IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ASHLEY SMITH,
Appellant,
vs.
DANIEL EIDEN,
Respondent.

No. 88496-COA

ORDER OF REVERSAL AND REMAND

Ashley Smith appeals from a district court judgment on a jury verdict in a tort action. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

Facts and procedural history

On June 25, 2020, in Las Vegas, while Smith was stopped at a red-light, respondent Daniel Eiden rear-ended her vehicle. After the accident, Smith attempted to begin her workday as a dental assistant but left shortly after arriving because she started to feel pain in her head, neck, and left shoulder. Smith's sister, Kaitlin Right, visited her over the weekend in Las Vegas following the accident and later testified at trial that, at the time, Smith's "pain was pretty high" and she was "not doing well." For approximately the next three months, Smith continued to work, but she experienced increasing pain throughout the day, which impaired her performance. Smith also apparently struggled with using her dominant left hand and was forced to use her non-dominant hand for certain tasks. She ultimately left her employment and temporarily went to live with Right in Reno.

Smith sought treatment for her pain, including 23 chiropractor visits over 13 weeks following the accident. During this time, Smith continued to experience pain in her head, neck, and shoulder, although no doctor prescribed pain medication for these issues. She was prescribed a muscle relaxant, but she declined to take this medication because it made her feel like she had no control over her body. On September 11, 2020, Smith underwent an MRI of her neck and shoulder, which showed she had "bulging discs" in her spine. Medial branch blocks were recommended to treat her condition, which involved injecting an anesthetic along with a steroid into Smith's cervical spine in six different locations. She underwent two of these procedures, the second of which significantly relieved her neck pain. However, Smith continued to experience ongoing shoulder pain, which left her with difficulty moving her arm and caused her to struggle to perform the tasks of daily living. Smith did not work during the time she lived with her sister, and her daily activities were limited. She eventually moved from Reno to Austin, Texas, to live with her father, Derek Smith, where she obtained a job as a treatment coordinator in a dentist's office. Her left shoulder pain continued to worsen, and she finally underwent surgery in Austin on January 7, 2022, to repair a tear in her supraspinatus tendon. Following surgery, Smith's shoulder pain improved.

Smith subsequently sued Eiden for her injuries arising out of the automobile accident. Eiden admitted liability and the case proceeded to a jury trial on the issues of causation and damages. Kaitlin and Derek testified on her behalf. At trial, Kaitlin acknowledged that while Smith lived with her in Reno, they got into arguments because Kaitlin told Smith you "need to have a job." But Kaitlin also testified that Smith was limited in her activity level and was spending time on the couch and in bed because

of the pain. Derek testified that his daughter did not have shoulder issues before the crash, but that afterwards she was in pain and largely unable to do basic tasks with her left arm. Smith testified on her own behalf about how the accident occurred, the pain she experienced for 18 months, the adverse effect the pain had on her job as a dental assistant, and her struggles with completing everyday tasks before her surgery. She further testified that following surgery she felt "great."

Medical experts on behalf of both parties also testified at trial. Dr. Xin Nick Liu, Smith's initial treating orthopedic surgeon in Las Vegas, testified that the accident caused the type of shoulder injury that Smith experienced—a supraspinatus tendon tear—because her arm was on the steering wheel at the time of impact. He also testified that Smith's left shoulder surgery was necessary to relieve the pain caused by the tear and to restore her mobility. In addition, Dr. Liu testified that the medical expenses incurred for treatment, including the surgery, were reasonable and necessary.

Although Eiden conceded liability at trial, he challenged whether the accident caused Smith's injuries. Eiden's accident reconstructionist, Peter Himpsel, testified that the accident could not have caused Smith's shoulder injury. Eiden also called a physical medicine and rehabilitation expert, Dr. Lawrence Lesnak, who had reviewed the initial MRI and opined that there was no causal connection between the car accident and Smith's injury. He also testified that the medial branch blocks were diagnostic only and would not have had any "therapeutic value." Additionally, Eiden called Dr. Michael Massey, a licensed chiropractor, who primarily challenged the reasonableness of Smith's medical expenses

related to her chiropractic care, opining that she needed much less care to achieve therapeutic results.

Before closing arguments, the parties settled jury instructions, including the one at issue in this appeal, Instruction 24, which states as follows:

> No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. Furthermore, the argument of counsel as to the amount of damages is not evidence of reasonable compensation. In making an award for pain and suffering, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

Relevant to this appeal, during closing arguments, Smith asked the jury for $729,000 in general damages for pain and suffering and, in rebuttal, stated that this amount was "to reflect what [Smith's] gone through." Eiden questioned the amount of pain that Smith was actually "living with" following the accident as she did not have her shoulder surgery until approximately 18 months after the accident, nor did she take any pain medications throughout this intervening period. Eiden asked the jury to find for Eiden "and award [Smith] no damages."

The jury was provided with two verdict forms approved by the parties. One form found in favor of Smith and had blank spaces for the jury to fill in a number for damages, including a blank space for "past pain and suffering." The other verdict form found for Eiden without an award of damages.

After deliberating for approximately 27 minutes, the jury submitted the following question to the district court: "Is the 729,000 that

the plaintiff is asking for pain and suffering set in stone, or can it change?" In discussing the jury's question with counsel, the district court stated, "[s]o they're asking if they can, you know, put less in that blank than what's been asked for," to which Smith's counsel responded, "[o]r more." With counsel's consent, and in response to the jury question, the district court directed the jury to Instruction 23, which specified the categories of damages, and Instruction 24, which stated that "there is no definite standard for calculating pain and suffering damages."

Less than two hours later, the jury returned a verdict in favor of Smith, which included $775,000 for past pain and suffering. Once the verdict was read, Eiden's counsel requested that the jury be polled, and each juror agreed that it was their verdict. Without objection or further comment, the jury was excused.

Subsequently, Eiden moved for a new trial under NRCP 59(a)(1) on several grounds, including that the jury manifestly disregarded Instruction 24, because the jury awarded Smith $775,000 for past pain and suffering, for which "the only basis" was "the improper, biased argument of her attorney" and that the jury should not have treated counsel's arguments as evidence. Eiden's motion sought either a new trial or, in the alternative, remittitur of the $775,000 awarded.[1] Smith opposed the motion, arguing in pertinent part that the jury did not disregard the jury instructions because, under the standard set in *Weaver Bros., Ltd. v. Misskelley*, 98 Nev. 232, 234,

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[1]Eiden asserted several other grounds for a new trial which were not granted by the district court and are not raised on appeal, including failing to give a jury instruction concerning the nature of the impact and severity of the injuries, attorney misconduct in closing arguments regarding Eiden's experts, and that the verdict was the "result of passion or prejudice" because it was "so unfathomably excessive."

645 P.2d 438, 439 (1982), it was possible for a reasonable jury to have reached the conclusion that it did and award $775,000 in past general damages, and therefore, the district court must accept that the jury followed the instructions.

The district court ultimately found that a new trial, or in the alternative, remittitur, was warranted as "the jury was confused about how much it could award." In referencing the jury's award of $775,000, the court noted that "[i]f this Court just focuses on the Plaintiff's evidence, then evidence supports the jury's award of past pain and suffering damages. However, given the totality of the evidence, the jury's award of past pain and suffering damages strikes this Court at first blush as palpably contrary to the evidence." Thus, the district court granted Eiden a new trial unless Smith accepted remittitur in the amount of $340,000 for past pain and suffering, noting that the modified award "represents three times the award of past medical expenses at trial."[2] This appeal followed.

On appeal, Smith challenges the district court's grant of the motion for a new trial, or in the alternative, remittitur, based on the jury's manifest disregard of the jury instructions, specifically Instruction 24.[3]

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[2]During the motion practice and the hearing on the motion for a new trial, Eiden discussed Nevada's statutory limitation that punitive damages cannot exceed three times the amount of compensatory damages awarded. *See* NRS 42.005(1)(a). However, Eiden acknowledged that "no such limitation specifically exists for compensatory damages." We caution the parties and the district court not to rely on a mathematical calculation when evaluating a jury award for general damages of pain and suffering, or when ordering remittitur for such damages.

[3]At oral argument, Eiden conceded that he is only requesting that the district court's grant of a new trial be affirmed, not the alternative relief of

Smith maintains that a new trial should only be granted if it was impossible for a jury to follow the instructions and reach the verdict that it did. Here, Smith argues she presented sufficient evidence to support the jury verdict, but that the court improperly reweighed the evidence against her and therefore abused its discretion in granting Eiden's motion for a new trial. On the other hand, Eiden argues that the district court properly found that the presumption the jury followed its instructions was rebutted, and thus properly reweighed the evidence upon considering the totality of the circumstances. Eiden contends the district court correctly found that the jury did not follow the court's instructions when awarding damages to Smith for her past pain and suffering, and therefore, a new trial was warranted. We disagree with Eiden.

The district court abused its discretion in granting a new trial

"This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). An abuse of discretion occurs when a district court "exercises its discretion in clear disregard of the guiding legal principles." *Id.* at 80, 319 P.3d at 615. A district court also abuses its discretion when it applies an incorrect legal standard, *see In re Halverson*, 123 Nev. 493, 510, 169 P.3d 1161, 1173 (2007), and makes factual findings which are not supported by substantial evidence, *see Real Est. Div. v. Jones*, 98 Nev. 260, 264, 645 P.2d 1371, 1373 (1982).

Under NRCP 59(a)(1)(E), a "court may, on motion, grant a new trial on all or some of the issues—and to any party—for any . . . cause[ ] or ground[ ] materially affecting the substantial rights of the moving party,"

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remittitur. As a result, we need not address the propriety of awarding remittitur to Smith as the alternative to a new trial on appeal.

including "manifest disregard by the jury of the instructions of the court." Here, Eiden filed his motion for a new trial under NRCP 59(a)(1)(E) after the jury was discharged but within the time frame required by NRCP 59(b), and the district court granted the motion for a new trial or, if Smith elected, remittitur. The district court supported the granting of a new trial solely based on the jury's manifest disregard of jury instructions, specifically Instruction 24, when determining the amount of pain and suffering damages, while the district court explicitly rejected the argument that the jury was influenced by passion or prejudice.

When alleging that the jury manifestly disregarded the court's instructions, a party is "required to object to the verdict before the jury [is] discharged." *Cramer v. Peavy*, 116 Nev. 575, 583, 3 P.3d 665, 670 (2000). "'[F]ailure to timely object to the filing of the verdict or to move that the case be resubmitted to the jury' constitutes a waiver of the issue."[4] *Id.* (quoting *Eberhard Mfg. Co. v. Baldwin*, 97 Nev. 271, 273, 628 P.2d 681, 682 (1981)). The rationale underpinning this rule is that, if a party timely objected, then the "trial court would then have had the opportunity to consider whether it was impossible for the jury to return [the] verdict as a matter of law, and if so, the matter could have been returned to the jury with additional instructions." *Cramer*, 116 Nev. at 583, 3 P.3d at 670.

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[4]While *Cramer* alternatively describes this issue as an inconsistent verdict and manifest disregard of instructions, in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1114, 197 P.3d 1032, 1040 (2008), the supreme court clarified that "there was no inconsistent verdict at issue" in *Cramer*, and that the argument was actually that "the jury's . . . verdict was impossible as a matter of law." In other words, *Cramer* was alleging that no reasonable jury could have reached the verdict that it did if it had followed the jury instructions. Thus, this was required to be raised before the jury was discharged.

However, a claim that the movant waived their right to object to a verdict may itself be forfeited for failing to raise it below. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been [forfeited] and will not be considered on appeal."). In *Taylor v. Kilroy*, No. 64283-COA, 2015 WL 5773345, *1 (Nev. Ct. App. Sept. 30, 2015) (Order of Affirmance), the district court granted a motion for a new trial based on the jury's manifest disregard of jury instructions, despite the motion being made after the jury was discharged. However, this court concluded that, because the non-moving party did not argue below that the moving party forfeited its manifest disregard argument, the non-moving party forfeited its forfeiture argument on appeal. *Id.*

Here, although Eiden timely filed his new trial motion within the time required by NRCP 59(b), he did not object to the verdict based on the jury's failure to follow Instruction 24 when awarding damages until after the jury had been discharged. But in opposing the new trial motion, Smith only challenged the merits of Eiden's argument that the jury manifestly disregarded Instruction 24 and not the timeliness of Eiden's challenge. Because the timeliness challenge was not preserved below, we elect to only address whether the district court abused its discretion in granting Eiden a new trial on the merits. *See Old Aztec Mine*, 97 Nev. at 52, 623 P.2d at 983.

"[T]his court presumes that the jury followed the court's instructions . . . and will uphold a jury's verdict if a reasonable mind might accept [the evidence] as adequate to support a conclusion." *Cox v. Copperfield*, 138 Nev. 235, 250, 507 P.3d 1216, 1229 (2022) (internal quotation marks omitted). "[T]o establish manifest disregard of the

instructions, the movant must demonstrate that, had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." *Id.* at 250, 507 P.3d at 1229-30 (citation modified). "This standard follows logically from the 1964 amendment of NRCP 59 which eliminated 'insufficiency of the evidence' as a grounds for granting a new trial." *Brascia v. Johnson*, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989). Therefore, in finding that the jury manifestly disregarded the jury instructions, "a court may not substitute its own judgment in place of the jury's judgment unless the jury erred as a matter of law." *Id.* "This precludes the court from granting a new trial if the question only concerns the weight of the evidence." *Id.*

Under this standard, the totality of the evidence is irrelevant so long as substantial evidence supports the jury's verdict. *See Banks v. Sunrise Hosp.*, 120 Nev. 822, 841, 102 P.3d 52, 65 (2004) (declining to hold that the jury disregarded instructions when it could have reasonably discounted the defendant's experts and lay witnesses and found the plaintiff's more credible); *Jaramillo v. Blackstone*, 101 Nev. 316, 319, 704 P.2d 1084, 1086-87 (1985) (holding that, based on one person's testimony in a partial record, "it was not impossible" for the jury to reach the verdict which it did); *Fox v. Cusick*, 91 Nev. 218, 221, 533 P.2d 466, 468 (1975) ("The fact that the weight of the evidence bearing on cause may have been against the verdict returned in the view of the trial judge, does not invest him with authority to order that the cause be tried again.").

Brascia involved injuries suffered in a motor vehicle accident in which the plaintiff stopped her car and was rear-ended by the defendant. 105 Nev. at 593, 781 P.2d at 766. In contrast to this case, the jury returned a verdict which found that both parties were equally liable, and, on the

plaintiff's motion, the trial court granted a motion for new trial because "the jury's finding of negligence on [the plaintiff's] part struck the court as 'absurd' and therefore the jury did not, in the trial court's opinion, follow the instruction of the court." *Id.* at 594, 781 P.2d at 767. The supreme court held that such "issues of negligence and proximate cause are considered issues of fact," and therefore "are for the jury to resolve." *Id.* at 595, 781 P.2d at 768-69 (citation modified). Because this was a question of fact for which the jury found that both parties were negligent, the supreme court could not conclude that the plaintiff "was free of negligence as a matter of law," and therefore reversed the order granting the motion for the new trial. *Id.* at 595-96, 781 P.2d at 768.

In *Cox*, the plaintiff slipped and fell while moving along a path as he participated in a stage show magic trick. 138 Nev. at 237, 507 P.3d at 1221. The jury returned a verdict which found the defendant magician negligent, but also found the plaintiff comparatively negligent and 100 percent the cause of his fall. *Id.* The district court subsequently denied the plaintiff's motion for a new trial on the grounds of manifest disregard of jury instructions. *Id.* On appeal, the supreme court observed that it was possible for the jury to have found that, although the defendant was negligent in maintaining part of the path, the plaintiff's own negligence entirely caused his injury elsewhere on the path. *Id.* at 250-51, 507 P.3d at 1230. Accordingly, "the jury could both comply with the court's instructions and [reach its verdict]," and "the district court therefore did not abuse its discretion in denying [the plaintiff's] motion for a new trial" on the grounds of manifest disregard of jury instructions. *Id.* at 251, 507 P.3d at 1230.

Here, the district court ordered a new trial based solely on its finding that the jury was confused as to the amount of damages it could

award and therefore manifestly disregarded Instruction 24, which dealt with determining the amount of past pain and suffering damages. The court noted that the jury's question about whether "the 729,000 that the plaintiff [was] asking for pain and suffering [was] set in stone, or can it change," in conjunction with the jury's eventual award of a substantially similar amount to what Smith asked for, implied that the jury was confused. Furthermore, the court noted that "the jury's award of past pain and suffering damages strikes this Court at first blush as palpably contrary to the evidence."[5] Therefore, the district court "believe[d] that the jury was confused about how much it could award," and thus "the jury manifestly disregarded its instructions in reaching the award of $775,000 in past pain and suffering damages."

However, the district court also acknowledged that "[i]f this Court just focuses on the Plaintiff's evidence, then evidence supports the jury's award of past pain and suffering damages." Therefore, the district court itself found that there was substantial evidence presented by Smith which supported the jury's verdict. Although the court noted that "there

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[5]The district court appears to have relied on *Meyer v. Estate of Swain*, 104 Nev. 595, 598, 763 P.2d 337, 339 (1988), for the proposition that manifest disregard of jury instructions is shown when a verdict "strikes the mind, at first blush, as manifestly and palpably contrary to the evidence." (Citation modified). However, when this standard has been applied, the supreme court has treated it like the substantial evidence test later articulated in *Brascia* and *Cox*. *See Meyer*, 104 Nev. at 598-600, 763 P.2d at 339-41 (concluding that manifest injustice occurred because a properly instructed jury could not have reached the verdict that it did); *Kroeger Props. & Dev., Inc. v. Silver State Title Co.*, 102 Nev. 112, 115-16, 715 P.2d 1328, 1330-31 (1986) (holding that there was no manifest injustice because, although there was evidence against the jury's verdict, "the jury was entitled to disbelieve it").

was also contrary evidence" presented by Eiden, the court was not permitted to reweigh the evidence in favor of Eiden as the jury was empowered to discount Eiden's evidence and credit Smith's evidence in reaching its verdict. *See Banks*, 120 Nev. at 841, 102 P.3d at 65. Thus, based on the evidence that Smith presented, it was possible for the jury to have followed Instruction 24 and reached the award that it did in this case. *See Cox*, 138 Nev. at 250-51, 507 P.3d at 1230. Because it was possible for the jury to have reached the verdict while following Instruction 24, the district court abused its discretion in granting the motion for a new trial on the grounds that the jury disregarded the instruction or was confused by it.[6] *See Gunderson*, 130 Nev. at 74, 319 P.3d at 611.

Further, the record reflects that substantial evidence supported the jury verdict. At trial, Smith presented witnesses attesting to the impact that her injury had on her life, including the difficulties with using her dominant hand following the accident, and ongoing pain that prevented her from performing her work duties and the activities of daily living. Dr. Liu testified that Smith's treatments, including two rounds of six injections along her cervical spine and surgery, were reasonable and necessary. Further, Dr. Liu testified that Smith's shoulder surgery resulted in weeks of rehabilitation and an arm sling. And medical records admitted into evidence reflected that Smith underwent approximately four months of physical therapy following surgery. Therefore, substantial evidence was

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[6]We also note that the jury award for past pain and suffering, although arguably in the range of the award requested by Smith, was not the exact number requested by counsel during closing. The jury therefore presumedly understood that it need not follow the arguments of counsel in reaching its verdict, which undermines the district court's position that the jury was somehow confused by Instruction 24.

presented by Smith to support the jury's verdict for past pain and suffering damages.

Although at trial Eiden questioned Smith's evidence in support of her past pain and suffering damages, including the fact that she waited to undergo surgery, declined pain medication, moved twice and was finally able to get a new job, these challenges go to the weight of the evidence. The district court is precluded from granting a new trial if "the question only concerns the weight of the evidence," which appeared to be the court's concern here. *See Brascia*, 105 Nev. at 594, 781 P.2d at 767. Under the manifest disregard standard, the district court must defer to the jury in weighing the evidence so long as the jury's verdict is possible. *See Banks*, 120 Nev. at 841, 102 P.3d at 65; *Fox*, 91 Nev. at 221, 533 P.2d at 468. Instead, the record demonstrates that the district court improperly substituted its judgment for that of the jury. *See Brascia*, 105 Nev. at 594, 781 P.2d at 767.

Because there was substantial evidence supporting the jury's award of past pain and suffering, which was, in fact, acknowledged by the district court, the record demonstrates that the jury could have followed the instructions, credited Smith's evidence, discredited the points that Eiden argued, and reached the verdict that it did. *See Cox*, 138 Nev. at 250-51, 507 P.3d at 1230. Accordingly, the district court abused its discretion in granting a new trial based on the manifest disregard of jury instructions.[7] *Id.* Therefore we,

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[7]Insofar as the parties raise other 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 further relief or need not be reached given the disposition of this appeal.

ORDER the judgment of the district court REVERSED AND REMAND this matter for the district court to reinstate the jury verdict in the amount of $775,000 for past pain and suffering in Smith's favor.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Crystal Eller, District Judge
Larry J. Cohen, Settlement Judge
Burk Injury Lawyers
Claggett & Sykes Law Firm
Richard Harris Law Firm
Messner Reeves LLP
Eighth District Court Clerk