IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EDGAR LORA, INDIVIDUALLY,
Appellant,
vs.
LEONARDO REYES, INDIVIDUALLY,
Respondent.

No. 87033-COA

ORDER OF REVERSAL AND REMAND

Edgar Lora appeals from a grant of partial summary judgment in a tort action certified as final pursuant to NRCP 54(b). Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Lora and respondent Leonardo Reyes were involved in a car accident in January 2021.[1] While the parties dispute fault, this appeal concerns whether future damages may be awarded to Lora. Following the accident, Lora sought various types of medical care, including left shoulder surgery to repair a torn labrum. After the surgery, Lora completed several weeks of physical therapy, but he has not sought further treatment since October 2021, despite his complaints of continuing mild to moderate pain in his left shoulder.

Lora filed a complaint against Reyes in June 2021, alleging that Reyes was liable based on negligence and negligence per se. In his initial NRCP 16.1 discovery disclosures, Lora listed all categories of future

[1]We recount the facts only as necessary for our disposition.

damages, indicating that the amount to be awarded was for the "[t]rier of [f]act to determine." This designation remained in Lora's disclosures until Lora's tenth supplement to his initial disclosures served in September 2022. At that time, Lora listed $100,000 for future damages related to pain and suffering, but the "[t]rier of [f]act to determine" designation remained in place for future medical expenses. Shortly thereafter, Lora disclosed the expert report of Dr. Randa Bascharon, who addressed the medical treatment that Lora might incur in the future and generally addressed the expenses related to that treatment. However, when discovery closed in December 2022, Lora still had not provided a computation of a total dollar amount for future medical expenses pursuant to NRCP 16.1(a)(1)(A)(iv).

A month later, Reyes moved for partial summary judgment on Lora's future damages because, in part, Lora had not made his mandatory disclosures for future medical expenses. Notably, Reyes had neither filed any prior motions to compel discovery regarding Lora's computation of future damages nor brought any other concerns to the discovery commissioner. In February 2023, after the close of discovery, Lora filed a twelfth supplement to his initial disclosures and listed $150,000 as his computation of future medical expenses. He also increased his calculation of future pain and suffering damages to $150,000. Reyes filed a motion to strike these disclosures as untimely.

The district court entered partial summary judgment in April 2023, stating that no genuine dispute of material fact existed as to whether Lora had timely provided a calculation of future damages. It found that Lora was unable to point to *any* disclosure demonstrating a computation of future medical expenses claimed. The court specifically found that neither Lora's treating physician, Dr. Gregory Bigler, through his deposition

testimony, nor Dr. Bascharon's expert report provided a clear computation of expected future medical expenses. Lora moved for reconsideration. The district court signaled its intent to reject the motion in a minute order but did not thereafter issue a written order. Lora then filed a motion to certify the order granting partial summary judgment pursuant to NRCP 54(b), which the district court granted. This appeal followed.

Lora argues that the district court erred by granting Reyes's motion for partial summary judgment in its entirety. Reyes disagrees and argues the district court properly entered partial summary judgment. We review a district court's grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.*

First, Lora argues that the district court erred by granting summary judgment based on a discovery dispute that was not properly raised in such a motion. Reyes responds that partial summary judgment was proper because no genuine dispute of material fact existed as to any future damages.

In his motion for summary judgment, Reyes contended that Lora failed to provide a timely computation of future damages required under NRCP 16.1(a)(1)(A)(iv) and *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 261, 396 P.3d 783, 785 (2017), and that NRCP 37(c)(1) accordingly required the exclusion of evidence that Lora failed to disclose. Here, the district court considered the request for a discovery sanction in the first instance. It then concluded that Lora failed to properly disclose future damages as required by NRCP 16.1(a)(1)(A)(iv), and that the sanction of

exclusion of future damages pursuant to NRCP 37(c)(1) was a self-executing, automatic sanction.

While NRCP 37(c)(1) provides for sanctions to remedy the failure to disclose required information, there are several choices as to the nature of the sanction. The district court improperly concluded that exclusion of the evidence is a self-executing, automatic sanction, when other possible sanctions also include an award of attorney fees, a statement to the jury about the non-disclosure, and the seven sanctions listed in NRCP 37(b)(1). Furthermore, NRCP 37(c)(1) provides that sanctions are not required if the failure to disclose "was substantially justified or is harmless."

Here, the court made summary findings that Lora's conduct was not substantially justified nor was it harmless. Nevertheless, by concluding that the exclusion of evidence was a self-executing sanction, the district court failed to exercise its discretion under NRCP 37(c)(1) to determine whether a lesser sanction might have been appropriate for Lora's noncompliance with NRCP 16.1(a)(1)(A)(iv). This was a manifest abuse of the court's discretion. *See Lund v. Eighth Jud. Dist. Ct.*, 127 Nev. 358, 363, 255 P.3d 280, 284 (2011) (concluding the district court manifestly abused its discretion where legal error caused it to fail "to exercise discretion that it unquestionably ha[d]"). Therefore, the district court erred by failing to consider all of the possible appropriate discovery sanctions by concluding that NRCP 37(c)(1) provides that the exclusion of evidence constituted a self-executing, automatic sanction.[2]

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[2]Relying on *Valley Health System, LLC v. Eighth Judicial District Court*, 127 Nev. 167, 252 P.3d 676 (2011), Lora contends that Reyes waived any argument regarding Lora's failure to comply with NRCP 16.1's disclosure requirements by failing to first bring the issue before the

Second, Lora argues that the district court erred by granting the motion for partial summary judgment because genuine factual disputes remained as to future damages. Lora identifies Dr. Bascharon's expert report and contends it sufficiently listed approximate costs for future medical treatment such as physical therapy, orthopedic visits, and medical injections. Reyes responds that Lora failed to meet his duty to disclose any computation for future damages and did not meet his burden of proof as to any future damages.

As stated previously, summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine dispute of material fact exists and that the moving party is entitled to judgment as a matter of law. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029. When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* The party moving for summary judgment must meet its initial burden of production to show no genuine dispute of material fact exists. *Cuzze v. Univ. & Cmty. Coll. Sys. of*

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discovery commissioner. However, the Nevada Supreme Court has not definitively held that an issue not raised before the discovery commissioner in the first instance is waived. In *Valley Health*, the supreme court addressed whether an *appellant*, when objecting to the discovery commissioner's recommendations to the district court, waives an argument that it failed to present to the discovery commissioner in the first instance. 127 Nev. at 173, 252 P.3d at 679. Lora would have this court extend *Valley Health* to a scenario in which the *respondent* did not go to the discovery commissioner at all, but instead raised an argument for the first time in district court. Such a scenario is distinguishable from the waiver rule in *Valley Health*, and we thus decline to extend its holding to the instant facts.

Nev., 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The nonmoving party must then "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact." *Id.* at 603, 172 P.3d at 134.

Here, Lora timely disclosed Dr. Bascharon's expert report and presented it in support of his opposition to Reyes's motion for summary judgment. Dr. Bascharon's expert report stated that Lora will need future medical care and provided estimated expenses for much of that care.[3] Although Lora did not provide a timely report detailing the full computation of future medical damages he would seek, the expert report contained evidence of future medical treatment and expenses thereby placing Reyes on notice of future damages. If there had been a concern regarding the exact dollar cost of certain future medical expenses, Reyes could have brought a timely motion to compel, which did not happen here.[4]

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[3]Although *Pizarro-Ortega*, 133 Nev. at 261, 396 P.3d at 785, held that the fact that a plaintiff's physician believes future medical care is necessary does not satisfy the prior version of NRCP 16.1(a)(1)(A)(iv) requiring a computation of damages, Dr. Bascharon's expert report went beyond mere speculation and offered dollar amounts for future care deemed necessary to a reasonable degree of medical certainty.

[4]We note that the district court in its order indicated that Lora provided no substantial justification for withholding computations of "future damages," however, reviewing the evidence in the light most favorable to Lora, as we must do on summary judgment, Lora did disclose evidence of future damages in an expert report. Despite the report, Reyes did not timely challenge Lora's lack of computation of damages during discovery that would have allowed this issue to be timely resolved before trial. This is also noteworthy because the district court reopened discovery for Reyes. Since discovery was reopened for at least one purpose, it appears that there would have been sufficient time to have reopened discovery to

When viewed in a light most favorable to Lora as the non-moving party, Dr. Bascharon's report provided specific facts as to future medical expenses that constitute a genuine dispute of material fact regarding those expenses. Lora also provided a figure of $100,000 for future pain and suffering within the discovery period, alerting Reyes to his potential exposure for future damages. Thus, the district court incorrectly concluded Lora had not disclosed *any* computation of his future damages because the expert did in fact set forth certain dollar amounts for future medical treatment and Lora timely disclosed pain and suffering damages. Further, Lora provided sufficient evidence to put Reyes on notice of other future medical treatment and created a genuine dispute of fact concerning additional future medical expenses. As there remains a genuine dispute of fact as to Lora's future medical damages, the district court erred by granting Reyes's motion for partial summary judgment.

Lora also argues that the district court erred in determining that Lora failed to present the required expert testimony to establish that future pain and suffering was probable. The district court concluded that Lora's injury was subjective and that Lora was thus required to present expert testimony to support future damages for pain and suffering. *See Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 74-75, 358 P.2d 892, 895 (1961). We disagree. *See Pizarro-Ortega*, 133 Nev. at 265 n.7, 396 P.3d at 788 n.7 ("We note, however, that general pain and suffering damages are not subject to [NRCP 16.1(a)(1)(A)(iv)'s predecessor's] computation-of-damages requirement."); *cf. Jackson v. United Artists Theatre Cir., Inc.*, 278

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correct any deficiencies in the computation of damages with Lora bearing the costs associated with such reopening, had the district court determined that this was the appropriate course of action under NRCP 37.

F.R.D. 586, 593 n.1 (D. Nev. 2011) (recognizing that FRCP 26(a)(1)(A)(iii) does not require a computation of pain and suffering damages because those damages "are subjective and do not lend themselves to computation"). While expert testimony may be required to prove a future physical or objective injury, the determination of future pain and suffering damages lies with the trier of fact. *Brownfield v. F.W. Woolworth Co.*, 69 Nev. 294, 296, 248 P.2d 1078, 1079 (1952).

We conclude it was error for the district court to find, on summary judgment, that Lora's torn labrum was a subjective injury. Indeed, genuine disputes of fact remained as to whether Lora's future damages related to the injury of the torn labrum can qualify as an objective (future medical treatment) or subjective injury (future pain and suffering), or both. Specifically, the torn labrum was identifiable on an MRI before the surgical repair, and following surgery, the evidence shows that Lora still has limited range of motion. Further, Dr. Bascharon stated that Lora will have "left shoulder post-traumatic arthropathy" in the future requiring medical treatment, which might include a total shoulder arthroplasty. The evidence was sufficient to create a dispute of material fact regarding whether Lora presented sufficient expert testimony to support an award of future medical damages based on the future medical treatment as opined to by Dr. Bascharon. Further, there remains a genuine dispute of fact concerning the long-term nature of Lora's injury, and any future pain and suffering related to that injury is in the province of the jury.[5]

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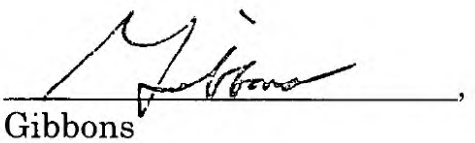
[5]Lora argues the district court erred by granting summary judgment based on discovery violations resulting in case-concluding sanctions without making express findings concerning appropriate factors provided in *Young*

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter for proceedings consistent with this order.[6]



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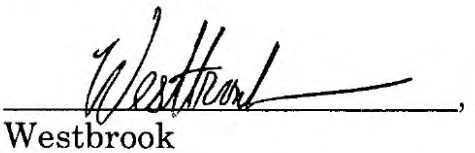

_____, J.
Westbrook

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v. Johnny Ribeiro Building, Inc., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). He also argues the court improperly denied his motion for reconsideration. However, as this court concludes reversal is warranted for other bases, we need not consider these issues. *See Miller v. Burk*, 124 Nev. 579, 588-89 & n.26, 188 P.3d 1112, 1118-19 & n.26 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar). Further, insofar as the parties have raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not provide a basis for relief.

[6]Upon remand, we direct the district court to conduct a status hearing to review this matter. The district court must decide whether to direct the discovery commissioner to hold a hearing concerning the discovery issues and to issue a report, to consider the unresolved motion in limine, or to issue an order reopening discovery to address any remaining issues regarding Lora's future damages, including computation of these damages. Depending on the district court's decisions regarding the aforementioned issues, it may be appropriate for the court to issue a revised scheduling order.

cc: Chief Judge, Eighth District Court
Eighth District Court, Dept. 14
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Eighth District Court Clerk