

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHANIE HALL, INDIVIDUALLY;  
AND SUN CAB, INC., INDIVIDUALLY  
AND D/B/A NELLIS CAB COMPANY, A  
NEVADA CORPORATION,

Appellants,

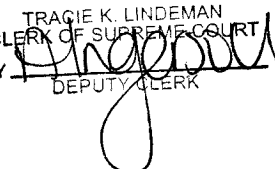
vs.

CORNELIUS ORTIZ, INDIVIDUALLY;  
AND IRENE STEINMAN,  
INDIVIDUALLY,  
Respondents.

No. 58042

**FILED**

OCT 31 2013

TRAGIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

**ORDER OF AFFIRMANCE**

This is an appeal from the amended final judgment and post-judgment orders in a personal injury action. Eighth Judicial District Court, Clark County; Allan R. Earl, Judge.

A taxi driven by appellant Stephanie Hall and owned by appellant Sun Cab, Inc. (collectively, Sun Cab) entered an intersection on a red light and collided with the passenger side of an SUV driven by respondent Cornelius Ortiz, causing injury to Ortiz. When Ortiz was taken to the hospital, the on-call neurosurgeon determined that he had a herniated disc in his spine and was at risk for paralysis. The next day, the neurosurgeon gave Ortiz the option of future invasive spinal fusion surgery (the surgery) and discharged Ortiz from the hospital. Over the next few months, Ortiz went to 15 doctor appointments where 2 different surgeons gave Ortiz a variety of options ranging from the surgery to conservative treatment. The surgery had substantial risks and no guarantee of success. Ortiz chose conservative treatment. Approximately nine months after the accident, Ortiz sneezed and became paralyzed. The

next day, Ortiz decided to have the surgery. Ortiz regained the ability to walk after extensive rehabilitation and treatment.

Ortiz and his wife Irene Steinman, also a respondent, filed a complaint against Sun Cab, seeking damages for injuries related to the accident. At trial, Sun Cab argued that Ortiz failed to mitigate his damages by unreasonably refusing surgery that would have prevented his paralysis. The district court denied Sun Cab's motion for judgment as a matter of law and its request for a special interrogatory on mitigation. The jury returned a \$1,294,721 verdict in favor of Ortiz and awarded Ortiz's wife \$25,000 for past damages. The jury attributed ten percent of Ortiz's damages to a previous car accident. Following trial, Sun Cab filed a renewed motion for judgment as a matter of law, a motion for a new trial, and a motion for remittitur. The district court denied Sun Cab's motion for a new trial and renewed judgment as a matter of law but granted in-part and denied in-part Sun Cab's motion for remittitur and reduced Ortiz's wife's past damages by the same ten percent. Sun Cab now appeals the amended judgment and post-judgment orders.

I. *The district court properly denied Sun Cab's renewed motion for judgment as a matter of law because substantial evidence supported the verdict*

Sun Cab argues that the district court improperly denied its renewed motion for judgment as a matter of law because no reasonable jury could have found that Ortiz mitigated his damages. We disagree.

The district court may grant a motion for judgment as a matter of law under NRCP 50(a)(1) "if the opposing party 'has failed to prove a sufficient issue for the jury', so that his claim cannot be maintained under controlling law." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (quoting NRCP 50(a)(1)). When considering a motion pursuant to NRCP 50, the district court "must view the evidence and all

inferences in favor of the nonmoving party.” *Id.* “To defeat the motion, the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party.” *Id.* at 222-23, 163 P.3d at 424. NRCP 50(b) allows a movant to renew its request for judgment as a matter of law. *Id.* at 223, 163 P.3d at 424. Judgment as a matter of law may be entered, pursuant to NRCP 50, when “the evidence is so overwhelming for one party that any other [judgment] would be contrary to the law.” *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 910, 193 P.3d 536, 542 (2008) (internal quotation marks omitted). We apply the same standard as the district court and review de novo the district court’s order denying a motion for renewed judgment as a matter of law under NRCP 50(b). *Nelson*, 123 Nev. at 223, 163 P.3d at 424-5.

“The doctrine of mitigation of damages has been applied to preclude recovery for disability which could have been avoided if the plaintiff had exercised reasonable diligence in seeking medical care, including surgical treatment.” *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284, 646 P.2d 553, 554 (1982) (“[A]n injured person cannot recover for damages which could have been avoided by the exercise of reasonable care”). The burden for a mitigation defense is on the defendant, who must prove that the plaintiff failed to use reasonable diligence in mitigating his damages. *Lublin v. Weber*, 108 Nev. 452, 454-55, 833 P.2d 1139, 1141 (1992).

We conclude that Sun Cab did not meet its burden to prove that Ortiz failed to use reasonable diligence in mitigating his damages. The record indicates that Ortiz acted reasonably in investigating his options and seeking care. Including his initial hospitalization, Ortiz went to 16 doctor appointments during a 9-month period.

Ortiz suffered a severe traumatic event and faced a very difficult decision. Rather than choosing to undergo a highly invasive and potentially debilitating surgery right from the outset, Ortiz opted to first try to address his injuries with a conservative approach. Dr. Muir noted that Ortiz was “pretty much stable,” that it is quite common for large disc herniations like Ortiz’s to absorb without surgery, and that more often than not, his surgical candidate patients, when given the option, say “no, I’ll just live with it or I’ll just take my pain medicine.” Dr. Muir testified that Ortiz chose to “go with the odds and . . . wait for the dis[c] to absorb, go away by itself, but you do take the risk of . . . being paralyzed.” Only five and a half months before the paralyzing injury, Dr. Thalgott determined conservative care would be pursued for the “next several months.”

The surgery’s success was far from guaranteed and Ortiz’s expert, Dr. Hedge, testified that at least 1-2% of patients who submit to spinal fusion surgery suffer paralysis. Spinal fusion surgery carries with it significant risks, even when performed perfectly. Dr. Thalgott, Dr. Seiff, and Dr. Muir all testified that although the dangers were rare, they had seen surgery complications occur with their patients including paralysis or death. None of Ortiz’s treating surgeons warned him that a sneeze could cause paralysis because it is so rare. We conclude that the reasonableness of Ortiz’s actions was properly for the jury to consider. The jury had multiple instructions concerning mitigation before them. Further, the jury had the ability to determine if Ortiz, understanding the surgery’s risks, had the right to reasonably say no and choose a more conservative method of recovery.

Therefore, we conclude that the district court properly denied Hall's renewed judgment as a matter of law because Ortiz presented sufficient evidence such that the jury could grant him relief.

II. *The district court did not abuse its discretion when it denied Sun Cab's motion for a new trial*

Sun Cab argues it was entitled to a new trial because (1) the district court abused its discretion by admitting evidence including photos and videos of Ortiz's past accidents that were irrelevant to Ortiz's damages and highly prejudicial, (2) the district court unreasonably refused to give a special interrogatory on mitigation, and (3) the jury manifestly disregarded the jury instruction on the mitigation of damages. We disagree.

We will not disturb a district court's decision concerning a motion for a new trial absent an abuse of discretion. *Nelson*, 123 Nev. at 223, 163 P.3d at 424-25; *see* NRCP 59.

A. *The district court did not abuse its discretion when it admitted photos and videos into evidence of Ortiz's past accidents*

Sun Cab argues that the district court abused its discretion by admitting evidence including photos and videos of Ortiz's past accidents that were irrelevant to Ortiz's damages and highly prejudicial. We disagree.

We review a district court's decision to exclude or admit evidence for an abuse of discretion. *M.C. Multi-Family Dev., L.L.C. v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). We conclude that the photographs and video of the 2007 accident were just one piece of evidence that the district court had discretion to allow the jury to weigh in determining Ortiz's damages and the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice. *See* NRS 48.035. Regarding the 2004 accident, we conclude

that the district court did not abuse its discretion because Sun Cab opened the door for its admission by unduly emphasizing the accident and making it a major focal point of the case. *See United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) (“Under the rule of curative admissibility, or the ‘opening the door’ doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court’s discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission”). Furthermore, the admission of photographs of the 2004 accident did not prejudice Sun Cab. Ortiz’s expert, Dr. Hedge, stated that a 10% apportionment should be made for injuries sustained in the 2004 accident, which is consistent with what the jury ultimately concluded. Therefore, the district court did not abuse its discretion in admitting the evidence.

**B. *The district court did not abuse its discretion when it refused to include Sun Cab’s special interrogatory***

At trial, the district court refused to include Sun Cab’s special interrogatory within the verdict form, which stated: “Did Plaintiff Ortiz fail to mitigate his damages?” Sun Cab argues that the district court materially prejudiced it by refusing to include this special interrogatory without explanation. Sun Cab argues that under *Allstate Insurance Co. v. Miller*, 125 Nev. 300, 321, 212 P.3d 318, 332 (2009), the district court should have explained on the record the reason for refusing the special interrogatory on mitigation. We disagree.

We review a district court’s determination to permit or refuse special interrogatories for an abuse of discretion and uphold the district court unless its decision is arbitrary or capricious. *Allstate Ins. Co.*, 125 Nev. at 320, 212 P.3d at 331. In *Allstate*, we held that in cases involving multiple claims or theories, when refusing special interrogatories, the

district court should explain on the record its reason for excluding them. *Id.* at 321, 212 P.3d at 332. This requirement ensures that the jury picks a theory with adequate evidentiary support and may further our review. *Id.*

We conclude that this case is distinguishable from *Allstate* because it only involved one cause of action: a negligence claim against Sun Cab. Therefore, it was up to the jury to weigh the evidence, and the district court did not need to explain on the record its reasoning for refusing Sun Cab's special interrogatory. *Allstate Ins. Co.*, 125 Nev. at 321, 212 P.3d at 332. However, at the hearing, the district court explained that it did not allow the special interrogatory because it concluded it was more than a single interrogatory, but rather part of a confusing series of interrogatories interdependent on each other. The district court concluded that the two jury instructions on mitigation, labored on by the parties, properly set forth the issue and if the jury read them, they would understand the issue. Additionally, there were variables regarding when Ortiz allegedly failed to mitigate, which the interrogatory did not encompass. Therefore, we conclude that the district court did not abuse its discretion when it refused to include Sun Cab's special interrogatory where only one theory of recovery was at issue.

*C. The jury did not manifestly disregard the trial court's instructions on the mitigation issue*

Sun Cab argues that the jury manifestly disregarded the district court's instructions on the issue of mitigation because the evidence overwhelmingly indicated that Ortiz failed to mitigate his damages. Sun Cab argues that the jury did not award damages for future lost wages and future loss of consortium, which evidenced that the jury likely found that Ortiz failed to mitigate his damages. We disagree.

Under NRCP 59(a)(5), a district court may grant a new trial when there was “[m]anifest disregard by the jury of the instructions of the court.” However, a district court may only grant a new trial on this ground when as a matter of law, the jury “could not have reached the conclusion that it reached.” *Carlson v. Locatelli*, 109 Nev. 257, 261, 849 P.2d 313, 315 (1993) (internal quotation marks omitted).

We conclude that the jury verdict is not ambiguous or inherently inconsistent as to mitigation. The jury’s awards for future medical expenses and future pain and suffering evidence that it may have rejected Sun Cab’s mitigation defense. The jury may have believed that the majority of Ortiz’s future pain and suffering was in the past. The jury awarded Ortiz damages for past wages but may have agreed with Sun Cab’s expert testimony that he was vocationally able to return to work after rehabilitation. Dr. Hodge testified that Ortiz had become independent in his self-care and mobility, and had regained the use of his arms and legs. Sun Cab’s vocational rehabilitation expert testified that Ortiz could return to work. These facts explain why the jury may not have awarded Ortiz future loss of income damages or future loss of consortium damages and does not indicate that the jury manifestly disregarded the mitigation instructions.

Based on the foregoing, we conclude that the district court did not abuse its discretion in denying Sun Cab’s motion for a new trial.

*III. The district court did not abuse its discretion in giving Jury Instruction No. 29 because it did not prejudice Sun Cab*

Sun Cab argues that Jury Instruction No. 29’s language does not reflect Nevada law because: (1) it overemphasized the alleged dangers associated with the surgery rather than focusing on whether a reasonably prudent man would have submitted to surgery, and (2) it improperly emphasized risk factors to consider whether Ortiz acted reasonably



prudent but did not reference risks of not proceeding with surgery. We disagree.

We will not overturn a district court's decision to give or decline a particular jury instruction absent an abuse of discretion or judicial error. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 735-36, 192 P.3d 243, 250 (2008). We review de novo whether a proffered instruction is an incorrect statement of law. *Allstate*, 125 Nev. at 319, 212 P.3d at 331. A misstatement of law within an instruction only warrants reversal if it caused prejudice and but for the error, a different result may have been reached. *Id.*

We conclude that the portion of Jury Instruction No. 29 regarding submitting to a dangerous surgery incorrectly stated the law because it should have focused on whether Ortiz had used reasonable diligence in mitigating his damages.<sup>1</sup> See *Lublin v. Weber*, 108 Nev. 452, 455, 833 P.2d 1139, 1141 (1992); *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284, 646 P.2d 553, 554 (1982) (explaining that mitigation in Nevada is grounded in whether an injured person could have avoided damages by the exercise of reasonable care). However, the instruction did not prejudice Sun Cab because the rest of the instruction and Jury Instruction No. 28 effectively cured any error. Immediately following the "dangerous" language in Jury Instruction No. 29, the instruction provides "if a reasonably prudent person would have submitted to the surgical procedure then those damages that the surgical procedure would likely have alleviated are not recoverable." Sun Cab is the one who requested

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<sup>1</sup>The dangerous surgery language of Jury Instruction No. 29 reads: "While the law does not require a plaintiff who sustained a personal injury by reason of the negligence act of another to submit to a surgical procedure which may be dangerous, . . ."

that the instruction contain this exact “reasonably prudent person” verbiage. Moreover, Jury Instruction No. 28 properly emphasized the reasonable person standard and stated: “there can be no recovery for damages which would have been avoided by reasonable medical care to which an ordinarily reasonable man under all the circumstances would have undertaken.”

Although Jury Instruction No. 29 contained an incorrect statement of the law in regard to an injured person submitting to a dangerous surgery, we conclude that reversal is not warranted because no prejudice to Sun Cab arose due to the mitigation language contained in the remainder of Jury Instruction No. 29 and in Jury Instruction No. 28. Accordingly, the district court did not abuse its discretion by giving Jury Instruction No. 29.<sup>2</sup>

*IV. The district court did not abuse its discretion when it denied Hall’s motion for remittitur because substantial evidence supported the verdict*

Sun Cab argues that the district court abused its discretion in denying its motion for remittitur because no evidence supported Ortiz’s damages for future pain and suffering (\$50,000) and future medical expenses (\$116,831) because he failed to mitigate his damages. Sun Cab argues that no one at trial testified that future medical expenses

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<sup>2</sup>We conclude that Sun Cab waived its argument concerning Jury Instruction 29 not containing risks of failing to proceed with surgery because it did not raise this argument at trial. *See In re AMERCO Derivative Litig.*, 127 Nev. \_\_\_, \_\_\_ n.6, 252 P.3d 681, 697 n.6 (2011) ([W]e decline to address an issue raised for the first time” before this court). Sun Cab’s own proffered instruction forming the basis of Instruction No. 29 was also silent on this matter.

amounted to \$116,831, but it argued this amount as past medical expenses in its closing argument. We disagree.

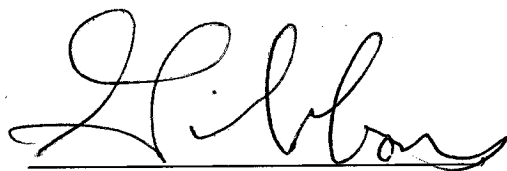
We review a district court's decision regarding an order of remittitur for an abuse of discretion. *See Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971). "We must accord deference to the point of view of the trial judge since he [or she] had the opportunity to weigh evidence and evaluate the credibility of witnesses—an opportunity foreclosed to this court." *Id.* at 311, 486 P.2d at 491-92. In reviewing a jury verdict, "[t]his court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." *Allstate Ins. Co.*, 125 Nev. at 308, 212 P.3d at 324 (alteration in original) (internal quotation marks omitted). We will not reverse or grant a new trial "on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *Automatic Merchandisers, Inc.*, 98 Nev. at 285, 646 P.2d at 555 (internal quotation marks omitted).

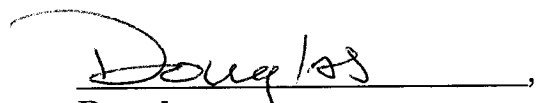
We conclude that the district court did not abuse its discretion when it denied Sun Cab's motion for remittitur because substantial evidence supported the jury's verdict. Because the jury had the ability to determine whether Ortiz mitigated his damages, the jury was able to award Ortiz damages based on future medical expenses and future pain and suffering. Ortiz's expert estimated future medical expenses with a present value range between \$193,403 to \$344,659 for his life-care plan. The jury's verdict indicates that it likely discounted the future medical expenses to \$116,831 as a compromise, which fell within the range of evidence.

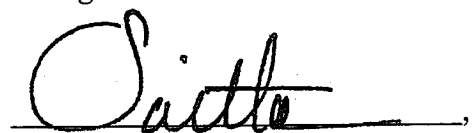
As for the \$50,000 awarded for pain and suffering, we conclude that such an award is highly subjective and within the province

of a jury. *See Stackiewicz v Nissan Motor Corp.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984) (noting that the measurement of pain and suffering damages falls peculiarly within the special province of the jury because the elements are wholly subjective). Furthermore, the jury's award of future pain and suffering is consistent with the jury's apparent rejection of Sun Cab's mitigation defense. Therefore, we conclude that the district court did not abuse its discretion when it denied Sun Cab's motion for remittitur.

Accordingly, we ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

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

  
\_\_\_\_\_  
Douglas J.

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

cc: Hon. Allan R. Earl, District Judge  
Leonard I. Gang, Settlement Judge  
Joshua A. Sliker  
Barron & Pruitt, LLP  
Hammond & Hammond, LLP  
Eighth District Court Clerk

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<sup>3</sup>We have considered the parties' remaining arguments and conclude they are without merit.