



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE FLORES,
Appellant,
vs.
JORGE LOPEZ,
Respondent.

No. 89689-COA

ORDER OF AFFIRMANCE

Jorge Flores 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; Erika L. Mendoza, Judge.

Respondent Jorge Lopez filed a personal injury action against Flores seeking monetary damages for injuries he sustained when Flores' vehicle collided with his vehicle. Prior to trial, Lopez filed three motions in limine seeking to exclude evidence and argument: that Lopez's medical treatment was "attorney-driven" or "litigation driven" or referring to the instant matter as a "medical buildup" case; related to when and why Lopez retained counsel; and related to the reduction of medical liens. Flores opposed the motions and following a nonevidentiary hearing, the district court granted Lopez's motion in limine addressing the retention of counsel and partially granted Lopez's two other motions in limine.

At trial, Lopez called his physical therapist, J. Lyons, to testify regarding his injuries. During Lyons' testimony, it was revealed that certain medical records in the possession of Lyons' office had not been

disclosed to Flores by Lopez's counsel along with his other medical records.¹ Flores requested that the custodian of records for Lyons' office testify. The district court granted Flores' request, and the custodian of records testified that she did not know exactly which documents had been provided to Lopez's counsel but that the undisclosed documents would normally have been provided to a requesting attorney had the attorney requested the complete file. Alleging that Lopez's counsel's failure to disclose the documents constituted evidence tampering, Flores moved to strike the complaint, or in the alternative, for an order barring Lopez's ability to use Lyons' testimony or his billing statements and an adverse inference instruction directing the jury that the undisclosed documents would have been beneficial to Flores' case. Flores also sought an order from the district court requiring in camera review of Lopez's counsel's emails to determine whether the undisclosed documents had been in counsel's possession and thus willfully withheld.

The district court found that the custodian of records' testimony was not clear as to whether the undisclosed documents had been provided to Lopez's counsel and that even if they had, there existed no evidence that Lopez's counsel withheld the documents intentionally. Based on this, the district court denied Flores' request for in camera review of Lopez's counsel's emails and ultimately denied Flores' request for sanctions. The district court did offer Flores the opportunity to recall Lyons and to call Lopez's pain management physician to question them about the information

¹The undisclosed documents, which were ultimately provided to Flores before Lopez testified at trial, included records from Lopez's pain management physician; a form indicating Lopez's pain complaints; an accident narrative form; a HIPAA release form; and a medical lien.

contained in the undisclosed documents. However, Flores did not do so, and although he obtained the undisclosed documents before Lopez took the stand, Flores chose not to cross-examine Lopez about the documents either.

Ultimately, the jury returned a verdict finding Flores negligent and awarding Lopez \$291,000 in damages. The district court entered judgment in favor of Lopez. This appeal followed.

On appeal, Flores first argues the district court abused its discretion by: (1) not ordering Lopez's counsel to produce emails to determine whether Lopez's failure to disclose the documents at issue constituted evidence tampering and (2) not thereafter applying the factors contained in *Young v. Johnny Ribeiro Building, Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990), to determine the appropriate sanction. Flores contends sanctions were warranted because the custodian of records testified that the undisclosed documents would normally be included with the documents provided to a requesting attorney thus demonstrating Lopez's counsel's actions amounted to evidence tampering. Lopez argues the district court did not abuse its discretion in its handling of the undisclosed documents and even assuming it had, any error was harmless because Flores was not sufficiently prejudiced to warrant relief.

A district court has the inherent authority to impose discovery sanctions for a party's failure to disclose evidence. *See MDB Trucking, LLC v. Versa Prods. Co., Inc.*, 136 Nev. 626, 630, 475 P.3d 397, 403 (2020). A district court's determinations regarding whether to impose discovery sanctions are reviewed for an abuse of discretion and "we will not substitute our judgment for that of the district court." *Young*, 106 Nev. at 92, 787 P.2d at 779; *cf. Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010) (providing that when a district court imposes case-terminating sanctions, a

heightened standard of review is applied where “the district court abuses its discretion if the sanctions are not just and do not relate to the claims at issue in the discovery order that was violated” (citing *Young*, 106 Nev. at 92, 787 P.2d at 779-80)). A district court’s order regarding whether to impose non-case terminating sanctions will be upheld where it is supported by substantial evidence and the court’s “findings of fact shall not be set aside unless they are clearly erroneous and not supported by substantial evidence.” *Valley Health Sys., LLC v. Est. of Doe by & through Peterson*, 134 Nev. 634, 639, 427 P.3d 1021, 1027 (2018), *as corrected* (Oct. 1, 2018) (internal quotation marks omitted). This court will not second guess a district court’s resolution of factual issues involving conflicting evidence or reconsider its credibility findings. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009); *see also Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (providing that an appellate court “is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party” (internal quotation marks omitted)).

We need not address Flores’ specific arguments regarding the emails and sanctions because he has not demonstrated that he was prejudiced by the district court’s decision not to order in camera review of Lopez’s counsel’s email or to impose sanctions. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (holding “[a]n error is harmless when it does not affect a party’s substantial rights”); *cf.* NRCP 61 (stating that courts “must disregard all errors and defects that do not affect any party’s substantial rights”). In his opening brief on appeal, Flores alleges he was prejudiced by Lopez’s failure to disclose the documents at issue because the information contained in the documents appeared to contradict

Lopez's deposition testimony and raised the possibility of preexisting injuries; and Lyons testified about the records of Lopez's pain management physician, which Flores did not know he had and which affected the manner in which Lyons was cross-examined.²

Initially, insofar as Flores contends that the undisclosed documents raised the possibility that Lopez's pain was the result of pre-existing injuries, the district court found Lopez's handwritten responses in the undisclosed documents were consistent with his pain being the result of the accident at issue in this case and did not imply that his injuries were related to a prior accident. These findings are not clearly erroneous and are supported by substantial evidence. *See Valley Health Sys.*, 134 Nev. at 639, 427 P.3d at 1027. And we will not second guess the district court's factual determinations based on this evidence or reweigh the evidence. *See Grosjean*, 125 Nev. at 366, 212 P.3d at 1080; *Quintero*, 116 Nev. at 1183, 14 P.3d at 523. In addition, the pain values reported by Lopez in the undisclosed documents were largely consistent with the other evidence, and Lyons' testimony regarding what Lopez initially reported as his pain level versus the higher pain level Lopez reported in the undisclosed documents arguably benefited Flores.³

²Flores makes additional arguments related to prejudice for the first time in his reply brief which we decline to consider. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (citing NRAP 28(c) and concluding that an issue raised for the first time in an appellant's reply brief was forfeited).

³In the undisclosed document at issue, which Lopez filled out the day after the accident prior to being seen by Lyons, Lopez reported his pain was at least a 7 out of 10. Lyons testified that Lopez represented to him that in

And while we recognize that the undisclosed documents were not available to Flores prior to trial, he learned about them during the trial and had an opportunity to question Lopez, Lyons, and Lopez’s pain management physician on these points, including by calling Lopez’s pain management physician as a witness and recalling Lyons to the stand, but Flores did not do so. Under these circumstances, we cannot conclude that any failure to timely disclose the documents adversely impacted Flores’ ability to litigate his case or otherwise affected his substantial rights—particularly since he does not argue or explain why he could not question these witnesses about the undisclosed documents after learning of them, and the documents at issue were consistent with the disclosed treatment records and testimony. *Cf. Palmieri v. Clark County*, 131 Nev. 1028, 1033 n.2, 367 P.3d 442, 446 n.2 (2015) (providing that issues not raised on appeal are waived). Therefore, we conclude Flores has not demonstrated that he was prejudiced by the district court’s decision not to order in camera review of Lopez’s counsel’s emails or to impose sanctions against Lopez and that any error in this respect was harmless. Accordingly, Flores is not entitled to relief in connection with the untimely disclosed documents.

Flores next argues the district court abused its discretion by partially granting Lopez’s three motions in limine that limited the admissibility of evidence and argument during trial. “We review a district court’s decision to admit or exclude evidence for abuse of discretion, and we will not interfere with the district court’s exercise of its discretion absent a showing of palpable abuse.” *M.C. Multi-Family Dev., L.L.C. v. Crestdale*

the time between the accident but prior to being seen by Lyons, Lopez’s “pain fluctuated between 4 and 7 out of 10.”

Assocs., Ltd., 124 Nev. 901, 913, 193 P.3d 536, 544 (2008); see *State ex rel. Dep't of Highways v. Nev. Aggregates & Asphalt Co.*, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976) (reviewing a decision on a motion in limine for an abuse of discretion). We review questions of law de novo. *Nance v. Ferraro*, 134 Nev. 152, 156, 418 P.3d 679, 683 (Ct. App. 2018).

First, Flores contends the district court improperly excluded evidence and argument that Lopez's medical treatment was "attorney-driven" or "litigation driven" or referring to the instant matter as a "medical buildup" case. The district court ruled that Flores could elicit testimony that Lopez was referred by his counsel to medical providers but could not offer evidence or argument alleging "medical buildup" or "attorney driven care" on the grounds that it would be more prejudicial than probative.

"Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). Evidence or argument that Lopez's medical treatment was improperly driven by his counsel or referring to this matter as a medical buildup case implicates "the justness of personal injury litigants' causes" in a manner that the Nevada Supreme Court has determined to be prejudicial before a jury. See *Lioce v. Cohen*, 124 Nev. 1, 22, 174 P.3d 970, 984 (2008). As such, we conclude the district court did not abuse its discretion in granting Lopez's motion in limine excluding such evidence or argument.

Next, Flores contends the district court improperly excluded evidence related to when and why Lopez retained counsel. Flores contends that the date on which a party retains counsel is a fact and not a communication made for the purpose of obtaining legal advice, and thus,

the district court erred by concluding that evidence related to Lopez's retention of counsel implicates the attorney-client privilege.⁴

The attorney-client privilege applies to confidential communications between an attorney and a client made for the purpose of facilitating the rendition of professional legal services. *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017); NRS 49.095. Whether and when a client consults with an attorney are facts generally not protected by the attorney-client privilege. *See Pohl v. Ninth Jud. Dist. Ct.*, No. 64725, 2016 WL 383086, at *2 (Nev. Jan. 28, 2016) (Order Denying Petition for Writ of Mandamus) (citations omitted).

To the extent the district court erred in concluding that the date Lopez retained counsel implicated attorney-client privilege, we conclude that given Flores' additional arguments regarding the admissibility of this evidence below, he is not entitled to relief. In opposition to Lopez's motion below, Flores argued that evidence related to Lopez's retention of counsel was admissible because it was "directly relevant to issues of secondary gain, medical buildup, and attorney-driven care." Flores' motive for admitting this evidence implicates the same prejudice concerns that are discussed above. *See Lioce*, 124 Nev. at 22, 174 P.3d at 984. Therefore, we conclude Flores fails to demonstrate the district court abused its discretion in granting Lopez's motion in limine excluding such evidence. *See* NRS 48.035(1) (providing that a district court may exclude relevant evidence "if

⁴Flores does not cogently argue that Lopez's reasons for retaining counsel were also not protected by attorney-client privilege, and thus, we do not consider this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not consider claims that are unsupported by cogent arguments).

its probative value is substantially outweighed by the danger of unfair prejudice”).

Finally, Flores contends the district court improperly excluded evidence or references related to the reduction of medical liens. The district court allowed Flores to ask questions related to the existence of liens tied to Lopez’s medical treatment to demonstrate bias but excluded evidence or reference to the reduction of such liens on the grounds that it implicated the collateral source rule.

“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) (quotation marks omitted). There is “a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose” but “evidence of the existence of medical liens to prove bias does not invoke the collateral source rule.” *Id.* at 538-39, 377 P.3d at 94 (emphasis 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.

Although Flores argues on appeal that the evidence does not implicate the collateral source rule because reduction of a medical lien is different than a medical insurer's write down, a provider's reasons for reducing how much they are willing to accept for satisfaction of a medical lien does not necessarily relate to the reasonable value of the medical services he or she has provided and is thus "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, 286 P.3d at 598. Therefore, we conclude the district court did not abuse its discretion in granting Lopez's motion in limine excluding such evidence or argument.⁵

Flores also argues the district court abused its discretion by failing to admonish the jury regarding Lopez's improper closing argument and that reversal and a new trial is therefore warranted. During closing, Lopez argued that "[t]his verdict is you sending a message based on the evidence that drivers—." Flores objected, interrupting Lopez's argument,

⁵To the extent Flores contends the district court also abused its discretion by not allowing him to ask questions related to the sale of liens or how and whether a medical provider collects on liens from plaintiffs, Flores did not explicitly raise these arguments below and the district court's ruling was limited to the reduction of medical liens. Thus, we need not consider these arguments on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been [forfeited] and will not be considered on appeal."). Further, the Nevada Supreme Court has held "that evidence regarding the sale of medical liens is likewise irrelevant to a jury's determination of the reasonable value of medical services provided." *Khoury*, 132 Nev. at 538, 377 P.3d at 93.

While Flores argues that *Khoury* should be overruled, "this court cannot overrule Nevada Supreme Court precedent." *Eivazi v. Eivazi*, 139 Nev. 408, 418 n.7, 537 P.3d 476, 487 n.7 (Ct. App. 2023).

and the district court sustained the objection. Although Flores also requested that the jury be admonished that the argument was improper, the court did not do so. Flores contends the district court should have admonished the jury that such an argument is improper because Lopez's argument to send a message, while not per se improper, was not based on the evidence but was instead based on general community safety principles.

We review whether an attorney's comments constitute misconduct de novo and review a district court's decision whether to instruct the jury for an abuse of discretion. *Evans-Waiiau v. Tate*, 138 Nev. 423, 429, 432, 511 P.3d 1022, 1028, 1030 (2022). Arguments asking the jury to send a message are improper where they call upon the jury to knowingly and deliberately reject the evidence or refuse to apply the law "either because the jury wants to send a message about some social issue" or "because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce*, 124 Nev. at 20, 174 P.3d at 982-83 (quoting *Jury Nullification*, *Black's Law Dictionary* (8th ed. 2004)). However, such arguments are not prohibited where counsel "did not implore the jury to disregard the evidence." *Capanna v. Orth*, 134 Nev. 888, 890-91, 432 P.3d 726, 731 (2018).

Here, while the district court was concerned that Lopez's counsel's argument implicated punishing Flores for his conduct, the challenged argument did not implore the jury to disregard the evidence. Further, the district court sustained the objection, admonished counsel in a sidebar, and counsel did not repeat the argument. Given these facts, we conclude Flores fails to demonstrate the district court abused its discretion in failing to admonish the jury. *Cf. Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 77, 319 P.3d 606, 613 (2014) ("If the district court fails to admonish

counsel or the jury after objecting counsel requests such admonishment promptly following his or her sustained objection, a party moving for a new trial must only demonstrate that ‘an admonition to the jury would likely have affected the verdict in favor of the moving party.’” (quoting *Lioce*, 124 Nev. at 18, 174 P.3d at 981)).

For these reasons, we

ORDER the judgment of the district court AFFIRMED.⁶



Bulla, C.J.



Gibbons, J.



Westbrook, J.

cc: Hon. Erika L. Mendoza, District Judge
Ara H. Shirinian, Settlement Judge
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Martinez Dieterich and Zarcone Legal Group
Bailey Kennedy
Ladah Law Firm
Eighth District Court Clerk

⁶Insofar as Flores raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.