IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT CHOWNING,
Appellant,
vs.
DEEANNA PARKS,
Respondent.

No. 86158

FILED

JUL 02 2024

ORDER OF AFFIRMANCE

This is an appeal from a judgment after a jury verdict and a post-judgment order in a torts action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Respondent Deeanna Parks suffered significant injuries in an accident while she was a passenger on a motorcycle driven by appellant Robert Chowning. As a result of crashing onto the pavement and sliding approximately 115 feet, Parks suffered fractured ribs, a punctured lung, a fractured clavicle, and torn ankle ligaments. Because the accident occurred in a remote location where they could not contact emergency services, Chowning had to transport the seriously injured Parks on the damaged motorcycle for 45 minutes to reach a hospital. Over several months following Parks' discharge from the hospital, she experienced back pain, underwent lumbar fusion surgery, and had a spinal cord simulator implanted.

Parks sued Chowning, alleging that his negligence caused the accident. Chowning did not contest liability, so the ensuing trial was limited to the issue of damages. The jury awarded Parks nearly $10 million in damages. The damages award included $1,083,639.17 for past medical expenses; $500,958 for future medical expenses; $1,813,000 for past pain

and suffering; and $5,516,000 in future pain and suffering. Chowning sought a new trial, arguing that Parks' counsel had committed misconduct during the trial. The district court denied the motion and this appeal followed.

Chowning first argues that the district court should have granted the motion for a new trial because Parks' counsel improperly suggested that Chowning's expert was effectively a "hired gun" and repeatedly injected personal opinions as to that expert's credibility and character. We review orders denying motions for a new trial for an abuse of discretion but review de novo whether an attorney's comments constitute misconduct. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

Where, as here, attorney misconduct is raised for the first time in a motion for a new trial, the district court must treat the issue as having been waived and determine whether there is plain error that warrants a new trial. *Id.* at 19, 174 P.3d at 982. In deciding whether there is plain error, the court first must determine whether the complaining party has demonstrated there was misconduct and then determine whether the complaining party "met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." *Id.* Irreparable and fundamental error, as we explained in Lioce, "is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different."[1] *Id.*

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[1]We reject Chowning's reliance on *Sipsas v. State*, 102 Nev. 119, 716 P.2d 231 (1986), which held that a new trial was warranted where attorney misconduct was so prejudicial as to require *sua sponte* court intervention and the district court did not intervene. *Sipsas* is a criminal case. *Lioce* governs the analysis of attorney misconduct in civil cases.

Some of Parks' counsel's statements constituted attorney misconduct. For example, during closing argument, Parks' counsel made the following comments, which improperly state counsel's personal opinion about the defense expert's credibility:

> I will not put aside the fact that [the defense expert] acts as though he's doing some independent medical exam when in reality he makes sure that the box is checked so he knows exactly what the payer wants him to say in advance.
>
> . . . .
>
> I will not put aside [the defense expert] intentionally making untruthful statements when he had a solemn duty to simply tell the truth over and over again.

See id. at 21-22, 174 P.3d at 983 (holding that "an attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases"). But we are unconvinced that Chowning met the high burden of demonstrating irreparable and fundamental error—"that no other reasonable explanation for the verdict exists." *Id.* at 19, 174 P.3d at 980 (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)).

The evidence of Parks' significant injuries provides a reasonable explanation for the verdict aside from Parks' counsel's improper argument. Parks provided substantial expert testimony regarding the extent and severity of her injuries; the long-term impact that the injuries would have on her, including additional surgeries in the future; and the chronic nature of her pain, for which she will need treatment for the rest of her life. For example, one of Parks experts, a neurosurgeon and spine specialist, testified that even after the lumbar fusion procedure, Parks would likely have residual pain for which she would need additional

treatment. The expert further testified that such treatment would have ripple effects on Parks' other spinal discs, such that it was a near certainty that Parks would require additional surgeries and treatments in the future, such as replacing the batteries on her spinal cord stimulator. A different expert, an orthopedic spine surgeon, similarly testified that Parks would experience pain for the rest of her life, and that she would require additional procedures to correct adjacent breakdowns of her spine. The defense expert conceded that Parks would continue to need follow up with regard to her pain and medications. In addition to the expert testimony, Parks' various friends and family members testified regarding the change in Parks' personality and activity levels after the accident where she went from being an active, joyful, and "spontaneous" person to a more sedentary person in constant pain.

The jury also may have had concerns with the defense expert's credibility regardless of Parks' counsel's commentary. For example, the expert wrote a report critical of Parks' medical treatment before reviewing Parks' medical records. The defense expert also testified that he never received what he would consider the most objective medical scans of Parks' injuries, and that a specific syndrome would explain Parks' pain despite none of the 43 treating medical providers ever having diagnosed Parks with that syndrome. Because it is not clear that the jury's verdict would have been different but for Parks' counsel's misconduct, we conclude that Chowning fails to demonstrate that there was plain error warranting reversal. *See Lioce*, 124 Nev. at 19, 174 P.3d at 982.

Finally, Chowning argues that the district court abused its discretion by denying his motion for a new trial under NRCP 59 because inappropriate conduct at the trial inflamed the passions and prejudice of

the jury in awarding damage for future pain and suffering. *See* NRCP 59(a)(1)(B), (F) (providing that the district court may grant a new trial for a prevailing party's misconduct or for "excessive damages appearing to have been given under the influence of passion or prejudice" where these issues "materially affect[ ] the substantial rights of the moving party"). "A jury is permitted wide latitude in awarding tort damages, and the jury's findings will be upheld if supported by substantial evidence." *Quintero v. McDonald,* 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000). But we have further held that an award "must have been given under the influence of passion or prejudice" for purposes of NRCP 59 where the award is "not supported by the evidence." *Nev. Indep. Broad. Corp. v. Allen,* 99 Nev. 404, 419, 664 P.2d 337, 347 (1983) (analyzing NRCP 59(a)(1)(F)'s predecessor text).

"The mere fact that a verdict is large is not itself indicative of passion and prejudice." *Hazelwood v. Harrah's*, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 984 P.2d 750 (1999). And here, there was substantial expert medical testimony to establish Parks' future pain and suffering damages in the amount of $5,516,000. *See Sierra Pac. Power Co. v. Anderson,* 77 Nev. 68, 75, 358 P.2d 892, 896 (1961) (concluding that the jury did not commit reversible error by awarding damages for subjective future pain and suffering where "there was substantial expert medical testimony to establish probable future pain and suffering"); *see also Krause Inc. v. Little,* 117 Nev. 929, 938, 34 P.3d 566, 572 (2001) ("[W]hen an injury or disability is subjective and not demonstrable to others (such as headaches), expert medical testimony is necessary before a jury may award future damages."). All the testifying experts agreed Parks would have residual pain and require additional treatments, with two of the experts

stating such treatments would likely include future surgeries. Further, Chowning failed to object to any of Parks' counsel's misconduct that he alleges inflamed the passions and prejudices of the jury. *See Beccard v. Nevada Nat. Bank*, 99 Nev. 63, 66 n.3, 657 P.2d 1154, 1156 n.3 (1983) (holding that the district court erred by granting a new trial under NRCP 59(a) for excessive damages given under the influence of passion or prejudice where "the moving party failed to object to the allegedly improper closing arguments at trial").

We therefore

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Stiglich

_______________, J.
Pickering

_______________, J.
Parraguirre

cc: Chief Judge, The Eighth Judicial District Court
Hon. James Crockett, Senior Judge
Ara H. Shirinian, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Thorndal Armstrong /Las Vegas
Messner Reeves LLP
Bighorn Law/Las Vegas
Eighth District Court Clerk