

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARY KIMBERLING,

No. 35219

Appellant,

vs.

CARLA KELSEY,

Respondent.

FILED

NOV 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an order of judgment entered pursuant to a jury verdict and from an order denying appellant Mary Kimberling's motion for a new trial.¹ Kimberling contends that she is entitled to a new trial for two reasons. First, she claims that the district court erred in admitting the testimony of respondent Carla Kelsey's two expert witnesses, Terry Clark and Dr. Elson. Second, she claims that the jury manifestly disregarded the district court's instructions by finding in favor of Kelsey.

NRCP 59(a) permits a district court to grant a new trial if a party's substantial rights were materially affected by one of the enumerated causes or grounds. We review the district court's decision to grant or deny a motion for a new trial under an abuse of discretion standard.²

1. Kelsey's Expert Witnesses

Kimberling contends that Terry Clark, an accident reconstructionist, testified beyond the limited scope permitted by the district court. She further contends Clark lacked the requisite

¹Kimberling also attempts to appeal from the district court's order denying her motion for judgment notwithstanding the verdict. That order is not appealable. Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 320 n.1, 890 P.2d 785, 790 n.1 (1995) (citing Ross v. Giacomo, 97 Nev. 550, 635 P.2d 298 (1981)).

²Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1505, 970 P.2d 98, 122 (1998) (citing Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993)).

qualifications needed to testify. We disagree. The district court determined that Clark possessed specialized knowledge that, if found credible, could have been helpful to the jury.³ Clark's testimony was confined by the court to areas within the scope of his knowledge. After reviewing the record, we conclude there was substantial evidence in the record of Clark's qualifications to testify. Therefore, the district court did not abuse its discretion by allowing Clark's limited testimony.⁴ We note that Clark was specifically precluded by the district court from testifying in areas where he lacked expertise.

Kimberling next contends that Dr. Elson lacked a sufficient factual basis for his conclusion because he relied in part upon an inadmissible accident reconstruction report. This contention is without merit; an expert may rely upon facts or data that were not admitted into evidence in reaching his opinion.⁵ We have reviewed Dr. Elson's testimony as well as the basis for his opinion and conclude that the district court did not abuse its discretion by allowing it.⁶

2. Manifest Disregard of the Jury Instructions

Kimberling claims that she presented overwhelming and undisputed evidence in support of her case. According to Kimberling, the jury must have manifestly disregarded the district court's instructions and ignored the elements of her negligence cause of action.

A new trial on this ground is warranted if we are able to conclude that had the jurors properly applied the district court's instructions, it would have been impossible for them to reach the verdict that they did.⁷ Our review of the jury verdict does not entail an appraisal

³See NRS 50.275.

⁴See Mulder v. State, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000) (citing Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984)) ("Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion.").

⁵See NRS 50.285.


⁶Id.

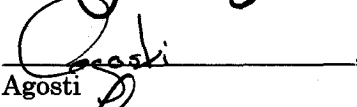
⁷M & R Investment Co. v. Mandarino, 103 Nev. 711, 716, 748 P.2d 488, 491 (1987).


of the weight and credibility of the evidence; thus, we may not disturb the jury's verdict unless it erred as a matter of law.⁸ Because the jury in this case returned a verdict in favor of the defendant, the verdict should not be disturbed so long as substantial evidence supports a finding that the plaintiff failed to prove at least one element of her negligence cause of action. Here, the record supports a finding that the April 1996 accident did not proximately cause Kimberling's claimed knee injury. Accordingly, we conclude that Kimberling is unable to demonstrate that she is entitled to judgment as a matter of law.

Having considered the appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.


_____. J.
Young


_____. J.
Agosti


_____. J.
Leavitt

cc: Hon. Lee A. Gates, District Judge
Hutchison & Steffen
Kummer Kaempfer Bonner & Renshaw
Clark County Clerk

⁸Brascia v. Johnson, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989)
(citing Fox v. Cusick, 91 Nev. 218, 220, 533 P.2d 466, 468 (1975)).