IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY WILLIAMS, Appellant, vs. STEPHEN DOUTEL, INDIVIDUALLY; AND AMBASSADOR LIMOUSINE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP, Respondents.	No. 69663 **FILED** AUG 30 2017 ELIZABETH A. BROWN CLERK OF SUPREME COURT BY S. Young DEPUTY CLERK
RANDY WILLIAMS, Appellant, vs. STEPHEN DOUTEL, INDIVIDUALLY; AND AMBASSADOR LIMOUSINE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP, Respondents.	No. 70091

ORDER OF AFFIRMANCE

Randy Williams appeals from a final judgment after a jury trial in a personal injury tort action. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Williams, while driving a vehicle owned by Ambassador Limousine (collectively, respondents), rear-ended appellant's vehicle when appellant was stopped at a stop sign. Respondents stipulated to breaching their duty of care, and proceeded to trial on the issue of whether the accident caused appellant's damages. The jury returned a defense verdict. Thereafter, the district court awarded costs to respondents.

Sufficiency of the Evidence

Appellant first challenges the sufficiency of the evidence in the record to support the verdict, but he did not move for a directed verdict and

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thereby waived this argument. Where a party fails to move for a directed verdict, and the jury returns a verdict against him, the question of sufficiency of the evidence is unreviewable unless that party can demonstrate "there is plain error in the record or if there is a showing of manifest injustice." *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981) (quoting *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969)). Under manifest injustice review,[1] we will direct a new trial only when there is "no substantial conflict in the evidence upon any material point, and the verdict or decision [is] against such evidence upon such point, or where the verdict or decision strikes the mind, at first blush, as manifestly and palpably contrary to the evidence." *Price*, 85 Nev. at 608, 460 P.2d at 842 (citation omitted).

The record on appeal plainly demonstrates a conflict in the evidence regarding whether this car accident caused any damages to appellant. We conclude the jury's verdict does not strike the mind, at first blush, as manifestly and palpably contrary to the evidence, and therefore we must affirm. Moreover, on this record, we conclude that even if appellant had not failed to move for a directed verdict, we would likely have affirmed the judgment. *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 839, 102 P.3d 52, 64 (2004) (requiring denial of a directed verdict where there is conflicting evidence on a material issue or if reasonable persons could draw different inferences from the facts).

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[1]Williams argues that there is "plain error" in the record but does not identify any specific "error" other than his viewpoint that the verdict was clearly wrong and the other alleged errors discussed in this order. Thus, Williams has failed to identify any specific errors for "plain error" review of the verdict, and this court's review is limited to deciding whether a "manifest injustice" would result from upholding the verdict.

Evidentiary objections to the defense experts' testimonies

Appellant raises a series of evidentiary objections relating to the defense experts' testimonies. Appellant raised these issues in a series of motions in limine below, and the district court entered detailed pretrial orders explaining what testimony would be permissible at trial. But when the defense experts testified related to these matters, appellant did not contemporaneously object. A motion in limine will sufficiently preserve an evidentiary objection for appeal "where [the] objection has been fully briefed, the district court has thoroughly explored the objection during a hearing on a pretrial motion, and the district court has made a definitive ruling." *Richmond v. State*, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). Otherwise, 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. *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). We conclude that the evidentiary challenges made in pretrial motion practice are preserved for appeal, but any new issue created by the testimony at trial that is not covered by the district court's pretrial rulings has been waived.[2]

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[2]Respondents also argue that some of appellant's arguments on appeal regarding the expert testimony rely on new legal theories not presented to the district court. "Parties may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below." *Dermody v. City of Reno,* 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989)). Having reviewed the record, we disagree with respondents' position, and given the Nevada Supreme Court's policy of favoring resolving cases on the merits, reject this argument. *See Huckabay Props. v. NC Auto Parts*, 130 Nev. 196, 203, 322 P.3d 429, 433 (2014) (explaining that this court prefers to decide cases on the merits.)

This court reviews the district court's order in limine allowing the admission of such expert testimony for an abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) ("This court reviews a district court's decision to allow expert testimony for abuse of discretion."); *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005); *see also Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances."). Relatedly, "[w]e review a district court's decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court's exercise of its discretion absent a showing of palpable abuse." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). But when the evidentiary ruling rests on a legal interpretation of the evidence code, this court reviews the ruling de novo. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012).

Appellant challenges the respondents' experts' testimonies on various grounds, which he divides into two categories: (1) that the district court erred in allowing respondent's experts to testify regarding appellant's psychological condition and to their opinion that he displayed secondary gain motives as such testimony was beyond the scope of their expertise, and (2) the district court erred in allowing respondents' experts to speculate that appellant and his treating physicians' motivation for claiming injury and prescribing treatment was purely financial. To the extent that any trial testimony violated the district court's pretrial rulings or raised new concerns on these topics that were not covered by the pretrial rulings, because appellant did not challenge the testimony, the district court did not

have a chance to correct any alleged error and the district court is not obligated to cure evidentiary matters sua sponte.

Therefore, we review this matter to the extent that the pretrial rulings did allow the trial testimony. NRS 50.275 and *Hallmark v. Eldridge* govern the admissibility of expert witness testimony generally. 124 Nev. at 498, 189 P.3d at 650; *see also Higgs v. State*, 126 Nev. 1, 17-18, 222 P.3d 648, 658-59 (2010); *see generally Perez v. State*, 129 Nev. 850, 313 P.3d 862 (2013). But, despite its general admissibility, expert testimony is impermissible when it tends to usurp the role of a jury in weighing conflicts in evidence or commenting on the veracity of other witnesses. *See, e.g., In re Assad*, 124 Nev. 391, 399-400, 185 P.3d 1044, 1049-50 (2008) (stating that expert testimony is properly excluded "[i]f it is irrelevant or if it impermissibly encroaches on the trier of fact's province" and stating "the rules of evidence concerning the admissibility of expert testimony do not distinguish between civil and criminal proceedings and many of our civil cases discussing NRS 50.275 rely on criminal cases."); *Cordova v. State*, 116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (holding that "[a]n expert may not comment on a witness's veracity or render an opinion on a defendant's guilt or innocence") (quoting *Lickey v. State*, 108 Nev. 191, 827 P.2d 824 (1992)).

Here, the district court's pretrial rulings adequately reflected Nevada law. Further, to the extent that the district court allowed any of the trial testimony at issue by its pretrial rulings, it was not an abuse of discretion to do so on this record.[3] We conclude that the respondents

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[3]The record provides adequate support for the conclusion that neurosurgeons and pain management specialists routinely consider potential psychological explanations for their patients' complaints, and are qualified to make such observations. Relatedly, the record supports the

adequately complied with the requirements of the pretrial rulings and, to the extent that they did not, those arguments were waived by appellant's failure to contemporaneously object.

The collateral source rule

Appellant argues that the district court erred in allowing collateral source testimony in this trial. "The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor;" thus, evidence of a collateral source of payment is *per se* inadmissible for any purpose. *Khoury v. Seastrand*, 132 Nev. ___, ___, 377 P.3d 81, 93-94 (2016) (quoting *Proctor v. Castelletti*, 121 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996)).

Similarly, evidence of medical providers selling their liens to third parties "is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion." *Id.* at ___, 377 P.3d at 93. However, an exception to the collateral source rule is that evidence of the existence of a medical lien is admissible to show bias, though it is the duty of the district court to keep the questioning within reasonable limits. *Id.* at ___, 377 P.3d at 94.

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conclusion that they routinely consider the possibility of secondary gain motives and malingering in their diagnostic evaluations. Finally, we do not agree with appellant that respondents' experts unlawfully speculated that appellant and his treating physicians were purely financially motivated; rather, our reading of the record shows they provided observations of billing and treatment practices in this case compared to the community, based on their professional experiences, and rendered reasonable, lawfully confined opinions thereon.

There was undisputed testimony throughout trial that many of appellant's healthcare providers treated him on a lien. Further, Dr. Schifini testified that some of the treating physicians sold their liens: "There was [sic] even instances in this particular case that were pointed out where interest in medical bills by a provider were sold to another company for pennies on the dollar . . . ." We agree that this testimony constituted collateral source evidence and was irrelevant. However, the appellant objected to the evidence, and the district court sustained the objection. Therefore, the evidence was not admitted, and no error occurred. *Cf. Walker v. State*, 78 Nev. 463, 467-68, 376 P.2d 137, 139 (1962) ("The court, however, sustained appellant's objection to the question, and no prejudice to the appellant therefore resulted.").

The appellant complains on appeal that, in addition to sustaining the objection, the district court should also have ordered that the evidence be stricken as well. However, the appellant has provided no authority for the contention that a sustained objection is insufficient to cure an error unless it is also accompanied by the granting of a motion to strike. *Cf. Burns v. State*, 88 Nev. 215, 219, 495 P.2d 602, 604 (1972) ("the district judge properly sustained defense counsel's objections. Burns on appeal claims that the judge committed reversible error in failing to admonish the jury to disregard the colloquy between the district attorney and Burns. We disagree . . ."); *see also Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (This court need not consider claims that are not cogently argued or supported by relevant authority.)

Moreover, the record does not clearly establish that the appellant's motion to strike was properly preserved. During the trial, the appellant objected to the evidence and also asked that it be stricken. In

response, the court conducted a sidebar conference with both counsel that the parties and the court failed to record or memorialize. Immediately following the sidebar, the court announced that it was sustaining the objection but made no comment on the motion to strike, and thus it is not clear whether the motion to strike was still pending or whether it had been withdrawn during the sidebar. Under these circumstances, we cannot conclude that the sustaining of the objection was insufficient by itself to cure any alleged error.

The judgment for costs and expert witness fees

Appellant argues that the district court's award of costs was unreasonable and that the court violated *Frazier v. Drake*, 131 Nev. ___, 357 P.3d 365 (Ct. App. 2015) in awarding expert fees. However, appellant has waived any contest to the award of costs because he failed to file a motion to retax costs[4] and, even if this court were inclined to liberally construe his opposition as a motion to retax, he included no substantive argument regarding the reasonableness of the costs and expert witness fees requested, and thus provided the district court no objection to respondents' request for fees in excess of the $1,500 presumptive limit. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (holding a party waived the right to contest costs on appeal by failing to move the district court to retax costs); *Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983 ("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."). Thus, the district court did not err in granting the requested costs

[4]*See* EDCR 2.20(e) (failure of a party to file a written opposition may be construed as an admission that the motion is meritorious).

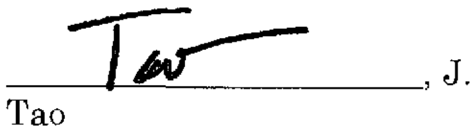
and expert witness fees in this situation, and that appellant waived any substantive contest to the award.

Appellant also argues that the judgment is nonetheless void because it was untimely. Appellant's argument is wrong on its face because the statutory period of NRS 18.110(1) is, by its own terms, not a jurisdictional requirement. *See* NRS 18.110(1) (". . . within 5 days after the entry of judgment, or such further time as the court or judge may grant"); *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

______________________, C.J.
Silver



______________________, J.
Tao

______________________, J.
Gibbons

cc: Hon. Kerry Louise Earley, District Judge
Thomas J. Tanksley, Settlement Judge
Armstrong Teasdale, LLP/Las Vegas
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Eighth District Court Clerk