IN THE SUPREME COURT OF THE STATE OF NEVADA

TOYS "R" US, INC.,
Appellant,
vs.
CRYSTAL HILL AND GERALD HILL,
Respondents.

No. 36836

FILED

JUN 03 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment, a district court award of attorney fees for the respondents, and a district court order denying appellant Toys "R" Us' motion for a new trial.

On October 15, 1996, the respondent Hills sued Toys "R" Us for negligence for injuries Crystal Hill suffered at a Toys "R" Us in Las Vegas. While Crystal was walking down an aisle, three boxes, weighing seven pounds each, fell from a shelf fourteen feet above her and struck her head, shoulders, and back. Crystal has since undergone back surgery and extensive medical treatment. Toys "R" Us stipulated to liability at trial, but disputes the jury's award of damages and the district court order granting attorney fees.

Toys "R" Us argues that the Hills had to prove Crystal's medical bills were reasonable and necessary prior to admitting the bills into evidence on the question of damages, and that the Hills failed to do so.[1] At the end of trial, the district court admitted the bills. Toys "R" Us

[1]See Curti v. Franceschi, 60 Nev. 422, 428, 111 P.2d 53, 56 (1941) (holding substantial evidence supported district court award for medical services because the doctor testified as to what he charged, that the charges were reasonable, and that he had no usual and customary fee).

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was given the option to redact the bills it believed were unrelated to the accident; however, Toys "R" Us chose not to redact. Toys "R" Us moved for a new trial, which the district court denied. The district court has broad discretion in determining the admissibility of evidence, and its ruling will not be reversed on appeal absent an abuse of such discretion.[2] This court will not disturb a district court's order denying a motion for a new trial unless it abused its discretion.[3]

The medical bills needed only to be relevant and authentic prior to admission.[4] Several doctors, as well as Crystal, extensively testified as to the course of treatment she underwent. Additionally, a time line was drawn for the jury, laying out the dates on which various medical treatments were rendered. The district court took judicial notice that medical providers charge for their services, and therefore, found that "[t]he bills and the dates [could] be matched and correlated to the medical records and their dates." Toys "R" Us stipulated to the admission of the medical records at the beginning of trial and never objected to the authenticity of the medical bills. Thus, we hold that the district court did not err by admitting the medical bills.

There was also substantial evidence to support the jury's finding that the medical treatment and corresponding medical bills were

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[2]Matter of Parental Rights as to N.J., 116 Nev. 790, 804, 8 P.3d 126, 135 (2000).

[3]DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000).

[4]See NRS 48.025(2) (stating that "[e]vidence which is not relevant is not admissible"); NRS 52.015 (stating that authentication is a condition precedent to admission).

proximately caused by Crystal's accident at Toys "R" Us.[5] Each medical bill could be correlated to each medical treatment in Crystal's medical records. Several doctors testified that Crystal's medical problems were caused by her accident at Toys "R" Us. Numerous doctors also testified as to the medical treatment Crystal underwent and that such treatment was necessarily incurred as a result of the accident.

Toys "R" Us also argues that evidence was not presented at trial to support the jury's award of $319,200 in future medical expenses. "An award of future medical expenses must be supported by sufficient and competent evidence."[6] This evidence must include the amount of future medical expenses[7] and that such expenses were reasonably necessary.[8] This court assumes that the jury considered the evidence favorable to the Hills and made all reasonable inferences in their favor.[9]

Dr. John Thalgott, who specializes in orthopedic surgery and spinal surgery, testified that in his opinion Crystal will suffer lifelong chronic pain, and such pain causes depression and weight gain. He also testified that the surgery was not successful. Dr. Timothy Glass, Crystal's

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[5]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989) (holding that this court will not overturn a jury's verdict if it is supported by substantial evidence).

[6]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998).

[7]Gibellini v. Klindt, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994).

[8]Hall v. SSF, Inc., 112 Nev. 1384, 1390, 930 P.2d 94, 97 (1996).

[9]Bally's, 105 Nev. at 555, 779 P.2d at 957.

chiropractor, testified that tissue in Crystal's neck had degenerated and lost normal function. Dr. Thalgott testified that Crystal will need future medical treatment in the form of chronic pain management and check-up MRI's. Crystal has undergone the forms of pain management in the past that Dr. Thalgott recommended. Thus, the jury could have reviewed prior medical bills for these types of medical treatments, determined their cost, considered Crystal's life expectancy, and based an award on those costs. Once the fact of damage is established "some uncertainty in the amount [of damages] is allowed."[10] Therefore, we find that sufficient evidence supports the jury's award for future medical expenses.

Toys "R" Us further contends that the Hill's attorney made an improper per diem argument in closing argument. Toys "R" Us did not object to the argument and failed to present the issue in any of its post-trial motions. Specific objections must be made to allegedly improper arguments to preserve the issue for appellate review, even if the appeal is based on NRCP 59(a)(6).[11] Thus, this court will only review this issue if the attorney's per diem argument constitutes plain error.[12]

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[10]Mort Wallin v. Commercial Cabinet, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989).

[11]Beccard v. Nevada National Bank, 99 Nev. 63, 66, 657 P.2d 1154, 1156 (1983) (holding that a party must object to an improper argument at time made, and if fails to do so, cannot bring up for the first time in a motion for a new trial based on NRCP 59(a)(6)).

[12]Parodi v. Washoe Medical Ctr., 111 Nev. 365, 368, 892 P.2d 588, 590 (1995) (noting that if an attorney fails to object, this court will only review issue if it constitutes plain error).

This court has not specifically held that per diem arguments constitute misconduct. However, this court has noted that per diem arguments should be premised "by an admonition that the suggestions of counsel are not to be taken as evidence but are merely thoughts of counsel as to what would be proper damages to award for this item."[13] In this case, the jury was instructed that "[s]tatements, arguments, and opinion of counsel are not evidence in this case." This court assumes that the jury has the mental capacity to distinguish between an argument and evidence.[14] The jury was also instructed that "[n]o definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering." Thus, we hold that even if the per diem argument constituted error, it did not prejudice the proceeding as it was adequately safeguarded by the jury instructions.[15]

Toys "R" Us argues that a new trial is warranted because the Hills' attorney's misconduct cumulatively affected the trial to such a degree that it influenced the jury's verdict, leading to an excessive award of $907,093 for pain and suffering. Toys "R" Us did not object to any of the Hills' attorney's allegedly improper remarks, except for those referencing a

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[13]Johnson v. Brown, 75 Nev. 437, 447, 345 P.2d 754, 759 (1959).

[14]See Jones v. Hogan, 351 P.2d 153, 159 (Wash. 1960) (holding that the Nevada Johnson v. Brown requirement that per diem arguments be followed by an evidence/argument jury instruction sufficiently limits prejudice because the jury has capacity to distinguish between evidence and argument).

[15]Parodi, 111 Nev. at 368, 892 P.2d at 590 (noting that an error constitutes plain error if it prejudicially impacts the verdict).

videotape not admitted at trial. Because Toys "R" Us bases its claim for a new trial on the cumulative effect of this alleged misconduct, we find that it must be reviewed under the plain error doctrine.[16] To constitute plain error, the misconduct must sufficiently permeate the trial to provide conviction that the jury award was based on passion and prejudice.[17]

While the Hills' attorney's comments might have been inappropriate, they were not so pervasive as to taint the jury's verdict when considered against the substantial evidence supporting the jury's award.[18] Crystal testified that she has suffered extensive pain for over five years. She also testified that she can no longer dance, swim, or horseback ride as she used to, or perform housework, yard work, and cooking. Her relationship with her husband has suffered as she is constantly irritable and cannot enjoy sexual relations. Further, doctors testified that Crystal was permanently injured and will suffer chronic pain for the remainder of her life, projected at thirty-one years. Therefore, we

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[16]Failure to object to improper attorney misconduct precludes appellate review, even if the appeal is asserted under NRCP 59(a)(6). See Southern Pac. Trans. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1236 (1978). When a party fails to preserve an issue for appeal, this court will only review the issue if it constitutes plain error. Parodi, 111 Nev. at 368, 892 P.2d at 590.

[17]Barrett v. Baird, 111 Nev. 1496, 1515, 908 P.2d 689, 702 (1995).

[18]See Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 25, 16 P.3d 415, 419 (2001) (holding that attorney's comments were inappropriate, but "were not so pervasive as to taint the jury verdict when considered against the overwhelming evidence").

find that substantial evidence supports the jury's award, and thus, the verdict was not prejudicially impacted by the Hill's attorney's comments.[19]

Nine months prior to trial, the Hills offered to settle for $274,999 for Crystal's claim, and $24,999 for Gerald's claim. Toys "R" Us rejected the offers, but failed to obtain a more favorable judgment at trial. Therefore, the district court awarded the Hills $209,000 in attorney fees under NRCP 68(f)(2). In determining whether to award attorney fees pursuant to NRCP 68, the district court is required to weigh specific factors enumerated in Beattie v. Thomas.[20] The district court only stated that it found the Beattie factors satisfied, but did not specify how they were satisfied. However, the district court clearly considered the Beattie factors as the Hills argued the factors in their motion for attorney fees, Toys "R" Us' opposition to the motion asserted the factors were not met, the district court stated that the factors were satisfied, and substantial evidence supports the factors.[21]

The Beattie factors include whether: (1) Toys "R" Us' defense was brought in good faith; (2) the Hills' offer was reasonable and in good faith; (3) Toys "R" Us' "decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith;" and (4) the fees sought by the Hills

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[19]Id.

[20]99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983).

[21]See Uniroyal Goodrich Tire v. Mercer, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995) (holding that record showed district court considered factors because parties argued the factors, the judge stated he evaluated the factors, and substantial evidence showed the factors were met).

"are reasonable and justified in amount."[22] Toys "R" Us contends that the district court abused its discretion in finding the third and fourth factors satisfied. "Unless the trial court's exercise of discretion [in evaluating the Beattie factors] is arbitrary or capricious, this court will not disturb the lower court's ruling on appeal."[23]

Here, Toys "R" Us admitted liability for the accident on the first day of trial and was aware when the offer was made that it would be liable to some degree for damages as its expert witness examined Crystal prior to the offers and found she was injured by the accident. Moreover, the Hills' settlement offers were reasonable, which Toys "R" Us does not dispute. There was considerable evidence of the extent of Crystal's injuries, and the jury's award of $1,025,600 for Crystal's damages and $241,362 for Gerald's damages was substantially larger than the offers. We hold, therefore, that the district court appropriately found that Toys "R" Us was unreasonable in rejecting the offer. Additionally, the Hills' attorneys spent a substantial number of hours on the case subsequent to the settlement offers, underwent a four-day trial, and the result of their efforts was successful. Thus, we hold the district court judge exercised sound discretion by finding the requested amount of attorney fees reasonable.

Toys "R" Us argues that the district court abused its discretion because it based the award of attorney fees on a contingency fee and

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[22]Beattie, 99 Nev. at 588-89, 668 P.2d at 274.

[23]Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985).

contingency fees are not "actually incurred" pursuant to NRCP 68(f)(2).[24] We find this argument meritless, as a contingency fee is a type of attorney fee and the Hills actually incurred this fee from the time of the offers. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. Valorie Vega, District Judge
Morris Pickering & Sanner
Denton & Lopez, Ltd.
Laxalt & Nomura, Ltd./Reno
Clark County Clerk

[24]NRCP 68(f)(2) provides that penalties for rejecting an offer may include "reasonable attorney's fees . . . actually incurred by the offeror from the time of the offer."