IN THE SUPREME COURT OF THE STATE OF NEVADA

CSR AMERICA, INC., AND ARC MATERIALS CORPORATION, D/B/A WMK BUILDERS PRODUCTS,

Appellants,

vs.

ROBERT KUKES AND KELLY KUKES, INDIVIDUALLY AND AS HUSBAND AND WIFE,

Respondents.

No. 35238

FILED

OCT 09 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment upon a jury verdict and an order denying appellant's motion for a new trial.

Appellants CSR America, Inc. and ARC Materials Corporation hosted a corporate golf "scramble." During a discussion about softball, David Ramsey, an employee of ARC, swung his golf club like a softball bat and inadvertently struck his friend, respondent Robert Kukes, in the face. The force fractured several bones and caused Kukes to ultimately lose his right eye.

Kukes and his wife, Kelly Kukes, sued Ramsey, CSR, and ARC asserting claims of negligence, loss of consortium, and respondeat superior.

A jury trial commenced on September 7, 1999. The jury returned a verdict on September 10, 1999, awarding the Kukes $3,700,600.00.[1]

[1]The individual components of the jury's damage award are set out below.

Past medical expenses:	$ 98,000.00
Past pain and suffering:	$1,250,000.00
Past wage loss:	$ 33,600.00
Future medical expenses:	$ 125,000.00

continued on next page . . .

01-16891

Appellants moved for a new trial under NRCP 59(a)(6), asserting that the verdict was not supported by substantial evidence and the award was the product of passion or prejudice.[2] The motion was denied, and this appeal followed.

A new trial may be granted under NRCP 59(a)(6) when the jury has awarded "[e]xcessive damages appearing to have been given under the influence of passion or prejudice."[3] "[I]n actions for damages in which the law has provided no legal rule of measurement, it is the jury's responsibility to determine the amount to be allowed."[4] A court should not grant a new trial on the grounds of excessive damages "unless the verdict is 'so flagrantly improper as to indicate passion, prejudice or corruption in the jury.'"[5] "On review, we will not disturb the district court's ruling on a motion for new trial absent an abuse of discretion."[6]

Appellants allege three grounds in support of their assertion that the verdict was influenced by passion or prejudice. First, appellants contend that the amounts awarded as past and future medical expenses and lost wages are not supported by the evidence adduced at trial. Second, appellants assert that the general damages were excessive in light of the evidence. Third, appellants contend that the Kukes introduced improper evidence of insurance and made improper arguments designed to inflame the passions of the jury.

. . . continued

Future pain and suffering: $2,000,000.00

Loss of consortium: $ 200,000.00

Total - $3,700,600.00

[2]Appellants also moved for a judgment notwithstanding the verdict or, in the alternative, for a remittitur.

[3]NRCP Rule 59(a)(6).

[4]Hazelwood v. Harrah's, 109 Nev. 1005, 1009-10, 862 P.2d 1189 (1993) (citing Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 686 P.2d 925 (1984), overruled on other grounds by Vinci v. Las Vegas Sands, 115 Nev. 243, 984 P.2d 750 (1999).

[5]Id.

[6]DeJesus v. Flick, 116 Nev. 812, 7 P.3d 459 (2000).

With respect to their first argument, appellants assert that the jury award of $98,000.00 for past medical expenses is excessive since the evidence demonstrated that the Kukes' past medical expenses totaled only $27,000.00. The Kukes contend that the jury was entitled to consider a $70,409.91 permanent partial disability (PPD) award by SIIS to Robert as a past medical expense because Robert will have to reimburse SIIS for that amount from any recovery in this case. The two sums added together purportedly support the $98,000.00 award. We disagree.

The record reflects that past medical expenses for Robert totaled $27,000.00. The amount Robert received as a PPD award is not a medical expense, nor is it any other element of damages. Robert was free to argue that he was entitled to more compensation for his partial disability and to have the jury instructed that he is required to reimburse SIIS from any recovery. The amount Robert received from SIIS is only evidence of the value that might be placed upon his disability; it is not evidence of medical expenses incurred by Robert. The $98,000.00 award for past medical expenses is not supported by substantial evidence in the record.

Appellants also contend, as a part of their first argument, that the evidence produced at trial does not support the jury's award of future medical expenses in the amount of $125,000.00. Appellants claim that the testimony only supports an award of approximately $55,000.00. We disagree. Dr. Steven Leibowitz testified Robert would have to undergo at least three additional surgeries to correct facial bones and eye level problems in addition to continued medical care for the rest of his life. Although the specific dollar estimates given by Dr. Leibowitz for the three surgeries did total approximately $55,000.00, he also testified that there would be additional expenses for annual medical care. While the evidence regarding the cost of this additional care is marginal, we conclude that there was sufficient evidence to support the jury's finding as to the future medical expenses.

Finally, appellants assert that there is no evidence to support the award of $33,600.00 for past wage loss. The Kukes contend that the past wage loss is not excessive because Robert's wage loss exceeded $21,000.00 and Robert must repay $12,000.00 in workers' compensation income benefits, so his wage loss is actually close to the $33,600.00 figure. However, the record reflects that Robert's total wage loss was about

$21,000.00, $12,000.00 of which was paid to him by SIIS. Again, the amounts paid by SIIS are simply some evidence of the amount of that loss, and Robert was free to present evidence that the actual loss exceeded the compensation he received from SIIS. He is entitled to receive compensation for his total loss, not duplicate compensation from appellants and SIIS. The record does not support an award of $33,600.00 for lost wages.

Appellants' second argument in support of their contention that the jury verdict was influenced by passion or prejudice involves the amount of the general damages. Appellants summarily contend that $2,000,000.00 for the loss of an eye and several surgeries is excessive and beyond that requested by the Kukes in closing argument. We disagree. There is evidence that Robert underwent four major surgeries, countless appointments and several inter-office surgical procedures. Furthermore, he may continue to undergo such procedures for the rest of his life. Moreover, counsel for the Kukes asked the jury to award over $1,000,000.00 for past pain, suffering and disability and to add an additional $1,000,000.00 for future pain, suffering and disability.

The mere fact that a verdict is large does not indicate passion and prejudice.[7] We conclude that the general damage award is supported by substantial evidence in light of the injury to Robert and the proof presented of past and future pain, suffering and disability.

Appellants' third argument involves allegations that the Kukes engaged in deliberate misconduct designed to arouse passion and prejudice in the minds of the jury. Appellants contend the Kukes shifted the focus of the trial from the negligence of Kukes and Ramsey to the size and wealth of CSR. Appellants assert the cumulative effect of respondents' improper arguments created passion and prejudice resulting in an excessive verdict.

The first allegation of improper conduct involves the existence of insurance. During trial, counsel for the Kukes asked Ramsey: "In fact, WMK wanted you to turn this in to your carrier, is that correct?" Appellants objected and, following a bench conference, questioning ceased on this issue. Appellants moved for a mistrial based on this question, and

---

[7]Id.; Guaranty Nat'l Ins. Co. v. Potter, 112 Nev. 199, 912 P.2d 267 (1996).

the district court denied the motion. Appellants contend this improper injection of insurance was error and that the district court abused its discretion in refusing to grant a mistrial. We disagree.

The reference to insurance was clearly improper and the district court so found. The district court determined that no further questions would be asked of the witness on this issue. Later, in ruling upon the motion for a mistrial, the district court further determined that the reference did not warrant a mistrial. Instead, the district court indicated it would give, if requested, a curative or cautionary instruction on the matter. Appellants chose not to ask for such an instruction. "Denial of a motion for mistrial can only be reversed where there is a clear showing of an abuse of discretion."[8] We find no abuse of discretion by the district court. This was a minor reference in a lengthy examination covering a multitude of subjects.

In addition to the insurance issue, appellants argue that the Kukes also created a prejudicial atmosphere against CSR by focusing the evidence and their arguments on CSR's status as a large, foreign corporation. In support of their argument, appellants cite to the following comments made by the Kukes' counsel during rebuttal:

> I started considering what perhaps the president of CSR in Australia would pay if it was his eye, because he's capable of paying. What would it be worth to him to get an eye back or what would it be worth to him if someone took his eye?

In addition, the Kukes' counsel referred to the fact that CSR had more than 360 employees in the local area and that CSR was not a "poor big corporation."

The arguments by the Kukes' counsel were made in response to statements made by appellants' counsel asking the jurors not to award large sums of money to the Kukes solely because CSR is a large corporation. The Kukes' counsel made the remarks as a part of a general argument that the Kukes were not seeking a large sum because CSR was a big corporation, but because the loss of an eye is a major injury. The reference to the number of employees was a request for the jury to consider whether the amount suggested as fair damages by the appellants

---

[8]Cramer v. Peavy, 116 Nev. 575, 580, 3 P.3d 665, 669 (2000) (citation omitted).

would be considered excessive by one of those employees or the company executives. Under the circumstances, we conclude the argument was not improper.

In addition, during the trial, the district court gave the following admonition:

> One of the parties in this case is a corporation. A corporation is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.

In light of the admonition given by the trial court and the minimal number of comments made, we conclude that the comments were not prejudicial.

Appellants also contend that the jury was influenced by the Kukes' counsel's improperly offering personal opinion during closing arguments. The Kukes' counsel stated, "let me tell you this guy is the real guy. This is the real article we're dealing with here. There isn't – there isn't a fake bone in this man's body. He is exactly what you see, and he is exactly the way he is." Appellants assert this argument is patently improper and constitutes personally vouching for the credibility and veracity of his client. We disagree.

SCR 173(5) states, in pertinent part, that a lawyer shall not "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused." We conclude that the comment complained of by appellants is not a violation of this rule or otherwise patently improper. Counsel was simply paraphrasing some of the testimony given by witnesses in their description of Mr. Kukes.

Finally, appellants argue that the Kukes' counsel repeatedly used techniques tactically similar to a "golden rule" argument, suggesting that the jurors should put themselves in the Kuke's position and that these tactics inflamed the jury. The arguments appellants complain of are as follows: (1) "when we think about losing [sight] ourselves . . . you can't cope with that concept, but they have to cope with this concept"; and (2) "[s]omebody who suffers their loss has no cap [on recovery] . . . until you've suffered it, you can't know about a cap or understand."

The "Golden Rule" prohibits counsel from explicitly or implicitly asking jurors to place themselves in the shoes of the injured party. Such arguments are forbidden because "they interfere with the jury's objectivity."[9] However, we conclude that the arguments complained of by appellants did not amount to golden rule arguments and were within the permissible scope of advocacy.

Appellants contend that the cumulative effect of the alleged improper conduct, together with the objective fact that the jury verdict on special damages exceeds the evidence presented at trial, warrants a new trial under our holding in DeJesus v. Flick.[10] We disagree. Although the past medical and lost wages damages were not supported by the evidence, a review of the record indicates that it was possible the jury simply misunderstood how to treat the evidence of the SIIS liens. In addition, we have concluded that many of the remarks complained about by appellants were not improper. The remaining conduct does not rise to the level of misconduct that permeated the trial in DeJesus. In addition, there is evidence that the jury was not influenced by passion or prejudice. Although the jury did award Robert a large sum of money, they also found comparative negligence and assessed his proportionate responsibility for his injuries at fifteen percent.

The denial of a motion for a new trial or, in the alternative, remittitur is reviewed for an abuse of discretion.[11] The district court did not abuse its discretion in denying the majority of appellants' claims. However, the district court did err in failing to grant a remittitur on the past medical and past lost wages damages. The actual uncontested amount of the past medical specials was $27,000.00 and the maximum amount of lost wages as established by the evidence was $21,000.00. Therefore, the district court should have granted a remittitur on those portions of the jury award.

Appellants' arguments in support of their appeal from the judgment mirrors their appeal from the denial of their motion for a new trial. In essence, they contend that they were denied a fair trial by the

---

[9]See DeJesus, 116 Nev. 812, 7 P.3d 459.

[10]Id.

[11]See Hazelwood, 109 Nev. at 1010-11, 862 P.2d at 1192.

conduct of the Kukes. For the reasons stated above, we conclude that this claim is without merit.

Finally, appellants also contend that substantial evidence does not support the jury's verdict. The court "will not overturn the jury's verdict if it is supported by substantial evidence, unless, from all the evidence presented, the verdict was clearly wrong." "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'" The reviewing court "must assume that the jury believed the evidence favorable to [the victorious party] and made all reasonable inferences in [that party's] favor." [12]

The evidence in the record indicates that Ramsey violated standard golf protocol by swinging his club like a baseball bat without checking his surroundings. Robert lost an eye and has a lifetime disability. He presented evidence from several individuals on how that disability has affected his life and that of his family. We therefore conclude that there is substantial evidence to support the judgment. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for entry of an amended judgment correcting the amount of the past medical and lost wages special damages consistent with this order.

Young, J.
Young

Leavitt, J.
Leavitt

Becker, J.
Becker

cc: Hon. Gene T. Porter, District Judge
Beckley, Singleton, Jemison, Cobeaga & List
Albert D. Massi, Ltd.
Clark County Clerk

---

[12]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989).