

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SUZETTE BEHR; AND CODY
FITZGERALD,
Appellants,
vs.
HEATHER DIAMOND,
Respondent.

No. 66612

FILED

NOV 04 2015

TRACIE F. LINDEMAN
CLERK OF APPEALS COURT
BY *[Signature]*
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

Appeal from an amended judgment awarding damages in a personal injury action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Appellants Suzette Behr and Kody Fitzgerald¹ (collectively “Fitzgerald”) appeal the district court’s award of future pain and suffering in favor of respondent Heather Diamond. The only issue before the court is whether the record contains sufficient evidence to support the award for future pain and suffering.

This case arises out of a car accident, in which a car driven by Fitzgerald and owned by Behr struck a palm tree. Diamond was a passenger in the back seat of the car. On impact, Diamond hit her head on the front seat, lost consciousness, and had a seizure. Diamond suffered a concussion and doctors later diagnosed Diamond with post-concussion syndrome. Later medical tests also revealed a Chiari-I malformation and a small posterior-inferior labral tear in her shoulder. Diamond subsequently underwent two brain surgeries to correct the Chiari-I

¹We recognize the correct spelling for appellant’s first name is Kody.

malformation, and arthroscopic surgery to repair the tear in her shoulder. Diamond sued Fitzgerald for negligence and Behr for negligent entrustment.

The parties do not dispute the facts of the accident. Rather, the main issue at trial revolved around the extent of damages—and in particular, whether Diamond's two Chiari-I malformation surgeries were causally related to the accident. The court heard testimony from four expert witnesses—one for Diamond, and three for Fitzgerald.² After a bench trial, the district court entered a verdict in favor of Diamond. The district court found the two Chiari-I surgeries were not causally related to the incident, but that Diamond still suffered significant problems as a result of the accident. Accordingly, the court awarded Diamond \$60,000.00 in past medical expenses, \$120,000.00 in past pain and suffering, \$50,000.00 in past loss of earnings, and \$120,000.00 in future pain and suffering. The district court did not award damages for future medical expenses or future lost wages, finding Diamond failed to present any evidence that she would need medical treatment in the future or that she sustained a loss of earning capacity.

Fitzgerald then moved to alter or amend the judgment, or in the alternative, for new trial, asserting two assignments of error. Of relevance here, Fitzgerald argued the evidence at trial did not support the

²Diamond presented Dr. Stuart Kaplan, the neurosurgeon who performed the two Chiari-I related surgeries. Fitzgerald presented (1) Dr. David Ginsberg, the neurologist who interviewed and examined Diamond, and reviewed her medical records, (2) Dr. Lewis Etkoff, a licensed psychologist and board certified in neuropsychology, who performed a neuropsychological exam on Diamond, and (3) Dr. Derek Duke, a neurosurgeon who reviewed Diamond's medical records.

award for future pain and suffering. The district court denied Fitzgerald's motion, thereby upholding the \$120,000.00 award. This appeal followed.

Fitzgerald contends the district court erred in awarding damages for future pain and suffering because Diamond did not present expert testimony to support the award. We agree.

This court will not disturb an award of damages where the record before the district court contains sufficient evidence to support the award. *Lyon v. Walker Boudwin Constr. Co.*, 88 Nev. 646, 649, 503 P.2d 1219, 1220 (1972). A claim for damages for future pain and suffering arising from subjective physical injury must be supported by expert testimony to the effect that "future pain and suffering is a probable consequence rather than a mere possibility." *Lerner Shops of Nev., Inc. v. Marin*, 83 Nev. 75, 79-80, 423 P.2d 398, 401 (1967). A subjective disability is one that is not demonstrable to others or not readily observable by the court. See *Gutierrez v. Sutton Vending Serv., Inc.*, 80 Nev. 562, 566, 397 P.2d 3, 4-5 (1964). Subjective injuries include headaches, *id.* at 566, 397 P.2d at 4, low-back pain, remorse, guilt, mental worry, distress, grief, and mortification. *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 75, 358 P.2d 892, 896 (1961). Objective injuries, on the other hand, include those such as shoulder injuries that cause a demonstrably limited range of arm motion and broken bones. *Krause Inc. v. Little*, 117 Nev. 929, 938, 34 P.3d 566, 572 (2001). These latter types of injuries do not require expert testimony because "the extent to which a broken bone causes pain and suffering is common knowledge." *Id.*

Here, the district court originally based its award of future pain and suffering on Diamond's post-concussion syndrome—namely, her headaches. In the court's oral findings at trial, it explained, "I believe that Heather's pain and suffering in the past and in the future is related to post-concussion syndrome. And it's real and headaches can be very

debilitating and are worthy of compensation just as—just as if there were a broken bone.” The court’s subsequent order, however, which denied in part Fitzgerald’s post-trial motion, referred additionally to the exacerbation of Diamond’s pre-existing lower-back injury and shoulder surgery in its explanation for awarding damages for future pain and suffering. Specifically, the court said:

[T]he Plaintiff proved to the Court’s satisfaction that her post concussive syndrome, as a result of the accident, continues to cause her headaches. In addition, while the Plaintiff does not have any future medical treatment scheduled, she did suffer an exacerbation of a pre-existing lower back injury, as well as underwent shoulder surgery as a result of the accident. Therefore, the Court’s previous award of \$120,000.00 in future pain and suffering is justified.

Although the district court referred only to Diamond’s post-concussive syndrome in its findings at trial, we consider the additional two injuries mentioned in the court’s subsequent order—Diamond’s pre-existing lower-back injury and shoulder surgery—in our analysis of the award for future pain and suffering.

First, the court erred to the extent it factored Diamond’s lower-back pain into the award. Low-back pain is a subjective injury, and therefore expert testimony must establish probable future low-back pain before the court may award damages for future pain and suffering. See *Sierra Pac. Power Co.*, 77 Nev. at 75, 358 P.2d at 896. Prior to the subject accident, Diamond had surgery on her lumbar spine to correct a genetic defect. According to her testimony at trial, she continued to experience lower-back pain even after the surgery, and experienced increased lower-back pain after the subject accident. She testified, however, that her lower-back pain had “gone away . . . for the most part,” but still “comes and goes” and “always will.” She failed, however, to

present expert testimony to establish she suffered increased back-pain as a result of the accident or probable future pain and suffering based on her lower-back pain. Therefore, an award for future pain and suffering on this basis was error.

Second, to the extent the district court factored Diamond's shoulder injury into the award, this was also error. A shoulder injury that substantially reduces one's range of arm motion is an objective injury and thus, a plaintiff's testimony alone can support an award of damages for future pain and suffering. *See Krause Inc.*, 117 Nev. at 938, 34 P.3d at 572. Here, however, Diamond testified she no longer experienced problems with her shoulder and that she could "throw a softball" and "pick up a bale of hay" with no problem. Further, the court had previously recognized in its findings at trial that "we don't really need to talk about the shoulder. That's wonderful that [she] had a good result." Therefore, an award for future pain and suffering on this basis was error.

Third, the court also erred in awarding damages for future pain and suffering based on Diamond's post-concussion syndrome and consequent headaches. According to the experts who testified at trial, the disabilities connected with post-concussion syndrome include nausea, vomiting, memory problems, fatigue, personality changes, headaches, dizziness, depression, anxiety, problems with sleep, and appetite disturbance. At the time of trial, however, Diamond complained only of occasional and mild headaches, dizziness, and light sensitivity. Because the court can not readily observe these injuries, expert testimony was needed to establish probable future pain and suffering based on these symptoms. *See Gutierrez*, 80 Nev. at 566, 397 P.2d at 4-5.

Here, none of the four expert witnesses testified that Diamond's post-concussion syndrome symptoms would continue in the future. On the contrary, the experts testified that post-concussion

syndrome symptoms are typically temporary, lasting only several months. And with respect to Diamond in particular, Dr. Kaplan reported that she “appear[ed] to be doing well” and that he was delighted with her progress in a follow-up visit on October 29, 2010. Further, according to Dr. Ginsberg’s testimony, Diamond’s post-concussion syndrome had resolved by the time of trial. And Dr. Duke testified that Diamond’s headaches had improved and resolved at some point after her two Chiari-I surgeries. While Dr. Etkoff testified that Diamond reported to still suffer from significant headaches in October 2012, he gave no opinion as to the probability of her headaches continuing in the future.


The only evidence that Diamond continued to experience headaches and dizziness came from her own testimony. Under *Gutierrez*, this is not competent evidence to support an award for future pain and damages. See *Gutierrez*, 80 Nev. at 565, 397 P.2d at 4 (holding plaintiff’s complaints of headaches up to the time of trial was insufficient to support an award for future pain and suffering).³

Therefore, because the district court’s award is neither supported by sufficient evidence with respect to Diamond’s shoulder injury nor by expert testimony with respect to Diamond’s lower-back pain and post-concussion syndrome, we

³The district court’s award is merely speculative as to the probability of Diamond’s future pain and suffering based on post-concussion syndrome. At trial, the court explained, “in the context of post-traumatic concussion syndrome or traumatic brain injury is that *we really don’t know*, and the science on this is continuing to evolve and we’re continuing to evolve, particularly in light of what’s happening with our returning service members as to what the long-term effect of a traumatic brain injury or a concussion syndrome are. But, you know, Heather is really young and has a lot of years to cope with *whatever the residuals are*.” (Emphasis added).

ORDER the judgment of the district court with respect to the award for future pain and suffering VACATED AND REMAND this matter to the district court for proceedings consistent with this order.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Gloria Sturman, District Judge
Janet Trost, Settlement Judge
Keating Law Group
Eglet Prince
Injury Lawyers of Nevada
Stovall & Associates
Eighth District Court Clerk