IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WYNN LAS VEGAS, LLC,
Appellant,
vs.
MICHAEL NAPPA, AN INDIVIDUAL,
Respondent.

No. 71166

ORDER OF REVERSAL AND REMAND

Wynn Las Vegas, LLC, appeals from a district court judgment, pursuant to a jury verdict, in favor of Michael Nappa in a tort action and from a district court order denying, inter alia, a renewed motion for judgment or for new trial or remittitur. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge.[1]

Respondent Michael Nappa slipped and fell in a pool of sulfuric acid outside the Wynn Las Vegas Resort and Casino on the Las Vegas Strip while on his routine morning walk.[2] A few months after his fall, Nappa

---

[1]Senior Judge Bonaventure presided over the jury trial and all post-judgment motions while Judge Kerry Louise Earley presided over all pretrial proceedings.

The Wynn also included the district court's orders concerning several motions in limine its amended notice of appeal. However, it does not argue that any of these orders were in error. Accordingly, we will not consider the propriety of these orders on appeal. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that an appellate court need not consider matters that are not cogently argued or supported by relevant authority).

[2]We do not recount the facts except as necessary to our disposition.

18-900806

went to his primary care physician complaining of arm pain. Nappa's physician referred him to an orthopedic specialist.

Dr. Michael Milligan, a sports medicine trained physician, saw Nappa during his first orthopedic appointment. Nappa complained of pain in his left shoulder, which he attributed to his fall at the Wynn. Dr. Milligan performed an external physical examination of Nappa, revealing some tenderness, and ordered an MRI. Based on his evaluation, Dr. Milligan referred Nappa to Dr. Andrew Martin, a general orthopedist.

Nappa told Dr. Martin his shoulder started to hurt after he fell at the Wynn. Dr. Martin reviewed the MRI of Nappa's shoulder and performed other physical tests to determine the nature of his injury. Dr. Martin diagnosed Nappa with a superior labrum anterior to posterior (SLAP) tear, a partial rotator cuff tear, acromioclavicular (AC) joint arthritis, and inflammation. Dr. Martin recommended, among other treatment options, surgery. Nappa had the surgery, which Dr. Martin performed.

About a year after his shoulder surgery, Nappa filed a complaint against the Wynn for negligence and premises liability.[3] He claimed damages stemming from his shoulder injuries (among others).

In his initial NRCP 16.1 disclosures, Nappa listed Dr. Martin as a treating physician expected to testify about Nappa's injuries as well as past and future medical treatment. Nappa did not specifically disclose that he expected Dr. Martin to testify about causation.

[3]In his complaint, Nappa also named other third-party defendants who are not relevant to this appeal.

During discovery, the Wynn deposed Dr. Martin. At that deposition, Dr. Martin testified that neither he nor Dr. Milligan had reached a conclusion as to what caused Nappa's SLAP tear while they were treating Nappa. Dr. Martin also testified that he did not have a specific opinion concerning the cause of Nappa's injury, at the time of his deposition, but he suggested that Nappa's fall was one of multiple possible causes. At his deposition, Dr. Martin provided the Wynn with all of the medical records he relied upon to treat Nappa's shoulder injuries.

Shortly after Dr. Martin's deposition, Nappa filed his fourth supplemental disclosure where he revised the topics he expected Dr. Martin to testify about to include "causation" and included the medical records Dr. Martin reviewed during his treatment of Nappa. The Wynn received Nappa's fourth supplemental disclosure three days after the close of discovery. The Wynn filed a motion in limine seeking to prohibit, among other things, Dr. Martin from testifying about the cause of Nappa's shoulder injury given his deposition testimony and Nappa's non-specific disclosure regarding the substance of Dr. Martin's expected opinion testimony.

After a number of motions and hearings concerning whether Dr. Martin could provide an expert opinion at trial about the cause of Nappa's SLAP tear, the district court determined it would not grant the Wynn's motion in limine. Instead, the district court required the parties to conduct a voir dire examination of Dr. Martin during trial, outside the presence of the jury, so the court could determine if he could testify and, if so, to what extent he could express his opinions.

During the voir dire examination, Dr. Martin testified that, in his opinion, the fall caused Nappa's SLAP tear. On cross-examination, Dr.

Martin conceded that he had not reached an opinion on the cause of Nappa's shoulder injury by the time of his deposition, nor had he previously expressed one, and the opinion he intended to offer to the jury—that Nappa's SLAP tear had been caused by Nappa flailing his left arm as he fell—"was not an opinion that [he] generated during [his] treatment of Mr. Nappa." Still, the district court concluded that, while it was "a close question," Dr. Martin could testify about causation.

Dr. Martin then testified in front of the jury that he believed the fall caused Nappa's SLAP tear, which necessitated the surgery. The Wynn did not dispute that Nappa fell. Instead, it presented the testimony of its own expert, Dr. Steven Sanders, to rebut Dr. Martin's testimony. Dr. Sanders testified that, in his opinion, Nappa could not have torn his labrum from his fall.

The jury returned a verdict for Nappa and awarded him $210,000 for past pain and suffering. After the district court entered judgment pursuant to the jury verdict, the Wynn filed a renewed motion for judgment as a matter of law or for a new trial or remittitur. The district court summarily denied this motion.

The Wynn appeals from the district court's judgment pursuant to the jury verdict and its order denying its renewed motion for judgment or for a new trial or remittitur arguing the district court abused its discretion by allowing Dr. Martin to provide opinion testimony about the cause of Nappa's shoulder injury. The Wynn argues that Dr. Martin's causation opinion was not formed during the course of treating Nappa such that,

pursuant to NRCP 16.1, Dr. Martin could only provide causation opinion testimony if he had disclosed an expert report, which he did not.[4]

The district court abused its discretion by allowing Dr. Martin to testify about causation

"This court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion." *Khoury v. Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 90 (2016).[5] All parties must disclose the identity of anyone they intend to call as expert witnesses at trial. NRCP 16.1(a)(2)(A). The purpose of this "rule is to take the surprise out of trials of cases so that all relevant facts and information pertaining to the action may be ascertained in advance of trial." *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (internal quotation marks omitted).

---

[4]The Wynn also argues that the methodology and data underlying Dr. Martin's causation opinion were so unreliable that the district court abused its discretion by not excluding his opinion. *See Hallmark v. Eldridge*, 124 Nev. 492, 500, 189 P.3d 646, 651 (2008) (holding that an expert witness may only testify if, inter alia, her testimony is "relevant and the product of reliable methodology" (footnote omitted)). However, the Wynn never raised this specific challenge during the proceedings below. Accordingly, we will not consider this argument for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

[5]The Nevada Supreme Court published its decision in *Khoury* one month after the trial in this case concluded. Still, the Wynn cited *Khoury* in its post-judgment "Renewed Motion for Judgment or, for New Trial or Remittitur." Given our disposition of this matter, we need not address the post-judgment motion and order and decline to do so.

A witness specifically retained or employed to provide expert testimony in a case must also provide a written report prepared and signed by that witness to the opposing party along with the disclosure identifying the witness. *See* NRCP 16.1(a)(2)(B). An unretained expert, such as a treating physician, is generally exempt from this expert report requirement. *See FCH1, LLC, v. Rodriguez*, 130 Nev. 425, 433, 335 P.3d 183, 189 (2014). However, for treating physicians, "this exemption only extends to 'opinions [that] were formed during the course of treatment.'" *Id.* (alteration in original) (quoting *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011). When a treating physician's testimony goes beyond opinions formed during the course of treatment, "he or she testifies as an expert and is subject to the relevant requirements," *id.*, including submitting an expert report that complies with NRCP 16.1(a)(2)(B). Allowing a treating physician to provide expert opinions formed outside the course of treatment without such an expert report is an abuse of discretion. *See id.* at 434, 335 P.3d at 190. But "[a] treating physician is not a retained expert merely because the witness will opine about diagnosis, prognosis, or causation of the patient's injuries, or because the witness reviews documents outside his or her medical chart in the course of providing treatment or defending that treatment." NRCP 16.1 drafter's note (2012 amendment). "However, any opinions and any facts or documents supporting those opinions must be disclosed in accordance with subdivision (a)(2)(B)." *Id.*

The Wynn does not argue that Dr. Martin relied on documents or records generated outside of the scope of his treatment of Nappa to reach his opinion on causation, but instead points to the timing of Dr. Martin reaching his causation opinion as grounds for a new trial. The Wynn

argues "that Dr. Martin did *not* form his causation opinions during the course of treatment." We agree.

In *Khoury*, the Nevada Supreme Court faced the same proposition: the appellant argued a treating physician's testimony was inadmissible without an expert report because he did not form his opinion during the course of treatment. *See* 132 Nev. at ___, 377 P.3d at 90. The court concluded that the treating physician was exempt from the expert report requirement because the evidence presented supported the fact that forming the relevant opinion was a component of the physician's course of treatment. *See id.* at ___, 377 P.3d at 91. Thus, the court determined that the treating physician's opinion "was formed in the course of his own treatment." *Id.*

Here, Dr. Martin conceded during his deposition that he did not form an opinion about the cause of Nappa's SLAP tear during the course of treatment nor did he express an opinion at the deposition. Not only did Dr. Martin reaffirm these concessions during the voir dire examination, he went further by testifying that forming a causation opinion was not "necessary at the time of [his] treatment." In this way, the current case is unlike the situation in *Khoury* where the evidence suggested the treating physician formed the relevant opinion as part of the course of treatment. Here, Dr. Martin admitted that he did not form his causation opinion during treatment and noted that doing so would not be a part of his normal practice.

NRCP 16.1(a)(2) "serves to place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Sanders v. Sears-Page*, 131 Nev. ___, ___, 354 P.3d 201, 212 (Ct. App. 2015). Here, Nappa disclosed that he expected to have Dr. Martin testify at trial so the Wynn

deposed Dr. Martin. Dr. Martin testified at his deposition that he did not form a definite opinion on the cause of Nappa's shoulder injury. However, after his deposition, Nappa sought to introduce an expert opinion from Dr. Martin about the cause of his shoulder injury without actually providing the opinion itself until trial. It was confirmed at trial that the opinion was not formed during, nor part of, Dr. Martin's treatment of Nappa. Thus, Nappa had to provide an expert report that contained "a complete statement of all opinions to be expressed and the basis and reasons therefor" as well as "the data or other information considered by [Dr. Martin] in forming [his] opinions." NRCP 16.1(a)(2)(B). Therefore, we conclude that the district court abused its discretion by determining that Dr. Martin could testify about his opinion on causation without disclosing an expert report.

Allowing Dr. Martin's testimony on causation was reversible error

An error in the admission of evidence does not require reversal unless "the error substantially affected the rights of the appellant." *Hallmark*, 124 Nev. at 505, 189 P.3d at 654. "This demonstration is made when the appellant demonstrates from the record that, but for the error, a different result might reasonably have been expected." *Id.* (internal quotation marks omitted).

Had Dr. Martin been precluded from providing causation opinion testimony, Nappa would only have been able to present his own personal testimony that his shoulder began to hurt after he fell while the Wynn would have presented the opinion of its medical expert to argue that Nappa's fall could not have caused his shoulder injuries. Consequently, the jury may have reasonably determined that, without Dr. Martin's causation opinion, Nappa had not proved that the fall caused his injuries. Therefore, we conclude that "a different result might reasonably have been expected,"

id., but for the district court's error in admitting Dr. Martin's causation opinion testimony. Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this case to the district court for a new trial.

_____, J.
Tao

_____, J.
Gibbons

SILVER, C.J., dissenting:

Surgeon Andrew Martin is the epitome of a treating physician. Therefore, I respectfully dissent and would affirm the district court by allowing the jury's verdict in favor of Nappa to stand in this case.

Nappa was a 67-year-old man taking his morning walk to exercise, when he slipped and fell in a puddle of sulfuric acid mixed with water, located on Wynn's private driveway by an entrance. Wynn personnel immediately "hosed" Nappa down before the fire department arrived. Nappa, who was complaining of upper arm pain, was thereafter transported by ambulance to Sunrise Hospital. *Importantly, Wynn's video camera captured the fall.* Only two weeks before trial, Wynn stipulated to liability for Nappa's fall as well as to the related treatment provided by Medic West Ambulance and Sunrise Hospital on the day of the fall. The jury was tasked with determining whether Nappa's later shoulder surgery and resulting damages were caused by the fall.

Nappa disclosed Dr. Martin as a treating-physician expert witness in his initial disclosures. Prior to trial, Wynn deposed Dr. Martin.

My reading of Dr. Martin's deposition reveals that he *clearly* expressed opinions regarding both the causation and mechanism of injury. Dr. Martin testified that he is a board certified orthopedic surgeon licensed in Nevada and had *no independent recollection* of treating Nappa. He did, however, review *his own* operative notes, the progress notes, and his associate's notes before his deposition. Based on Nappa's history and MRI images, Dr. Martin recommended that Nappa undergo shoulder surgery to repair the injury, which Dr. Martin performed. *Multiple times* during the deposition, Dr. Martin opined that the fall caused Nappa's injury. This was true, he testified, irrespective of whether Nappa fell on the right side or the left side of his body. Further, Dr. Martin opined that surgery was required due to Nappa's injury to alleviate his pain. Dr. Martin never had any discussions with Nappa or his attorney prior to his deposition. Furthermore, he never reviewed any other related documents or literature, the videotape of the fall, or any other doctor's medical records involving Nappa prior to his deposition.

Again, during voir dire and at trial, Dr. Martin testified that based on Nappa's history and images in his MRI, the fall caused Nappa's injury and the injury required surgery. In his 16 years as a surgeon, he had only testified one other time. From my reading, it appears that as a result of Dr. Martin's lack of legal prowess, Wynn's attorneys cleverly asked questions during court proceedings insinuating that, as a treating physician, Dr. Martin never made "legal causation opinions" during his medical treatment. But, in his attempts to answer the lawyers, Dr. Martin tried to also explain that he generally focuses on treating his patients as a doctor, not rendering formal opinions regarding legal causation as defined by Wynn's attorneys.

I agree with the district court that in totality, when reading both Dr. Martin's deposition and voir dire, it's very clear that he formed an opinion during the course of his treatment—that Nappa's fall in this case caused his injury, requiring surgical intervention. Thus, hyper-technical semantics of how a question is posed to a witness by an attorney does not mandate reversal here.

I simply do not agree with my colleagues that this hyper-technical reading of Dr. Martin's deposition or voir dire can be interpreted to somehow morph this treating surgeon into a hybrid retained medical expert witness. Thus, I further disagree with my colleagues' conclusion that NRCP 16.1 required an expert report or that his testimony should have been excluded in this case for failing to comply with that rule.

This case is easily distinguished from *FCH1, LLC v. Rodriquez*, 130 Nev. 425, 335 P.3d 183 (2014). In *FCH1*, a pain doctor testified not only to his treatment of the plaintiff for pain, but also about orthopedic surgery, neurology and neurological science, podiatry, radiology, and damages involved in a life-care plan. *Id.* at 433-434, 335 P.3d at 189. Further, the pain doctor reviewed a compendium of that plaintiff's other medical records consisting of thousands of pages of documents from many providers. *Id.* The Nevada Supreme Court held that to the extent that the pain doctor utilized those documents in the course of providing treatment to the plaintiff, the doctor's opinions were proper. *Id.* But, the district court's allowing that same doctor to testify to records from other providers that were not involved in the pain doctor's treatment was an abuse of discretion as an expert report was required under those circumstances. *Id.*

In *FCH1* the Nevada Supreme Court stated, "[w]hile a treating physician is exempt from the report requirement, this exemption only

extends to 'opinions [that] were formed during the course of treatment.'" *Id.* at 433, 335 P.3d at 139, *quoting Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817 (9th Cir. 2011). The supreme court clarified that "[w]here a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements." *Id.* Further, in *Goodman*, the Ninth Circuit Court of Appeals held that "a treating physician is only exempt from [the] written report requirement to the extent that his opinions were formed during the course of treatment." 644 F.3d at 826. Thus, it is improper for parties to avoid filing an expert report by presenting testimony from the party's treating doctors while effectively asking those doctors to opine outside the scope of their treatment by reviewing and relying in part on medical documents from other providers. *Id.*

This is simply not the case here. Dr. Martin was the treating surgeon, he reviewed *only* his own reports and records, and he made opinions as to causation based on his treatment alone. The record is devoid of any evidence that Dr. Martin opined on anything outside his own treatment. Wynn's assertion that reversal of the jury's verdict is required simply because Nappa never filed an expert report regarding Dr. Martin is absurd in my view.

Moreover, there was certainly no surprise here at trial and nothing suggests the failure to file an expert report prejudiced Wynn in any way. *See FCH1*, 130 Nev. at 434-35, 335 P.3d at 190 (noting that discovery prevents parties from being surprised by new evidence during trial). Wynn took Dr. Martin's deposition prior to trial along with two other defendants' attorneys—all three asking questions of Dr. Martin. Critically, Wynn also presented testimony to the jury from its own expert, orthopedic surgeon Dr.

Steven Sanders, whose opinions directly contradicted those put forth by Dr. Martin. Thus, Wynn cannot show prejudice such that—even if the district court abused its discretion by admitting Dr. Martin's testimony—reversal of the jury's verdict is required by the mere fact that Dr. Martin did not file an expert witness report prior to trial. *See* NRCP 61 ("The court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."); *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (holding that to show an error affected the party's substantial rights, the party must demonstrate that "but for the alleged error, a different result might reasonably have been reached").

For the foregoing reasons, the district court did not abuse its discretion by admitting the testimony of treating surgeon Dr. Martin, and the jury's verdict in this case should stand. I, therefore, respectfully dissent.

Silver, C.J.

Silver

cc: Hon. Joseph T. Bonaventure, Senior Judge
Chief Judge, Eighth Judicial District
Stephen E. Haberfeld, Settlement Judge
Marquis Aurbach Coffing
Semenza Kircher Rickard
Nettles Law Firm
Eighth District Court Clerk