IN THE SUPREME COURT OF THE STATE OF NEVADA

BINNIE MCLEMORE,
Appellant,
vs.
LARRY JOE BERRY,
Respondent.

No. 36619

FILED

JUN 19 2003

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Binnie McLemore appeals from a final judgment entered on a jury verdict in an automobile negligence case.[1] Ms. McLemore contends that the district court erred by precluding her medical expert from testifying to the cause of her injuries and concerning her claim for future damages. We agree in part and therefore reverse the judgment and remand this matter to the district court for a new trial.

Relevant Factual and Procedural History

This case arises from a December 24, 1997, motor vehicle accident between Ms. McLemore and respondent, Larry Joe Berry. Although there is some dispute as to the severity of the impact between the vehicles, the physical damage described by the parties was not particularly serious. Mr. Berry's daughter, a passenger in his vehicle, was taken to a Reno emergency facility, briefly treated, and released. About two hours after the accident, Ms. McLemore began to experience pain in her back, neck, and jaw. Several days later, Ms. McLemore sought treatment with her regular physician, apparently without positive results. At the recommendation of her attorney, she ultimately consulted with Dr. Eloy Ituarte, an internist and endocrinologist, on February 24, 1998. Dr. Ituarte conducted a gross neurological examination but found no

[1]See NRAP 3A(b)(1).

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particular problems of diagnostic significance. Because of her complaints, Dr. Ituarte referred her for therapy, anti-inflammatory medication and herbs. On March 30, 1998, Dr. Ituarte ordered magnetic resonance imaging ("MRI") because of Ms. McLemore's failure to respond to therapy. The report of the MRI ordered by Dr. Ituarte, dated April 15, 1998, revealed normal degenerative changes of the cervical spine, a central protrusion of the C6-7 intervertebral disc, and a "slight bulge" of the C5-6 intervertebral disc. Noting the anomalies documented in the MRI report, Dr. Ituarte obtained a second opinion in writing from Dr. Phelps Kip, a spine specialist, who examined Ms. McLemore on one occasion, on May 15, 1998. Dr. Kip also reviewed the April 15, 1998, MRI and its corresponding report. In his own report, Dr. Kip identified normal degenerative cervical spine changes from levels C-5 to C-7, and the cervical disc protrusion at the C-6 and C-7 levels. Without being advised that Ms. McLemore sustained back injuries in a July 1997 accident, or being advised of the existence of radiographs taken shortly thereafter, Dr. Kip's report concluded that the radiographic anomalies seen following the December 1997 accident were caused by that event, but noted that the degenerative changes were most likely part of the normal aging process.

Dr. Ituarte saw Ms. McLemore on only two other occasions, the last of which took place in November or December of 1998.

Ms. McLemore filed suit against Mr. Berry. The case proceeded to trial on May 22, 2000, on Ms. McLemore's claims of accrued and future special and general damages. She made no claims for loss of income and, as of the date of trial, was experiencing good and bad days, the majority of which were "good days" where she was basically pain free. Her primary claims of residual discomfort involved stiffness and soreness of her right shoulder, a pulling sensation in the right side of her neck, and occasional "sharp shooting" sensations in the left side of her neck.

Doctors Ituarte and Kip were Ms. McLemore's primary damage witnesses at trial. Thus, the actual medical evidence in support of her personal injury claim was sparse, to say the least, having involved only four sessions with Dr. Ituarte, the last of which occurred one and one-half years prior to trial, and one session with Dr. Kip approximately two years prior to trial. Ms. McLemore's original trial strategy was to have Dr. Ituarte lay a predicate for Dr. Kip's opinion that the accident between Ms. McLemore and Mr. Berry traumatically caused the bulging disc. As discussed below, this plan went awry.

Initially, Dr. Ituarte testified to his regimen in treating patients with spinal injuries:

> [To perform an] evaluation. Examination to . . . make a diagnosis, to put a label on the condition. And then to either direct their care to a specialist or direct further investigations for non-surgical treatment, such as physical therapy or medications to relieve the pain and muscle spasm.

In the case of Ms. McLemore, Dr. Ituarte felt competent to "do an initial evaluation and to make some initial recommendations for therapy."

The district court precluded Dr. Ituarte from drawing any conclusions relative to the causation of Ms. McLemore's injuries, including the diagnosed disc herniation, or relative to any claim for future damages. Further, the district court sustained Mr. Berry's objection to Ms. McLemore's inquiries as to whether Dr. Ituarte agreed with Dr. Kip's reported impression of the cause of Ms. McLemore's disc problem:

> I do not think that Dr. Ituarte based on his medical expertise can give a prognosis or a diagnosis as far as either from an orthopedic surgeon or from his experience. He referred this case out, and we are going along with that testimony. That's why I sustained the objection.

Thus, based upon Dr. Ituarte's apparent total reliance on Dr. Kip's report, the district court sustained Mr. Berry's objection to this testimony. Dr. Ituarte did testify to a degree, over Mr. Berry's objections, about Ms. McLemore's future prognosis:

> And it is really hard for me with any reasonable certainty to find any way of making an exact prognostication about what direction things [Ms. McLemore's future medical complications] will go. . . . As I said, unfortunately, I don't know of any way at the moment where I can predict who is going to develop those kinds of problems and who isn't.

As discussed below, the district court later refused to allow Dr. Ituarte to testify as to whether Ms. McLemore's present injuries subjected her to an increased risk of future complications.

Dr. Kip testified that he had not seen the patient for nearly two years. Although, indicating that continuing problems as of the time of trial would be present probably for the foreseeable future, and that it was uncommon to find asymptomatic protruding C6-7 discs in persons under the age of forty, Dr. Kip stated on cross-examination that any opinion he might have concerning causation between the subject accident and the spinal condition he identified in the MRI was purely speculative. Dr. Kip also conceded at trial that the minimal and old contact with the patient made it impossible for him to draw any conclusions concerning what event in Ms. McLemore's life caused the disc protrusions, and rendered it impossible to divine any prognostications concerning any future problems. Thus, in apparent contradiction to his initial report, he could only speculate whether the automobile accident caused Ms. McLemore's injuries and could not offer an opinion concerning future medical complications. Because of this change in testimony, the district court

allowed admission of Dr. Kip's report relating the bulging disc to the December 1997 accident.

Dr. William Kane, an orthopedic surgeon, testified on behalf of the defense that he examined Ms. McLemore in March of 2000, confirmed signs of degenerative spine changes, but that his review of radiographs prior and subsequent to the December 1997 accident showed improvement rather than a worsening of Ms. McLemore's spinal condition. He further testified that Ms. McLemore might encounter future problems from non-accident-related arthritic changes.

Ms. McLemore ultimately submitted an offer of proof that Dr. Ituarte would testify that Ms. McLemore's injuries, including the herniated disc, were connected to the accident in this case based upon his personal examinations, his reliance upon other experts, and his lengthy experience with accident related trauma.[2] The offer also represented that Dr. Ituarte would testify that Ms. McLemore was at increased risk in the future for "such things as stenosis[3] and . . . further degenerative changes and that sort of thing." The district court refused this offer of proof.

While settling the jury instructions, the district court concluded that Ms. McLemore had not presented adequate evidence of future damages. Therefore, the court rejected Ms. McLemore's proposed future damages jury instruction. The jury ultimately awarded Ms. McLemore $10,311.34,[4] and the district court entered a final judgment

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[2]Dr. Ituarte testified to having considerable experience as an emergency room physician earlier in his career.

[3]Narrowing of the spinal canal.

[4]Ms. McLemore introduced documentation of pre-trial medical expenses in the amount $5,511.34; the verdict awarded Ms. McLemore $5,000.00 in general damages and $5,311.34 in medical damages.

upon the verdict.[5] For the purposes of this appeal, based upon the district court's ruling concerning future damages, we will assume that the award represents her pre-trial general and special damages.

Ms. McLemore appeals from the final judgment, contending that the district court erred when it: (1) excluded Dr. Ituarte's causation and future damages testimony; and (2) refused to instruct the jury on future damages.

Discussion

NRS 50.275[6] governs the admissibility of expert witness testimony. The decision whether to admit or exclude expert testimony lies within the sound discretion of the trial court.[7] We will not disturb that decision absent a clear abuse of discretion.[8] Additionally,

> Once a physician is qualified as an expert, he or she may testify to all matters within his or her experience or training, and the expert is generally given reasonably wide latitude in the opinions and

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[5]The district court amended its final judgment and awarded Mr. Berry $12,445.10 for attorney fees and costs under NRS 17.115 and NRCP 68. Ms. McLemore does not appeal the amended judgment.

[6]NRS 50.275 states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.

[7]See Powers v. United Servs. Auto. Ass'n., 114 Nev. 690, 699 n.3, 962 P.2d 596, 602 n.3 (1998); Prabhu v. Levine, 112 Nev. 1538, 1547, 930 P.2d 103, 109, (1996).

[8]Krause, Inc. v. Little, 117 Nev. 929, 934, 34 P.3d 566, 569 (2001).

> conclusions he or she can state, being subject only to the general exercise of discretion by the district court concerning whether the expert is truly qualified to render such testimony.[9]

"[N]ormally a medical expert is expected to testify only to matters that conform to the reasonable degree of medical probability standard."[10] A "reasonable degree of medical probability" is

> a standard requiring a showing that the injury was more likely than not caused by a particular stimulus, based on the general consensus of recognized medical thought.[11]

An expert medical witness need not be a specialist to testify regarding matters that "are common knowledge to all physicians and recognized as truisms by the medical profession."[12]

Causation testimony

Ms. McLemore first contends that the district court erred when it refused to allow Dr. Ituarte to testify that the December 24, 1997, accident caused her injuries. Ms. McLemore additionally contends that, because "Dr. Ituarte did not base his conclusions solely on Dr. Kip's impressions, but rather [on] his own research," it was permissible under NRS 50.285[13] for Dr. Ituarte to testify, either using his own research or

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[9]Fernandez v. Admirand, 108 Nev. 963, 969, 843 P.2d 354, 358-59 (1992) (citing NRS 50.275; Brown v. Capanna, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989); Freeman v. Davidson, 105 Nev. 13, 15, 768 P.2d 885, 886 (1989)).

[10]Capanna, 105 Nev. at 671-72, 782 P.2d at 1304 (citing Orcutt v. Miller, 95 Nev. 408, 595 P.2d 1191 (1979)).

[11]Black's Law Dictionary 1018 (Abridged 7th ed. 2000).

[12]Fernandez, 108 Nev. at 970, 843 P.2d at 359.

[13]NRS 50.285 states:

continued on next page . . .

Dr. Kip's impressions as the basis for his causation testimony. Ms. McLemore alleges that the district court's ruling prevented her from recovering for the herniated disc, thus warranting a new trial under NRS 47.040.

To a limited degree, we conclude that the district court erred when it refused to permit Dr. Ituarte to testify regarding the cause of Ms. McLemore's injuries. First, Dr. Ituarte conducted his own clinical examination of Ms. McLemore, took a medical history, ordered MRI studies of Ms. McLemore's cervical spine, and obtained an interpretation from a radiologist, which showed a slightly bulging cervical disc. Second, Dr. Ituarte was allowed to consider the medical conclusions in Dr. Kip's report concerning the condition of Ms. McLemore's spine.[14] Third, Dr. Ituarte demonstrated that he was an experienced specialist in internal medicine who had treated many patients with the symptoms described by Ms. McLemore. Thus, we conclude that Dr. Ituarte was competent to testify to a diagnosis and whether the symptoms experienced were related to the accident.

We therefore conclude that the district court erred by precluding Dr. Ituarte's opinion regarding the causation of Ms. McLemore's injuries. This error denied Ms. McLemore the ability to fully

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> 1. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing.
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> 2. If of a type reasonably relied upon by experts in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[14]See NRS 50.285.

prove her case on pre-trial general damages based upon an alleged connection between the accident and the disc protrusion. Thus, we cannot conclude that its rulings constitute harmless error.[15] Dr. Ituarte may not, however, at trial on remand, rely upon or refer to the portion of Dr. Kip's report in which he observes that the disc protrusion was related to the accident. While NRS 50.285 allows a clinician to base opinions upon the findings of other specialists if ordinarily and reasonably relied upon in the practice of medicine, Dr. Kip's reported conclusion about causation has no medical significance, only legal. Further, he renounced the opinion stated in his initial report.

Future damages testimony

Ms. McLemore argues that the district court abused its discretion when it excluded Dr. Ituarte's testimony regarding her future damages. Ms. McLemore argues that this evidentiary ruling affected her substantial rights because it led to the district court's denial of any jury instruction on this aspect of her claims and, thus, prevented the jury from considering such an award.

Mr. Berry submits that Ms. McLemore failed to meet her burden of proof on future medical expenses since neither Dr. Ituarte nor

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[15]See NRCP 59(a) which states in relevant part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; . . . (7) Error in law occurring at the trial and objected to by the party making the motion.

Dr. Kip could provide competent future damages testimony. Thus, he concludes that the district court did not abuse its discretion when it refused to instruct the jury regarding future medical damages.

A party claiming damages for future pain and suffering from a subjective physical injury must substantially support his or her claim with expert testimony.[16] In the present case, Ms. McLemore testified that she experienced intermittent stiffness and soreness of her right shoulder, a pulling sensation in her neck, and occasional sharp shooting sensations in her left neck. She also testified that she returned to her pre-accident aerobics regimen, four to five times per week, within a month of the accident, and that the majority of her days were basically pain free. Thus, Ms. McLemore was required to support her claim for future damages with expert testimony.

Here, Dr. Ituarte and Dr. Kip, the sole witnesses on future damages, were unable to draw any conclusions, to a reasonable degree of medical certainty, concerning Ms. McLemore's claim in this regard. Dr. Kip refused to speculate based upon his brief exposure to the patient and the length of time that had elapsed between his consultation and the trial. As to Dr. Ituarte, even the excluded testimony spoke only in generalities on this issue. Thus, because Ms. McLemore's medical experts could not testify with the requisite certainty about her future medical complications, the district court properly exercised its discretion when it denied Ms.

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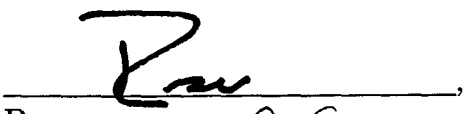
[16]K-Mart Corporation v. Washington, 109 Nev. 1180, 1196, 866 P.2d 274, 285 (1993) (citing Lerner Shops v. Marin, 83 Nev. 75, 79-80, 423 P.2d 398, 401 (1967)) ("[R]ecovery for future pain and suffering arising from subjective physical injury must be substantially supported by expert testimony stating that future pain and suffering is a probable consequence rather than a mere possibility.").

McLemore's proposed jury instruction that would have allowed an award for future medical damages.

Conclusion

We reverse the district court's judgment and remand for a new trial with instructions to the district court to permit Dr. Ituarte to testify regarding his conclusions about the cause of Ms. McLemore's symptoms identified prior to the time of trial. However, we affirm the district court's ruling effectively disallowing her claim for future damages.

It is so ORDERED.[17]



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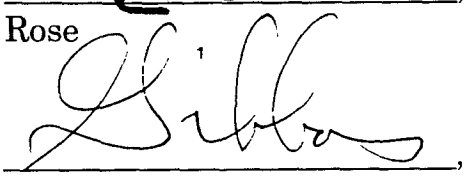

_____, J.
Gibbons

cc: Hon. Steven R. Kosach, District Judge
James Andre Boles
Hamilton & McMahon
Washoe District Court Clerk

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[17]We have carefully considered Ms. McLemore's other arguments on appeal and conclude that they lack merit. Ms. McLemore's counsel conceded at oral argument that she did not produce any evidence of lost wages. We also conclude that certain statements by the district court at trial do not constitute judicial misconduct.

Because our ruling today re-opens the question of who will be the prevailing party at the conclusion of trial proceedings on remand, the district court may be required to revisit the fee and cost awards made under NRCP 68.

MAUPIN, J., concurring in part and dissenting in part:

I would affirm the judgment below in its entirety. In my view, the district court's refusal to admit Dr. Ituarte's testimony concerning Ms. McLemore's pre-trial damages constitutes harmless error. To explain, Ms. McLemore's primary claim of error was that the district court precluded her from associating the disc protrusion with the accident. Here, notwithstanding the refusal of the testimony, Dr. Kip's 1998 written report was admitted into evidence and, as a prior inconsistent statement (to his in court testimony), was admissible to prove the truth of the statement in the report, that the bulging disc was related to the accident. Also, this damage case was based upon only five interactions with two doctors, one of which examined the patient on one occasion some two years before trial, and the other of which examined her on only four occasions over a nine-month time frame ending some one and one-half years prior to trial. Finally, Ms. McLemore's direct testimony confirms that her damage case was not so serious as to discredit the verdict, here $10,311.34.[1] In this, I note again that she submitted evidence of pre-trial medical special damages in the amount of $5,511.34; and that the jury awarded all but $200.00 of that claim, and also awarded $5,000.00 in general damages sustained prior to trial.

Conclusion

Although the district court erroneously refused the testimony of Dr. Ituarte, I conclude that, given the paucity of medical evidence in

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[1]See Quintero v. McDonald, 116 Nev. 1181, 1182, 14 P.3d 522, 523 (2000) (noting that "[a] jury is permitted wide latitude in awarding tort damages, and the jury's findings will be upheld if supported by substantial evidence").

support of Ms. McLemore's claim of pre-trial pain and suffering and the admitted moderate nature of her personal injury claim, the refusal of the district court to allow Dr. Ituarte's testimony does not compel reversal.

I would therefore, as stated, affirm all aspects of the judgment rendered in this case.[2]

Maupin, J.

Maupin

[2]My conclusions concerning the verdict below underscore the majority's affirmance of the district court's refusal to instruct on future damages.