IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARELL L. MOORE; AND CHARLENE A. MOORE, INDIVIDUALLY AND AS HUSBAND AND WIFE,
Appellants,
vs.
JASON LASRY, M.D., INDIVIDUAL; AND TERRY BARTMUS, RN, APRN,
Respondents.

No. 81659-COA

FILED

MAR 16 2022

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

ORDER OF REVERSAL AND REMAND

Darell L. Moore and Charlene A. Moore appeal from the district court's denial of a motion for a new trial. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.[1]

On Christmas day, 2016, Darell Moore reported to the St. Rose Emergency room complaining of pain in his left lower leg.[2] While at St. Rose, respondent Jason Lasry, M.D., and respondent Terry Bartmus, RN, APRN, examined Darell's leg. They found no immediate treatment was required and Darell was discharged with aftercare instructions for "musculoskeletal pain as well as hypertension." Three days later, Darell returned to St. Rose with similar complaints of pain in his left leg. On this visit, a different doctor examined Darell and assessed that his left lower extremity was receiving

[1]Although the Honorable Bonnie A. Bulla, Judge, was the discovery commissioner during the early stages of the underlying proceeding, she did not have any involvement in any decision relevant to the issues presented on appeal and, therefore, Judge Bulla participated in the decision of this matter.

[2]We recount the facts only as necessary to our disposition.

suboptimal blood flow. Darell was taken to the ICU in critical condition, eventually undergoing an above-knee amputation.

Based on these events, Darell Moore—along with his wife Charlene—sued Dr. Lasry and Nurse Bartmus. In their complaint, the Moores alleged that Dr. Lasry and Nurse Bartmus committed malpractice by failing to diagnose Darell's lack of blood flow to his left extremity when he initially presented at the hospital on December 25, thereby adversely affecting Darell's outcome. The case proceeded to a jury trial in January 2020.

As required by NRS 41A.100, this medical malpractice case turned largely on retained and non-retained expert testimony, also referred to as treating physician testimony. In pretrial disclosures, both the Moores as well as Dr. Lasry and Nurse Bartmus disclosed Robert Wiencek, M.D., as a treating physician and a potential witness.[3] Dr. Wiencek was also listed in the joint pretrial memorandum. However, Dr. Lasry and Nurse Bartmus did not disclose the specific impeachment materials they planned to use at trial against the Moores' only standard of care expert witness, Alexander Marmureanu, M.D.

Early in the trial, the Moores called their expert witness, Dr. Marmureanu, to testify that Dr. Lasry and Nurse Bartmus had violated the applicable standard of care in their treatment of Darell. During the cross-examination of Dr. Marmureanu, counsel for Nurse Bartmus referenced two

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[3]We note that the Moores also disclosed the person most knowledgeable (PMK) for Dr. Wiencek's practice, instead of Dr. Wiencek himself, in certain documents. Nevertheless, we are confident that the parties understood that Dr. Wiencek had been identified as a potential witness, and specifically as one of Darell's treating physicians on multiple occasions.

purported impeachment documents, neither of which were disclosed prior to trial as required by NRCP 16.1 or even during trial at the time of Dr. Marmureanu's cross-examination. The first was an article published by Kaiser Health News that discussed heart surgeons with higher-than-average death rates. Dr. Marmureanu was among those practitioners listed, but the reference to the article in the trial transcript does not provide any explanation regarding specifics of the article or the context in which the statistics were compiled. The second document was a spreadsheet containing performance ratings for coronary artery bypass providers in California and again the specifics of the document or the context in which the ratings were relevant are not contained in the trial record. Nevertheless, the district court permitted counsel for Nurse Bartmus to use these two documents to cross-examine Dr. Marmureanu, including asking him whether he was one of the "worst" practitioners in California.

During Dr. Marmureanu's cross-examination, the Moores' attorney objected to the use of the impeachment materials. A bench conference was conducted, but not recorded. At the conclusion of the day's proceedings, the district court summarized a conference at the bench, which appeared to address certain objections made by Moores' counsel to the cross-examination of Dr. Marmureanu. In its summary, the district court noted that the Moores' counsel had taken issue with the questioning and the defendants' failure to "confront[ ]" Dr. Marmureanu with the referenced impeachment documents and also documented that it had overruled the objections and permitted cross-examination without limitation.

The trial spanned approximately two weeks and the defense called several expert witnesses.[4] During the weekend before the conclusion of the trial, the Moores' attorney apparently decided to call Darell's treating physician, Dr. Wiencek, as a witness. The Moores purportedly gave less than twenty-four hours' notice to Dr. Lasry and Nurse Bartmus that they intended to call Dr. Wiencek on what was anticipated to be the last day of trial. We point out that, during trial, several witnesses had already testified about Dr. Wiencek's treatment of Darell based on Dr. Wiencek's reports, which had been admitted into evidence.

Notwithstanding the numerous disclosures of Dr. Wiencek as a potential witness by both sides, as well as the admission of his medical records, Dr. Lasry and Nurse Bartmus objected to Dr. Wiencek being called as a witness based on the lack of notice. The district court agreed with the defendants and did not allow Dr. Wiencek to testify, citing the Moores' failure to timely advise the court and the parties that they intended to call Dr. Wiencek.

Ultimately, the jury returned a defense verdict. The Moores filed a motion for a new trial. The district court acknowledged that it may have erred in allowing Dr. Marmureanu to be impeached with the undisclosed documents but concluded it did not err with respect to excluding

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[4]In addition to their own testimony, Dr. Lasry and Nurse Bartmus called three expert witnesses in total: Dr. Scott Wilson to rebut Dr. Marmureanu's various opinions, Dr. David Barcay to opine on standard of care, and Dr. John Janzen to address damages. In contrast, the Moores called two expert witnesses in total: Dr. Marmureanu on standard of care and Dr. David Fish to address damages. All the experts testified that their opinions were given to a reasonable degree of medical probability as required. *See Morsicato v. Sav-On Drug Stores, Inc.*, 121 Nev. 153, 158, 111 P.3d 1112, 1116 (2005).

Dr. Wiencek as a witness at trial. The district court denied the Moores' motion for a new trial, from which the Moores now appeal.

We review orders granting or denying a motion for a new trial for an abuse of discretion. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). We defer to the district court's factual findings. *Id.* However, "deference is not owed to legal error." *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 1190, 1197 (2010). Further, where a district court fails to consider all the circumstances or errors weighing on a motion for a new trial, we may remand for further proceedings. *See Lioce*, 124 Nev. at 27, 174 P.3d at 987-88.

We first address the Moores' challenge to the cross-examination of Dr. Marmureanu with undisclosed impeachment evidence. The Moores argue that the district court abused its discretion in permitting their expert to be cross-examined with undisclosed documents because impeachment evidence is required to be timely disclosed. *FGA, Inc. v. Giglio*, 128 Nev. 271, 283, 278 P.3d 490, 497-98 (2012) (noting evidentiary rulings are reviewed for an abuse of discretion). Dr. Lasry and Nurse Bartmus counter in two ways. First, they argue the Moores waived this point by failing to object at trial. Second, they argue that NRCP 16.1 does not require the disclosure of impeachment evidence. We agree with the Moores.

A party is generally deemed to have waived an issue on appeal if an objection was not made at trial. *Khoury v. Seastrand*, 132 Nev. 520, 534 n.3, 377 P.3d 81, 91 n.3 (2016); *BMW*, 127 Nev. at 137, 252 P.3d at 659. Based on the district court summary of the bench conference at the end of the day, the Moores sufficiently objected to Dr. Lasry and Nurse Bartmus's use of the impeachment documents. Thus, the Moores preserved the issue for appeal.

Further, respondents' second argument also fails. The disclosure of impeachment materials is governed by NRCP 16.1 which states:

> Except as exempted by Rule 16.1(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:
>
> . . .
>
> (ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, including for impeachment or rebuttal, and, unless privileged or protected from disclosure, any record, report, or witness statement, in any form, concerning the incident that gives rise to the lawsuit.

NRCP 16.1(a)(1); *see also* NRCP 16.1(a)(3).

Having determined the Moores preserved their objection below, we agree that a copy of the impeachment evidence must be provided or described by category and location. We also disagree with the construction of NRCP 16.1 proposed by Dr. Lasry and Nurse Bartmus to suggest otherwise. Their argument attempts to insulate impeachment evidence from the disclosure requirement unless it "concern[s] the incident that gives rise to the lawsuit." This construction is incompatible with the plain reading of the rule, as the word "and" denotes two categories of evidence. Thus, under Nevada law, unlike its federal counterpart, impeachment evidence must be initially disclosed under NRCP 16.1(a)(1), timely supplemented pursuant to NRCP 26(e)(1), and identified in the parties' pretrial disclosures as required by NRCP 16.1(a)(3). We believe that the district court, in its

order, recognized its error in permitting the impeachment of Dr. Marmureanu with the undisclosed documents, but nevertheless believed that this one error was insufficient to grant a new trial. We are uncertain, however, if the district court properly considered the impact that the improper impeachment of Dr. Marmureanu had on the outcome of the trial because the doctor was the Moores' only standard of care expert. Therefore, discrediting Dr. Marmureanu as a medical expert by using improper impeachment evidence may well have unfairly marginalized Dr. Marmureanu, whose testimony was required to support the Moores' case. Indeed, this makes the second alleged error, which the district court did not in fact consider to be an error, even more problematic.

The Moores' second challenge to the district court's order denying a new trial was its decision to preclude Dr. Wiencek from testifying as a witness near the end of trial. The Moores argue that the district court abused its discretion in disallowing Dr. Wiencek's testimony because he was disclosed as a potential witness in the pretrial disclosures and, alternatively, even if their disclosure of Dr. Wiencek was somehow deficient, this should not have resulted in Dr. Wiencek being disallowed as a witness at trial because Dr. Wiencek had previously been disclosed as a witness by other parties; therefore, any alleged disclosure error was harmless under NRCP 37. Dr. Lasry and Nurse Bartmus argue that providing them with only twenty-four hours' notice to prepare for the cross-examination of Dr. Wiencek as a trial witness was insufficient, unjustified, and prejudicial. We disagree under the circumstances presented.

As a general rule, witnesses must be disclosed before trial. NRCP 16.1(a)(3); *see also* EDCR 2.67 (requiring a list of expected witnesses to be included in the pretrial memorandum). A treating physician need not produce a written report prior to testifying, but without such a report, the

physician's testimony is confined to the treatment he provided. NRCP 16.1(a)(2)(C); *Khoury*, 132 Nev. at 533, 377 P.3d at 90. In other words, a treating physician that testifies without a previously disclosed written report may not surmise or offer his opinion on issues beyond his own treatment. *See FCH1, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014) (finding a district court erred by permitting testimony to go beyond observations to the "mechanism" of the party's injury). Even if a witness is not properly disclosed, a district court may permit the witness to testify if the failure to disclose is harmless. NRCP 37(c)(1).

Here, Dr. Wiencek was disclosed as a witness multiple times. The Moores listed him in their pretrial disclosures; Dr. Lasry and Nurse Bartmus also listed Dr. Wiencek in their pretrial disclosures. His name appeared again in the joint pretrial memorandum. Further, as the Moores only intended to call Wiencek to testify as a treating physician, an expert report was not required. NRCP 16.1(2)(D). In addition, the parties were aware of Dr. Wiencek's anticipated trial testimony based on his medical records, which had already been admitted into evidence. As the district court specifically noted, references to Dr. Wiencek were "all over" the record. While Dr. Wiencek's testimony would have been limited to his treatment and care of Darell as his treating physician, the jury may have benefited from his testimony. His testimony may have assisted the jury in understanding the condition of Darell's left extremity before Dr. Lasry and Nurse Bartmus had occasion to examine him and the effective methods for detecting a pulse in Darell's lower left leg.[5] Specifically, the existence of

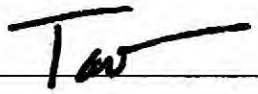
[5]We note that we were not provided with the trial exhibits, and in particular the medical records, thus, we are unable to specify the exact date of Darell's last visit with Dr. Wiencek before the hospitalization at issue here.

palpable pulses was a central issue at trial. Certainly, as a medical expert, although limited to his role as a treating physician, Dr. Wiencek's testimony may have been helpful to the Moores on this issue, as their standard of care expert had been subject to cross-examination with improper impeachment evidence.

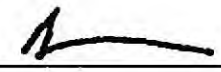
Accordingly, the district court erred in excluding Dr. Wiencek as a witness and preventing him from testifying as Darell Moore's treating physician. Because the district court did not consider this second error, singularly or in conjunction with the first error, we reverse and remand for the district court to consider both errors in determining whether to grant or deny Moores' motion for a new trial as we do not undertake this analysis in the first instance. *Lioce*, 124 Nev. at 27, 174 P.3d at 987-88. Therefore, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Kathleen E. Delaney, District Judge
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