

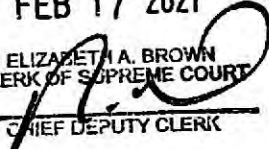
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

PARK APTS, INC., D/B/A ANDOVER
PLACE APARTMENTS,
Appellant,
vs.
REINA ANGELINA CISNEROS,
Respondent.

No. 79982-COA

FILED

FEB 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Park Apts, Inc. dba Andover Place Apartments appeals from a final judgment in a personal injury action. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

This case arises from a slip-and-fall accident. Reina Angelina Cisneros (Ms. Cisneros), a tenant of Park Apts, Inc. (Park Apts), suffered a serious wrist injury after slipping and falling on a pathway outside of her residence.¹ Ms. Cisneros underwent surgery for her injury and later filed a lawsuit against Park Apts.

The case proceeded to a bench trial. On cross-examination of Ms. Cisneros, Park Apts's counsel asked her if she recalled testifying on direct examination that she slipped and fell on the sloped part of a pathway. Ms. Cisneros responded affirmatively. Park Apts's counsel then asked if she recalled not being able to remember any details of her slip-and-fall accident during her deposition. Ms. Cisneros's counsel objected that the question misstated her deposition testimony. Because neither party proffered her original deposition with the referenced testimony to the district court, the court did not rule on the objection as stated. Instead, the court sustained Ms.

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

Cisneros's objection on the grounds that Park Apts's attorney phrased its question improperly for impeachment purposes. Although Park Apts argued that NRCP 32(a) allowed it to impeach Ms. Cisneros with her deposition testimony, the district court reiterated that its basis for sustaining the objection was the way Park Apts's counsel phrased the question in order to be able to use Ms. Cisneros's transcript for impeachment. Park Apts elected not to pursue this line of questioning.

The district court ultimately awarded Ms. Cisneros damages in the amount of \$50,620.20, which included special damages of \$17,245.20.² Although these special damages were based on medical costs she incurred from the Flamingo Surgery Center (FSC) in the amount of \$18,347.60, and Dr. Ryan Grabow's treatment in the amount of \$4,646.00, the district court did not admit the exhibits containing the billing records of FSC or Dr. Grabow. However, Dr. Grabow, Ms. Cisneros's treating physician and her expert witness at trial, reviewed the FSC billing records during his testimony and opined that the amount of the charges reflected in the FSC bill was in the range of charges for similar surgeries, and the bill "looked very reasonable."³ Dr. Grabow also testified his surgical bill was "usual and customary" and agreed that the specific charges contained in both medical bills were not only reasonable but also necessary because of the information

²The court initially awarded \$22,993.60 in special damages, which included the surgical facility expenses from FSC of \$18,347.60, and Dr. Ryan Grabow's bill of \$4,646.00, and then subtracted twenty-five percent for Ms. Cisneros's comparative fault for a total special damages award of \$17,245.20.

³We note that at trial Dr. Grabow testified that the FSC bill was itemized and that \$14,000 and \$347 were the costs related to the operation and \$4,000 represented the cost of the vendor who provided the hardware used for the surgery. Added together, these charges total \$18,347.

Ms. Cisneros provided regarding her medical history, which he included in his initial note, information he gathered from the emergency department, and an operative report regarding her fall and broken wrist. Although the district court sustained Park Apts's objection to allowing Ms. Cisneros's counsel to read the exact amount of the FSC bill into the record, it allowed Dr. Grabow to testify as to the reasonable charges for the services FSC provided. *See supra* note 3. The district court then allowed Dr. Grabow to testify as to the amount of the FSC bill, as well as his surgical bill. In the judgment, the district court stated that it relied on the *testimony* of Plaintiff and Dr. Grabow in awarding special damages. This appeal followed.

Park Apts advances two arguments on appeal. First, it contends the district court erred by sustaining Ms. Cisneros's objection to Park Apts's questioning her regarding her testimony at deposition because in doing so the court prohibited Park Apts from being able to impeach Ms. Cisneros using her deposition. Second, Park Apts claims the district court erred when it allowed an expert witness to testify regarding the amount of Ms. Cisneros's medical bills, and relied on that testimony when awarding special damages, when Ms. Cisneros failed to introduce the medical bills into evidence. We address each argument in turn.

First, Park Apts argues the district court erroneously prohibited it from impeaching Ms. Cisneros during its cross-examination pursuant to NRS 50.075 and NRCP 32(a)(2), which allow a party to impeach a witness with inconsistent deposition testimony. Park Apts specifically argues that Ms. Cisneros provided inconsistent testimony during direct examination as compared to her deposition testimony.⁴ Park Apts also avers that had it been

⁴Park Apts also maintains the district court should have allowed it to use Ms. Cisneros's deposition testimony because it intended to refresh the

given the opportunity to impeach Ms. Cisneros with her deposition testimony, it would have been able to prove that she was not credible.

This court reviews the district court's rulings on objections related to the use or admission of testimony for an abuse of discretion. *Thompson v. Thompson*, 49 Nev. 375, 247 P. 545, 548 (1926). A district court does not abuse its discretion by ruling on a party's objection when the opposing party has an opportunity to defend the propriety of its question but does not do so. *Id.* Additionally, this court reviews "a district court's decision to exclude [or admit] evidence for an abuse of discretion," and will not disturb the district court's exercise of discretion "absent a showing of palpable abuse." *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013) (internal quotation omitted).

Further, this court will not disturb the district court's order or judgment if the district court's error in admitting or excluding evidence was harmless. *Cf.* NRC 61; *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010). "An error is harmless when it does not affect a party's substantial rights." *Wyeth*, 126 Nev. at 465, 244 P.3d at 778. "[I]f the moving party shows that the error is prejudicial, reversal may be appropriate." *Id.* (citing *Cook v. Sunrise Hosp. & Med. Ctr.*, 124 Nev. 997, 1006-07, 194 P.3d 1214, 1219-20 (2008)). To demonstrate an error is prejudicial, "the movant must show that the error affects the party's substantial rights" such that, but for the district court's error, "a different result might reasonably have been

witness's recollection. However, Park Apts never attempted to ask the district court if it could refresh Ms. Cisneros's recollection with her deposition testimony. Ms. Cisneros's counsel merely asked the court if he could "make an offer of proof on the issue" and stated that "NRC 32(a) allows [him] to impeach with a deposition transcript."

reached.” *Id.* The inquiry is fact-dependent; thus, this court must review the entire record to evaluate the error. *Id.*

The record reveals that the district court did not bar Park Apts from using deposition testimony to impeach Ms. Cisneros, but rather only ruled, much more narrowly, that counsel phrased the question improperly. Counsel asked whether Ms. Cisneros recalled “not being able to recount any details of [her] fall at [the] deposition.” Ms. Cisneros’s counsel objected, stating Park Apts misstated her deposition testimony. The district court expressly refused to rule on whether the question misstated testimony, stating that it could not do so because the parties had not provided the court with the deposition testimony. Nevertheless, the district court sustained Ms. Cisneros’s objection, concluding that the way Park Apts phrased the question for impeachment purposes was improper. Counsel did not try to rephrase the question but instead moved on to a different topic.

The district court properly sustained Ms. Cisneros’s objection based on the way Park Apts’s counsel phrased his question. On appeal, Park Apts frames the court’s ruling broadly as precluding it from being able to impeach Ms. Cisneros at trial using any part of her deposition testimony. However, the district court’s actual ruling was narrow in upholding Ms. Cisneros objection, noting explicitly that it was not making a broader decision based on the substance of her testimony and its ruling was limited to “the one question as phrased.”⁵ Although it had the opportunity, Park Apts never tried to rephrase the question but instead moved on to other

⁵The district court confirmed this during Park Apts’s motion for a new trial hearing: “The issue with regards to utilizing the deposition transcript wasn’t the basis of sustaining the objections. . . . [T]he Court sustained the objection as phrased.”

topics.⁶ We find no abuse of the district court's discretion in sustaining Ms. Cisneros's objection under these circumstances.

Second, Park Apts argues that this court should strike the district court's special damages award because it was erroneously based on unadmitted medical billing records.⁷ We disagree.

⁶During Park Apts's motion for a new trial hearing, the district court reiterated that it "only sustained [the objection] for the way that you phrased the question . . . [and] did not prevent you at any point from reasking the question."

⁷We note that the question of whether or not certain exhibits were admitted appears ambiguous based upon the existing record. At calendar call, the parties stated they "agreed to all of the exhibits," but no specific exhibits were discussed, and the entire exchange was brief. Later during the trial, the parties began to disagree as to which exhibits should be admitted, and the court determined that the parties had agreed to preserve their objections to all exhibits for the time of trial as set forth in their pretrial memorandums, and therefore, had not agreed to the wholesale admission of the exhibits. Unfortunately, this resulted in some confusion as to the parties' intent with respect to the admission of certain exhibits, including the medical bills.

Pursuant to NRCP 16.1(a)(3)(B), unless otherwise ordered by the district court, pretrial disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless otherwise ordered by the court, a party may file an objection, together with the grounds for it, as to the admissibility of materials identified under NRCP 16.1(a)(3)(A)(iii), which includes trial exhibits. Any objection *not* made—except for relevancy objections under NRS 48.025 and NRS 48.035—is typically waived unless excused by the district court for good cause or otherwise stipulated by the parties. The purpose of this procedure is to require objections such as authenticity to generally to be made in advance of trial in order to streamline the trial process. However, medical testimony still would be required to establish the relevancy of a medical bill, for example, including that it was necessarily incurred. Here, although the parties failed to comply with the

This court reviews a district court's calculation of an award of damages for an abuse of discretion. *Dynamic Transit Co. v. Trans Pac. Ventures, Inc.*, 128 Nev. 755, 762-63, 291 P.3d 114, 118 (2012). Additionally, this court reviews the district court's factual findings for an abuse of discretion, and we will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838, 335 P.3d 211, 214 (2014).

Further, the party seeking special damages must provide the opposing party with a computation of said damages.⁸ See NRCP

letter of the rule in how they handled exhibits at calendar call and trial, neither party objected on this basis.

It is also worth noting that at calendar call the district court questioned Ms. Cisneros's counsel about the large number of PMK (person most knowledgeable) witnesses that were listed in the pretrial memorandum. Counsel responded that it would not be necessary to call the PMKs at trial because "we agreed to all the exhibits coming in." Park Apts's counsel, who was present at the time, apparently also agreed and did not object. Subsequently, however, Park Apts's counsel filed a trial brief to exclude Ms. Cisneros's medical bills based on failure to demonstrate authenticity, and also made this argument at the time of trial. Ms. Cisneros did not object that this violated Rule 16.1(a)(3)(B) in view of any agreement set forth at calendar call. Because the medical bills were not admitted into evidence, and indeed were returned to Ms. Cisneros's counsel at the conclusion of trial, we need not decide whether the bills were properly authenticated and admitted. *Cf. Sanders v. Sears-Page*, 131 Nev. 500, 354 P.3d 201 (Ct. App. 2015).

⁸We note Ms. Cisneros included a computation of damages in her initial disclosures, and it does not appear that Park Apts is challenging the special damages awarded based on a failure to provide a computation of damages.

16.1(a)(1)(A)(iv); *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 264, 396 P.3d 783, 786 (2017). The same party must also prove she was damaged “and the amount thereof.” *Gibellini v. Klindt*, 110 Nev. 1201, 1206, 885 P.2d 540, 543 (1994). Though “the amount of special damages need not be mathematically exact,” there must be an “evidentiary basis for determining an amount that is reasonably accurate.” *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 737, 192 P.3d 243, 251 (2008). However, this court must vacate the district court’s damages award if the party seeking them fails to satisfy her burden of proving said damages. *See Paullin v. Sutton*, 102 Nev. 421, 424, 724 P.2d 749, 750 (1986).

At issue in this case is whether the district court properly awarded special damages based on medical bills that were *not* admitted into evidence at trial. Instead, the district court permitted Dr. Grabow to testify regarding Ms. Cisneros’s past medical expenses incurred as a result of her fall. Specifically, the court allowed Dr. Grabow to confirm the reasonableness and necessity of the charges on his surgical bill and the FSC bill where he performed the surgery. These are the only two bills at issue on appeal.

The district court did not abuse its discretion in awarding Ms. Cisneros special damages based on Dr. Grabow’s testimony. *See Pizarro-Ortega*, 133 Nev. at 266-68, 396 P.3d at 788-89 (where a medical expert was permitted to testify regarding the reasonableness of past expenses based on another witness’s report, and to provide an estimate of reasonable future medical expenses based on personal knowledge).

Here, Dr. Grabow had the requisite personal knowledge to testify regarding the past medical expenses Ms. Cisneros incurred for her surgery. During his testimony, Dr. Grabow discussed his surgical procedure as well as the equipment and personnel necessary to perform the type of surgery he performed on Ms. Cisneros. During direct examination, Dr. Grabow testified

he often operates at FSC, is familiar with their billing practices, and does medical record reviews “for both Work Comp and personal injury and insurance defense.” Dr. Grabow also listed the many procedures and equipment necessary for the type of surgery Ms. Cisneros underwent: consistent need for IV fluid in the pre-operation and post-operation holding areas and rooms, a metal plate and screws for the surgery, x-rays, sutures, anesthesia equipment, and oxygen tanks. He also testified about the personnel needed: x-ray technicians, anesthesiologists, scrub technicians, circulators, nurses, and surgeons. Dr. Grabow also testified as to the range of costs associated with the type of surgery performed on Ms. Cisneros, including: \$400 to \$900 for a metal plate, \$2,000 to \$3,000 for an endoscopic carpal tunnel surgery, and \$15,000 to \$40,000 for a distal radial fracture surgery. Finally, Dr. Grabow testified he was familiar with the type of billing codes associated with the aforementioned procedures, equipment, and personnel.


Importantly, Dr. Grabow testified that his surgery at FSC was necessary to treat Ms. Cisneros’s condition, and that his charges, as well as those of FSC, were reasonable and customary. Though the district court did not admit these medical bills into evidence, this alone is not dispositive as to whether there was sufficient evidence to award special damages in the form of medical expenses to Ms. Cisneros. Here, Dr. Grabow testified, based on his review of his bill and the FSC bill, that both bills were in the reasonable and customary range for the costs associated with the type of surgery he had performed—a range of \$15,000 and \$40,000.

Because Dr. Grabow’s testimony is evidence, and he had the requisite personal knowledge to support the necessary foundation for the district court to award Ms. Cisneros part of her medical costs, we conclude the court properly considered his testimony in awarding special damages.

Further, because Park Apts did not present any medical evidence or testimony to contradict or refute Dr. Grabow's expert testimony regarding these costs, (nor did it object to Dr. Grabow's testimony in this regard), there was uncontroverted evidence to enable the district court to determine that \$18,347.60 and \$4,646.00 were "reasonably accurate" medical costs and to award a percentage of these costs as special damages.⁹ Therefore, substantial evidence supports the special damages awarded by the district court, and the court did not abuse its discretion in making the award.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Joanna Kishner, District Judge
Boyack Orme & Anthony
Richard Harris Law Firm
Eighth District Court Clerk

⁹Applying Dr. Grabow's testimony, the district court's award of special damages of \$17,245.20 was within the range of what would be reasonable and customary for the medical treatment Ms. Cisneros received.