

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRITT HAYES, AN INDIVIDUAL,
Appellant,
vs.
JOHN MICHAEL WATSON, AN
INDIVIDUAL; AND GOMEZ, KOZAR,
MCELREATH AND SMITH,
PROFESSIONAL CORPORATION,
D/B/A WESTERN SURGICAL GROUP,
A NEVADA PROFESSIONAL
CORPORATION,
Respondents.

No. 85087

FILED

JUN 06 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict and from an order denying a post-judgment motion for a new trial in a tort action. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Nurse Britt Hayes and Doctor John Watson were treating a patient in an emergency room. Watson reportedly became angry at the paramedics who delivered the patient to the hospital. After removing the patient from a backboard, Watson dropped or threw down the backboard, injuring Hayes's foot. Hayes sued for negligence. Watson prevailed at a jury trial, and Hayes moved for a new trial, which the district court denied. Hayes now appeals.

The district court properly allowed testimony from Watson's witness

First, Hayes challenges the district court's decision to allow Dr. Myron Gomez to testify. Gomez, one of Watson's employers, was the only witness called by the defense. We review a district court's decision on the

admissibility of evidence for an abuse of discretion. *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 764, 312 P.3d 503, 507 (2013).

When a party fails to timely disclose a witness, the witness may not testify or provide evidence “unless the failure was substantially justified or is harmless.” NRCP 37(c)(1). Watson disclosed Gomez as a witness two days late. But Gomez’s participation in the litigation was not a surprise to Hayes because Hayes deposed Gomez and listed Gomez as a potential witness earlier in discovery. We conclude the district court did not abuse its discretion in deciding the delayed disclosure was harmless.

Hayes also argues Gomez gave improper expert testimony on how trauma surgeons typically remove backboards from under patients. While Hayes failed to object to the testimony at trial, she asserts she preserved her objection through a motion in limine requesting Gomez be ordered to testify consistent with his deposition. We disagree. A motion in limine can preserve an evidentiary issue for appeal only when the district court fully considers the issue, and when the “ruling permitting introduction of evidence was explicit and definitive.” *Richmond v. State*, 118 Nev. 924, 931, 59 P.3d 1249, 1254 (2002) (quoting *Palmerin v. City of Riverside*, 794 F.2d 1409, 1413 (9th Cir. 1986)).

While the district court ultimately allowed Gomez to testify and declined to limit Gomez’s testimony to the content of his deposition, the district court’s original order on Hayes’s motion in limine did not allow Gomez to give any testimony, regardless of the content; Hayes was required to object to improper testimony by Gomez to preserve the issue for appeal. Because she did not, Hayes waived the issue of whether Gomez gave

improper expert testimony. *See Hotel Riviera, Inc. v. Short*, 80 Nev. 505, 510, 396 P.2d 855, 858 (1964) (citing *In re Dumais*, 76 Nev. 409, 414, 356 P.2d 124, 126 (1960)).

The district court erroneously excluded Watson's video deposition, but the error was harmless

Hayes contends the district court abused its discretion in excluding Watson's deposition for any substantive purpose. A district court's decision concerning the admission of depositions is reviewed for an abuse of discretion. *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 247, 955 P.2d 661, 670 (1998). We conclude the district court abused its discretion by excluding the video deposition in its entirety. An adverse party's deposition may be used at trial "for any purpose," regardless of whether the deponent is available to testify. NRCp 32(a)(3); *see Cmty. Counselling Serv., Inc. v. Reilly*, 317 F.2d 239, 243 (4th Cir. 1963) (collecting cases and holding "the Rule permits a party to introduce, as part of his substantive proof, the deposition of his adversary, and it is quite immaterial that the adversary is available to testify at the trial or has testified there"); *see also* 8A Wright & Miller, *Federal Practice & Procedure* § 2145 (3d ed. 2024) (explaining that under the similar provision in the Federal Rules of Civil Procedure 32(a)(3) a trial court has discretion to exclude parts of a deposition, but may not refuse to allow the deposition merely because the party is available to testify in person).

Here, though, the abuse of discretion was harmless because Watson "was subjected to extensive cross-examination at trial, and on the same matter covered in the deposition." *Bowman v. Tisnado*, 84 Nev. 420, 422, 442 P.2d 899, 900 (1968) (concluding an erroneous exclusion of a deposition is harmless when the witness is subject to examination on the same topics as the deposition). Further, Hayes did not provide the video

deposition in the appellate record, and “[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court’s decision.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Thus, the exclusion does not warrant reversal.

The district court properly denied Hayes’s motion for a new trial

Hayes raises her remaining challenges through the lens of the district court’s denial of her motion for a new trial. We review “orders denying or granting motions for a new trial for an abuse of discretion.” *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008) (citing *Langon v. Matamoros*, 121 Nev. 142, 143, 111 P.3d 1077, 1078 (2005)). A new trial is appropriate “where an aggrieved party’s substantial rights have been materially affected.” *Edwards Indus., Inc. v. DTE/BTE, Inc.*, 112 Nev. 1025, 1035, 923 P.2d 569, 575 (1996).

Hayes argues a new trial was warranted due to attorney misconduct; namely, Watson’s references to Hayes’s workers’ compensation payments. “Whether an attorney’s comments are misconduct is a question of law, which we review de novo.” *Lioce*, 124 Nev. at 20, 174 P.3d at 982 (citing *Bronneke v. Rutherford*, 120 Nev. 230, 232, 89 P.3d 40, 42 (2004)). We agree that Watson’s references to Hayes’s workers’ compensation payments are misconduct. See *Cramer v. Peavy*, 116 Nev. 575, 581, 3 P.3d 665, 669 (2000) (holding evidence of workers’ compensation payments “cannot be used by the defense to imply that the plaintiff has already been compensated, will receive a double recovery if awarded a judgment[,] or has overcharged SIIS”).

Nevertheless, to warrant a new trial, the misconduct must have materially affected Hayes’s substantial rights. *Edwards Indus.*, 112 Nev. at 1035, 923 P.2d at 575. Hayes only objected to some of the alleged

misconduct below, and because we evaluate the prejudice of objected-to and unobjected-to misconduct under different standards, we discuss each in turn.

For the unobjected-to misconduct, Hayes bears the burden of demonstrating “the attorney misconduct amounted to irreparable and fundamental error.” *Lioce*, 124 Nev. at 19, 174 P.3d at 982. “[I]rreparable and fundamental error 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.” *Id.* We cannot say the misconduct certainly changed the result. At trial, Watson testified he was careless, inattentive, and did not act reasonably. But other witnesses testified the way Watson dropped the backboard was typical, and that they would not have noted anything “abnormal . . . if it didn’t induce that pain response in [Hayes].” In light of conflicting testimony, it is up to the trier of fact to determine credibility and weigh the evidence. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009). We conclude the unobjected-to misconduct does not warrant reversal.

Turning to the objected-to misconduct, Hayes objected to Watson’s most egregious references to workers’ compensation, which took place during closing. First, Watson implied Hayes sued because “[s]he was not satisfied that workers’ compensation was paying for her medical bills.” Hayes objected, and the district court told Watson to move on. While the district court did not admonish the jury to disregard the comment about workers’ compensation, Hayes did not request an admonishment. So, Hayes must “demonstrate that the misconduct was so extreme that the objection

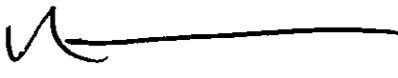
and sustainment could not have removed the misconduct's effect." *Gunderson v. DR Horton, Inc.*, 130 Nev. 67, 77, 319 P.3d 606, 613 (2014); *cf. Lioce*, 124 Nev. at 17, 174 P.3d at 981.

Watson explicitly argued the workers' compensation payments were relevant to the verdict. Hayes again objected, and the court sustained the objection, and admonished the jury that the jury instructions would tell the jury how to consider the workers' compensation. The jury instructions provided the amount of workers' compensation paid, and stated the jury was to come to its verdict without considering the workers' compensation. Hayes, again, did not request a different admonishment.

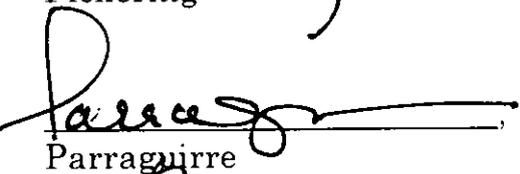
We conclude Hayes did not meet her burden to show "that the [objected-to] misconduct was so extreme that the objection and sustainment could not have removed the misconduct's effect." *Gunderson*, 130 Nev. at 77, 319 P.3d at 613 (2014). First, the district court properly instructed the jury to adhere to the jury instructions, which stated that the amount of workers' compensation was not relevant to the verdict. Second, as discussed, there was sufficient evidence from which the jury could find Watson not liable, even without any attorney misconduct. Third, and most importantly, because the jury found Watson was not negligent, the jury never reached the issue of damages, and thus did not consider whether damages should be reduced because of Hayes's workers' compensation payments. So nothing in the jury's verdict indicates the jury considered the workers' compensation payments at all, much less improperly, and we conclude the district court's admonishments were sufficient to remove the misconduct's effect.

We have considered Hayes's other arguments, and conclude they lack merit. We also conclude the district court did not abuse its discretion by denying Hayes's motion for a new trial. Accordingly, we,

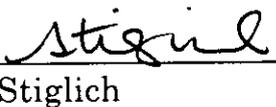
ORDER the judgment of the district court AFFIRMED.¹


_____, C.J.
Herndon


_____, J.
Pickering


_____, J.
Parraguirre


_____, J.
Bell


_____, J.
Stiglich


_____, J.
Cadish

¹The Honorable Patricia Lee, Justice, did not participate in the decision on this matter.

cc: Hon. Kathleen M. Drakulich, District Judge
Jonathan L. Andrews, Settlement Judge
Laxalt Law Group, Ltd./Reno
Guinasso Law, LTD
Hutchison & Steffen, LLC/Reno
Law Office of Annalisa Grant
Washoe District Court Clerk