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ELIZABETH A. BROWN
CLERK OF SUPREME COURT

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JORGE ANDRES GARCIA-VERDUGO AND ROSA AIDEE VERDUGO, Appellants, vs. BELKIS MARTINEZ, Respondent.	No. 89849-COA

ORDER OF AFFIRMANCE

Jorge Andres Garcia-Verdugo and Rosa Aidee Verdugo appeal from a district court order denying their motion to amend judgment and remittitur. Eighth Judicial District Court, Clark County; Hon. Timothy C. Williams, Judge.

Jorge, while driving Rosa's vehicle in traffic, rear-ended the vehicle of respondent Belkis Martinez and her husband. Martinez filed a complaint alleging that appellants were negligent in causing the collision and as a result, Martinez sustained bodily injury, pain, and suffering. During the trial, the jury heard evidence about the collision, Martinez's injuries, and her treatment for those injuries. The jury found: appellants were negligent in causing the collision, appellants' negligence was the proximate cause of Martinez's injuries, and that Martinez failed to mitigate her damages. The jury awarded Martinez $27,844.13 for past medical specials, $131,400 for past pain and suffering, and $50,400 for future medical specials. The jury did not award any damages for future pain and suffering.

Appellants moved to amend the judgment and sought remittitur of the pain and suffering and future medical specials award. They argued that, given the jury instruction describing the duty to mitigate and the jury's finding that Martinez did not mitigate her damages, the jury's award for future medical expenses amounted to manifest injustice. They also argued the jury's award of pain and suffering was excessive and erroneous. The district court denied appellants' motion. The court determined that the award for future medical expenses was consistent with the medical testimony presented at trial. The district court found that the instructions were clear and the jury's award for unavoidable future medical expenses was not inconsistent with its finding regarding Martinez's failure to mitigate and the award for past pain and suffering was reasonable and not flagrantly improper. This appeal followed.

On appeal, appellants challenge the district court's order denying their motion to alter or amend judgment and seeking remittitur. We review orders disposing of motions to amend pursuant to NRCP 59(e) and motions seeking remittitur for an abuse of discretion. *Panorama Towers Condo. Unit Owners' Ass'n v. Hallier*, 137 Nev. 660, 662, 498 P.3d 222, 224 (2021); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010); *Harris v. Zee*, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971). "An NRCP 59(e) motion to alter or amend a judgment may be appropriate to correct manifest errors of law or fact, address newly discovered or previously unavailable evidence, prevent manifest injustice, or address a change in controlling law." *Panorama*, 137 Nev. at 662, 498 P.3d at 224 (internal quotation marks omitted); *see AA Primo*, 126 Nev. at 582, 245 P.3d at 1193. A district court's decision regarding remittitur is entitled to deference and is not suspect unless the damages awarded are "so excessive as to suggest the intrusion of passion or prejudice." *Harris*, 87 Nev. at 312, 486 P.3d at 492.

Appellants first contend that the record and verdict did not support the district court's conclusion that the jury correctly applied the mitigation instruction. The jury was instructed that "[t]he Plaintiff has a duty to mitigate her damages, that is an affirmative burden to act in a manner that minimizes her damages," and that "[t]here can be no recovery of damages which would have been avoided by Plaintiff through the exercise of reasonable mitigation efforts." Appellants contend that the jury's findings indicate it believed Martinez was injured but also failed to mitigate her damages after September 4, 2018. Thus, they argue any damages based on expenses incurred after that date were improperly awarded.

Courts presume "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); *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 plaintiffs 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). "[A] court may not substitute its own judgment in place of the jury's judgment unless the jury erred as a matter of law." *Brascia v. Johnson*, 105 Nev. 592, 594, 781 P.2d 765, 767 (1989). A court is precluded from granting relief if the question only

concerns the weight of evidence, even where the verdict appears against the weight of evidence. *Id.; see also 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.").

We conclude that the district court did not abuse its discretion in denying the motion. Appellants' argument is premised on their extrapolation from the past medical specials award that Martinez failed to mitigate damages after September 4, 2018, as they contend the awards for past pain and suffering and medical expenses indicate that the jury did not follow the mitigation instruction. However, the verdict does not contain any express indication of how and when the jury determined Martinez failed to mitigate damages in the instant matter. Moreover, while "an injured person cannot recover for damages which could have been avoided by the exercise of reasonable care," an injured party may still be entitled to unavoidable damages. *Automatic Merchandisers, Inc. v. Ward*, 98 Nev. 282, 284, 646 P.2d 553, 554 (1982). And here, appellants failed to demonstrate it was impossible for the jury to have correctly applied the mitigation instruction and to have concluded, based on the evidence presented, that the amount of past pain and suffering and future medical expenses were unavoidable. *See Cox*, 138 Nev. at 250, 507 P.3d at 1229-30. Accordingly, the district court did not err in denying relief on this ground.

Second, appellants argue that the award of $50,400 in future medical expenses was erroneous as the award was inconsistent with the jury's finding that Martinez failed to mitigate damages and the evidence introduced at trial supporting the mitigation finding. Appellants further contend that the

district court did not employ the correct standard in evaluating the jury's future medical treatment award.

A plaintiff is entitled to an award for future medical expenses where it has been shown "that such future medical expenses are reasonably necessary," *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390, 930 P.2d 94, 97 (1996), and that the contemplated damages are reasonably certain to be incurred, *see Yamaha Motor Co. v. Arnoult*, 114 Nev. 233, 249, 955 P.2d 661, 671 (1998) (indicating that to recover future medical expenses, a plaintiff must show "a reasonable probability that such expenses will be incurred"). However, as discussed above, "an injured person cannot recover for damages which could have been avoided by the exercise of reasonable care." *Automatic Merchandisers*, 98 Nev. at 284, 646 P.2d at 554.

The district court's determination that the award for future medical expenses was consistent with the expert testimony is supported by the record. At trial, the jury received testimony from both Martinez's treating chiropractor and her pain management specialist as well as from a physician who reviewed Martinez's medical history and documentation. This testimony described how Martinez initially sought chiropractic care, which resolved the pain in her upper back and neck, but only reduced her lower back pain. Thereafter, she engaged a pain management specialist and received radio-frequency ablation of spinal nerves in her lower back to completely resolve the pain. Doctors also recommended Martinez engage in an exercise regimen to strengthen muscles and support the affected joint, but she was hesitant to engage in any such program and instead continued to get yearly ablation treatments to manage the injury. While the defense expert disputed the cause of Martinez's injury and whether the treatment she pursued was necessary, he acknowledged the injury existed and required treatment. Additionally, the

jury's findings with regard to causation indicate that they credited Martinez's doctor over the defense expert in certain respects. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009) ("[C]redibility determinations and the weighing of evidence are left to the trier of fact."). Thus, the district court's observation that the testimony was not contradictory on the need for future medical care was supported by substantial evidence.

Additionally, although appellants point to statements made by the district court during a hearing and assert that the court used incorrect language when describing the evidentiary standard concerning the jury's future medical expenses award, there is no indication from the court's written order that it employed the incorrect standard in evaluating the motion and the written order controls. *See Kirsch v. Traber*, 134 Nev. 163, 168 n.3, 414 P.3d 818, 822 n.3 (2018) (recognizing that written orders control over statements made at a hearing). Moreover, because the jury could have concluded based on the evidence introduced at trial that Martinez was reasonably likely to incur unavoidable future medical expenses on account of the collision regardless of the treatment she elected to pursue, *see Conner*, 103 Nev. at 355, 741 P.2d at 801, appellants fail to demonstrate that the district court abused its discretion in denying relief in this regard.

Third, appellants contend that the $131,400 award for past pain and suffering was grossly excessive given the jury's mitigation finding. Further, appellants argue that the award was inconsistent with evidence that she was highly amenable to more conservative treatment during the period those damages covered.

The Nevada Supreme Court has repeatedly expressed its reluctance to substitute its judgment for that of the trier of fact on the issue of damages. *See, e.g., S. Pacific Co. v. Watkins*, 83 Nev. 471, 495 435 P.2d 498,

513 (1967); *Brownfield v. Woolworth Co.*, 69 Nev. 294, 297, 248 P.2d 1078, 1080 (1952). "[T]he court is not justified in reversing the case or granting a new trial on the ground that the verdict is excessive, unless it is so flagrantly improper as to indicate passion, prejudice or corruption in the jury." *S. Pacific Co.*, 83 Nev. at 495, 435 P.2d at 513-514 (quoting *Forrester v. S. Pacific Co.*, 36 Nev. 247, 134 P. 753 (1913)). In reviewing a jury verdict, "[t]his court upholds a jury verdict if there is substantial evidence to support it, but will overturn it if it was clearly wrong from all the evidence presented." *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009) (alteration in original) (internal quotation marks omitted). Amounts awarded for pain and suffering are subjective and within the province of the jury. *See Canterino v. The Mirage Casino-Hotel*, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001), *opinion modified on reh'g*, 118 Nev. 191, 42 P.3d 808 (2002); *see Stackiewicz v. Nissan Motor Corp.*, 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984) (noting that the measurement of pain and suffering damages falls peculiarly within the special province of the jury because the elements are wholly subjective).

Appellants have not demonstrated that the award for pain and suffering was "flagrantly improper." The evidence established that Martinez had not experienced back pain before the collision. After which, she consistently reported experiencing significant pain to treating physicians. She experienced resolution of her neck and upper back pain with chiropractic care, but substantial pain still persisted in her lower back for months after the accident. The pain did not resolve until she received the ablation treatment. Given this testimony and the jury's awarding $131,400 of the $548,400 requested for pain and suffering, appellants have not demonstrated that the jury failed to account for the amount of that award which might have been avoided had Martinez pursued more conservative treatment. Accordingly, we

conclude that appellants fail to demonstrate that the district court abused its discretion in denying relief.

Having considered appellants' contentions and concluding that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Bulla, C.J.

Gibbons, J.

Westbrook, J.

cc: Hon. Timothy C. Williams, District Judge
Hon. Stephen E. Haberfeld, Settlement Judge
Barron & Pruitt, LLP
De Castroverde Law Group
The Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, District Court Clerk