

IN THE SUPREME COURT OF THE STATE OF NEVADA

DORON YORK,  
Appellant,

vs.

EMMETT SMITH,  
Respondent.

No. 49529

EMMETT SMITH,  
Appellant,

vs.

DORON YORK,  
Respondent.

No. 50209

**FILED**

JUL 06 2010

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

These are consolidated appeals from an amended district court judgment on a jury verdict in a torts action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appellant in Docket No. 49529, Doron York, caused an automobile accident that injured respondent in Docket No. 49529, Emmett Smith. Smith brought a negligence suit against York, ultimately recovering past and future damages for a variety of injuries sustained in the accident, including expenses related to a contemplated future ankle surgery. Following trial, York filed a motion for remittitur or, in the alternative, for a new trial. The district court granted York's motion for remittitur and reduced the jury's verdict for future medical expenses by the cost of the proposed ankle surgery and vacated the entire award for future pain and suffering. The district court denied York's motion for a new trial.

On appeal, York argues that the district court erred in denying his motion for a new trial because the district court's improper admission of speculative expert testimony relating to the proposed ankle

surgery tainted the jury's awards of lost earnings and general damages. In his appeal in Docket No. 50209, Smith argues that the district court erred in granting the remittitur because he had sufficiently proven the future medical expenses for the proposed ankle surgery and future pain and suffering associated thereto. For the following reasons, we conclude that the challenges raised by both parties fail and therefore affirm the judgment of the district court.

#### York's appeal

York contends that the district court erred in denying his motion for a new trial because the admission of speculative expert testimony regarding a proposed ankle surgery incurably tainted the lost earnings and general damages awards. The premise behind York's argument is that "[t]here is a reasonable likelihood that the jury's other damages awards—at least in part—reflected compensation based on the improper future medical expenses." We disagree.

At trial, several experts testified as to the severity of Smith's ankle injury and the possible need for future surgery. While Smith failed to introduce evidence to show that he intended to undergo the future surgery, and thus did not establish a basis for recovering those damages (discussed below), the record clearly establishes that Smith's ankle injury was severe and that it would impact his ability to work for the rest of his life.

Moreover, the medical expenses and future damage award related to the proposed ankle surgery can be easily separated from the total verdict because of the jury's specificity in awarding damages. The jury awarded damages as follows: (1) past medical expenses of \$230,000; (2) past pain and suffering of \$30,000; (3) past lost earnings of \$170,000;

(4) future medical expenses of \$180,000; (5) future pain and suffering of \$15,000; and (6) future lost earnings of \$300,000. In its order of remittitur, the district court reduced the future medical expenses by \$18,000, which was the cost of the proposed surgery, and struck the entire future pain and suffering award for \$15,000. York has neither demonstrated nor do we see any taint of the award for lost earnings or general damages resulting from expert testimony about the proposed ankle surgery.

Because of the specificity of the jury's verdict and the distinct nature of the future damage award, we conclude that the district court did not abuse its discretion in denying York's motion for a new trial.<sup>1</sup> See Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 576 (1996) (orders denying or granting motions for a new trial are reviewed for an abuse of discretion).

#### Smith's appeal

Smith argues that the district court erred in remitting future medical damages relating to a proposed ankle surgery because he

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<sup>1</sup>York also argues that Smith failed to prove causation for the ankle injury through the use of expert witness testimony pursuant to Morsicato v. Sav-On Drug Stores, Inc., 121 Nev. 153, 111 P.3d 1112 (2005). This argument is misplaced. Morsicato only requires expert testimony to establish causation in medical malpractice cases. Id. Thus, because causation in a negligence case may be established through circumstantial evidence, see Jeep Corporation v. Murray, 101 Nev. 640, 644-45, 708 P.2d 297, 300 (1985), superceded by statute on other grounds as stated in Countrywide Home Loans v. Thitchener, 124 Nev. \_\_\_, \_\_\_, 192 P.3d 243, 253-54 (2008), and Smith introduced such evidence, York's argument fails.

presented sufficient evidence at trial to support the jury's award. For the following reasons, we disagree.

An order of remittitur is reviewed for an abuse of discretion. See Harris v. Zee, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971). "We must accord deference to the point of view of the trial judge since he had the opportunity to weigh evidence and evaluate the credibility of witnesses—an opportunity foreclosed to this court." Id. at 311, 486 P.2d at 491-92.

Generally, a plaintiff seeking future medical expenses "must establish that such future medical expenses are reasonably necessary," Hall v. SSF, Inc., 112 Nev. 1384, 1390, 930 P.2d 94, 97 (1996), and that the contemplated damages are reasonably certain to be incurred. See Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998) (indicating that in order to recover future medical expenses, a plaintiff must show "a reasonable probability that such expenses will be incurred." (citing Saide v. Stanton, 659 P.2d 35, 37 (Ariz. 1983))); Nev. J.I. 10.02 (providing that recoverable future medical expenses are those that a jury believes a plaintiff "is reasonably certain to incur.").

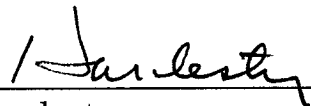
In granting remittitur, the district court explained that remittitur was appropriate in light of Smith's "failure to get a determination from [a] doctor that this surgery was needed to a reasonable degree of medical certainty." We cannot conclude that this determination amounted to an abuse of discretion.

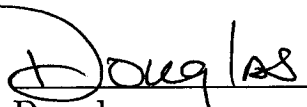
While Smith's expert testified that he recommended surgery as an attractive treatment option for Smith, the expert also testified that the surgery represented but one of several viable treatment options that were available to Smith, and that he and Smith had not yet decided upon a course of treatment. The expert did not address the likelihood of

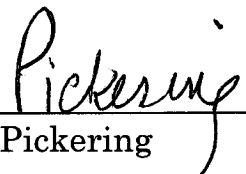
proceeding under any of the various options for treatment, and did not indicate whether there was a reasonable degree of medical probability that the surgery was necessary. See Banks v. Sunrise Hospital, 120 Nev. 822, 834, 102 P.3d 52, 61 (2004) (“Generally, a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard.”) (quotations omitted). Moreover, Smith failed to introduce any evidence establishing that he intended to undergo the surgery.

In light of the uncertainty surrounding future treatment options, we conclude that the district court did not abuse its discretion in remitting the future damages related to those expenses. Accordingly, because both parties’ arguments on appeal fail, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

cc: Chief Judge, Eighth Judicial District  
Hon. Douglas W. Herndon, District Judge  
Hon. J. Charles Thompson, Senior Judge  
Ara H. Shirinian, Settlement Judge  
Albert D. Massi, Ltd.  
Alverson Taylor Mortensen & Sanders  
Lewis & Roca, LLP/Las Vegas  
Eighth District Court Clerk