IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KRISTY ROBERTS, INDIVIDIUALLY AND AS SPECIAL ADMINISTRATOR FOR THE ESTATE OF DANIEL ROBERTS,
Appellant,
vs.
EUGENE P. LIBBY, D.O., AN INDIVIDUAL; AND EUGENE P. LIBBY, D.O., PC., A NEVADA PROFESSIONAL CORPORATION,
Respondents.

No. 66513

FILED

JUN 20 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a district court judgment entered following a jury verdict in a medical malpractice action and post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Appellants Kristy Roberts and the estate of Daniel Roberts (collectively "the Robertses") initiated a medical malpractice suit against respondent Dr. Eugene Libby and his professional corporation (collectively "Dr. Libby") for injuries arising out of a surgery that Dr. Libby performed on Daniel Roberts' arm. Before seeing Dr. Libby, Daniel underwent two surgeries to have hardware installed in his arm after breaking his ulna. Dr. Libby removed the hardware and closed three small muscle herniations in Daniel's arm. Daniel was subsequently diagnosed with compartment syndrome, which resulted in two additional surgeries and

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the loss of 70 percent of the muscle in his injured arm.[1] A jury ultimately found in favor of Dr. Libby. The district court thereafter awarded Dr. Libby costs, assigning Daniels' estate[2] and Kristy joint and several liability for that award.

In this appeal, we consider whether testimony from two defense witnesses was improperly admitted, whether the district court erred in denying the Robertses' motion for judgment as a matter of law and/or motion for a new trial,[3] and whether the district court abused its discretion by ordering joint and several liability for costs.[4]

We review a district court's decision to admit or deny evidence for an abuse of discretion. *Sheehan & Sheehan v. Nelson Malley & Co.*,

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

[2]Daniel passed away from causes unrelated to the injury at issue in this case.

[3]The Robertses' arguments concerning this motion are meritless. NRCP 50(a)(1) provides the district court may grant a motion for judgment as a matter of law "[i]f during a trial by jury, a party has been fully heard on an issue and on the facts and law a party has failed to prove a sufficient issue for the jury." But, where conflicting evidence exists on a material issue, "or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court." *Banks v. Sunrise Hospital*, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) (internal quotations omitted). Additionally, the Robertses failed to show they are entitled to a new trial under the grounds set forth in NRCP 59(a) as any error here was harmless. We therefore conclude the district court did not err in denying the Robertses' motion for judgment as a matter of law and/or motion for a new trial.

[4]We have carefully considered the Robertses' remaining arguments regarding their motions and conclude they are without merit.

121 Nev. 481, 492, 117 P.3d 219, 226 (2005). NRCP 16.1(a)(2)(B)[5] requires an expert witness to provide a written report containing the expert's opinions "to be expressed and the basis and reasons therefor [and] the data or other information considered by the witness in forming the opinions." A treating physician, however, is exempt from the report requirement when that physician testifies to "opinions [that] were formed during the course of treatment." *FCH1, LLC v. Rodriguez*, 130 Nev. ___, ___, 335 P.3d 183, 189 (2014) (quoting *Goodman v. Staples the Office Superstore, L.L.C.*, 644 F.3d 817, 826 (9th Cir. 2011); *see also* NRCP 16.1. drafter's note (2004 amendment) ("The requirement of a written report applies only to an expert who is retained or specially employed to provide expert testimony in the case"). If a treating physician testifies outside the scope of treatment, the physician "testifies as an expert and is subject to the relevant requirements." *FCH1*, 130 Nev. at ___, 335 P.3d at 189. 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).

The Robertses contend that the district court erred when it allowed Daniel's treating physician, Dr. Andrew Bronstein, to opine as to Daniel's medical care provided by other physicians. We disagree. Here, Dr. Bronstein offered opinions concerning the surgery performed by Dr. Libby only days before Dr. Bronstein performed Daniel's emergency

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[5]Though the supreme court filed an amendment to NRCP 16.1 on May 6, 2016, the changes do not take effect until July 5, 2016 and the amendment does not change the portions cited.

surgery. Dr. Bronstein testified that he consulted with Dr. Libby at UMC regarding Daniel's prior surgery involving the hardware removal and muscle herniations. This information was important in understanding Daniel's later complication involving compartment syndrome. Moreover, Dr. Bronstein testified that in order to treat Daniel, he relied on Daniel's medical history, Dr. Libby's post-operative reports, and conversations directly with Dr. Libby. Thus, under these facts, the district court did not err when it allowed Dr. Bronstein to testify to opinions concerning Dr. Libby's medical treatment regarding the hardware removal surgery, and Daniel's medical care after the surgery, because the information was critical to Dr. Bronstein's own emergent intervention.

Next we consider whether the district court erred by permitting defense expert Dr. Daniel Horowitz to testify to a previously undisclosed opinion. "This court reviews a district court's decision to allow expert testimony for an abuse of discretion." *Hallmark v. Eldridge,* 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

NRCP 16.1(a)(2) requires written disclosures of each party's experts, as well as the experts' opinions "well in advance of trial." *Sanders v. Sears-Page,* 131 Nev. ___, ___, 354 P.3d 201, 212 (Ct. App. 2015). In relevant part, NRCP 16.1(a)(2)(B) provides an expert report "shall contain a *complete* statement of all opinions to be expressed and the basis and reasons therefor." (Emphasis added). The policy underlying NRCP 16.1 "serves to place all parties on an even playing field and to prevent trial by ambush or unfair surprise." *Sanders,* 131 Nev. at ___, 354 P.3d at 212.

Here, Dr. Horowitz's report broadly stated that Dr. Libby "performed a reasonable and appropriate surgery" and the expert report specifically discussed both hardware removal and closing the fascia. Thus,

the report encompassed closing the fascia in assessing that Dr. Libby did not breach the standard of care. Although it is arguable that the better practice would have been for Dr. Horowitz to supplement the record to describe in more detail his opinion of Dr. Libby's performance of the surgery, we cannot conclude under these facts that Dr. Horowitz testified to an undisclosed opinion.

Dr. Horowitz may have offered an undisclosed opinion by testifying that the compartment syndrome would have been evident within eight to twelve hours, rather than three days later as happened in this case. However, this testimony was offered to contradict the Robertses' expert's testimony that the compartment syndrome occurred as a result of closing the fascia. Thus, as the district court noted, Dr. Horowitz's testimony on this point may have been permissible to impeach the Robertses' expert's testimony that the compartment syndrome likely set in immediately after Dr. Libby's surgery.

But, even assuming the district court erred in allowing this testimony, the error does not warrant a reversal. In light of the substantial evidence supporting the jury's verdict, the Robertses have not shown the outcome of the case would have changed had this testimony not been given. *See generally Levine v. Remolif*, 80 Nev. 168, 390 P.2d 718 (1964) (concluding that precluding an expert from testifying was harmless error because the expert's testimony would not have changed the outcome of the case); *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (providing that in order to establish that an error is prejudicial and therefore warrants a reversal, "the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"). And, the defense

presented substantial evidence that Daniel's injuries were a known complication from the surgery, and that Daniel knew of this potential complication and consented to take the risk.

We next consider whether the district court erred by ordering Kristy Roberts and Daniel Roberts' estate jointly and severally liable for costs.[6] We review a district court's award of costs for an abuse of discretion. *Borgerson v. Scanlon*, 117 Nev. 216, 221, 19 P.3d 236, 239 (2001). In *Mayfield v. Koroghli*, 124 Nev. 343, 184 P.3d 362 (2008), the supreme court addressed cost apportionment in the context of a single prevailing plaintiff and multiple non-prevailing defendants. The court instructed that where a prevailing plaintiff pursues claims against multiple defendants and these claims arise out of the same factual circumstances, the district court has discretion to conclude apportionment of costs among defendants is impracticable if the claims are so intertwined that apportionment is impracticable or impossible. *Id.* at 353, 184 P.3d at 368-69. But before denying apportionment, the district court must first attempt to apportion costs and then "make specific findings, either on the record during oral proceedings or in its order, with regard to the circumstances of the case before it that render apportionment impracticable." *Id.* at 353-54, 184 P.3d at 369.

Although *Mayfield* dealt with apportioning costs among defendants, we note the Nevada Supreme Court in *Mayfield* adopted the

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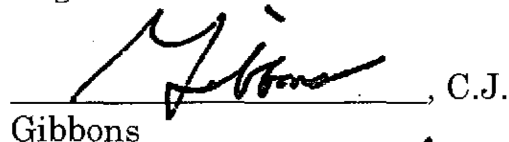
[6]We note that although the district court's order stated it "denied" the Robertses' motion to clarify, the district court, by ordering joint and several liability, in fact granted the motion and clarified its earlier order. This clarification was proper under *Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977), and renders moot the issue on appeal concerning the Robertses' motion for clarification of order of costs.

California Court of Appeal's reasoning from *Abdallah v. United Savings Bank*, 51 Cal.Rptr.2d 286, 293 (1996), where a defendant was the prevailing party and the plaintiffs sought to apportion costs. Accordingly, the *Mayfield* rationale applies in this case, and the lack of specific findings in the district court's order as to why it found joint and several liability to costs violates *Mayfield*. Moreover, nothing in the record appears to reflect that the district court attempted to apportion costs before ordering joint and several liability.[7] When the supreme court employs mandatory language, like that used in *Mayfield*, we are constrained to follow those instructions. We therefore conclude the district court should have made specific findings on the record as to why it ordered joint and several liability in this case as the appropriateness of apportionment is a factual issue that we can only review on appeal after a determination by the district court. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.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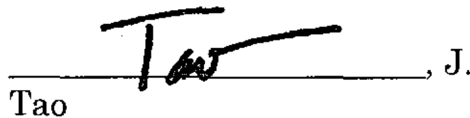
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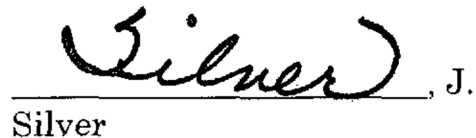
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[7]The order suggests the court held a hearing on the motion, but that transcript was not transmitted to this court on appeal. *See* NRAP 30(b)(3). Generally we presume missing portions of the record support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 608, 172 P.3d 131, 135 (2007). However, because nothing in the order or the record suggests the district court made the necessary factual findings, we conclude remand is nevertheless appropriate in this case.

cc: Hon. Gloria Sturman, District Judge
Ara H. Shirinian, Settlement Judge
Bowen Law Offices
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Eighth District Court Clerk