IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDA C. MARRONE,
Appellant,
vs.
JOHN KACZMAREK; AND THE SALVATION ARMY, A CALIFORNIA CORPORATION,
Respondents.

No. 51354

FILED

NOV 0 3 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict in a tort action and a post-judgment order denying a motion for a new trial. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

On appeal, appellant Linda Marrone argues that the district court abused its discretion in denying her motion for a new trial based on various instances of alleged judicial misconduct. Separately, Marrone challenges the district court's award of costs. For the following reasons, we conclude that both challenges fail and therefore affirm the judgment of the district court. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Judicial misconduct

Marrone contends that the district court abused its discretion in denying her motion for a new trial based on allegations that the district court (1) misstated the standard of proof regarding future medical

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damages and (2) was biased in resolving a "contrived" discovery dispute. We disagree.[1]

Preliminarily, the parties disagree over the appropriate standard of review for new trial motions based on judicial misconduct. While the denial of a new trial motion based on judicial misconduct is reviewed for an abuse of discretion, whether judicial misconduct occurred at all is subject to de novo review. Cf. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (attorney misconduct presents a legal question subject to de novo review); State v. Kirkpatrick, 184 P.3d 247, 261 (Kan. 2008) ("In cases alleging judicial misconduct, th[e] . . . standard of review is unlimited").

Future medical damages standard of proof

Marrone argues that the district court committed misconduct in requiring her medical expert, Dr. Muir, to testify to a "certainty" regarding future medical damages.

During questioning of Dr. Muir, Marrone's counsel asked Dr. Muir to give an opinion regarding Marrone's need for future surgery to within a reasonable degree of medical "probability." Before Dr. Muir could answer, the district court interrupted and asked Mar rone's counsel to rephrase the question using the term "certainty."

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[1]Marrone also contends that the district court engaged in additional acts of judicial misconduct by (1) becoming an advocate for the defense, (2) making several nonverbal displays of annoyance and disbelief, and (3) improperly denying Marrone the opportunity to present live witness testimony as proof of misconduct. Having thoroughly reviewed all of Marrone's contentions, we conclude that they are without merit. Moreover, contrary to Marrone's assertions, the cumulative effect of the district court's actions does not indicate bias or amount to misconduct.

While we agree that the district court's insistence on a "certainty" standard was misguided and ultimately overly formalistic,[2] Hall v. SSF, Inc., 112 Nev. 1384, 1390, 930 P.2d 94, 97 (1996) (a plaintiff must establish only that "future medical expenses are reasonably necessary"), we disagree that this misstatement amounted to judicial misconduct. Accordingly, this argument lacks merit.

Discovery dispute

Marrone claims that the district court was biased in resolving a "contrived" discovery dispute over a late-disclosed MRI film. As discussed below, this mischaracterizes the record.

Although films from Marrone's two prior MRIs were already stipulated into evidence, her counsel placed the film from a third, recently conducted MRI into the joint exhibit book three days before trial. Despite its late disclosure, Marrone's counsel sought to question Dr. Muir about the film, prompting a contemporaneous objection from defense counsel.

While Marrone claims that the late-disclosed MRI film was automatically stipulated into evidence in light of Kaczmarek's equal access to Marrone's medical records, mere access does not negate the clearly established requirement that opposing counsel be given fair notice of an

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[2]Although instruction 10.02 of the Nevada Pattern Jury Instructions characterizes recoverable future medical expenses as those that a jury believes a plaintiff "is reasonably certain to incur," Nev. J.I. 10.02, our caselaw has never endorsed this pattern language as necessary to support an award of future medical damages.

exhibit's use at trial.[3] See NRCP 16.1(a)(3)(c); NRCP 26(e)(1); see also EDCR 2.67.

Contrary to Marrone's attempt to recast this dispute as contrived, the district court correctly recognized that the MRI film's late disclosure presented a legitimate ground for dispute. Accordingly, the district court did not commit misconduct in resolving the dispute.

Costs

Separately, Marrone alleges that Kaczmarek was not entitled to recover the portion of his costs that were incurred before Kaczmarek made his $50,001 offer of judgment. Because this matter primarily involves an issue of statutory interpretation concerning the recovery of pre-offer costs, we apply de novo review. See Barney v. Mt. Rose Heating & Air Conditioning, 124 Nev. ____, 192 P.3d 730, 733 (2008).

Marrone's $12,000 verdict was substantially less than Kaczmarek's $50,001 offer of judgment. Accordingly, Kaczmarek moved to recover costs under NRS 17.115 and NRCP 68. Noting that Marrone had failed to best Kaczmarek's offer, the district court granted Kaczmarek's motion for the full amount of Kaczmarek's costs ($13,258.24), including the costs incurred before the offer of judgment.[4]

While NRCP 68(f)(2) limits recovery to "post-offer costs," and thereby prohibits the recovery of pre-offer costs, NRS 17.115(4)(c) simply

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[3]Moreover, rather than equate to a biased "tirade" or "partisan rant," as Marrone suggests, it appears from the record that the district court's challenged remarks on this matter were couched in the tone of a well-placed admonishment.

[4]Notably, the district court order awarded Kaczmarek costs exclusively under NRS 17.115, and made no mention of NRCP 68.

states that the offeree shall "pay the taxable costs incurred by the party who made the offer." Given the statute's lack of similarly limiting language, NRS 17.115 plainly creates a broader right for an offeror to recover costs than NRCP 68.

Because NRCP 68 and NRS 17.115 provide independent grounds for cost recovery, see Beattie v. Thomas, 99 Nev. 579, 587-88, 668 P.2d 268, 273-74 (1983) (refusing to recognize one provision as prevailing over the other), we reject Marrone's attempt to read NRCP 68's textual prohibition on awarding pre-offer costs into NRS 17.115. Accordingly, we conclude that Kaczmarek's pre-offer costs were recoverable under NRS 17.115. See H.- H.- M. Safe Co. v. Balliet, 44 Nev. 94, 96, 190 P. 76, 77 (1920).

[BM1] Based on the above, we conclude that the district court did not abuse its discretion in denying Marrone's motion for a new trial or in its award of costs. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Michelle Leavitt, District Judge
Janet Trost, Settlement Judge
Richard Harris Law Firm
Hansen Rasmussen, LLC
Eighth District Court Clerk