

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN MANUEL MARTINEZ,
Appellant/Cross-Respondent,
vs.
ZABRINA RAE KOMINOS,
Respondent/Cross-Appellant.

No. 49890

FILED

JUL 06 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal and cross-appeal from district court orders denying appellant's motion for a new trial on damages and awarding respondent attorney fees and costs. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

FACTS

This action stems from a motor vehicle accident that occurred in March 2004. In July 2005, appellant Juan Manuel Martinez filed a complaint alleging negligence and seeking damages for personal injuries to his neck and shoulder. After extensive discovery, Martinez filed a motion in limine to preclude one of respondent Zabrina Rae Kominos's medical experts, John Herr, M.D., from providing speculative expert testimony regarding the causation of Martinez's shoulder injury. Following a hearing, the district court granted Martinez's motion in limine. In November 2005, Kominos made an offer of judgment in the amount of \$85,000, which Martinez rejected, because his medical expenses alone totaled \$83,951.61 at that time. In December 2006, Kominos made a second offer of judgment for \$100,000, which was also rejected by Martinez.

At trial, Kominos admitted liability for the accident and the trial proceeded on the issues of causation of Martinez's injuries and damages. Both parties' medical experts agreed that Martinez's neck injury was caused by the automobile accident and that the approximate \$50,000 for chiropractic and pain management treatment Martinez received for his neck injury was reasonable. However, according to the trial transcript, whether the accident caused Martinez's shoulder injury was highly contested.

While discussing Martinez's shoulder injury, Kominos's medical expert, Dr. Herr, was asked by Kominos's counsel whether there was another way to tear the labrum in the shoulder other than trauma, despite the district court's order precluding speculative testimony. In response, Dr. Herr stated, "Trauma can sure do it. No doubt about it. But with use, with hard use, especially hard use on a repetitive basis, the glenoid labrum as well as the rotator cuff can tear on a degenerative or insidious basis, meaning, it just starts to wear out with time. And as we get older, that type of tearing becomes more and more common." Martinez did not object to Dr. Herr's testimony.

The jury returned a verdict in favor of Martinez and awarded him \$30,625 for past medical expenses and \$5,000 for past physical and emotional pain and suffering. Thereafter, Martinez filed a motion for a new trial on damages conditioned on Kominos's acceptance of additur. Kominos opposed Martinez's motion for new trial and filed a motion for attorney fees and costs under NRS 17.115, NRCP 68, and NRS 18.020. In its May 23, 2007, order, the district court awarded Kominos costs in the amount of \$21,603.06 and fees in the amount of \$16,024.50, and in its July

9, 2007, order, the court denied Martinez's motion for a new trial. This appeal and cross-appeal followed.

DISCUSSION

On appeal, Martinez argues that the district court abused its discretion in denying his motion for a new trial on damages and in granting Kominos's motion for attorney fees and costs. Martinez offers two reasons why a new trial on damages should have been granted: (1) the jury's award of \$35,625 is substantially less than the conceded proofs of special damages and indicates that the award is clearly inadequate and in violation of the district court's instructions, and (2) Dr. Herr's speculative testimony regarding the cause of Martinez's shoulder injury was prejudicial. Kominos disagrees, arguing that the evidence and testimony presented at trial was sufficient for the jury to have decided not to award Martinez 100 percent of his medical damages and to award only a small amount for pain and suffering. Kominos also contends that Dr. Herr's testimony was not speculative, as his testimony referred to injuries in general and not to Martinez's injury, and that Martinez waived the right to challenge Dr. Herr's alleged speculative testimony on appeal, as counsel failed to object during trial. Finally, on cross-appeal, Kominos asserts that the attorney fees award was inadequate.

Having reviewed the record and transcripts in this case, we conclude that the district court abused its discretion in denying Martinez's motion for a new trial on both grounds alleged by Martinez, as the damages awarded were clearly inadequate and because Dr. Herr's speculative testimony was prejudicial. We therefore also vacate the order awarding attorney fees and costs to Kominos, rendering Kominos's cross-appeal moot.

Standards of review

The district court has broad discretion in determining motions for additur, and we will not disturb the court's determination unless that discretion has been abused. Donaldson v. Anderson, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993). We review claims of prejudice concerning errors in the admission of evidence based upon whether the error substantially affected the appellant's rights. Hallmark v. Eldridge, 124 Nev. ___, ___, 189 P.3d 646, 654 (2008).

Inadequate damages

The record in this case reveals that Martinez's medical expenses for his neck injury totaled \$45,229.10, and the medical experts of both parties agreed that Martinez's neck injury was caused by the accident and that his medical treatment was reasonable. However, the jury awarded Martinez only \$30,625 for past medical expenses and \$5,000 for pain and suffering.

This court has held that additur is appropriate when the damages awarded are clearly inadequate and if the case would be a proper one for a new trial limited to damages. Drummond v. Mid-West Growers, 91 Nev. 698, 712, 542 P.2d 198, 208 (1975). When the jury awards an amount that is substantially less than the conceded proofs of special damages, there is an indication that the jury award is inadequate in violation of the district court's instructions. Lee v. Ball, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005). Here, the jury award of \$30,625 for medical expenses does not cover the conceded medical damages for Martinez's neck injury. In light of the jury's disregard for the district court's instructions, the case is a proper one for a new trial. NRCP 59(a)(5); Shere v. Davis, 95 Nev. 491, 493, 596 P.2d 499, 500 (1979). However, due to the

interrelationship of the causation and damage issues in this case, it is not a proper case for a new trial limited to damages. Id. Nor is additur appropriate. Id. at 493, 596 P.2d at 501. Although Martinez's motion in this case requested only additur or a new trial limited to the issue of damages, the district court had the power to grant a new trial on causation, as well as damages. Id. Accordingly, we conclude that the district court abused its discretion in not granting a new trial on all issues because the jury award was clearly inadequate.

Speculative testimony

In light of our decision to reverse the district court's order denying a new trial, we resolve the issue regarding Kominos's medical expert's testimony in order to avoid admission of the same type of testimony at Martinez's new trial.

Kominos argues that Martinez waived his right to raise the issue regarding speculative testimony because Martinez did not object to the admission of the alleged speculative testimony at trial. We have held that "where an objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling, then a motion in limine is sufficient to preserve an issue for appeal." Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). Accordingly, we conclude that Martinez's motion in limine to preclude Kominos's medical expert, John Herr, M.D., from providing speculative expert testimony regarding the causation of Martinez's shoulder injury was sufficient to preserve the issue for appeal.

At trial, Dr. Herr testified concerning an ultimate issue in the case—causation. Dr. Herr testified that, in addition to trauma, "the

glenoid labrum as well as the rotator cuff can tear on a degenerative or insidious basis, meaning, it just starts to wear out with time.” Dr. Herr’s alternate theory of causation is a statement regarding the causation of other glenoid labrum injuries in general. His statement is not based on particularized facts pertaining to Martinez’s injury. We have previously determined that expert testimony based on generalities rather than the particularized facts of the case is inadmissible. Hallmark v. Eldridge, 124 Nev. ___, ___, 189 P.3d 646, 651-52 (2008). In Porter v. State, 94 Nev. 142, 576 P.2d 275 (1978), this court held that proffered expert testimony regarding the general unreliability of eyewitness accounts, which did not specifically address the particular witness’s perception and recollection, was properly excluded. Id. at 147-48, 576 P.2d at 278. Similarly, in this case, Dr. Herr testified about another possible cause of rotator cuff injuries in general and not about another possible cause of Martinez’s shoulder injury specifically. Accordingly, Dr. Herr’s testimony regarding an alternate theory of causation was speculative, as it was not based on the particularized facts of Martinez’s shoulder injury, and thus, it was improperly admitted at trial. Having concluded that the district court erred in admitting Dr. Herr’s speculative testimony, we now determine whether the error compels reversal.

Claims of prejudice concerning errors in the admission of evidence are reviewed based upon whether the error substantially affected the rights of the appellant. Hallmark, 124 Nev. at ___, 189 P.3d at 654. This can be shown when the appellant demonstrates from the record that, but for the error, a different result may reasonably have been expected. Id. Applying this standard to the instant case, we conclude that the erroneous admission of Dr. Herr’s speculative testimony substantially

affected Martinez's rights. Specifically, substantial evidence supported Martinez's medical expenses for his neck and shoulder injuries. Kominos did not dispute that Martinez spent \$45,229.10 on medical treatment for his neck injury alone. Nor did Kominos dispute that Martinez's neck injury was caused by the accident. Without addressing Martinez's shoulder injury, as causation of the shoulder injury was clearly an issue at trial, the jury's award of \$30,625 for past medical expenses and \$5,000 for past physical and emotional pain and suffering was inadequate to compensate Martinez for his neck injury. While its exact impact will remain unknown, it is possible that Dr. Herr's speculative testimony influenced the jury's perception of Martinez, and consequently, their award. Therefore, we conclude that a different result might reasonably have been reached regarding the jury's award for medical expenses but for the error in admitting the Dr. Herr's speculative testimony. Accordingly, the error was prejudicial to Martinez and compels reversal.

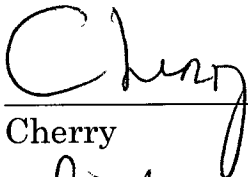
Attorney fees and costs


The district court awarded Kominos \$16,024.50 in attorney fees pursuant to NRS 17.115 and NRCP 68, and \$21,603.06 in costs pursuant to NRS 18.020. Kominos's award of attorney fees and costs was based on Martinez's failure to obtain a more favorable judgment than Kominos's last offer of judgment. In light of our decision to reverse the district court's order denying a new trial and remanding for proceedings consistent with this order, we necessarily vacate the court's award of attorney fees and costs to Kominos. Baker v. Noback, 112 Nev. 1106, 1112, 922 P.2d 1201, 1204 (1996).

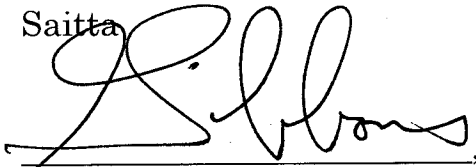
CONCLUSION

Having concluded that the district court abused its discretion in denying Martinez's motion for a new trial because the jury award was clearly inadequate and because Dr. Herr's speculative testimony was prejudicial, we

ORDER the judgment of the district court REVERSED and the attorney fees award VACATED and we REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
Carolyn Worrell, Settlement Judge
Arin & Associates, PC
Parker, Nelson & Associates
Atkin Winner & Sherrod
Eighth District Court Clerk