IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CARMINE RIGA, III, AN INDIVIDUAL,
Appellant,
vs.
SHAIYA MCNABB, AN INDIVIDUAL; AND RODNEY MCNABB, AN INDIVIDUAL,
Respondents.

No. 80856-COA

FILED

MAY 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Carmine Riga, III, appeals from a district court judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

This case arises from a car accident occurring in July 2015.[1] Shaiya McNabb was driving a truck owned by her father, Rodney McNabb (collectively referred to as the McNabbs). Shaiya was stopped at a red light when she decided to change lanes and reversed her truck striking the front end of Riga's car. Riga subsequently filed a complaint alleging negligence as to Shaiya and negligent entrustment and liability under the "Family Use Doctrine" as to Rodney. Riga alleged that he sustained significant injuries and that he required cervical surgery as a result of the accident.

Although the McNabbs ultimately conceded duty and breach, they disputed causation and damages. At trial, Riga asked for $1.3 million dollars in alleged damages, which included the costs of a cervical surgery, future surgery, months of lost wages, and pain and suffering related to the accident. The McNabbs argued that Riga's cervical spine issues necessitating surgery predated the car accident, the car accident did not

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

cause Riga's injuries as alleged, and Riga was exaggerating his symptoms. Following a five-day trial, the jury found in favor of the McNabbs, determining that Riga was not entitled to recover damages.

Without first having moved for a new trial in district court, Riga filed this appeal requesting that we reverse and remand for a new trial by arguing that McNabbs' counsel engaged in attorney misconduct and that the court abused its discretion in making certain rulings during trial. Riga further suggests that attorney misconduct was also involved with these rulings. However, Riga failed to object to a vast majority of the alleged instances of attorney misconduct during trial when the district court could have properly considered the objections and ruled on them, saving time and judicial resources. "Objections provide the trial court an opportunity to correct any potential prejudice and to avoid a retrial. This opportunity for correction may also obviate the need for an appeal." *Ringle v. Bruton*, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004).[2]

As a preliminary matter, we must determine whether Riga has properly preserved his arguments regarding attorney misconduct for our review without first having moved for a new trial below. Relying on the Nevada Rules of Appellate Procedure 3A(a), Riga avers on appeal that all

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[2]We note that during trial Riga preserved his objections to attorney misconduct involving the McNabbs' attorney's questioning of Dr. Cash. Riga objected twice on the grounds that the McNabbs' attorney interjected his opinion regarding Riga's character into the questioning. However, the district court sustained Riga's objections to this line of questioning based on counsel's commentary and instructed the attorney, "[l]et's go on." This is a textbook example as to why objections to attorney misconduct should be made on the record so that the district court has the opportunity to rule on them in a timely fashion and correct any potential prejudice.

appellate arguments are preserved with or without first moving for a new trial. We disagree.

When interpreting a statute, this court focuses on the words used in the statute. *See Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013) ("Our analysis begins and ends with the statutory text if it is clear and unambiguous."). Words are to be given "their plain and ordinary meanings unless the context requires a technical meaning or a different meaning is apparent from the context." *Lofthouse v. State*, 136 Nev., Adv. Op. 44, 467 P.3d 609, 611 (2020). The rules of statutory construction apply to court rules, including the NRAP. *Weddell v. Steward*, 127 Nev. 645, 651, 261 P.3d 1080, 1084 (2011).

NRAP 3A(a), "Standing to Appeal," provides that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, with or without first moving for a new trial." NRAP 3A(b) enumerates "Appealable Determinations," which include a final judgment entered in an action and "[a]n order granting or denying a motion for a new trial." NRAP 3A(b)(1)-(2). Thus, by its plain language, including its title, NRAP 3A(a) articulates who may bring an appeal, not whether an issue is preserved for appellate review, whereas 3A(b) summarizes the types of rulings that are independently appealable. Although a party has standing to appeal, it does not necessarily follow that the party has sufficiently preserved an issue for our review. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (providing that "[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, in this case, although Riga has standing before this court, as he is an aggrieved party who appeals from a final judgment, he did not preserve the issues related to attorney misconduct for appellate review.

Specifically, Riga largely failed to timely and properly object to each act of alleged attorney misconduct and failed to move for a new trial based on that misconduct before the district court in the first instance. *See Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008) (recognizing that a "timely and proper objection" must be made to preserve attorney misconduct claims for appellate review); *Old Aztec*, 97 Nev. at 52-53, 623 P.2d at 983-84; *Craig v. Harrah*, 65 Nev. 294, 306, 195 P.2d 688, 693 (1948) ("The reason of the long established rule for requiring that a motion for a new trial be made, and passed upon, before a consideration of the evidence can be had, is . . . that the trial court may first have an opportunity to rectify an error, if one was made, without subjecting the parties to the expense and annoyance of an appeal." (internal quotation marks omitted)); *Sauter v. Wasemiller*, 389 N.W.2d 200, 201-02 (Minn. 1986) (reaffirming the general rule that in order to preserve issues for appellate review, they must first be raised before the trial court in a motion for a new trial, as this allows the district court "time for reflection and the opportunity to consider the context in which the alleged error occurred and the effect it might have had upon the outcome of the litigation"); *see also Bato v. Pileggi*, Docket No. 68095 (Order of Affirmance, April 14, 2017) (concluding that the issue of attorney misconduct had been waived when no proper objection was raised and no motion for a new trial was made).

Accordingly, we conclude that on appeal Riga has waived his arguments regarding attorney misconduct, whether objected to or not below, by failing to move for a new trial before the district court. This failure prevented the district court from being able to consider the severity of the misconduct and its prejudicial impact on the outcome of the trial in the first

instance. After all, the district court is in the best position to evaluate the alleged misconduct and determine if a new trial is necessary.[3]

Further, without Riga first having moved for a new trial, we decline plain-error review of any attorney misconduct on appeal. In doing so, we emphasize that plain-error review is discretionary. *See, e.g.*, *Flowers v. State*, 136 Nev. 1, 8, 456 P.3d 1037, 1045 (2020) ("Plain error review is discretionary, not obligatory."); *Hoard v. Hartman*, 904 F.3d 780, 787 (9th Cir. 2018) (recognizing that plain-error review is discretionary); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 993 (3d Cir. 1996) ("In the absence of a party's preservation of an assigned error for appeal, we review for plain error, and our power to reverse is discretionary." (internal quotation marks omitted)).

In addition, the plain-error review by appellate courts as envisioned by *Lioce* presupposes that the appellant moved for a new trial in the district court. *Lioce*, 124 Nev. at 14, 174 P.3d at 978 ("In these appeals, we revisit the standards that the district courts are to apply when deciding a motion for a new trial based on attorney misconduct."). Thus, with the exception of its plain-error review, *Lioce*'s framework for assessing attorney misconduct does not apply to appellate courts. Because Riga failed to

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[3]We recognize that making objections to counsel's statements during closing is not ideal as it may interrupt the concentration of the jurors resulting in juror annoyance, or inadvertently draw attention to the misconduct thereby emphasizing the very statements that should not have been made. This why it is imperative that a request for new trial be made before the district court in the first instance, as the court having listened to the entire trial is in the best position to engage in plain error review and evaluate the prejudicial nature of the misconduct where an objection was not preserved.

preserve the acts of attorney misconduct for appellate review by first moving for a new trial, we conclude that he has waived these arguments.[4]

We now address the remainder of Riga's arguments, which were preserved for appellate review. Here, Riga argues that the district court committed reversible error in four instances: (1) admitting a previously undisclosed promotional video, (2) admitting testimony on conclusions in an undisclosed report, (3) admitting testimony as to conclusions not in a report, and (4) failing to admonish the jury.

"The district court enjoys broad discretion in determining whether evidence should be admitted." *Prabhu v. Levine*, 112 Nev. 1538, 1548, 930 P.2d 103, 110 (1996). This court "review[s] a district court's decision to admit or exclude evidence for abuse of discretion, and . . . 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).

First, Riga argues that the district court abused its discretion in allowing the McNabbs to refresh his recollection with a promotional video that he filmed for his attorney, wherein he stated that his attorney referred him to his chiropractor. Specifically, Riga contends that the district court erred by overruling his objection and that it abused its discretion in allowing the video to be used to refresh his recollection.

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[4]To be clear, we are not condoning all arguments made by the McNabbs' attorney during the course of the trial. Here, like in *Capanna v. Orth*, counsel "artfully word[ed] his argument as a hypothetical," but "veered from hypothetical" to nearly the exact scenario presented at trial. 134 Nev. 888, 891, 432 P.3d 726, 731 (2018). Thus, we take this opportunity to remind counsel that it is not acceptable to walk the fine line between making inferences from the facts and violating the "golden rule," and therefore, we strongly encourage counsel to stay away from that line and in safe territory.

At trial, the district court permitted the McNabbs to use the video in order to refresh Riga's recollection regarding who referred him to his treating chiropractor because he testified that he could not remember. *See* NRS 50.125. Riga objected to the video on the grounds of relevancy, which remains Riga's primary concern on appeal. Indeed, Riga contends that the use of the video turned his testimony into a "laughing matter" for the jury. Importantly, however, the district court restricted the use of the promotional video at trial to refreshing Riga's recollection, only. The court found that because the McNabbs had not disclosed the video, nor indicated that they would be using the video during trial, the video or excerpts from it would not be published to the jury or admitted into evidence.

Further, while the district court permitted McNabbs' counsel to directly quote Riga's *own* statement from the video to refresh his recollection, rather than having Riga review the video and then testify, this procedure does not necessarily amount to an abuse of discretion. This is so because the statement in the video was Riga's own statement and was thus admissible as a prior inconsistent statement or a statement of a party opponent. *See* NRS 51.035(2)(a), (3)(a); *see also Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (holding that we will affirm the district court if it reaches the correct result, even if for the wrong reason). Consequently, any reference to Riga's statement on the promotional video was not unduly prejudicial not only because the statement was potentially admissible under the rules of evidence, but also because its use here was limited to refreshing Riga's recollection, which was permissible under these circumstances.

Even assuming that the district court somehow abused its discretion in permitting the video to be used to refresh Riga's recollection, Riga has not demonstrated that the court's decision affected his substantial

rights. *Cf.* NRCP 61. Nor has he demonstrated that but for the reference to his statement in the video, "a different result might reasonably have been expected." *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971). Therefore, we conclude that Riga has not established that the district court's decision regarding the limited use of the promotional video warrants reversal.

Second, Riga argues that the district court abused its discretion in allowing Dr. Tung to testify as to a previously undisclosed expert report. *See Khoury v. Seastrand*, 132 Nev. 520, 533, 377 P.3d 81, 90 (2016) ("This court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion."). Specifically, Riga alleges that he "faced undue prejudice and unfair surprise" when Dr. Tung, for the first time at trial, testified that the accident did not contribute to the need for surgery. The McNabbs argue that the district court did not abuse its discretion in allowing such testimony as the supplemental report was properly disclosed in accordance with the Nevada Rules of Civil Procedure.

Pursuant to NRCP 16.1(a)(2), parties are required to disclose the identity of anyone they intend to call as an expert witness at trial and to provide a written report to the extent one is required. Additionally, NRCP 26(e) requires a party to supplement expert disclosures within the time limits required by NRCP 16.1(a)(3) (providing that pretrial disclosures are due at least 30 days before trial).

Having reviewed the record, we conclude that the McNabbs timely disclosed Dr. Tung's supplemental report well before trial in accordance with NRCP 16.1 and NRCP 26(e). In particular, the record reveals that the report was disclosed twice—once shortly after it was written in April 2019 and again in September 2019, which was months before the 30

day time limit required by NRCP 16.1(a)(3). Accordingly, we conclude that the district court did not abuse its discretion in allowing Dr. Tung to testify in accordance with his supplemental report.

Third, Riga argues that the district court abused its discretion in allowing Dr. Cash, one of Riga's *treating physicians*, to testify as to the motive of "secondary gain," when no medical expert had opined that Riga exhibited a financial incentive for seeking medical treatment.

At trial, the McNabbs asked Dr. Cash to define the term secondary gain, to which Riga objected stating that it was a prejudicial term. The district court allowed the question because it was potentially relevant to the credibility of both Riga and the doctor, and that the question was within the doctor's knowledge and experience.

We conclude that the district court did not abuse its discretion in allowing the McNabbs to question Dr. Cash about secondary gain. A medical expert is permitted to testify regarding secondary gain based on his treatment of Riga and his overall experience in treating patients, even if the term secondary gain was not included in Dr. Cash's medical records or expert report. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 270 n.13, 396 P.3d 783, 791 n.13 (2017) (recognizing that it is within the district court's discretion to permit or exclude testimony regarding secondary gain). In fact, Dr. Cash testified that he was aware of secondary gain and considers it in the course and scope of treatment, stating, "I treat patients all the time, I look for secondary gain, whether they're involved in a court case or not and so do all the medical providers . . . ."

Further, because no doctor testified at trial that Riga was motivated by "secondary gain" or that he otherwise exhibited a financial reason for seeking treatment, including Dr. Cash, we conclude that the

district court did not abuse its discretion in allowing Dr. Cash's testimony on secondary gain, as it was not prejudicial to Riga.

Finally, Riga argues that even though the district court properly sustained his objection and disallowed Dr. Cash to answer the question about whether he writes down medical liens, the district court committed reversible error by not giving a limiting instruction or admonishing the jury based simply on the McNabbs' counsel asking the question.[5] The McNabbs respond that the district court did not abuse its discretion because Riga did not request any type of limiting instruction or admonishment following the sustained objection.

We conclude that the district court did not abuse its discretion, or otherwise commit reversible error, in failing to sua sponte give a limiting instruction or admonishment to the jury after sustaining the objection. Because Riga did not request a limiting instruction or admonishment from the court, he is precluded from arguing on appeal that the court erred in not providing one. *Cf. Stickney v. State*, 93 Nev. 285, 286-87, 564 P.2d 604, 605 (1977) (providing that a defendant's election not to have the jury admonished vitiates any objection the defendant may have had regarding the reference); *see also Walker v. State*, 78 Nev. 463, 467-68, 376 P.2d 137, 139 (1962) ("The

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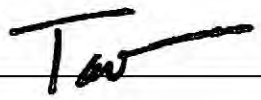
[5]We note that inquiry into medical liens on cross-examination is not per se prohibited. In *Khoury*, the supreme court stated that while evidence of write downs "is irrelevant to a jury's determination of the reasonable value of the medical services," as is evidence of a provider selling their liens, using such evidence to prove bias does not invoke the collateral source rules and is allowed. *Khoury*, 132 Nev. at 538-39, 377 P.3d at 93-94 (internal quotation marks omitted). In *Williams v. Doutel*, this court concluded 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." Docket Nos. 69663, 70091 (Order of Affirmance, Ct. App., August 30, 2017).

court, however, sustained appellant's objection to the question, and no prejudice to the appellant therefore resulted."). Additionally, because the court sustained the objection to the question and it remained unanswered, an admonishment was not necessary because jury instruction four directed the jury that "[it] must not speculate to be true any insinuation suggested by a question asked a witness," as "[a] question is not evidence" and to "disregard any evidence to which an objection was sustained." *See Newman v. State*, 129 Nev. 222, 237, 298 P.3d 1171, 1182 (2013) (providing that courts are to presume that the jury followed all of the jury instructions given). Therefore, we conclude that the district court did not commit reversible error in failing to give a limiting instruction or admonishment to the jury regarding the question involving medical lien write-downs, especially in light of Riga's failure to request either.

For the foregoing reasons, we

ORDER the judgment of the district court AFFIRMED.[6]

_____, C.J.
Gibbons



_____, J.
Tao

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Bulla

[6]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

cc: Hon. Mark R. Denton, District Judge
Janet Trost, Settlement Judge
Nicolas M. Bui, Ltd.
Winner & Sherrod
Eighth District Court Clerk