

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GILBERT RIVERO,
Appellant,
vs.
ANTONIO MARCELO,
Respondent.

No. 73371

FILED

MAY 18 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Gilbert Rivero appeals from a district court judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; David M. Jones, Judge.¹

Rivero and respondent Antonio Marcelo² were involved in an automobile collision.³ While Rivero was stopped at a traffic light, Marcelo drove his vehicle into the rear of Rivero's vehicle. Subsequently, Rivero filed a complaint for damages against Marcelo alleging that Marcelo's negligence had exacerbated a pre-existing back condition Rivero suffered from, which required Rivero to undergo surgery. Marcelo conceded liability, but contested that his negligence caused Rivero any injury or damages.

Marcelo identified Jubal Hamernik, Ph.D., P.E., as a retained expert in biomechanical engineering to render opinions about the physical

¹Judge Kenneth Cory presided over the pretrial motions in limine that are relevant to this appeal.

²In his original complaint, Rivero also named Scott Hubacek as a defendant; however, Hubacek was later dismissed with prejudice from the case by stipulation.

³We do not recount the facts except as necessary to our disposition.

forces involved in the accident. Rivero filed a motion in limine to exclude Hamernik's testimony, which was denied without explanation.

The case proceeded to a jury trial. After Rivero's voir dire examination of Hamernik, the district court allowed Hamernik to testify as an expert in biomechanical engineering. During direct examination, Marcelo's counsel asked Hamernik if "this accident [was] capable of producing injury." Rivero's counsel objected and the district court sustained that objection. Marcelo's counsel then asked Hamernik if, in his opinion, "this accident [was] capable of producing injury in the general population." Rivero's counsel did not object to this question. Hamernik answered the question in the negative. Rivero's counsel did not object to this response.

The jury returned a defense verdict for Marcelo. Rivero appeals from the district court's judgment on the jury's verdict.

Rivero argues the district court abused its discretion and committed reversible error by permitting Hamernik to testify about the "unlikelihood of injury in a low-speed collision to the general population." He contends that the district court improperly delegated its gate-keeping function to the jury by characterizing Rivero's voir dire challenges to Hamernik as impeachment material for cross-examination rather than a demonstration that Hamernik's opinion testimony "fails to meet the threshold requirements for admissibility."

"We review a district court's decision to admit expert testimony for an abuse of discretion." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Id.*

To testify as an expert witness, the witness must be qualified in an area of specialized knowledge,⁴ the testimony must assist the trier of fact, and the testimony must be limited to the scope of the expert's knowledge. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). A witness's testimony will assist the trier of fact "only when it is relevant and the product of reliable methodology." *Id.* at 500, 189 P.3d at 651. To determine if the witness's opinion is based upon reliable methodology, the district court should consider, among other things, "whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." *Id.* at 500-01, 189 P.3d at 651-52. If the witness formed the "opinion based upon the results of a technique, experiment, or calculation, then a district court should also consider whether (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute." *Id.* at 501-02, 189 P.3d at 652.

Hallmark requires a district court to determine if an expert's expected testimony will assist the trier of fact in understanding the evidence or determine a fact in issue. *Id.* at 500, 189 P.3d at 651. However, *Hallmark* does not dictate which factors determine the outcome of the district court's analysis, as "[a]n expert's testimony will assist the trier of fact only when it

⁴Rivero does not contest that Hamernik qualifies as an expert.

is relevant and the product of reliable methodology”—both discretionary determinations. *See id.* at 500-02, 189 P.3d at 651-52 (noting that the factors to determine if an expert’s testimony is the product of a reliable methodology “are not exhaustive, may be accorded varying weights, and may not apply equally in every case”).

Here, Hamernik did not offer any evidence that biomechanics was a recognized field of expertise. Further, he did not personally examine the vehicles at issue or the site of the accident. And, while he testified during voir dire that he does not “offer opinions regarding injuries,” he opined in front of the jury that the general population would likely not suffer injuries from an accident like the one that occurred here.

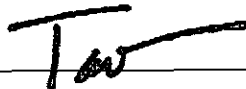
Despite these deficiencies, Hamernik relied on evidence specific to this particular accident to form his opinions. He examined photographs and measurements of the vehicles taken by his associate. Further, he examined repair estimates from the service center that repaired Rivero’s vehicle. He also reviewed published vehicle data about both vehicles. Hamernik testified about his opinions concerning the speed of the vehicles involved in this accident, their change in velocity, and the likely movement of Rivero and Marcelo within their respective vehicles.

Where the record on appeal, as in this case, contains facts that both support and oppose the district court’s decision that an expert’s testimony will assist the trier of fact, we cannot conclude that “no reasonable judge could reach a similar conclusion under the same circumstances.” *See Leavitt*, 130 Nev. at 509, 330 P.3d at 5. Thus, we conclude the district court did not abuse its discretion by permitting Hamernik to testify.

Moreover, even if we agreed with Rivero that the district court should not have permitted Hamernik to testify, such an error would only be

reversible if it “substantially affected” Rivero’s rights. *Hallmark*, 124 Nev. at 505, 189 P.3d at 654. This showing 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 omitted). However, Rivero did not include the entire trial transcript in the record on appeal, leaving this court only to speculate about what other evidence the jury considered and what effect Hamernik’s testimony may have had on the outcome of the trial.⁵ Thus, even if the district court erred in permitting Hamernik to testify, we cannot conclude that error requires reversal here. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (“When an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.”). Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, J.
Gibbons

SILVER, J., concurring:

I concur in result only. I believe that Rivero properly preserved his objection to Marcelo’s biomechanical expert testifying as to Rivero’s injury through both a motion in limine and objection during trial. Hamernik is

⁵Rivero only included an excerpt of the trial transcript containing Hamernik’s testimony.

simply not a qualified competent expert to testify to injuries sustained because he is not a medical doctor. That said, any error as to Hamernik's testimony regarding injury to the general population is harmless, as Rivero was able to present to the jury his own expert's medical testimony that the collision exacerbated Rivero's pre-existing injury. *See 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").


_____, C.J.
Silver

cc: Hon. David M. Jones, District Judge
Jay Young, Settlement Judge
Greenman Goldberg Raby & Martinez
Cooper Levenson, P.A.
Eighth District Court Clerk