

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERALD KIRT,
Appellant,
vs.
MARGO SMITH; AND STEPHANIE
SMITH,
Respondents.

No. 64805

FILED

OCT 16 2015

TRACIE R. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a jury verdict in a personal injury action. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

FACTS AND PROCEDURAL HISTORY

This is an action in personal injury arising from a car collision. Appellant Gerald Kirt was driving near the intersection of Vegas Valley Drive and Topaz Street in Las Vegas, Nevada, when his car collided with another car driven by Respondent Stephanie Smith. Thereafter, Kirt filed a claim for negligence which asserted that Smith caused the collision by failing to yield the right of way, and that as a result of the collision he sustained severe neck and back injuries that required surgery and rendered him unable to work. During trial, Kirt requested damages in the amount of \$115,000 for past medical expenses, \$250,000 in future medical expenses, \$117,000 in past lost earnings capacity, and \$862,000 in future lost earnings capacity.

Smith presented evidence to the jury that Kirt's alleged injuries pre-dated the collision and that Kirt had received treatment, including administration of narcotic pain medications, for neck, back, and

shoulder issues for a number of years before the collision. Smith further noted that Kirt's medical diagnosis was the same both before and after the collision, with the only substantive difference being his claims of increased pain following the collision. Smith introduced medical records indicating that Kirt had visited his physician only twelve days before the collision and reported that his pain was already getting worse even prior to the crash.

Prior to trial, Kirt filed a motion in limine requesting that the district court prevent Smith and her witnesses from arguing or suggesting that the lawsuit was attorney-driven or a medical build-up case without first obtaining the permission of the court outside the presence of the jury. Over Smith's objection, the district court granted the motion by way of a written order that simply stated, "Plaintiff's Motion in Limine to Exclude Arguments that this case is an Attorney Driven or Medical Build Up Case is Granted."

After deliberating, the jury returned a verdict finding Smith 100 percent liable for the collision, and awarding Kirt damages in the amount of \$25,000 for past medical expenses, \$5,000 for past pain and suffering, and \$20,000 for past wage loss, for a total of \$50,000. Following entry of judgment, Kirt did not file a motion with the district court seeking additur, judgment as a matter of law, or a new trial. Instead, Kirt filed this appeal from the judgment entered on the jury verdict.

ANALYSIS

In this appeal, Kirt asserts that Smith's counsel committed attorney misconduct by violating the court's pre-trial order in four discrete ways during the trial: (1) during opening statements, Smith's attorney contrasted "the statements that he made to the emergency personnel before there was a lawyer involved" with those made later during

discovery; (2) one of Smith's expert witnesses, Dr. Joseph Schifini, was permitted to testify regarding "secondary gain behavior" and suggested that cases in which a plaintiff is clearly injured "normally settle;" (3) another of Smith's expert witnesses, Dr. Derek Duke, was permitted to testify regarding "secondary gain behavior" and referred to the "ring of physicians" who regularly work with plaintiffs' attorneys; and (4) during closing argument, Smith's counsel argued that Kirt had previously injured himself playing sports but only chose to file a lawsuit following the collision because "the difference is there's no one there to pay for that accident and that injury. Now there's an accident and now there's someone to pay. . . . Now there's someone to bill for all the medical treatment and his wages for the rest of his life. . . . Now he has an accident and that's someone else's fault allegedly and we'll get them to pay for it."

To the first, second, and fourth classes of alleged misconduct, Kirt made no contemporaneous trial objection when they occurred. The third alleged violation, relating to Dr. Duke's testimony, is somewhat more complicated.

During his testimony, Dr. Duke referred to "secondary gain behavior." Kirt did not object. Later, Duke began to refer to a "ring of physicians" who specialize in treating car accident victims. Kirt's counsel immediately interrupted and asked for a bench conference, during which he expressed concern that if Duke's answer were permitted to continue along these lines, the court's pre-trial motion in limine might be violated ("I think he's trying to go there"). After a brief discussion, the parties agreed to move the questioning to a different topic and, after the conference, Smith's counsel did so. At no time during the conference did Kirt's counsel state that he believed the motion in limine had already been

violated by any answer already given, nor did he ask the trial judge for a ruling on any pending objection or ask for the jury to be admonished. All that Kirt's counsel did was indicate that he thought that Duke was "trying to go" to the subject of the pre-trial motion in limine. Although Kirt now claims that he lodged an objection to Duke's testimony during the bench conference, the trial record indicates that he did not.

In *Bayerische Motoren Werke AK-Tiengesellschaft v. Roth*, 127 Nev. 122, ___, 252 P.3d 649, 656 (2011), the Nevada Supreme Court held that violation of a pre-trial order in limine can constitute misconduct warranting a new trial. However, to justify a new trial, "the order must be specific, the violation must be clear, and unfair prejudice must be shown." *Id.* at 652.

Furthermore, a trial court's pre-trial order in limine does not constitute a continuing objection to any misconduct whenever it might occur during the trial. *Id.* at 659. Rather, in order to constitute misconduct that was properly preserved under *Lioce*, a contemporaneous objection must still be made immediately when the misconduct occurs. "When an attorney violates an order in limine, a contemporaneous objection to the violation affords the court and the parties the opportunity to correct the misconduct and/or clarify the order, if the order's parameters are unclear." *Id.* at 659. If no contemporaneous objection was made at the time of the misconduct, then the misconduct is considered "unobjected-to" for purposes of the *Lioce* analysis notwithstanding the pre-trial order. *Id.* at 661 ("A contemporaneous objection is required to preserve attorney misconduct for violating an order in limine"). Thus, even if alleged violations were the specific subject of a pre-trial order in limine, if they

were "not objected to, any claim that they amounted to attorney misconduct was waived unless they amounted to plain error." *Id.*


In this case, the district court's written pre-trial order in limine consists of a mere single sentence, granting the subject motion. However, early in the trial, the district court appears to have expanded upon its order in a lengthy colloquy outside the presence of the jury. During the colloquy, the court explained that expert witnesses would be permitted to testify that, based on their experience, the plaintiff did not provide accurate or consistent information to his physicians and that such behavior is, in their opinion, consistent with malingering or "faking." However, witnesses would not be permitted to call the plaintiff a liar or specifically accuse him of lying.


Even if the statements cited by Kirt can be said to have represented a clear violation of the court's order, Kirt's failure to contemporaneously object to them waived any claim of misconduct unless they amounted to plain error. *Id.* at 661. In this case, our review of the record indicates that the jury's verdict was reasonably based upon the evidence. The jury found that Smith was at fault for the collision and awarded Kirt a total of \$50,000 in damages. While this amount was significantly less than that requested by Kirt, the jury heard substantial evidence that Kirt had already previously suffered injuries to the very same parts of his body that he contended were hurt in the collision, and that those prior injuries caused much of his pain. Indeed, medical records indicated that Kirt had reported to his physician, only 12 days before the collision, that his previous injuries were getting worse. Based on this evidence, a reasonable jury could have concluded that Kirt had suffered some injuries from the collision, but that the majority of his pain and


suffering was due to his prior injuries rather than the collision. This is not one of those "rare" cases where the evidence presented by both parties was extremely close and the misconduct so repeated or egregious that the jury's verdict likely hinged upon the misconduct rather than the evidence, resulting in fundamental error. *See Lioce*, 124 Nev. at 19, 174 P.3d at 982 (party alleging misconduct bears burden of demonstrating that its case is "a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error").

We therefore,

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Stefany Miley, District Judge
Stovall & Associates
Atkin Winner & Sherrod
Eighth District Court Clerk