal).

[4]Gordon v. Hurtado, 91 Nev. 641, 643-44, 541 P.2d 533, 534-35 (1975); see also Powers v. Johnson, 92 Nev. 609, 610, 555 P.2d 1235, 1236 (1976); Choat v. McDorman, 86 Nev. 332, 335-36, 468 P.2d 354, 355-56 (1970).

experience, training, or education that will assist the jury in understanding the dynamics of the accident.[5] Therefore, since Morrison was questioned about his specialized knowledge regarding accident reconstruction, and in light of Michael's failure to object at trial, we perceive no abuse of discretion related to the district court's admission of Morrison's testimony.[6]

Michael next asserts that the district court erred in excluding the testimony of Brian Jones, his own proffered accident reconstructionist. We disagree. Both parties concede that they stipulated to their own informal discovery deadlines. The final informal discovery deadline allowed discovery up to and including Friday, September 16, 2005. Although Kiefer produced his expert witness report before this deadline, Michael did not produce Jones' report until September 19, 2005. The district court therefore allowed testimony by Kiefer's reconstructionist, but excluded Michael's reconstructionist's testimony. The trial court enjoys broad discretion to exclude an untimely disclosed witness from trial.[7] Here, by the terms of the parties' own stipulation, Kiefer's accident reconstructionist was timely disclosed as an expert witness and Michael's expert was not. Accordingly, we conclude that the district court acted

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[5]See, e.g., Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 955 P.2d 661 (1998); Anderson v. State, 109 Nev. 1129, 865 P.2d 318 (1993).

[6]See Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (noting that failure to object at trial generally bars appellate review of any alleged error, unless the error is plain error).

[7]Hansen v. Universal Health Servs., 115 Nev. 24, 28-29, 974 P.2d 1158, 1160-61 (1999).

within its discretion by allowing Kiefer's expert to testify while excluding Michael's expert's testimony.

Michael further asserts that references by Kiefer's attorney to Kiefer's personal "code" that he was not going to kill anyone with his truck and comparisons of the truck Kiefer drove to a "bazooka" improperly appealed to the emotions of the jury by portraying Kiefer as a self-sacrificing hero and require reversal. We disagree. As a general rule, "[c]ounsel is allowed to argue any reasonable inferences from the evidence the parties have presented at trial . . . [and] enjoys wide latitude in arguing facts and drawing inferences from the evidence."[8] Even so, counsel may not make improper or inflammatory arguments that appeal solely to the emotions of the jury.[9]

As we recently established in Lioce v. Cohen, when a party objects to purported misconduct and this objection is overruled, reversal is only warranted if this court determines that the district court incorrectly overruled the objection and that failure to sustain the objection and admonish the jury affected the moving party's substantial rights.[10] Essentially, this court considers whether a proper admonition to the jury "would likely have affected the verdict in favor of the moving party."[11] When a party fails to object to attorney misconduct at trial, this court will

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[8]Jain v. McFarland, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993) (citations omitted).

[9]See DeJesus v. Flick, 116 Nev. 812, 819, 7 P.3d 459, 464 (2000); Barrett v. Baird, 111 Nev. 1496, 1514, 908 P.2d 689, 701-02 (1995).

[10]122 Nev. ___, ___, 149 P.3d 916, 926 (2006).

[11]Id.

reverse only when the misconduct amounted to "irreparable and fundamental error . . . that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different."[12]

Here, the majority of the statements by Kiefer's counsel were supported by evidence in the record, as Kiefer himself testified that he swerved to avoid hitting Michael because he did not want to hurt anyone. Therefore, we conclude that the statements of Kiefer's attorney were largely permissible inferences from the evidence. We further note that Michael only made one objection to these statements during closing argument. Michael did not object to any statements regarding Kiefer's "code" made during opening arguments. To the extent that any objected-to statements were improper, we conclude that any error in the district court's decision to override the objections did not affect Michael's substantial rights since Michael failed to demonstrate that any admonitions to the jury would likely have affected a verdict in his favor. We similarly conclude that any unobjected-to statements did not amount to misconduct rising to a level of irreparable and fundamental error requiring reversal.

We also reject Michael's contention that the jury award was not supported by the evidence presented. With respect to an award of damages, "the jury's findings will be affirmed on appeal if they are based upon substantial evidence in the record."[13] This court defines substantial

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[12]Id. at ___, 149 P.3d at 927.

[13]Prabhu v. Levine, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996) (citing Keystone Realty v. Osterhus, 107 Nev. 173, 807 P.2d 1385 (1991)).

evidence as that which "'a reasonable mind might accept as adequate to support a conclusion.'"[14] Further, the calculation of uncertain damages, such as pain and suffering, fall "peculiarly within the province of the jury," and this court "may not invade the province of the fact-finder by arbitrarily substituting a monetary judgment in a specific sum felt to be more suitable."[15] Here, we conclude that testimony by Kiefer himself, Kiefer's medical records, and testimony by Kiefer's medical expert were sufficient to support the amount of the damage award, as well as the jury's finding that these damages were a result of the accident between Michael and Kiefer.

Finally, we also reject Michael's contention that various comments by the district court constituted improper judicial commentary that, when viewed cumulatively, warrant reversal. Generally, "'[i]f remarks made by the judge in the progress of a trial are calculated to mislead the jury or prejudice either party, it would be grounds for reversal.'"[16] Even so, to warrant reversal, the combined impact of judicial misconduct and other errors must either have "'a prejudicial impact on the verdict when viewed in context of the trial as a whole,' or 'seriously affect[ ] the integrity or public reputation of the judicial proceedings.'"[17]

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[14]Id. (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

[15]Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984).

[16]Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 417, 470 P.2d 135, 140 (1970) (quoting Peterson v. Silver Peak, 37 Nev. 117, 121-22, 140 P. 519, 521 (1914)).

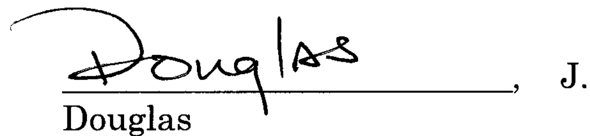
[17]Parodi, 111 Nev. at 368, 892 P.2d at 590 (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

Judicial misconduct does not require reversal if the combined effect of the alleged error is harmless.[18] Here, none of the alleged instances of improper conduct, including the court's comment that expert testimony was "interesting," appeared to be calculated to mislead the jury or prejudice either party. Therefore, even when viewed cumulatively, we conclude that any alleged error did not have a prejudicial impact on the verdict, or otherwise affect the integrity of the proceedings.[19]

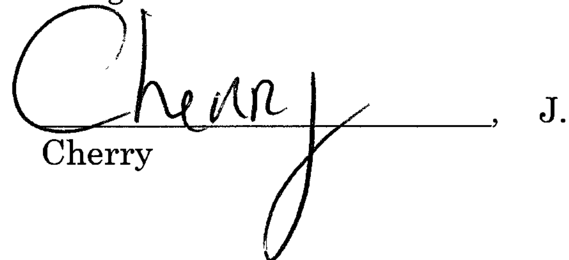
Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Gibbons



_______________, J.
Douglas



_______________, J.
Cherry

cc: Hon. Jessie Elizabeth Walsh, District Judge
Leonard I. Gang, Settlement Judge
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Martin & Allison, Ltd.
Eighth District Court Clerk

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[18]Gordon v. Hurtado, 91 Nev. 641, 645, 541 P.2d 533, 536 (1975).

[19]We have also reviewed Michael's other claims on appeal, and conclude they lack merit. Further, we deny appellant's motion for oral argument in this matter.