

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMETTE SCOTT,  
Appellant/Cross-Respondent,  
vs.  
JIAN YING ZHOU,  
Respondent/Cross-Appellant.

No. 37158

FILED

JUL 11 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND  
REMANDING

Jimette Scott appeals from the district court's award of attorney fees to Jian Ying Zhou. Scott asserts that the district court abused its discretion by awarding attorney fees to Zhou. Zhou cross-appeals, asserting that the district court abused its discretion by denying her motion for additur. Additionally, Zhou has asked that NRAP 38 sanctions be imposed against Scott for filing a frivolous appeal. We conclude that Scott's argument has merit and that Zhou's arguments are without merit. Accordingly, we conclude that the decision of the district court should be reversed in part, affirmed in part and remanded to the district court for further proceedings.

Scott asserts that the district court abused its discretion by awarding Zhou \$10,000.00 in attorney fees pursuant to NRS 18.010(2)(a). Scott argues that the award was excessive and that the district court should have considered the fact that Zhou was not entitled to attorney fees under NAR 20 when making its award of fees pursuant to NRS 18.010(2)(a). Additionally, Scott asserts that the district court abused its discretion because it failed to articulate any basis upon which it relied in making its award of attorney fees.

While we recognize that existing law has separated awards made under NRS 18.010(2)(a) from awards made under NAR 20,<sup>1</sup> we conclude that the district court abused its discretion when it failed to consider the fact that Scott improved her position on liability from arbitration to trial. NAR 20 and NRS 18.010 fail to explicitly provide for the situation where a defendant requests a trial de novo and succeeds at trial in improving her position on liability; however, since the award of attorney fees under NRS 18.010(2)(a) is discretionary, the district court should have considered the fact that Scott, after requesting a trial de novo, successfully convinced the jury to reduce the amount of Zhou's judgment. Otherwise, defendants who have meritorious grounds for requesting a trial de novo, would be deterred from doing so merely out of the fear of being held responsible for all the additional attorney fees incurred from going to trial.

Accordingly, we conclude that the district court's award of attorney fees to Zhou should be reversed, and the matter should be remanded to the district court so that it may determine a reasonable attorney fee award for Zhou in light of the fact that Scott was successful in convincing the jury to reduce the size of Zhou's judgment.

On cross-appeal, Zhou asserts that the district court abused its discretion by denying Zhou's motion for additur after the jury failed to award Zhou damages for her past pain and suffering. At trial, the jury received two instructions that dealt with compensation for Zhou's past pain and suffering. Instruction No. 23 stated:

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<sup>1</sup>See Panicaro v. Robertson, 113 Nev. 667, 669, 941 P.2d 485, 486 (1997).

In determining the amount of losses, if any, suffered by the Plaintiff as a proximate result of the accident in question, you will take into consideration the nature, extent and duration of the injuries or damage you believe from the evidence Plaintiffs have sustained, and you will decide upon a sum of money sufficient to reasonably and fairly compensate Plaintiff for the following items:

1. The reasonable medical expenses Plaintiff has necessarily incurred as a result of the accident from the date of the accident to the present.

2. The physical and mental pain, suffering, anguish and disability endured by the Plaintiff from the date of the accident to the present.

Instruction No. 24 stated:

No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

Zhou contends that the district court should have granted her motion for additur because the jury manifestly disregarded the above instructions when it concluded that Scott should be held liable for Zhou's medical expenses, but that Zhou was not entitled to any damages for past pain and suffering.

A district court is given wide discretion in deciding motions for additur.<sup>2</sup> A district court's decision to deny a motion for additur will not be disturbed on appeal absent an abuse of that discretion.<sup>3</sup> Nonetheless, the court has granted additur on appeal when the damages awarded were clearly inadequate or shocking to the court's conscience.<sup>4</sup>

As indicated by the jury instructions, the jury was not required to award damages for past pain and suffering merely because it also awarded damages for past medical expenses. We note that testimony on cross-examination tended to refute the fact that Zhou had experienced any pain and suffering. Assessing the credibility and the degree of weight that testimony should be given is within the sole province of the jury.<sup>5</sup> It was within the sole province of the jury to weigh the testimony before it when it determined whether Zhou was entitled to compensation for past pain and suffering. Therefore, we conclude that the decision of the district court denying Zhou's motion for additur should be affirmed.

Finally, Zhou argues that Scott should be subjected to NRAP 38 sanctions because it was unreasonable for Scott to argue that the district court abused its discretion when it awarded attorney fees pursuant to NRS 18.010.

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<sup>2</sup>Donaldson v. Anderson, 109 Nev. 1039, 1041, 862 P.2d 1204, 1206 (1993).

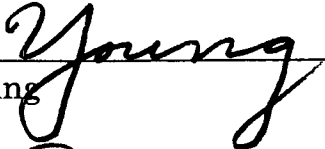
<sup>3</sup>Id.

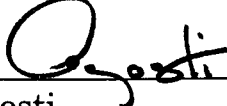
<sup>4</sup>Id. at 1042, 862 P.2d at 1206.

<sup>5</sup>See Young v. Nevada Title Co., 103 Nev. 436, 441, 744 P.2d 902, 904 (1987) (holding that questions of credibility and the weight to be given to the testimony of witnesses is within the sole province of the trier of fact).

As indicated by our earlier analysis on this issue, it was not frivolous for Scott to argue that the district court should have considered the fact that Scott improved her position on liability from arbitration to trial. Moreover, it was not frivolous for Scott to challenge the amount of the award or to challenge the district court's failure to properly articulate a basis for the award in its order. Therefore, we conclude that Scott should not be subjected to NRAP 38 sanctions. 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.

  
\_\_\_\_\_, J.  
Young

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Leavitt

cc: Hon. Michael L. Douglas, District Judge  
Leach & English  
Bruce D. Schupp  
Clark County Clerk