

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MACIE PEELER,  
Appellant,  
vs.  
ANTHONY JOSEPH AIELLO,  
INDIVIDUALLY,  
Respondent.

No. 79630-COA

FILED

JUL 29 2021

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

*ORDER REVERSING, VACATING, AND REMANDING*

Macie Peeler appeals from a judgment pursuant to a jury verdict in a tort action and district court orders denying her motion for new trial, or additur in the alternative, and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Peeler was driving northbound on Swenson Street in the innermost left lane of two turn lanes. In the adjacent left turn lane on Peeler's right side was Anthony Joseph Aiello, also driving northbound in a rental car.<sup>1</sup> While turning left, Aiello failed to maintain his lane, making an abrupt turn and colliding into the front right end of Peeler's car. Following the accident, Peeler received conservative treatment followed by cervical fusion surgery for ongoing neck pain and radiculopathy. Her treating physicians also recommended future lumbar surgery as well as other treatment. At trial, the main contention between the parties was whether the accident caused Peeler's damages, because evidence at trial demonstrated that Peeler had chronic neck and back pain prior to the accident from previous motor vehicle accidents that occurred decades before. Peeler testified that she had been asymptomatic before the accident,

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<sup>1</sup>We recount the facts only as necessary to our disposition.

although Aiello contended that she was actively receiving treatment for *lower* back pain at that time.

Seventeen months before trial, Peeler filed a motion in limine to exclude Aiello's expert witness, Dr. Michael Seiff, a neurosurgeon, who had performed an Independent Medical Examination (IME) on Peeler pursuant to NRCP 35.<sup>2</sup> Peeler argued that Dr. Seiff's opinions about causation could not assist the jury because Dr. Seiff's opinions were based on an unreliable methodology, and he was not qualified to opine on biopsychosocial issues or speculate on secondary gain. For his causation opinions, Dr. Seiff relied on the American Medical Association's causation protocol (AMA causation protocol).<sup>3</sup> Dr. Seiff's report indicated that his opinions were within a reasonable degree of medical certainty. During his deposition, Peeler asked Dr. Seiff about whether the AMA causation protocol worked on a standard equivalent to "more-likely-than-not" in terms of how confident Dr. Seiff had to be in reaching his conclusions. Dr. Seiff answered "no," but expressed confusion about the question. During his deposition, Dr. Seiff also stated that he never received formal training on the AMA causation protocol. Further, when Peeler asked Dr. Seiff how he

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<sup>2</sup>Although neither party refers to Dr. Seiff's examination of Peeler as an NRCP 35 examination in their briefs, but rather as an independent medical examination, the only mechanism by which this would have occurred is via NRCP 35, which is consistent with the record. We note that Dr. Seiff's qualifications as a neurosurgeon to perform an IME are not in question, and neither party disputes that he was in fact qualified to perform such an examination. Rather, the *scope* of his testimony based on his examination of Peeler is at issue on appeal.

<sup>3</sup>We note that the AMA causation protocol is also referred to as the AMA causation guides or guidelines in the record. For consistency, we refer to the information as the AMA causation protocol.

evaluates subjective pain statements from patients, he explained that he universally did not find such pain complaints reliable and that Peeler's pain complaints, without other objective medical findings, were not reliable evidence of causation between the accident and Peeler's injuries. However, Dr. Seiff also acknowledged that certain of Peeler's short-term complaints of pain, primarily involving soft tissue, were likely related to the car accident. It also appears that he did not challenge certain medical treatment Peeler received early on, including cervical injections to address her neck pain.

The district court tentatively denied Peeler's motion in limine regarding Dr. Seiff, but it deferred more detailed consideration of the matter under *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008) for a future hearing to be conducted in conjunction with the trial. In its order tentatively denying the motion, the district court found that "medical certainty" and "medical probability" are "premised on the same understanding that the expert's opinion is more likely than not, or 50 percent likely," so Dr. Seiff's report complied with the requisite standard for expert testimony.<sup>4</sup> Regarding Dr. Seiff's biopsychosocial opinions,<sup>5</sup> the

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<sup>4</sup>We recognize that medical expert opinions given "within a medical degree of probability" or a "medical degree of certainty" refer to the same standard, namely, the opinions given are more likely than not, or are likely to occur more than fifty percent of the time. See *Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005); see also *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 530, 262 P.3d 360, 368 (2011).

<sup>5</sup>Biopsychosocial theory, as described in the record, refers to psychological and social factors that could contribute to an injured person's perception of pain, such as stress, anxiety, lack of sleep, and sometimes litigation. Based on closing arguments at trial, the parties appear to agree that biopsychosocial issues are "grounded" in psychology.

district court relied on reasoning from a Nevada federal district court that it is not improper for a doctor to suggest that a plaintiff may have ulterior motives for his or her pain complaints when they are not supported by objective evidence.

Eight months before trial, Peeler filed a bench brief, reiterating and expanding her arguments to exclude Dr. Seiff's testimony; Aiello did not file a bench brief or a response. The district court did not address the issues again until trial. During trial, and outside the jury's presence, the court held a *Hallmark* hearing. Peeler questioned Dr. Seiff about the AMA causation protocol, suggesting that the protocol was written in the context of workers' compensation law. Dr. Seiff responded that the entire book was not just about workers' compensation but was unclear about the AMA causation protocol. Peeler then asked whether the AMA endorsed its own protocol, and Dr. Seiff read a portion of the AMA causation section that explained that the protocol does not reflect the AMA's views or policies. At the end of the hearing, the district court made a ruling from the bench denying Peeler's motion in limine solely because Peeler's objections "went to the weight not the admissibility of [Dr. Seiff's] opinions."

During his pre-trial deposition, Dr. Seiff agreed that he performed a "physical examination" of Peeler and explained the nature of his examination. At trial, Dr. Seiff testified that when he examined Peeler, she told him she suffered from back and neck pain and he noted that she had some tenderness in her back and weakness in her legs. He then testified that the accident involving Aiello caused some initial soft tissue injuries, but there was no objective evidence of a spinal injury visible on Peeler's imaging studies. Dr. Seiff opined that Peeler's cervical fusion surgery for chronic pain was related to degenerative changes, and that if

she needed future spinal care, it would not be related to the accident. Dr. Seiff also identified the methodology upon which he based his opinions—the AMA causation protocol. That protocol states that subjective pain complaints are not valid and are unreliable in assessing causation of a patient’s injury because such complaints do not constitute objective medical evidence. He also testified about the application of the biopsychosocial theory in addressing Peeler’s complaints, and he opined that Peeler’s subjective pain complaints may be the result of other stresses, such as ongoing litigation, previous litigation, anxiety and depression, and insomnia. He again emphasized that there was no objective or credible medical evidence of any ongoing injury from the accident, and that Peeler’s subjective complaints of continued pain were irrelevant.

Although prior to trial Aiello conceded breach of duty, the jury found in Aiello’s favor and awarded nothing to Peeler. After trial, Peeler filed a motion for a new trial, or additur in the alternative, which the district court denied.<sup>6</sup> Peeler now raises several arguments on appeal.<sup>7</sup>

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<sup>6</sup>Peeler also appeals the district court’s award of attorney fees and costs to Aiello as the prevailing party, which based on our disposition we necessarily vacate and remand for further proceedings.

<sup>7</sup>In addition to the expert testimony issue discussed in this order, Peeler also argued the district court unreasonably restricted her questioning of the jury venire, the district court abused its discretion when it admitted documents that were not timely disclosed, and the district court abused its discretion when it denied a new trial or additur. In light of our disposition on the expert testimony issue, we do not address Peeler’s remaining arguments. We nevertheless offer a word of caution to the district court; namely, restrictive voir dire may be unduly prejudicial to a party’s case, and the court should refrain, for example, from suggesting that damages are only alleged and not real damages, even though the extent of the damages may be in dispute, or from disallowing questions regarding the

Peeler avers the district court erred when it allowed Dr. Seiff to testify because his testimony hinged on unreliable methodologies that violated *Hallmark*. For example, Peeler contends that Dr. Seiff relied on the AMA causation protocol, which she argues is not peer-reviewed, not neutral, and requires a higher standard to prove causation than required by Nevada law. To support this argument, Peeler points to another case from the Eighth Judicial District, in which the district court, after an evidentiary hearing, made specific *Hallmark* findings and concluded that the assistance factor was not satisfied because the AMA causation protocol was unreliable.<sup>8</sup> Although not authoritative here, that court ultimately precluded a doctor from conducting an NRCP 35 exam. Moreover, Peeler argues that Dr. Seiff used the incorrect section of the AMA causation protocol, specifically those pertaining to workers' compensation instead of personal injury, for his causation opinions. Dr. Seiff also admitted that he did not fully read, and had no training on, the AMA protocols as a whole. Further, Peeler claims the district court erred when it allowed Dr. Seiff to testify about biopsychosocial issues because only clinical social workers or psychologists are trained to address these issues.

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location of the accident in order to determine a prospective juror's familiarity with the location and to rule out possible bias.

<sup>8</sup>See *Wilson v. Yancey*, Case No. A-13-680635-C (Eighth Judicial District Ct., Amended Findings of Fact and Conclusions of Law in Support of Order Precluding Derek Duke, M.D., from Conducting a Rule 35 Examination, July 17, 2017). The court in *Wilson* also concluded that the doctor exhibited bias against plaintiffs in general in support of its order. Further, the court specifically denounced as unreliable the application of the AMA causation protocol to personal injury cases.

We review the district court's decision to allow expert testimony for an abuse of discretion. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). An error in admitting evidence is reversible only if it "substantially affected" the appellant's rights. *Hallmark*, 124 Nev. at 505, 189 P.3d at 654.

As a preliminary matter, Dr. Seiff is a special type of medical expert—an independent medical examiner under NRCP 35—which, in addition to *Hallmark*, sets forth its own requirements. Specifically, in order to be an examiner under NRCP 35, the designated expert performing either a "physical or mental examination" must be a "suitably licensed or certified examiner." NRCP 35(a).<sup>9</sup> In this case, Dr. Seiff is a licensed physician in the practice area of neurosurgery. The record does not demonstrate that he has been licensed in any other discipline such as clinical sociology, psychology, or psychiatry. To be sure, neurosurgery has some overlap with other disciplines as it involves surgery on the brain as well as the spine. But, Dr. Seiff is not a trained or licensed clinical sociologist, psychologist, or psychiatrist, nor was he hired to perform an NRCP 35 examination in these areas. Although he examined Peeler for the purpose of performing the NRCP 35 examination, including performing certain tests, he did not have

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<sup>9</sup>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, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). Here, the previous version of NRCP 35 would have applied so we have cited it herein.

an ongoing physician-patient relationship with Peeler, nor could he be considered one of Peeler's treating physicians, as this was not his role. Ultimately, as required by NRCP 35, Dr. Seiff prepared a "detailed written report setting out the examiner's findings, including the results of all tests made, diagnoses, conclusions . . . ." Based on the record, Dr. Seiff authored multiple reports.

We recognize that Peeler is not challenging Dr. Seiff's ability to have performed the IME in his practice area of neurosurgery (as he did in fact perform the examination), but rather challenges the admission of his testimony at trial on two other primary grounds. Peeler argues that the district court erred in allowing Dr. Seiff to testify because: "(1) he wholly relied upon the AMA guidelines for his causation theory, which are legally unreliable; and (2) he was not qualified to test on biopsychosocial issues or speculate on secondary gain." In order to resolve these issues, we turn our analysis to *Hallmark*.

A witness must satisfy three requirements to testify as an expert witness:

- (1) he or she must be qualified in an area of "scientific, technical, or other specialized knowledge" (the qualification requirement);
- (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and
- (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

*Hallmark*, 124 Nev. at 498, 189 P.3d at 650 (quoting NRS 50.275).

The Nevada Supreme Court has explained the assistance requirement as follows:

An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable



methodology. In determining whether an expert's opinion is based upon reliable methodology, a district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization. . . . [T]hese factors are not exhaustive, and may be accorded varying weights, and may not apply equally in every case.

*Id.* at 500-02, 189 P.3d at 651-52 (footnotes omitted).

In applying these standards, it is not the district court's role to assess either the credibility or weight of the proffered expert testimony; credibility and weight are matters within the jury's domain. The district court's role as gatekeeper is limited to determining, as a matter of law, whether the proffered testimony is admissible, which means that it must apply these legal standards to the contents of the proffered testimony. Here, the district court failed to do so. The district court dismissed Peeler's arguments as merely challenging the weight of Dr. Seiff's testimony rather than its admissibility, and did not properly apply the standards of *Hallmark* to the content of those opinions, including his opinions on causation based on the AMA causation protocol, as well as his qualifications and opinions involving biopsychosocial and secondary gain issues. Although Dr. Seiff should not be precluded from testifying as an expert under NRCP 35 in the field of neurosurgery, we agree with Peeler that the district court failed to narrow the scope of his opinions in advance of trial by properly applying *Hallmark*, and therefore the court abused its discretion. *Cf. Higgs v. State*, 126 Nev. 1, 18, 222 P.3d 648, 659 (2010)

("[T]he qualification, assistance, and limited scope requirements . . . ensure reliability and relevance. . .").

Peeler argues that Dr. Seiff was not *qualified* to render opinions involving biopsychosocial and secondary gain issues. In his deposition, Dr. Seiff noted that he was retained based upon his expertise in the area of neurosurgery to perform a physical examination, not a mental evaluation. Treating physicians may be able to testify on secondary gain issues, if they have the proper foundation to do so. *Cf. Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 270 n.13, 396 P.3d 783, 791 n.13 (2017). Here, however, Dr. Seiff was not a treating physician, and his role as an NRCP 35 examiner was apparently limited to neurosurgery. Thus, to the extent that any opinions regarding biopsychosocial and secondary gain issues founded in the disciplines of clinical sociology, psychology, or psychiatry were outside the scope of his retention, they should have been excluded under the "scope" requirement.

Peeler next argues that the district court failed to determine whether Dr. Seiff's causation opinions were "based upon reliable methodology" (the AMA causation protocol) so as to be of *assistance* to the trier of fact. In response, Aiello argues the AMA causation protocol that Dr. Seiff relied on is reliable in part because Nevada requires physicians to use the AMA Guides to the Evaluation of Permanent Impairment in workers' compensation cases. *See* NRS 616C.110(1)(a)-(b). However, the AMA impairment guides are located in a different manual than the AMA causation protocol, and there is no indication in the record before us that this protocol is similarly reliable to the AMA guides on permanent impairment.

Aiello claims that even if the AMA causation protocol is not reliable, Dr. Seiff's opinions regarding causation were based on other methodologies. However, his initial expert report only indicates that he used the AMA causation protocol, and while Dr. Seiff testified that he used other methodologies, he did not elaborate on those or explain their reliability.

In view of these flaws, Dr. Seiff's testimony failed to meet the standards of *Hallmark* in significant ways, and therefore, the district court abused its discretion when it concluded that Dr. Seiff's testimony was generally admissible in its entirety.<sup>10</sup>

We also conclude that the admission of such evidence substantially affected Peeler's rights. *Cf.* NRCP 61 (stating errors not affecting substantial rights shall be disregarded). Specifically, the AMA causation protocol suggests that "pain" is not a reliable indicia of injury, which is contrary to the medical profession's use of the existence of pain for diagnosis and treatment, and any level of pain that a jury is entitled to consider when awarding compensation for an injury. Further, under Nevada law, an injured party is entitled to recover for pain and suffering, and "no fixed standard exists for deciding the amount of pain and suffering damages." NJI 5.2. Further, "[t]he elements of pain and suffering are wholly subjective." *Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 454, 686 P.2d 925, 932 (1984). Thus, Dr. Seiff's testimony likely confused the jury as to what type of damages it could have awarded, including whether, based on Dr. Seiff's testimony, an award for pain and suffering could even have been made. As an aside, Dr. Seiff testified at trial that Peeler likely

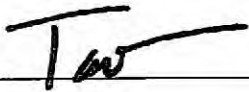
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<sup>10</sup>In light of our disposition above, we do not address Peeler's other issues on appeal pertaining to Dr. Seiff's testimony.

had some injury following the accident, and the district court also stated that it would have awarded Peeler some damages. Yet, the jury awarded nothing. Accordingly, we

ORDER the judgment of the district court REVERSED, VACATE the order awarding attorney fees and costs, and REMAND this matter for a new trial and further proceedings consistent with this order.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Nancy L. Allf, District Judge  
Nettles Morris  
Claggett & Sykes Law Firm  
Messner Reeves LLP  
Eighth District Court Clerk