IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES E. HAGAN,
Appellant,
vs.
TAYLOR GOLCEKER; DANIEL GOLCEKER; AND DEBORAH GOLCEKER,
Respondents.

No. 81103-COA

ORDER OF AFFIRMANCE

Charles Hagan appeals from a judgment entered pursuant to a short trial jury verdict in a tort action, and from a post-trial order denying his motion for a new trial. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.[1]

Hagan and respondent Taylor Golceker were involved in a contested-liability vehicle accident after Taylor executed a right turn out of a Starbucks drive-thru onto a three-lane road and moved to the middle lane. Hagan, who was travelling in the left lane, maintains that Taylor struck his vehicle—a Ford pickup truck—became stuck on his vehicle's step, and hit Hagan's truck multiple times while trying to disengage. Taylor, on the other hand, insists that she was properly established in the middle lane when Hagan's vehicle "booped" into the left side of her vehicle.

Later, Hagan filed a complaint in district court against Taylor, Taylor's parents, Daniel and Deborah Golceker (who owned the vehicle

[1]Candace C. Carlyon, Pro Tempore Judge, served as the short trial judge in this case.

Taylor was driving), and their insurer, Allstate Insurance Company.[2] The case proceeded to court annexed arbitration where the arbitrator found in favor of Hagan and awarded him $6,027.67 for damages to his vehicle and person.

Shortly thereafter, Hagan filed a request for trial de novo and the case proceeded to the short trial program. In the short trial program, the parties engaged in a substantial amount of discovery disputes regarding Hagan's medical records (both for injuries he claimed as a result of the accident and for his pre-existing injuries).

The parties also filed a number of motions in limine. Hagan filed motions seeking to exclude irrelevant medical records "obtained in violation of" HIPAA, and a motion to exclude Taylor's medical expert report. Taylor filed five motions in limine: (1) to exclude reference to Taylor's prior accidents; (2) to exclude reference to Taylor purportedly fleeing the scene; (3) to exclude reference to Taylor being unable to obtain information regarding her business cell phone; (4) to exclude reference to Hagan's argument that the accident caused him to develop shingles; and (5) to exclude reference to Hagan's anxiety and PTSD claims.

During a pretrial hearing, the short trial judge considered the motions and ultimately denied Hagan's motions regarding medical records and Taylor's expert witness (with the caveat that the parties would work together to redact sensitive or irrelevant information), denied Taylor's motion in limine regarding her second cell phone, and granted Taylor's other motions in limine regarding her purportedly fleeing the scene, her prior accidents, Hagan's shingles claim, and Hagan's anxiety claim.

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[2]Hagan dismissed Allstate while the case was in court annexed arbitration, and later assented to dismiss Daniel and Deborah Golceker from the case.

Prior to trial, the parties and the short trial judge held several pretrial conferences wherein the parties compiled their exhibits into a joint evidentiary booklet in accordance with NSTR 18. Following jury deliberations, the foreperson announced that the jury found in favor of Taylor and against Hagan. Shortly thereafter, Hagan filed his "Plaintiff's NRCP Rules 50, 59(a)(1)(A),(B),(C),(E),(F), and (G) and [60](b)(1)(3) Motions for Judgment as a Matter of Law, New Trial, and Relief From Judgment." After full briefing and a hearing on the motions, the short trial judge entered a 17-page findings of fact and conclusions of law denying them on the grounds that Hagan failed to object and failed to show prejudice regarding each allegation of misconduct or error set forth therein. Hagan now appeals.

On appeal, Hagan challenges the short trial judge's rulings on the motions in limine and argues that the short trial judge erred in denying his motion for a new trial, as there were several irregularities and instances of purported attorney misconduct that "materially affected [his] substantial rights."[3] In her answering brief, Taylor counters by arguing that the jury verdict was supported by substantial evidence, that Hagan failed to object or to raise many of these purported errors below, and further argues that Hagan has failed to show how any alleged error "prejudiced him or impacted

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[3]Hagan also challenges the sufficiency of the evidence in the record to support the verdict, but he did not move for judgment as a matter of law prior to the submission of this matter to the jury under NRCP 50(a) and thereby waived this argument. Where a party fails to move for judgment as a matter of law under NRCP 50(a), and the jury returns a verdict against him, the question of sufficiency of the evidence is unreviewable unless that party can demonstrate "there is plain error in the record or if there is a showing of manifest injustice," and we conclude that Hagan has failed to do so here. *Avery v. Gilliam*, 97 Nev. 181, 183, 625 P.2d 1166, 1168 (1981) (quoting *Price v. Sinnott*, 85 Nev. 600, 607, 460 P.2d 837, 841 (1969)).

the outcome of the case." Accordingly, Taylor argues that Hagan failed to show the need for a new trial below and likewise has failed to show reversible error on appeal.

We first turn to Hagan's arguments regarding the district court's rulings on the motions in limine. On appeal, Hagan challenges the short trial judge's order granting Taylor's motions in limine to exclude evidence of (1) Taylor fleeing the scene, (2) Taylor's prior accidents, and (3) Hagan's claim that the accident caused shingles. But Hagan failed to oppose these motions below. *See* EDCR 2.20(e) (providing that the district court may construe a party's failure to timely oppose a motion "as an admission that the motion . . . is meritorious and a consent to granting the same").

And although the short trial judge permitted Hagan to state oral objections at the hearing, Hagan failed to provide this court with a transcript of those proceedings or a statement of the evidence pursuant to NRAP 9(d). Because these missing documents are necessary to our review of Hagan's challenge to the orders regarding the motions in limine, we presume that they support the district court's decision. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (providing that appellant is responsible for making an adequate appellate record, and when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision").[4]

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[4]We note that Hagan later filed for rehearing on Taylor's motion in limine to preclude him from presenting evidence of shingles and his own motion in limine to exclude Taylor's expert witness. Both motions were denied by the short trial judge. But Hagan cannot raise a new issue in a motion for reconsideration that he failed to raise in the initial hearing. *See*

Next, Hagan argues that the district court erred when it granted Taylor's motion to compel and ordered him to sign medical releases regarding his anxiety and PTSD claims, and argues that those disclosures violated HIPAA. However, Hagan fails to specifically identify which portions, if any, of Taylor's medical requests are not HIPAA compliant. Further, Hagan directs this court to 42 C.F.R. Part 2, which relates to substance abuse records, in support of his argument that the medical requests were overbroad. But 42 C.F.R. Part 2 is inapplicable to this case as substance abuse records were not at issue or requested below. Thus, we decline to address this issue as it is not cogently argued. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that appellate courts need not address issues that are not supported by cogent argument).

We now turn to Hagan's contentions regarding the short trial judge's denial of his motion for a new trial. In this context, Hagan argues that several irregularities in the trial proceedings, as well as attorney misconduct, tainted the jury verdict and warrant a new trial. "The decision to grant or deny a motion for new trial rests within the sound discretion of the trial court." *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) (internal quotation marks omitted).

Turning to the purported irregularities in the trial proceedings, Hagan argues that the short trial judge erred when it (1) allowed defense counsel to prepare the final iteration of the evidentiary notebook; (2) allowed defense counsel to redact medical reports contained within the evidentiary notebook; (3) purportedly denied him the use of his first

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Achrem v. Expressway Plaza Ltd. P'ship, 112 Nev. 737, 742, 917 P.2d 447, 450 (1996) ("Points or contentions not raised in the original hearing cannot be maintained or considered on rehearing.").

preemptory challenge; and (4) failed to include necessary jury instructions. However, the record reveals that Hagan failed to object to each of these purported errors below, and, when asked by the district court if he had any "questions, comments, or concerns" regarding the evidentiary notebook, the materials therein, and the jury instructions, Hagan answered "[n]o, your honor." Likewise, Hagan affirmatively waived his first preemptory challenge during jury selection. Accordingly, these issues are not properly before this court on appeal and we do not address them. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 717 (2009) (concluding that, by failing to promptly object to the district court's action, appellant "did not preserve the issue for appeal" and "his consent" waived any challenge).

Similarly, Hagan also argues that the district court should have sua sponte excluded Taylor's medical expert based on his failure to disclose his previous cases under NRCP 16.1(a)(2)(B)(v), and he argues that the district court failed to properly apply NRS 48.135 (describing when evidence of liability insurance is admissible at trial) during the proceedings. However, Hagan raises these arguments for the first time on appeal, and thus the arguments are waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

We turn now to Hagan's allegations of attorney misconduct. "In analyzing attorney misconduct in the context of an appeal from an order denying a new trial motion, we look at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009).

In his informal brief, Hagan argues that defense counsel made several misrepresentations of the facts during his opening statement and

closing arguments. In *Lioce v. Cohen*, our supreme court outlined various standards that district courts must use to evaluate a motion for a new trial that vary based on whether a litigant objected to the misconduct during trial. 124 Nev. 1, 14-19, 174 P.3d 970, 978-82 (2008).

"For objected-to misconduct, a party moving for a new trial bears the burden of demonstrating that the misconduct is so extreme that objection, admonishment, and curative instruction cannot remove its effect." *Bayerische Motoren Werke Aktiengesellschaft*, 127 Nev. at 133, 252 P.3d at 656. Here, Hagan only objected to two instances of purported misconduct: (1) where defense counsel argued that Hagan intended to make a u-turn from a turning lane in front of the Starbucks and (2) when defense counsel presented argument regarding filling out the jury instructions. And although the short trial judge overruled both objections, it nevertheless admonished the jury that arguments made by counsel are arguments, and not evidence. Therefore, in light of the short trial judge's subsequent admonishment and the record on appeal, we cannot conclude that Hagan has met his burden to demonstrate that these comments were so extreme that the district court's curative instruction could not remove their effect.

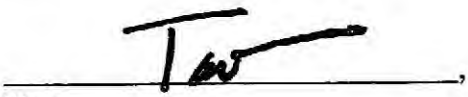
As to the unobjected-to conduct, which may be reviewed only for plain error, Hagan asserts that defense counsel's comments during opening and closing misrepresented the facts of the case. *See Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 815-16, 357 P.3d 387, 395-96 (Ct. App. 2015) (explaining plain error review in the context of unobjected-to attorney misconduct). However, upon review of the record, defense counsel's comments appear to be based on statements from the medical records and testimony evoked at trial. Consequently, we conclude that Hagan has not shown that these brief statements made during the short trial amounted to such irreparable and fundamental error that, but for the misconduct, the

verdict would have been different, *Bayerische Motoren Werke Aktiengesellschaft*, 127 Nev. at 133, 252 P.3d at 656-57, and we therefore affirm the short trial judge's order denying Hagan's motion for a new trial.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[5]

_____, C.J.
Gibbons



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cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Dept. 1
Candace C. Carlyon, Pro Tempore Judge
Charles E. Hagan
Gentile Law Group
Eighth District Court Clerk

[5]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.