



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHANNA SIERRA JOSEPHINE DIAZ,
Appellant,
vs.
RONALD GENE MARSDEN,
Respondent.

No. 89202-COA

ORDER OF REVERSAL AND REMAND

Johanna Sierra Josephine Diaz appeals from the entry of a district court final judgment after a jury verdict in a personal injury action. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Respondent Ronald Gene Marsden filed a personal injury action against Diaz, seeking monetary damages for injuries he sustained when Diaz's Jeep and Marsden's motorcycle collided while Diaz was trying to make a U-turn from southbound Nellis Boulevard onto northbound Nellis Boulevard.

Marsden filed a complaint against Diaz alleging she acted negligently, recklessly, or carelessly for making an unsafe and illegal U-turn that caused the collision. Marsden further alleged that because of the collision, he suffered personal injuries that required him to seek medical treatment and caused him severe pain and suffering. Diaz filed an answer in which she denied making an unsafe U-turn and expressly denied liability for the collision. As is relevant to an issue presented on appeal, Diaz also

asserted the affirmative defenses of comparative negligence and assumption of the risk.

In her deposition, Diaz testified that she agreed the collision was her fault and that police determined she was at fault and cited her for failure to yield. She further testified that traffic was “pretty heavy” at the time of the collision, that one of the three northbound lanes was under construction, and that vehicles had stopped in the first and second northbound lanes she was attempting to cross to allow her to complete her turn. She explained that she never saw Marsden before the collision but thought he was traveling too fast for the conditions because: (1) when she looked into the third lane she was attempting to cross right before the collision, the one Marsden was traveling in, it was clear and she did not see him approaching, but then they suddenly collided and; (2) traffic around Marsden had stopped.

In his deposition, Marsden testified that he was familiar with the area where the collision occurred and knew that people often make U-turns there to access an adjacent apartment complex. Marsden explained that at the time of the collision, he was traveling in the third lane, which was clear, but that traffic in the two lanes next to his had stopped. Marsden testified that he had “no idea” how fast he was going at the time of the collision but that he was not planning on stopping or slowing down prior to the collision. Marsden explained that following the collision, he was taken via ambulance to a hospital for treatment for the injuries he sustained and that he underwent subsequent treatment for his injuries.

Following the depositions of the parties and their respective medical experts, Marsden filed three separate motions for partial summary judgment as to affirmative defenses, negligence, and medical damages. Diaz opposed the motions. The district court thereafter granted Marsden's motions for partial summary judgment. The court determined that Diaz could not raise affirmative defenses, that Diaz was solely at fault for the collision as a matter of law, and that Marsden was entitled to \$93,485.19 in special medical damages based on expert testimony. Diaz filed a motion for reconsideration. The district court denied Marsden's motion and conducted a jury trial solely on the issue of general damages, although the court permitted its award of the medical specials to be presented to the jury. The jury returned a verdict awarding \$53,125 in general damages, and the district court entered judgment in favor of Marsden. This appeal followed.

Diaz raises several arguments on appeal. First, she argues that the district court erred by granting Marsden's partial motions for summary judgment regarding her affirmative defenses because genuine disputes of material fact remain regarding whether Marsden was comparatively negligent or assumed the risk in operating his motorcycle thereby negating or reducing Diaz's liability for damages. Second, because genuine disputes of material fact remain as to whether Marsden's failure to operate his motorcycle with due care contributed to the accident and his injuries, it was error to grant summary judgment in his favor on the issue of negligence. Third, Diaz argues the district court erred by granting partial summary judgment on damages and awarding Marsden \$93,485.19 in medical specials because the jury, and not the court, should have determined the

amount of damages to be awarded. And at trial the jury should not have been permitted to learn of the special damages awarded by the court because it was tasked with considering general damages only.

This court reviews a grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate where, construing all evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact, and “the moving party is entitled to a judgment as a matter of law.” *Id.* (internal quotation marks omitted); see NRCP 56(a). Generally, negligence and implied assumption of the risk are factual issues for the jury. See *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007) (“We are reluctant to affirm summary judgment in negligence cases because, generally, the question of whether a [party] was negligent in a particular situation is a question of fact for the jury to resolve.”); see also *Kuchta v. Sheltie Opco, LLC*, No. 76566-COA, 2020 WL 3868434, at *5 n.7 (Nev. Ct. App. July 8, 2020) (Order of Reversal and Remand) (noting that both primary and secondary implied assumption of the risk requires “(1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed”); *Kerns v. Hoppe*, No. 55615, 2012 WL 991651, at *4 (Nev. Mar. 21, 2012) (Order Affirming in Part, Reversing in Part and Remanding) (concluding the district court erred by granting summary judgment because there was “a genuine issue of material fact as to whether the decedent knew of and fully appreciated the risks of doctor shopping in order to procure drugs to feed his addiction”). We address Diaz’s arguments in turn.

First, while Diaz testified at her deposition that she agreed she caused the collision and was cited for the U-turn violation, she also testified that she thought that Marsden was going too fast for the conditions, including the heavy traffic, and because she looked into Marsden's lane prior to the collision and saw that it was clear, and then suddenly collided with him. Additionally, Marsden testified at his deposition that he knew that people frequently made U-turns where the collision occurred and that traffic had stopped in the two lanes adjacent to him but had no plan to stop or even slow prior to the collision. Based on this testimony, there remain genuine disputes of material fact as to whether Marsden was comparatively negligent as the aforementioned deposition testimony supports Diaz's contention that Marsden may have been knowingly operating his motorcycle in a manner that was unsafe for the conditions thereby contributing to the accident. See *Wood*, 121 Nev. at 729, 121 P.3d at 1029; cf. NRS 484B.603(1) (describing the duty of a driver to decrease speed under certain conditions).

Where comparative negligence is asserted as a defense, "the comparative negligence of the plaintiff or the plaintiff's decedent does not bar a recovery if that negligence was not greater than the negligence or gross negligence of the parties to the action against whom recovery is sought." NRS 41.141(1). The district court must instruct the jury that "plaintiff may not recover if the plaintiff's comparative negligence or that of the plaintiff's decedent is greater than the negligence of the defendant" NRS 41.141(2)(a). If the jury determines the plaintiff is entitled to recover, it must determine the total damages the plaintiff would be entitled to

without regard to plaintiff's comparative negligence and in a special verdict indicate the percentage of negligence attributable to each party. NRS 41.141(2)(b).

Accordingly, the district court erred by granting summary judgment as to Diaz's affirmative defense of comparative negligence and we reverse the grant of partial summary judgment on that affirmative defense, which can be raised by Diaz at trial to argue against both liability and damages. *See Cox v. Copperfield*, 138 Nev. 235, 248, 507 P. 3d 1216, 1228 (2022) (acknowledging comparative negligence can limit liability in that "[a] plaintiff's duty of care for the plaintiff's own safety is the same as a defendant's—that of a reasonable person under like circumstances. And a defendant's coextensive duty of care to a foreseeable plaintiff does not obviate a plaintiff's duty of reasonable self-care" (internal citation omitted)); *cf. Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (explaining that under the circumstances presented in the case "[c]ontributing fault, if any, on [the plaintiff's] part could reduce [the plaintiff's] recovery under the doctrine of comparative negligence, but does not negate a finding that [the defendant's] negligence was a proximate cause of [the plaintiff's] injuries."). In addition, we reverse the grant of summary judgment on the affirmative defense of secondary implied assumption of the risk in this automobile/motorcycle accident case because the above testimony compels

such a result here.¹

Second, although Diaz admitted to causing the accident in her deposition, as discussed above, the parties testified to other facts that raise a genuine dispute as to whether Marsden was comparatively at fault in causing the accident. And because it was error to grant summary judgment on the affirmative defense of comparative negligence, the district court erred in granting summary judgment on liability, particularly when considering the facts in the light most favorable to Diaz, the nonmoving party, as the jury could determine that Diaz was not the proximate cause of the accident and Marsden's injuries. *See Cox*, 138 Nev. at 250, 507 P. 3d at 1230 (explaining that "[b]ased on these divergent accounts of the incident, the jury weighed the evidence and concluded that [defendants'] negligence

¹*See Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 220 & n.22, 180 P.3d 1172, 1177 & n.22 (2008) (providing that the implied assumption of the risk doctrine is generally divided into the subcategories of primary and secondary and that "secondary implied assumption of risk arises where the plaintiff knowingly encounters a risk created by the defendant's negligence" (internal quotation marks omitted)); *see also Marty ex rel. Marty v. Malin*, No. 57133, 2012 WL 3139862, at *2 (Nev. July 31, 2012) (Order of Reversal and Remand) (providing that because the analysis for secondary implied assumption of the risk is akin to comparative negligence, it requires a factual determination that must be decided by a jury).

We further note that the Nevada Supreme Court has recognized that the primary implied assumption of the risk doctrine should not be treated as an affirmative defense but rather be incorporated into the district court's initial duty analysis. *Turner*, 124 Nev. at 221, 180 P. 3d at 1177. Because the parties do not dispute that Diaz owed a duty of care while operating a motor vehicle, it is unnecessary for this court to consider whether the primary implied assumption of the risk doctrine affects that duty.

was not the proximate cause of [the plaintiff's] fall and resulting injuries."). Thus, the jury could find that Marsden was comparatively at fault when operating his motorcycle, and therefore that his conduct was the proximate cause of the accident that would result in a verdict in Diaz's favor or a reduced verdict for Marsden.

Third, Diaz argues the district court erred by granting partial summary judgment regarding special medical damages and awarding Marsden \$93,485.19. As previously stated, this court reviews a grant of summary judgment de novo and summary judgment is only appropriate where, construing all evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact and the moving party is entitled to a judgment as a matter of law. See *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

In resolving this issue, we first address a related issue raised by Diaz. Diaz contends the district court improperly determined her expert witness's opinion regarding the reasonableness of Marsden's medical expenses was inadmissible because it implicated the collateral source rule by being based on Medicare write-down rates. The party moving for summary judgment must meet its initial burden of production to show no genuine disputes of material fact exist. *Cuzze v. Univ. & Cmty. Coll. Sys. of 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.

“The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.” *Khoury v. Seastrand*, 132 Nev. 520, 538, 377 P.3d 81, 93-94 (2016) (citation omitted). The Nevada Supreme Court has created “a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any purpose*” to address “the danger that the jury will misuse the evidence to diminish the damage award.” *Id.* at 538-39, 377 P.3d at 94 (citation omitted). “Evidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers ‘is irrelevant to a jury’s determination of the reasonable value of the medical services and will likely lead to jury confusion.’” *Id.* at 538, 377 P.3d at 93 (quoting *Tri-Cty. Equip. & Leasing v. Klinke*, 128 Nev. 352, 360, 286 P.3d 593, 598 (2012) (Gibbons, J., concurring)). This is because “write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider, and not necessarily relating to the reasonable value of the medical services.” *Tri-Cty. Equip. & Leasing*, 128 Nev. at 360, 286 P.3d at 598. “If the write-downs cause one party to receive a windfall, it should be the insured plaintiff, not the tortfeasor.” *Id.* at 361, 286 P.3d at 599.

Here, the district court determined that Diaz’s expert’s opinion regarding the reasonableness of Marsden’s medical expenses was based on Medicare write-down rates. This determination is supported by the record. Although Diaz argues that the evidence does not implicate the collateral

source rule because Marsden's bills were not paid by Medicare, the write-down rates Diaz's expert witness relied on in determining the reasonableness of Marsden's medical expenses were based on factors "not necessarily relating to the reasonable value of the medical services " and are "irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion. " *See id.* at 360-61, 286 P.3d at 598-99.

Accordingly, we conclude the district court did not err by determining that Diaz's expert evidence on the reasonableness of Marsden's medical bills was inadmissible. *See Khoury*, 132 Nev. at 538-39, 377 P.3d at 94; *see also Cuzze*, 123 Nev. at 603, 172 P.3d at 134. Therefore, Diaz is not entitled to relief based on this argument.


Nevertheless, we agree with Diaz that the district court erred by awarding Marsden \$93,485.19 in special medical damages because the jury's potential apportionment of fault to Marsden based on his comparative negligence could potentially have affected the special damages awarded. Generally, it is within the province of the jury to determine damages. *See Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984); *see also* NRS 41.141(1), (2).

As discussed above, the district court erred in granting summary judgment on Diaz's affirmative defense of comparative negligence, which the jury should have been able to consider. Because Marsden's recovery may be reduced or even barred by his potential comparative negligence, the jury must have the opportunity to also consider Marsden's comparative negligence in determining the proximate cause of

his injuries. See Cox, 138 Nev. at 251, 507 P.3d at 1230 (explaining that the jury could “conclude, as it did, that the [defendants] were negligent but not the proximate cause of [plaintiff’s] injuries”). Therefore, as damages are within the province of the jury to decide, we conclude that the district court also erred by granting Marsden’s motion for partial summary judgment as to special damages and reverse the grant of summary judgment on this issue. For these reasons, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for a new trial on liability and damages with the proper jury instructions regarding comparative negligence.²


Bulla, C.J.


Gibbons, J.


Westbrook, J.

cc: Hon. Mary Kay Holthus, District Judge
Israel Kunin, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Clear Counsel Law Group

²In light of our disposition, we need not reach the other arguments raised on appeal as they do not provide a basis for additional relief.

Eighth District Court Clerk