IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSHUA KALANI NIETO,
Appellant,
vs.
ERICA ELIZABETH CHANDLER,
Respondent.

No. 76148-COA

FILED
MAR 26 2020
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Joshua Kalani Nieto appeals from a final judgment following a jury trial in a tort action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.[1]

After a motor vehicle collision, Nieto sued Erica Elizabeth Chandler for various negligence claims.[2] Well in advance of trial, Chandler made an offer of judgment to Nieto for $40,000. A dispute arose as to whether Nieto or his attorney, who subsequently withdrew, properly accepted Chandler's offer. Ultimately, the district court determined that Nieto had failed to accept the offer and set the case for trial. Chandler stipulated to liability, and the case proceeded to trial before a jury on damages only.[3]

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[1]The original caption for this matter included Cary Chandler, who is not a party to this appeal. As a result, the clerk of this court shall amend the caption for this case to conform to the caption on this order.

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

[3]Nieto abandoned his wage loss claim at trial, and only sought damages for medical expenses, and past and future pain and suffering.

During direct examination, Nieto testified that he could not work for "[a]lmost one month" after the car accident while he waited for drug test results.[4] Outside the presence of the jury, the district court addressed with the parties the admission of Nieto's payroll records near the time of the car accident. Nieto objected to their admission as irrelevant and without foundation as well as being too prejudicial. Chandler argued that the records were relevant, substantive evidence because they contradicted Nieto's testimony that he did not work for one month following the car accident. At trial, Chandler was permitted to cross-examine Nieto regarding the payroll records demonstrating that he was in fact paid following the accident in order to contradict his earlier testimony that he was unable to work. Following Nieto's testimony, the district court admitted the payroll records into evidence.

Ultimately, the jury returned a verdict for Nieto in the amount of $12,860.99. As the jury did not award Nieto more in damages than covered by the offer of judgment, Chandler moved for attorney fees and costs under NRCP 68. The district court granted Chandler's motion, and after awarding Chandler attorney fees pursuant to the offer of judgment, entered a final judgment in favor of Chandler. This appeal followed.

Nieto argues that the district court abused its discretion by admitting his payroll records at trial and further argues that the offer of judgment was invalid and, therefore, Chandler should not have been awarded attorney fees. We begin by addressing Nieto's arguments regarding the admission of his payroll records. Nieto argues that his payroll records were irrelevant and lacked proper foundation for admission, and

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[4]The drug test was required as part of his employer's company policy.

further, even if they were relevant, any probative value was substantially outweighed by the danger of unfair prejudice.

"Trial courts have considerable discretion in determining the relevance and admissibility of evidence." *Thomas v. Hardwick*, 126 Nev. 142, 151, 231 P.3d 1111, 1117 (2010) (internal quotation marks omitted). Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). It is within the trial court's discretion to decide whether to admit or exclude evidence after balancing its prejudicial effect against its probative value. *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 243, 577 P.2d 1234, 1235 (1978). NRS 48.035 favors admissibility, and a district court's decision regarding whether evidence is prejudicial "will not be disturbed unless it is manifestly wrong." *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (internal quotation marks omitted).

As relevant here, "[i]mpeachment by use of extrinsic evidence is prohibited when collateral to the proceedings." *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004). "Collateral facts are by nature outside the controversy, or are not directly connected with the principal matter or issue in dispute." *Id.* (internal quotation marks omitted). Consequently, extrinsic evidence is noncollateral if it is "crucial to the issue directly in controversy" or subject to another exception to the rule. *Abbott v. State,* 122 Nev. 715, 736, 138 P.3d 462, 476 (2006); *see also Jezdik v. State*, 121 Nev. 129, 138-39, 110 P.3d 1058, 1064-65 (2005) (adopting the doctrine of

"specific contradiction," *see* discussion *infra* p. 5); 1 Robert P. Mosteller, *McCormick on Evidence* § 49 (8th ed. 2020) (identifying two methods by which extrinsic evidence of a prior inconsistent statement is noncollateral: (1) "if the matter itself is relevant to a fact of consequence on the historical merits of the case," and (2) if the extrinsic evidence relates to a "linchpin" fact of the case).

Our review of this issue first centers on whether the payroll records were truly collateral and irrelevant to Nieto's claims made at trial. Here, Nieto argues that his payroll records were both collateral and irrelevant because he was not making a wage loss claim, or any type of economic damage claim, at trial. Given that Nieto abandoned his wage loss claim and the payroll records were not relevant to his remaining claims, we conclude the payroll records were collateral and thus extrinsic to the proceedings.

Nevertheless, Chandler argues that the payroll records remained relevant because they were probative of Nieto's "general damages and . . . [the] seriousness of his complaints." Chandler further argues that Nieto, by testifying on direct examination at trial that he missed one month from work, opened the door thereby allowing Chandler to use the payroll records for impeachment purposes, even though they constituted extrinsic evidence. It should also be noted that Nieto, in his response to Chandler's interrogatories, indicated that he had missed two weeks of work. Thus, there was a contradiction in his own testimony as to the amount of work he had missed following the accident.

Although the payroll records were collateral or extrinsic to Nieto's remaining claims at trial, we agree that Nieto's testimony on direct examination potentially "opened the door" for him to be cross-examined on

the issue of missed work by using his payroll records. In *Jezdik*, 121 Nev. at 138-39, 110 P.3d at 1064-65, the Nevada Supreme Court adopted the doctrine of "specific contradiction." Specific contradiction arises when a party seeks to introduce evidence in rebuttal to contradict specific factual assertions raised during the witness's direct examination. *Id.* at 139, 110 P.3d at 1064. "Under this exception, the defendant's false statements on direct examination trigger or open the door to the curative admissibility of specific contradiction evidence." *Id.* at 138, 110 P.3d at 1064 (internal quotation marks omitted). The supreme court held that "when a party resorts to extrinsic evidence to show a specific contradiction with the adversary's proffered testimony, the evidence should squarely contradict the adverse testimony." *Id.* at 139, 110 P.3d at 1065. Such testimony provides a "valuable aid to the jury in assessing [a party's] credibility." *Id.* at 139-40, 110 P.3d at 1064 (internal quotation marks omitted).

Here, however, Nieto also argues that Chandler failed to call a witness to provide appropriate foundation for the admission of the payroll records to support that the records contradicted his testimony. Specifically, during cross-examination, there was no witness to testify that being paid on a given day per the payroll records meant that Nieto had in fact worked on that day, contrary to Nieto's testimony. Therefore, Nieto argues, the payroll records should have been excluded as they lacked the proper foundation for admission. Nieto further testified on cross-examination that he was not in charge of payroll and therefore did not know how it worked, but testified that he did not work following the accident (even if the payroll records showed he was paid)—with only the actual amount of time he missed from work being in dispute. Based on the lack of foundation for the payroll records, we agree that the district court abused its discretion in

admitting the records to impeach Nieto's credibility regarding his ability to work following the accident.

Nevertheless, even if the admission of the payroll records constituted an abuse of discretion, it was harmless error. To be reversible, an error must affect a party's substantial rights. *Cf.* NRCP 61. An error is harmless when it does *not* affect a party's substantial rights. *Id.* To demonstrate that an error is not harmless, a party "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." *Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016); *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219-20 (2008). The inquiry is fact-dependent and requires this court to evaluate the error in light of the entire record. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010); *Boyd v. Pernicano*, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963) ("[I]t is our duty to search the record as a whole, and exercise a judicial discretion in deciding whether the error is harmless or reversible in nature.").

Nieto argues that the admission of the payroll records constitutes reversible error because the probative value of the records was substantially outweighed by the prejudicial effect—unfairly tarnishing his credibility in front of the jury. However, Nieto fails to demonstrate how the admission of the payroll records affected his substantial rights such that "but for the alleged error, a different result might reasonably have been reached." *Wyeth*, 126 Nev. at 465, 244 P.3d at 778.[5]

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[5]Based on our review of the record, during closing argument Nieto requested damages for past medical expenses in the amount of $24,678.87, past pain and suffering in the amount of $50,000 and future pain and

In this case, based on entirety of the evidence contained in the record below and as presented at trial, we conclude that payroll records in and of themselves did not affect Nieto's substantial rights and, therefore, the admission of these records constituted harmless error. For example, at trial Nieto conceded that he was *not* fired for his inability to physically perform his job duties, but rather for playing video games and watching movies during work hours. He also contradicted his previous testimony regarding how much time he missed from work following the accident. This testimony arguably adversely affected Nieto's credibility more than the admission of the payroll records. Equally important, Chandler's medical expert contested the extent of Nieto's medical damages, and Chandler presented additional evidence demonstrating that: (1) Nieto's airbags did not deploy; (2) no emergency medical aid was required at the scene of the accident; (3) Nieto did not immediately seek medical attention; (4) Nieto has worked several physically laborious jobs since the accident; and (5) Nieto

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suffering in the amount of $7,500. Chandler argued that Nieto had failed to prove that his chest complaints were related and overall his injuries were not as extensive as he claimed. Chandler suggested awarding $7,099 for his medical expenses, excluding the medical expenses for the chest pain, and $5,000 for past pain and suffering because Nieto had suffered only soft tissue injuries that had resolved in a few months. The jury returned a verdict nearly mirroring Chandler's suggestions: $7,860 for past medical expenses and $5,000 for past pain and suffering. Here, we have no cogent argument or legal authority to support that a different jury award might have been "reasonably reached" if the payroll records had not been admitted. Specifically, the jury found only some of Nieto's medical expenses to be related to the accident, and that his soft tissue injuries had resolved in a few months. Therefore, it is reasonable to conclude that the medical records and related medical testimony (versus the admission of the payroll records) resulted in a lesser award to Nieto than what he asked for during closing argument.

has not been treated for his injuries in years. And while Nieto's physician testified that all of Nieto's medical expenses were reasonable and necessary, that physician had not treated Nieto in several years, and his treatment was only responsible for a small portion of Nieto's expenses. Consequently, the jury awarded Nieto less medical expenses than he requested. In summary, based on the evidence in the record, including Nieto's testimony, along with the additional fact that neither party particularly relied on the payroll records in their closing arguments, we are unable to conclude that a different result at trial would have been reached had the payroll records been excluded.

Moreover, on appeal, Nieto only speculates that the outcome at trial would have been different but for the admission of the payroll records. He offers no factual or legal support for his argument—except to point out the difference in the amount of Nieto's verdict in comparison to Chandler's $40,000 offer of judgment. However, the possibility of receiving a smaller award than an offer of judgment is one of the inherent risks a party assumes when rejecting such an offer. Thus, we conclude that his argument fails to meet the standards articulated in NRCP 61, *Khoury*, and *Wyeth*. As Nieto failed to demonstrate how he was unfairly prejudiced by the admission of the payroll records, we conclude that the district court's admission of those records was harmless error.

Nieto next argues that the district court abused its discretion by honoring the offer of judgment because the offer was ambiguous and contained an impermissible condition precluding an award of attorney fees. Although the district court did not address this issue below, we agree and conclude that Chandler's offer of judgment was legally invalid. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) ("The ability of this

court to consider relevant issues *sua sponte* in order to prevent plain error is well established.").[6]

"[A]ny party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions." Former NRCP 68(a).[7] However, "[a]n offer of judgment must be unconditional and for a definite amount in order to be valid for purposes of NRCP 68." *Pombo v. Nev. Apartment Ass'n*, 113 Nev. 559, 562, 938 P.2d 725, 727 (1997); *see also Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010) (noting the rule that an offer of judgment must be unconditional as an example of "formal requirements" to which such offers must adhere).

Here, the offer of judgment included a provision that stated, "[n]o attorney's fees are to be added to this amount and this Offer is voided by an award of same." This language in the offer constitutes an impermissible condition thereby rendering the offer of judgment invalid under *Pombo*. 113 Nev. at 562, 938 P.2d at 727. Therefore, we reverse the district court's order awarding attorney fees and costs pursuant to the offer of judgment. *See Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035, 923 P.2d 569, 575 (1996) (providing that an invalid offer of judgment could not provide a proper basis for attorney fees and costs).

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[6]Because we conclude that the offer was legally invalid, we need not address the other specific grounds for reversal urged by Nieto.

[7]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). All orders in this case were entered before March 1, 2019. Accordingly, we cite to the prior version of NRCP 68.

Finally, because an award of attorney fees to Chandler was based solely on the offer of judgment, on remand, there is no basis for awarding attorney fees to Chandler over Nieto—the prevailing party.

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.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
Stephen E. Haberfeld, Settlement Judge
Bowen Law Offices
Gentile Law Group
Eighth District Court Clerk