IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS STOCKARD, SPECIAL ADMINISTRATOR OF THE ESTATE OF EDWIN A. KLINE, JR., DECEASED,
Appellant,
vs.
LANE BAXTER-KRAEMER,
Respondent.

No. 39133

THOMAS STOCKARD, SPECIAL ADMINISTRATOR OF THE ESTATE OF EDWIN A. KLINE, JR., DECEASED,
Appellant,
vs.
LANE BAXTER-KRAEMER,
Respondent.

No. 39770

FILED

NOV 04 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a $75,700.00 judgment, awarded by the district court in favor of Lane Baxter-Kraemer and against Edwin A. Kline, Jr., an order denying Kline's motion for a new trial, and an order granting Baxter-Kraemer's motion for attorney fees.

This case arises out of two vehicular accidents in which Baxter-Kraemer was injured. On Friday, March 15, 1996, Kline's pickup collided with Baxter-Kraemer's car in Reno, causing her to hit her head. The following Monday, Baxter-Kraemer went to her family doctor, who diagnosed her with postconcussion syndrome and told her to take it easy for a few days. However, Baxter-Kraemer began to suffer frequent migraines, and in May 1996, she suffered a stroke due to a complicated migraine. As a result of the stroke, Baxter-Kraemer's motor skills, singing ability and ability to perform complex mental tasks were impaired. She made significant progress in dealing with these disabilities through

treatment. On December 17, 1999, Baxter-Kraemer's vehicle was struck by a delivery truck. She felt as if her progress had been completely undone. Baxter-Kraemer sued Kline and the second tortfeasor.[1] The second tortfeasor settled with Baxter-Kraemer for $165,000.00, but the suit against Kline proceeded to trial. The jury awarded Baxter-Kraemer $75,700.00 in past and future damages. Kline then moved to amend the judgment to allow him to offset the judgment with the settlement or, alternatively, for a new trial. Baxter-Kraemer moved for attorney fees. The district court denied Kline's motion and granted Baxter-Kraemer's motion. Kline now appeals the judgment, the order denying his motion for a new trial and the order granting Baxter-Kraemer's motion for attorney fees. We affirm.

Kline contends that the district court erred by allowing evidence of the second motor vehicle accident, without allowing evidence that would enable the jury to apportion liability between Kline and the second tortfeasor. According to Kline, the jury heard about damages for which Kline was not responsible. He argues that Baxter-Kraemer treated this case as a Kleitz v. Raskin[2] case until trial, then switched tactics,

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[1]Edwin Kline died shortly after the accident for unrelated reasons. Thomas Stockard is the special administrator of Kline's estate and the named party for the purpose of this suit. However, for simplicity, we refer to Kline rather than to Stockard.

[2]103 Nev. 325, 327, 738 P.2d 508, 509 (1987) (holding that, once the plaintiff proves that the second tortfeasor's actions were a cause of the injury, then the burden shifts to the tortfeasor to apportion damages, and if he cannot do so, "he is jointly and severally liable for the entire amount of damages attributable to the injury").

which prevented Kline from objecting to evidence not related solely to the first accident.

""The doctrine of "invited error" embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit"[3] and precludes review of the alleged errors that were caused, by acts of commission or omission, by the party alleging the error.[4] The record reflects that Kline sought the introduction of evidence of the 1999 motor vehicle accident. During a pre-trial motion in limine, Kline's counsel asserted that the jury would have to hear about the second accident and its effects on Baxter-Kraemer. Kline also referred to the second accident in both his opening and closing arguments, arguing that the second accident caused part of Baxter-Kraemer's health problems. Kline's examination of witnesses at trial focused on the contribution of the second accident to Baxter-Kraemer's health problems.

We conclude that Kline invited the alleged error he now raises. He sought admission of evidence of the second accident, and the injuries flowing from it, to minimize his own contribution to Baxter-Kraemer's injuries. Furthermore, if Kline were allowed to invoke Kleitz v. Raskin[5] to offset the damages awarded to Baxter-Kraemer with the settlement she received, the result would be that Kline would not pay for any of the injuries he had caused.

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[3]Pearson v. Pearson, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (quoting 5 Am. Jur. 2d Appeal and Error § 713 (1962)).

[4]Id. (citing 5 Am. Jur. 2d Appeal and Error § 721 (1962)).

[5]103 Nev. 325, 738 P.2d 508 (1987).

We further conclude that Kline's arguments that the district court erred by failing to give Kline's proffered jury instruction and special verdict form, and by instructing the jury to apportion damages because there was insufficient evidence upon which to base an apportionment decision, lack merit. "[A] party is entitled to have the jury instructed on all of his case theories that are supported by the evidence," if the instruction is consistent with existing case law and does not have a tendency to mislead the jury.[6] We will not overturn the district court's rejection of a proffered jury instruction absent an abuse of discretion.[7] Nor will we reverse a judgment by reason of an erroneous jury instruction if the error was harmless.[8]

The record reveals that the jury was presented with sufficient evidence to apportion damages. Almost all of the expert witnesses attributed the majority of Baxter-Kraemer's health problems to her stroke, and the stroke to the head trauma resulting from the first car accident. Dr. Edwin Carlisle Holland, an osteopath treating Baxter-Kraemer, testified that he believed the stroke was caused by the 1996 accident with Kline. Dr. Edgar Angelone, a psychologist and neuropsychologist who assesses and treats cognitive dysfunction, testified that Baxter-Kraemer had several physical and cognitive impairments, most of which he

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[6]Silver State Disposal v. Shelley, 105 Nev. 309, 311, 774 P.2d 1044, 1045-46 (1989).

[7]K-Mart Corporation v. Washington, 109 Nev. 1180, 1190, 1197, 866 P.2d 274, 281, 285 (1993) (holding that the district court did not abuse its discretion by refusing to give a proffered jury instruction where the given instructions adequately covered the law).

[8]Wynn v. Smith, 117 Nev. 6, 16, 16 P.3d 424, 430 (2001).

attributed to the head injury sustained in the 1996 car accident. However, Dr. Angelone also testified that he could not comment on a causal relationship between the 1996 car accident and the stroke, nor could he separate the effects of the 1996 and 1999 car accidents.

Dr. John H. Peacock, a practicing neurologist and professor who conducted an independent medical examination, testified that the 1996 car accident caused: (1) postconcussion syndrome; (2) the stroke; and (3) musculoskeletal problems. He testified that Baxter-Kraemer probably would not experience significant improvements in her motor deficits, and that she would require medical care for the rest of her life for the injuries suffered in the 1996 accident. He testified that the 1999 accident merely set Baxter-Kraemer back in her gains in physical rehabilitation.

On the other hand, Dr. John Bower, Baxter-Kraemer's family doctor and the doctor who treated her immediately after the 1996 car accident and again after the stroke, testified that there was no causal relationship between the car accident and the stroke. He testified that he believed a complex migraine caused the stroke. Similarly, Dr. Timothy James Doyle, the neurologist who examined Baxter-Kraemer immediately after the stroke, testified that although significant head trauma could trigger a stroke, he did not believe that Baxter-Kraemer's stroke was caused by the 1996 car accident because of the lapse of two months between the accident and the stroke. Dr. Harry Hayden Hill, a medical doctor who performed an independent medical exam, testified that there was no causation between the accident and the stroke. He testified that he believed Baxter-Kraemer's symptoms were due to her emotional problems with depression rather than an organic brain injury. He conceded, however, that her emotional problems were, at least in part,

caused by the 1996 accident. Finally, he testified that the 1999 car accident brought back her emotional problems and that it was more blameworthy than the 1996 accident for her current disabilities.

"The credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact."[9] The evidence was undisputed that Baxter-Kraemer had suffered a stroke two months after the 1996 car accident, and that most of her disabilities were caused by the stroke. There was conflicting testimony as to whether there was a causal link between the stroke and the 1996 accident. A reasonable jury could have determined that the testimony of Dr. Holland, Dr. Angelone and Dr. Peacock was more credible than the testimony of the other doctors regarding causation. Although no doctor attempted to quantify the amount of the first accident's contribution to Baxter-Kraemer's injuries, it was not necessary for them to do so because that was the jury's duty. Hence, we conclude that the district court did not err by instructing the jury not to award damages resulting from the 1999 accident.

The record reflects that there was also sufficient evidence to allow the jury to award future damages reasonably certain to occur as a result of the 1996 accident. Dr. Holland testified that Baxter-Kraemer would have a greater risk of injury due to the 1996 accident, that she would continue to find it more difficult to cope with daily stress than before the accident, that singing would continue to be difficult for her and that she would experience a diminished quality of life. He also testified to her continuing need for treatments, with the frequency ranging from

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[9]Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000).

monthly to weekly, depending on the severity of her symptoms. He testified that the cost of each treatment ranged from $120.00 to $240.00, and that physical therapy costs, at a minimum, $30.00 per treatment. Similarly, Dr. Peacock testified that Baxter-Kraemer's motor deficits would probably not improve and that she would require medical care for the rest of her life for the injuries suffered in the 1996 accident. From this testimony, the jury could have reasonably concluded that Baxter-Kraemer would have damages in the future stemming from the first accident, and there was sufficient evidence for the jury to assign a value to those damages.

Kline further contends that the district court erred by failing to apply joint and several liability, per the holding in Kleitz,[10] where Baxter-Kraemer was involved in two consecutive accidents and incurred unapportionable damages and by failing to give his proffered jury instruction and verdict form premised on the principles set forth in Kleitz. Kline's argument hinges on the assumption that there was not enough evidence presented to allow the jury to apportion damages. For the reasons set forth previously, we conclude that there was sufficient evidence by which the jury could apportion damages.[11] Therefore, the district court did not abuse its discretion by rejecting Kline's jury instruction and verdict form, as the district court instructed the jury not to

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[10]103 Nev. at 327, 738 P.2d at 510.

[11]For this same reason, we reject Kline's argument that the district court erred by refusing to apply joint and several liability, preventing Kline from offsetting the $75,700.00 judgment against himself with the $165,000.00 settlement between Baxter-Kraemer and the second tortfeasor.

award damages stemming from the second accident. It is presumed that the jury follows the law in which it is instructed, and the party asserting the contrary bears the burden of proving that the jury did not follow the law.[12] Kline failed to overcome the presumption that the jury followed the district court's instructions. Although there was conflicting evidence regarding apportionment, the record reveals there was sufficient evidence to allow the jury to apportion damages.[13]

Finally, Kline contends that the district court improperly awarded attorney fees and costs to Baxter-Kraemer under NRCP 68, because the unapportioned judgment was improperly compared to Baxter-Kraemer's offer of judgment, which represented the apportioned damages. He further contends that the district court failed to properly consider the factors set forth in Beattie v. Thomas[14] in granting attorney fees and costs, because the evidence revealed that Kline's rejection of the offer of judgment was not made in bad faith or that it was grossly unreasonable.

This court will not overturn a district court's award of attorney fees unless the record reflects that the district court abused its

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[12]Krause Inc. v. Little, 117 Nev. 929, 937, 34 P.3d 566, 571 (2001) (stating that "[t]his court presumes that a jury follows the district court's instructions" and that the parties asserting that the jury failed to follow instructions provided no evidence to overcome the presumption).

[13]Furthermore, Kline had an incentive not to try to apportion damages in the hopes that the verdict would be less than the settlement with the second tortfeasor, allowing Kline to claim that he was jointly and severally liable with the second tortfeasor and to offset his entire liability with the settlement.

[14]99 Nev. 579, 668 P.2d 268 (1983).

discretion.[15] After Baxter-Kraemer initiated this suit against Kline, the case was assigned to the court-annexed arbitration program, and the arbitrator awarded Baxter-Kraemer $1,875.00. Baxter-Kraemer requested a trial de novo because, according to her, the evidence of a causal relationship between the car accident and the stroke was not available at the time of arbitration.

On December 8, 1999, Baxter-Kraemer served an offer of judgment for Kline's policy limits of $25,000.00, plus prejudgment interest of $3,700.00 and costs of $1,543.12, on Kline. Kline rejected the offer. After most of the discovery was completed and the majority of witnesses had been deposed, Baxter-Kraemer again served an offer of judgment on Kline on March 28, 2001, for $25,000.00, plus costs and prejudgment interest. Kline again rejected the offer. However, on May 10, 2001, after receiving information regarding Dr. Peacock's expected testimony, Kline made an offer of judgment for $25,000.00. Baxter-Kraemer chose to go to trial.

On May 6, 2002, the district court granted Baxter-Kraemer's motion for attorney fees and costs pursuant to NRS 17.115 and NRCP 68. The record reveals that the district court considered the factors set forth in Beattie[16] in deciding to award attorney fees and costs. The record reveals that, as of the date of Baxter-Kraemer's second offer of judgment, plus costs and interest, all of the expert witnesses except Dr. Peacock had been

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[15]U.S. Design & Constr. v. I.B.E.W. Local 357, 118 Nev. ___, ___, 50 P.3d 170, 173 (2002).

[16]99 Nev. at 588-89, 668 P.2d at 274. These factors apply equally to a defendant who has rejected a plaintiff's offer of judgment. See NRCP 68.

deposed, and many had linked Baxter-Kraemer's stroke to the injury sustained in the car accident with Kline. In fact, Kline subsequently made a counter-offer for $25,000.00 prior to trial, which Baxter-Kraemer rejected. At trial, the jury awarded Baxter-Kraemer $75,700.00. Hence, we conclude that the district court did not abuse its discretion in finding that her claim was brought in good faith, as reflected by the jury verdict; the offer was reasonable in both timing and amount, as all but one of the expert witnesses had been deposed and many had opined that Baxter-Kraemer's stroke was causally related to the first car accident; Kline's rejection of the offer was grossly unreasonable, in light of the deposition testimony and the fact that he subsequently made the very same counter-offer; and the attorney fees were reasonable and justified.

For the foregoing reasons, we

ORDER the judgments and orders of the district court AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
McKissick Van Walraven & Harris
David Hamilton
Washoe District Court Clerk