

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATRINA DUNCAN, AN INDIVIDUAL,  
Appellant/Cross-Respondent,  
vs.  
GREGORY CARTER, INDIVIDUALLY,  
AND GLENN CARTER,  
INDIVIDUALLY,  
Respondents/Cross-Appellants.

No. 51673

**FILED**

**DEC 14 2009**

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

This is an appeal and cross-appeal from a district court judgment on a jury verdict and a post-judgment order denying a motion for a new trial and a motion for attorney fees and costs and to retax costs in a tort action. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

This case arises out of a car accident in which respondents/cross-appellants Gregory Carter and Glen Carter collided with appellant/cross-respondent Katrina Duncan. Duncan underwent chiropractic treatment, physical therapy, and eventually, triple fusion spine surgery. After the accident, and prior to surgery, Duncan was on a ladder working on a ceiling light fixture when she received an electrical shock and fell off the ladder. The Carters stipulated to liability and the parties proceeded to trial regarding damages only. At trial, Duncan sought damages for all her injuries, including the surgery. The Carters' theory of the case was that the fall off the ladder re-injured Duncan's back, necessitating the surgery, and that the Carters should only pay for Duncan's damages incurred before the ladder fall. The first trial ended in

a mistrial. At the second trial, the jury awarded Duncan \$50,000. The parties raise a total of six issues on appeal.

Duncan appeals, arguing that: (1) the district court erred by excluding Dr. Mark Bradley Kabins's testimony regarding Duncan's ladder fall and the cause of her injuries, warranting a new trial; and (2) defense counsel's statements in closing argument constituted misconduct, warranting a new trial.

The Carters cross-appeal, arguing that (1) this court should award them attorney fees on appeal because Duncan's appeal is frivolous, (2) the district court erred by denying their attorney fees for the first trial after plaintiff's counsel caused a mistrial, (3) the district court erred by failing to recognize them as a prevailing party and denying them attorney fees and costs for the second trial, and (4) the district court erred by denying their motion to retax Duncan's costs.

We conclude: (1) the district court abused its discretion in excluding Dr. Kabins' testimony regarding the electric shock and ladder fall, warranting a new trial; (2) defense counsel did not commit misconduct in his closing argument; (3) this court should not award the Carters attorney fees and costs on appeal because Duncan's appeal is not frivolous; (4) the district court acted within its discretion by denying the Carters' motion for attorney fees after the mistrial; (5) the district court acted within its discretion in denying the Carters' motion for attorney fees after the second trial under NRS 18.010; and (6) the district court properly awarded Duncan costs, but the record is insufficient for this court to review the reasonableness of the costs or the district court's denial of the Carters' motion to retax Duncan's costs.

The parties are familiar with the facts and procedural history, and, therefore, we do not recount them except as necessary for our disposition.

I. The district court abused its discretion in excluding Dr. Kabins's testimony regarding Duncan's ladder fall

Duncan argues that the district court abused its discretion and committed reversible error by excluding Dr. Kabins's opinion that the ladder fall did not injure Duncan's back and that the car accident was the sole cause of her injuries. We agree. As a treating physician, Dr. Kabins could give an expert opinion about the ladder fall. The Carters also had notice that Dr. Kabins would testify about the cause of Duncan's injuries. Finally, the limitation of Dr. Kabins's testimony affected Duncan's substantial rights.<sup>1</sup>

Generally, the scope of a witness's testimony and whether a witness can testify as an expert is within the district court's discretion. Johnson v. Egtedar, 112 Nev. 428, 436, 915 P.2d 271, 276 (1996). An expert can rely on facts learned at or before trial, if they are the type of facts reasonably relied upon by experts in the field, regardless of their admissibility. NRS 50.285. Also, an expert can give an opinion without disclosing the facts upon which he relied, unless otherwise required by the court. NRS 50.305. A treating physician's opinion on causation is part of the ordinary care of a patient, and he or she may testify regarding

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<sup>1</sup>We note that Dr. Kabins was identified by Duncan as a witness prior to trial. The Carters did not depose Dr. Kabins or move in limine prior to the commencement of the second trial to preclude him from giving an expert opinion about the effect of the ladder fall.

causation without an expert report. Elgas v. Colorado Belle Corp., 179 F.R.D. 296, 298 (D. Nev. 1998).

A. As both a treating physician and an expert, Dr. Kabins could properly testify about Duncan's ladder fall

In this case, Dr. Kabins testified that Duncan had "traumatic internal disc disruption" to her lowest three discs, more likely than not caused by the car accident. He recommended the spinal surgery and said that the need for the surgery was primarily from the car accident. The defense objected when Duncan's counsel began questioning Dr. Kabins about whether he knew of the ladder fall incident. The defense argued that Dr. Kabins is an expert witness, whose testimony is limited to the matters discussed in his report, which did not include the ladder fall incident.

The district court ruled that Duncan's counsel could not question Dr. Kabins about the ladder fall unless "it's opened up on cross-examination." The district court reasoned that because the ladder fall was not addressed in Dr. Kabins' expert report, it was information he acquired after the close of discovery, and therefore the defense did not have sufficient notice that Dr. Kabins would testify about it.

In this case, Duncan disclosed Dr. Kabins as a treating physician and an expert and he submitted an expert report. The defense agreed to his testifying as an expert.<sup>2</sup> As a treating physician, he could testify regarding his opinion on causation without an expert report. Elgas,

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<sup>2</sup>The Carters argue that Duncan did not properly qualify Dr. Kabins as an expert. We conclude that this argument lacks merit because the Carters stipulated to his testifying as an expert on the record.

179 F.R.D. at 298. Therefore, it is irrelevant whether he discussed the ladder fall in his expert report. Thus, as a treating physician, Dr. Kabins could have properly testified about whether the ladder fall caused Duncan's injuries. Also, when Dr. Kabins testified, Duncan had already testified regarding the ladder fall incident. Therefore, under NRS 50.285, it was proper for Dr. Kabins to give an expert opinion of causation, subject to the Carters' ability to cross-examine him. Thus, the district court abused its discretion in limiting Dr. Kabins's testimony.

B. The Carters had notice that Dr. Kabins would testify regarding the cause of Duncan's injuries

The Carters had sufficient notice that Dr. Kabins would testify regarding whether the ladder fall caused Duncan's injuries. In Johnson, 112 Nev. at 436, 915 P.2d at 276, this court held that the district court abused its discretion when it excluded a doctor's expert testimony regarding causation because the defense had notice that the plaintiff was going to call the expert to testify about the cause of the plaintiff's injuries. Similarly, interpreting analogous federal rules, the United States District Court for the District of Nevada held that the purpose of an expert report is to give notice to the opposing party and to conserve resources. Elgas, 179 F.R.D. at 299. Further, "where a party elicits evidence he cannot thereafter be heard to say that such evidence is not admissible, and where he offers evidence that certain conditions exist, he cannot complain that the court permits his evidence to be rebutted." Provence v. Cunningham, 95 Nev. 4, 7, 588 P.2d 1020, 1022 (1979) (quoting McNab v. Jeppesen, 102 N.W.2d 709, 712 (Minn. 1960)).

Like in Johnson, Dr. Kabins submitted an expert report. Further, Duncan had testified regarding the incident and, therefore, the Carters knew the incident was in the record. As an expert, Dr. Kabins

could offer an opinion about the incident. In addition, the defense expert testified that the ladder fall was the cause of Duncan's injuries after the fall, requiring the surgery. Dr. Kabins's opinion that the ladder fall did not injure Duncan's back not only contradicted the defense theory of the case, but would have helped rehabilitate Duncan after the defense's cross-examination. It was proper for Duncan to present an opinion contrary to the defense theory of the case through Dr. Kabins. See Provence, 95 Nev. at 7, 588 P.2d at 1022. Therefore, the district court abused its discretion in limiting Dr. Kabins's testimony because the defense had notice that he could testify about the ladder fall, and Duncan had a right to present the testimony.

C. The district court's limitation of Dr. Kabins's testimony affected Duncan's substantial rights

A district court's exclusion of evidence can be error if it affects the substantial rights of the party and the district court is aware of the substance of the evidence. NRS 47.040(1). We now discuss why exclusion of this testimony was prejudicial to Duncan.

First, Dr. Dunn, Duncan's surgeon, testified that his opinion that the car accident caused all of Duncan's injuries remained the same regardless of the ladder fall. However, the defense attacked his credibility by highlighting his \$64,000 lien on this case. Dr. Kabins had no lien and his credibility was not attacked in this manner. Therefore, Dr. Kabins could have testified that the ladder fall did not cause Duncan's injuries, corroborating Dr. Dunn's testimony, and the jury may have given his testimony more weight than Dr. Dunn's. Second, after objecting to Dr. Kabins testifying regarding the ladder fall, the defense highlighted in its closing that Dr. Kabins could not offer an opinion regarding what really caused Duncan's injuries because he was kept in the dark about the ladder

fall. Had the district court allowed Dr. Kabins to testify that he did not believe the ladder fall caused Duncan's injuries, the defense could not have argued this in closing, and the testimony may have helped rebut the Carters' defense. Therefore, we conclude that the district court's abuse of discretion affected Duncan's substantial rights and warrants reversal.

II. Defense counsel did not commit misconduct in his closing argument

Duncan argues that defense counsel made statements in closing argument that warrant a new trial. She argues that defense counsel's argument misstated the burden of proof, elicited the jury's sympathy for the Carters, and sought jury nullification. We disagree.

Defense counsel told the jury that it could not have questions about whether the accident caused the surgery, asked the jury not to knock down the Carters with a million-dollar judgment, and not to reward Duncan's perjury. Specifically, he said:

Before you lay-before anybody is to knock these guys down with such a huge verdict, the evidence has got to be consistent and it's got to be logical, and it's got to flow, and you can't have questions about it to make the conclusion that this surgery came off the car accident, when you've got clear evidence that she treated and she got better, and you've got an intervening event where she gets electrocuted off of a ladder, won't admit it to anybody. Her own doctor admits it's the type event that can cause a back injury and it can cause disc disruption which is exactly what he operated on. But she hid it from everybody. And she's asking you to reward her for hiding that.

And i[f] it hadn't been by accident, it never would have been found out anyway because she lied to us under oath in her deposition about the fact that it even occurred.

... it is upon that evidence tremendously up just to knock these gentlemen down with a million and three hundred fifty-five thousand dollars when... she's admitted that she's been untruthful, and she's admitted that she's committed perjury.

After defense counsel finished the closing argument, there was an off-the-record bench conference. Duncan's counsel then made rebuttal closing argument. After the jury left to deliberate, Duncan's counsel objected to the defense's reference to knocking the defendants down with a million-dollar verdict. Duncan's counsel also argued that defense counsel misstated the law when he said that the jury could not have any questions about this because it misstates the burden of proof. The district court overruled Duncan's objections and denied her request for a curative instruction.

"Whether an attorney's comments are misconduct is a question of law" that this court reviews de novo. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). When trying a case, counsel is afforded wide latitude, but "may not make improper or inflammatory arguments that appeal solely to the emotions of the jury." Grosjean v. Imperial Palace, 125 Nev. \_\_\_, \_\_\_, 212 P.3d 1068, 1078 (2009). When misconduct is objected to and the district court does not admonish the jury, the first inquiry is whether the district court erred in overruling the objection. Lioce at 18, 174 P.3d at 981. If it did err, then the next inquiry is "whether an admonition to the jury would likely have affected the verdict in favor of the moving party" such that overruling the objection and failing to admonish the jury affected the moving party's substantial rights. Id. Duncan asserts three arguments regarding the defense counsel's closing argument.



First, Duncan argues that the defense counsel's comment that the jury could not have any questions about whether the accident caused the surgery misstated the burden of proof. Defense counsel only once stated that the jury "can't have questions about it" and, therefore, he did not commit misconduct. Also, Jury Instruction No. 18 properly stated that the burden of proof was by a preponderance of the evidence. Therefore, the district court properly overruled Duncan's objection.

Second, Duncan argues that the defense counsel's asking the jury not to knock down the Carters with a million-dollar judgment was an attempt to arouse the jury's sympathy for them. Gregory Carter testified that his mom is a nurse, his dad is an aircraft mechanic, and he was driving a 1989 Plymouth Acclaim at the time of the accident. Glenn Carter, Gregory's father, testified that he is a single parent with three sons. Given this testimony, the jury could conclude that the Carters were not wealthy, regardless of defense counsel's closing arguments. Also, many jurors may think that one million dollars is a large sum of money, regardless of defense counsel's closing arguments. Thus, the district court properly overruled Duncan's objection.

Third, Duncan argues that defense counsel was seeking jury nullification. Jury nullification is when the jury rejects the evidence or refuses to apply the law to the facts of the case either to send a message about a social issue or because the result mandated by the law seems unjust to the jury. Lioce, 124 Nev. at 20-21, 174 P.3d at 982-83. In this case, defense counsel did not mention social ills or any other issues unrelated to the facts in his closing argument. Duncan provides no facts or law supporting the contention that the defense sought jury nullification.

Therefore, we conclude that defense counsel did not commit misconduct, and the district court properly overruled Duncan's objection.

III. The Carters are not entitled to attorney fees and costs on appeal because Duncan's appeal is not frivolous

The Carters argue that this court should award them attorney fees and costs for having to defend Duncan's frivolous appeal. They argue that Duncan only appealed to drag out the litigation, and her arguments have no merit. We disagree.

This court may impose monetary sanctions or require an offending party to pay attorney fees and costs on appeal for filing a frivolous appeal. NRAP 38(b). Duncan's arguments on appeal are not frivolous. As discussed above, the district court erred in limiting Dr. Kabins's testimony. Also, although we conclude that the district court properly overruled Duncan's objections regarding statements made by defense counsel in his closing argument, the argument was not frivolous. Duncan's arguments were in good faith and reasonable under the law. Further, Duncan cites to relevant caselaw and statutes in her brief, and nothing in the record suggests that she brought the appeal only to delay litigation or abuse the appellate process. Therefore, the Carters are not entitled to their attorney fees as costs on appeal.

IV. The district court acted within its discretion by denying the Carters' motion for attorney fees after the mistrial

The Carters argue that the district court erred in denying them attorney fees incurred during the first trial because Duncan's counsel caused the mistrial. Duncan argues that the district court erred in declaring a mistrial, and therefore attorney fees as sanctions were not warranted. We conclude that the Carters' argument lacks merit because

the district court acted within its discretion in denying their motion for attorney fees.

At the first trial, defense counsel objected to plaintiff's counsel's closing argument, where counsel pointed out that Duncan's expert was a spine surgeon, but that defendant's expert was a general orthopedist who did not perform spine surgeries. Plaintiff's counsel suggested that the defense could not find a spine surgeon to agree with its theory of the case, saying "[t]hey couldn't find one. Is that possible? Or maybe they did find one and that spine surgeon maybe looked at stuff and said, I agree with [plaintiff's spine surgeon]." Defense counsel moved for a mistrial, and the district court granted it. After the mistrial, the Carters moved for attorney fees and the district court summarily denied the motion, pending reconsideration after the next trial. After the next trial, the defense again moved for attorney fees and the district court again denied the motion.

"Whether an attorney's comments are misconduct is a question of law, which we review de novo; however, we will give deference to the district court's factual findings and application of the standards to the facts." Lioce, 124 Nev. at 20, 174 P.3d at 982 (footnote omitted). This court reviews a district court's decision regarding attorney fees for abuse of discretion, unless the issue involves purely legal questions, and then this court reviews the decision de novo. Settelmeyer & Sons v. Smith & Harmer, 124 Nev. \_\_\_, \_\_\_, 197 P.3d 1051, 1057 (2008). The district court may award attorney fees and costs against a party or attorney who purposely causes a mistrial. NRS 18.070.

When considering sanctions and attorney fees for professional misconduct, we stated that

sanctions for professional misconduct at trial in civil cases are best considered in the first instance by the district court. Therefore, the district court may, on a party's motion or sua sponte, impose sanctions for professional misconduct at trial, after providing the offending party with notice and an opportunity to respond.

Lioce, 124 Nev. at 26, 174 P.3d at 986.

In this case, the district court made one finding regarding its decision to deny the Carters' motions for attorney fees. It stated in its order, "[t]he single question is whether the Plaintiff purposefully caused the mistrial to occur. The Court does not find that it was a purposeful act nor a pattern from a single attorney."

The issue is whether the district court abused its discretion in denying the Carters' motion for attorney fees as a sanction for plaintiff's counsel's earlier misconduct. This court must give deference to the district court's determination that attorney fees were not warranted because, according to the district court's order, plaintiff's counsel did not act purposefully or repeatedly. Instead, counsel's comment was a single instance in one trial. Also, under NRS 18.070, Lioce, and Settelmeyer, the district court's decision whether to award attorney fees as sanction for misconduct is discretionary. Therefore, the district court acted within its discretion in denying the Carters' motion for attorney fees after plaintiff's counsel caused a mistrial.

V. The district court acted within its discretion in denying the Carters' motion for attorney fees under NRS 18.010

The Carters argue that the district court erred in denying them attorney fees under NRS 18.010 because they were the prevailing party, and Duncan's lawsuit was fraudulent and groundless because Duncan hid the ladder fall from defense counsel and her doctors and

caused the need for two trials. We conclude that the Carters are not entitled to attorney fees under NRS 18.010 because they were not the prevailing party, and Duncan's claims were not frivolous.

Under NRS 18.010(2)(a), the district court may award the prevailing party attorney fees if the party has not recovered more than \$20,000. For a defendant to be a prevailing party, he must recover a money judgment. Singer v. Chase Manhattan Bank, 111 Nev. 289, 294, 890 P.2d 1305, 1307-08 (1995).

In this case, the Carters did not receive a money judgment. Rather, the jury awarded Duncan less in damages than she sought. Therefore, because the Carters did not obtain a money judgment, they are not prevailing defendants under NRS 18.010(2)(a). Thus, the district court did not abuse its discretion in denying the Carters' motion for attorney fees under NRS 18.020(2)(a).

Under NRS 18.010(2)(b), the district court may award attorney fees if it finds that the opposing party's claim is brought without reasonable grounds or to harass the prevailing party. This court reviews the district court's decision whether to award attorney fees under NRS 18.010(2)(b) for an abuse of discretion. Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995). Such an award must be supported by evidence that the party did not have reasonable grounds to bring the suit or brought it to harass the other party. Id. The district court must consider whether the party had reasonable grounds to bring the suit at the time it filed suit. Id. at 1095, 901 P.2d at 688.

The Carters did not present evidence that Duncan did not have reasonable grounds to bring her suit or that she brought it to harass them. The trial was solely about damages, and the jury awarded Duncan

damages for the injuries it found to be caused by the car accident. The Carters surmise that Duncan's claims for damages after the ladder fall were groundless because the jury awarded past medical expenses in the exact amount claimed before the ladder fall. Duncan's expert, Dr. Dunn, testified that the ladder fall did not injure Duncan's back, and therefore the car accident was the sole cause of her injuries. Dr. Kabins also opined that the car accident caused Duncan's harm. Thus, Duncan presented evidence supporting her claim for damages after the ladder fall. Although the jury may have ultimately found against her on those claims, there is no evidence the claims were groundless when filed. Therefore, the district court acted within its discretion in denying the Carters attorney fees under NRS 18.010(2)(b).

VI. The district court properly awarded Duncan her costs, but the record is insufficient for this court to review the reasonableness of the costs or the district court's denial of the Carters' motion to retax Duncan's costs

The Carters ask this court to reverse the district court's award of costs to Duncan because they are the prevailing party. Alternatively, the Carters argue that this court should reverse the district court's order denying their motion to retax Duncan's costs because they are unreasonable and some of them are not itemized, making a determination of reasonableness impossible. We conclude that the district court properly awarded Duncan her costs, but that the record is insufficient for this court to review the reasonableness of the costs or the district court's denial of the Carters' motion to retax Duncan's costs.

The district court must award costs to the prevailing party against the adverse party against whom judgment is rendered in an action for money damages where the plaintiff seeks more than \$2,500. NRS 18.020(3). This court reviews the district court's determination of

allowable costs for abuse of discretion. Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 493, 117 P.3d 219, 227 (2005). The costs must be reasonable and actual, rather than an approximation. Id.

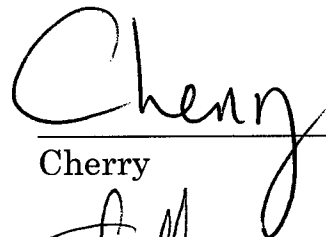
In this case, Duncan sought damages in excess of \$10,000. Also, as discussed above, Duncan is the prevailing party. Therefore, the district court properly awarded Duncan her costs under NRS 18.020. Thus, the remaining issues are whether the district court abused its discretion in determining that the costs were reasonable and actual and whether the district court erred in denying the Carters' motion to retax Duncan's costs.

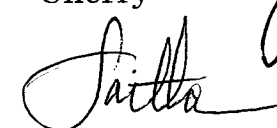
Here, Duncan filed a memorandum of costs and disbursements, the Carters moved to retax Duncan's costs, and Duncan filed an opposition. Duncan itemized each category of costs that the Carters challenged and admitted a few discrepancies as follows: (1) Duncan claimed \$1,065.43 for medical records, but admitted that the cost was actually \$790.56; (2) Duncan admits a \$10 overage in deposition costs; (3) Duncan initially claimed \$16,750 for expert fees, but in her opposition lists the fees as \$19,500; and (4) Duncan admits a 78-cent overage in the original postage costs.

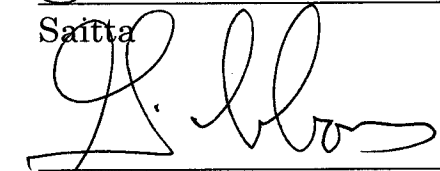
The parties both acknowledge that the district court awarded Duncan's costs, but the record does not contain a district court order awarding Duncan's costs. Thus, the record does not reveal the amount of costs the district court awarded Duncan. Without this order, it is unclear whether the district court ordered Duncan's costs based on her initial memorandum of costs and disbursements, or based on the corrections Duncan made in her opposition to the Carters' motion to retax. Also, the order denying the Carters' motion to retax does not state any findings of

fact or conclusions of law. The only record of the hearing is a minute order, and it does not reveal any of the district court's findings of fact or conclusions of law. Therefore, this court does not have before it the amount of costs the district court awarded Duncan, the figures it relied on, or its reasoning. Thus, there is insufficient evidence in the record for this court to review the reasonableness of the costs or the district court's denial of the Carters' motion to retax Duncan's costs. We remand this issue to the district court for further findings.

As such, we ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART and REMAND this matter to the district court for proceedings consistent with this order.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. David B. Barker, District Judge  
Robert F. Saint-Aubin, Settlement Judge  
Christensen Law Offices, LLC  
Delanoy Schuetze & McGaha, P.C.  
Eighth District Court Clerk