

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ROBERT J. CHICARELLI,
Appellant,
vs.
RESURRECCION OCAMPO, M.D.,
Respondent.

No. 80143-COA

FILED

MAR 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *E. Brown*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Robert J. Chicarelli appeals from a judgment pursuant to a jury verdict in favor of Dr. Resurreccion Ocampo in a professional negligence case. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Chicarelli suffers from epilepsy and has struggled to control his seizures all his life.¹ His seizure disorder left him partially disabled and reliant on others for care. Chicarelli was taking many medications intended to control his seizures, including two benzodiazepines: Klonopin and Onfi.

In June 2015, Chicarelli was admitted to Desert View Hospital in Pahrump for altered mental status. At admittance, a hospital employee filled out a medication reconciliation form, which listed all of the medications Chicarelli was prescribed and taking at home, including Klonopin and Onfi. The admitting physician signed the form and ordered several medications for Chicarelli, including Klonopin. However, there was a question mark on the form next to Onfi and no physician ordered staff to administer the drug. The next day, another doctor conducted a history and physical examination and did not include Onfi in his report notes, nor did the doctor order Onfi.

¹We recite the facts only as necessary for our disposition.

The following day, Dr. Resurreccion Ocampo decided to discharge and transfer Chicarelli to another hospital because Dr. Ocampo determined that Chicarelli needed psychiatric treatment, which was unavailable at Desert View. Dr. Ocampo created a discharge and transfer summary report in which she listed medications the hospital ordered for Chicarelli, including Klonopin. However, she did not review the medication reconciliation form and did not list Onfi in her transfer report.

Chicarelli was ultimately transferred to North Vista Hospital in Las Vegas, where he did not receive Klonopin. After a few days at North Vista, Chicarelli went into status epilepticus, which is a type of long-lasting and uncontrollable seizure. Multiple experts testified at trial and explained that benzodiazepine withdrawal likely caused the status epilepticus episode. Chicarelli was placed in a medically induced coma and placed on a ventilator. When he awoke, Chicarelli was transferred to a long-term rehabilitation facility.

Chicarelli sued Dr. Ocampo for professional negligence,² alleging that she breached the standard of care when she did not review and sign the medication reconciliation form, which would have told her that Chicarelli needed Onfi. During the jury trial, Chicarelli presented evidence that he went into status epilepticus because of the cessation of both Onfi and Klonopin; he accordingly alleged that Dr. Ocampo was negligent, along with several of the other doctors who cared for him, and partially responsible for his damages. Chicarelli presented evidence that Dr.

²Chicarelli also sued one of the treating physicians at North Vista Hospital, as well as Desert View and North Vista hospitals. However, the district court dismissed the hospitals from the case and the other physician settled prior to trial.

Ocampo's conduct fell below the standard of care because there was a hospital policy for transferring/discharging doctors to review and sign the medication reconciliation form before discharging a patient. Conversely, Dr. Ocampo presented evidence that removal of Klonopin was the primary factor for Chicarelli's injury, and that Dr. Ocampo did not breach the standard of care because there was no policy or other requirement that she review and sign the medication reconciliation form at discharge.

When the parties rested their cases, Chicarelli sought to introduce a concurrent-causes jury instruction:

There may be more than one proximate cause of an injury. When negligent conduct of two or more persons contributes concurrently as proximate causes of an injury, the conduct of each of said persons is a proximate cause of the injury regardless of the extent to which each contributes to the injury.

A cause is concurrent if it was operative at the moment of injury and acted with another cause to produce the injury. *It is no defense that the negligent conduct of a person not joined as a party was also a proximate cause of the injury.*

(Emphasis added.) Dr. Ocampo objected to this instruction, arguing that there was no evidence to support it. She further argued that the court issued other instructions that covered the issue. Specifically, instruction 24 defined proximate cause:

A proximate cause of injury, damage, loss[,] or harm is a cause which, in natural and continuous sequence produces the injury, damage, loss[,] or harm, and without which the injury, damage, loss[,] or harm would not have occurred.

Further, instructions 25 and 26 instructed the jury to complete a special verdict form "indicating the percentage of negligence, if any,

attributable to the non-parties” and the settling doctor because the parties claimed that “one or more non-parties are responsible” for the injury.

The district court agreed that testimony presented by Chicarelli that the cessation of both Onfi and Klonopin caused Chicarelli’s status epilepticus episode, which supported the concurrent-causes instruction. The court also noted that this was Chicarelli’s theory of the case. However, the court did not give the instruction, stating that it should have been presented sooner and that Chicarelli could still argue his theory of the case under the proximate cause instruction.³

During closing argument, Chicarelli argued that many of the treating physicians, including Dr. Ocampo, breached their respective standards of care and caused Chicarelli’s injury. Conversely, Dr. Ocampo stressed that only the doctors at North Vista were responsible, because they failed to give Klonopin to Chicarelli, which ultimately led to his uncontrollable seizures.

After Dr. Ocampo’s closing and outside the presence of the jury, the district court sua sponte admonished defense counsel that its refusal to give the concurrent-causes instruction was not permission to incorrectly state the law. The court believed Dr. Ocampo suggested to the jury that there could be only one proximate cause of the injury—an inaccurate statement of law. The court said it should have given the concurrent-causes instruction and was worried there was reversible error. Chicarelli did not

³Chicarelli claims, without authority, that the instruction was timely while Dr. Ocampo does not argue about timeliness in her answering brief. Because Dr. Ocampo does not argue untimeliness, and the district court did not specifically find that the proposed instruction was untimely and exclude it, we do not address this issue.

move for a mistrial, request that the jury be instructed further, or take any other action. The jury ultimately found for Dr. Ocampo.

On appeal, Chicarelli argues that the district court committed reversible error when it failed to give the concurrent-causes instruction. Chicarelli asserts that by not giving the instruction, the court effectively removed his theory of the case. Dr. Ocampo argues that the concurrent-causes instruction was not warranted by law or supported by evidence at trial and that even if the court issued the instruction, the result would not have changed.

“We review a decision to admit or refuse a jury instruction for an abuse of discretion or judicial error.” *D & D Tire v. Ouellette*, 131 Nev. 462, 470, 352 P.3d 32, 37 (2015). “[A] party is entitled to jury instructions on every theory of [his] case that is supported by the evidence.” *Johnson v. Egtedar*, 112 Nev. 428, 432, 915 P.2d 271, 273 (1996) (citations omitted). “[T]he offering party must demonstrate that the proffered jury instruction is warranted by Nevada law.” *D & D Tire*, 131 Nev. at 470, 352 P.3d at 38. We review whether a jury instruction accurately states Nevada law de novo. *Id.* at 470, 352 P.3d at 37.

Chicarelli argues that the court should have given the concurrent-causes instruction because it was his theory of the case that there were multiple proximate causes for his injury. Dr. Ocampo argues that the court did not need to give the instruction because it was not required by law, supported by evidence at trial, and that the other instructions sufficiently informed the jury about proximate cause. We agree with Chicarelli that the court should have given the instruction.

In *Banks ex rel. Banks v. Sunrise Hospital*, the Nevada Supreme Court determined that a concurrent-causes instruction was

appropriate in a medical malpractice case where the parties presented conflicting testimony over the cause of the injury. 120 Nev. 822, 842, 102 P.3d 52, 65-66 (2004). In *Banks*, the appellant argued that malfunctioning equipment at the hospital caused his injury, while the respondent argued that the doctor performing surgery caused the injury. *Id.* The court noted that the “instruction cautioned jurors that, even if [respondent] was not the sole cause of the injury, but a contributing cause, the jury could still find [respondent] liable.” *Id.* The instruction presented in *Banks* is identical to the one Chicarelli offered. *See id.*

This case is similar to *Banks* in that the parties presented conflicting testimony regarding the cause of injury. Chicarelli argues that Dr. Ocampo’s conduct was one piece of proximate cause that ultimately led to Chicarelli’s status epilepticus episode. Conversely, Dr. Ocampo argues that only the North Vista doctors’ conduct caused Chicarelli’s injury. Trial testimony supported Chicarelli’s allegation. Chicarelli’s witnesses opined that removing both Onfi and Klonopin caused the injury. However, other testimony supported Dr. Ocampo’s defense theory because her expert opined that removing Klonopin was the primary factor, but admitted that removing Onfi could have contributed to the injury. The district court further admitted that Chicarelli’s theory of the case was that there were multiple causes of injury. Therefore, the concurrent-causes instruction was supported by evidence presented during trial and warranted by Nevada law.

However, “[i]f one instruction adequately covers a given theory of liability or defense, it is preferable that the court refuse additional instructions relating to the same theory, though couched in different language.” *D & D Tire*, 131 Nev. at 471, 352 P.3d at 38 (quoting *Duran v. Mueller*, 79 Nev. 453, 460, 386 P.2d 733, 737 (1963)). Dr. Ocampo argues

that instructions 24, 25, and 26 sufficiently covered Chicarelli's theory of the case, that Chicarelli was not prevented from arguing his theory of the case, and Chicarelli did present evidence of multiple causes to the jury. Yet, none of the other jury instructions specifically informed the jury that there may be more than one proximate cause to an injury. *See Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 797 (2004) (defining proximate cause as "any cause which in natural, [foreseeable] and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred." (emphasis added)). Therefore, the district court abused its discretion when it failed to provide the concurrent-causes instruction.

We next decide whether the district court's decision prejudiced Chicarelli such that the jury might have reached a different result. "[P]rejudice must be established in order to reverse a district court judgment; it is not presumed and is established by providing record evidence showing that, but for the error, a different result might have been reached." *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (regarding a jury instruction issue). "The burden is upon the appellant to show the probability of a different result." *Truckee-Carson Irrigation Dist. v. Wyatt*, 84 Nev. 662, 667, 48 P.2d 46, 50 (1968). We must review the record as a whole to resolve whether a different result might have been reached. *Cook*, 124 Nev. at 1006, 194 P.3d at 1219 (citing *Wyatt*, 84 Nev. at 666-68, 48 P.2d at 49-50).

Chicarelli argues that the court's failure to properly instruct the jury prejudiced the outcome of the trial, while Dr. Ocampo argues that the result would not have been different. Chicarelli failed to file a reply brief to

respond to Dr. Ocampo's assertions that the result would not have changed. Instead, Chicarelli relies on the district court's belief that it committed a prejudicial error. Chicarelli generally claims the error was prejudicial and reversible, but he fails to explain how a different result might have been reached if the concurrent-causes instruction was given, which is required for us to reverse the district court's judgment. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority); see also *Cook*, 124 Nev. at 1006, 194 P.3d at 1219.


Although we conclude the district court should have given the jury instruction, the record also suggests that the jury heard about and likely understood it was permitted to find there were multiple proximate causes to Chicarelli's injury. During Chicarelli's closing argument, he clearly argued that Dr. Ocampo was not the only cause of Chicarelli's injury, and indeed requested that the jury apportion 17% of the fault to Dr. Ocampo. More importantly, even though the jury did not complete the special verdict form, the special verdict form did have questions asking the jury to apportion fault to all of the non-parties and the settling defendant.

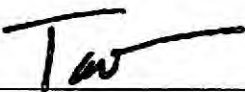
Furthermore, Chicarelli's argument is premised on the district court's belief that it may have committed a prejudicial error. Chicarelli, however, did not move for a mistrial, seek further instructions for the jury, or request any other action when there was still a chance to correct this supposed error. In addition, Chicarelli has not established with any authority that the district court's belief itself is a sufficient basis to warrant reversal. In fact, the court's belief that Dr. Ocampo's closing argument misstated the law appears to be factually incorrect; Dr. Ocampo's counsel

argued there was only one cause of the actual injury—removing the Klonopin. Therefore, Dr. Ocampo argued that she was not the *actual* cause of injury because she did not remove the Klonopin, and the district court did not understand the argument clearly.

Because Chicarelli did not meet his burden to show the probability of a different result if the concurrent-causes instruction was given, his appeal necessarily fails. *See Wyatt*, 84 Nev. at 667, 48 P.2d at 50; *cf.* NRCF 61 (stating the court must disregard all errors that do not affect substantial rights). Accordingly, we

AFFIRM the judgment of the district court.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

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