

IN THE SUPREME COURT OF THE STATE OF NEVADA

KATHERINE S. WRIGHT,
Appellant,
vs.
LOIS DOBIEZ, AND MARGARET
ZEMLO, D/B/A PEGGY'S HAIR SHOP,
Respondents.

LOIS DOBIEZ, AND MARGARET
ZEMLO, D/B/A PEGGY'S HAIR SHOP,
Appellants,
vs.
KATHERINE S. WRIGHT,
Respondent.

No. 39741

FILED

FEB 11 2004

JANETTE M. SLOAN
CLERK OF SUPREME COURT
BY *J. Richard*

No. 39973

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a district court judgment entered pursuant to a jury verdict for the defense and a cross-appeal from an order reducing the award of costs and attorney fees to Margaret ("Peggy") Zemlo and Lois Dobiez. On December 31, 1998, Katherine Wright received cosmetology services from Lois Dobiez at Peggy's Hair Shop, owned by Peggy Zemlo. Katherine fell out of a salon chair while blow-drying her own hair, hitting the back of her head, neck and shoulder. Katherine testified that she suffered a fractured sternum, shoulder pain, severe neck pain and migraines after the accident, and that she was required to undergo shoulder surgery and two neck surgeries as a result. Katherine sued Lois Dobiez and Peggy Zemlo on the theory that they were negligent in allowing her to blow-dry her own hair without instructing her regarding how to properly sit on the salon chair, and that the neck and shoulder surgeries were necessitated by injuries that she sustained in the fall.

During trial, the district court admitted testimony by Mary Manna, the executive director of the Nevada Board of Cosmetology. The district court also allowed Peggy and Lois to cross-examine Katherine regarding monetary recoveries she had received as a result of her prior car accidents. After a six-day trial, the jury returned a verdict in favor of Peggy and Lois. The district court awarded Peggy and Lois attorney fees and costs pursuant to NRCP 68 and NRS 17.115, but reduced the amounts sought upon Katherine's motion to retax costs.

Katherine appealed, alleging that the district court erred by allowing Mary Manna to testify and by admitting evidence of the amounts of Katherine's prior settlements. Peggy and Lois cross-appealed, alleging that the district court abused its discretion by awarding them only a portion of the costs and attorney fees they sought. For the reasons set forth herein, we vacate the district court's judgment and the order retaxing costs and attorney fees and remand for a new trial.

At trial, Lois and Peggy elicited evidence that Katherine had been involved in three prior vehicle accidents and had had two neck surgeries before the salon accident. They further elicited testimony from Katherine that, after two of the three car accidents, she had made claims and received settlements of \$100,000.00 each.

Katherine called two witnesses, a cosmetology instructor and the director of education of the Southern Nevada University of Cosmetology. Both testified that allowing a customer to perform cosmetological services on herself was a violation of the cosmetologist's standard of care. In response, Lois and Peggy called a beauty salon owner to testify that she has allowed clients to blow-dry their own hair and has seen that practice in other salons. They also called Mary Manna, the

executive director of the Nevada Board of Cosmetology, who testified that blow-drying one's own hair in a salon did not constitute practicing cosmetology without a license. The jury, after deliberating for less than an hour, returned a verdict in favor of Lois and Peggy. Post-trial, the district court granted Lois and Peggy's motion for attorney fees and costs, after retaxing the submitted costs.

Katherine now appeals from the jury verdict, arguing that the district court erred by allowing evidence of Katherine's prior settlements and by allowing Mary Manna to testify as to her interpretation of the governing statutes. Peggy and Lois cross-appeal, arguing that the district court erred by retaxing their costs and reducing the total amount of attorney fees and costs awarded pursuant to NRCP 68(f) and NRS 17.115.

Katherine contends that the district court erred by allowing evidence of Katherine's prior settlements because the settlements and the amounts were irrelevant to the issues of Lois's and Peggy's liability and damages, and alternatively that the prejudicial effect of such evidence greatly outweighed any probative value. She asserts that the district court abused its discretion because the settlements and their amounts reflected factors not brought to the jury's attention, such as insurance coverage and degree of fault. Katherine contends that the district court further abused its discretion in allowing Peggy and Lois to use a copy of a settlement check to refresh Katherine's memory because such evidence was highly prejudicial. She argues that she did not open the door to evidence of the settlement amounts by eliciting evidence of her medical history. She contends that the only purpose for admitting into evidence the amounts of the settlements was to make the jury believe that she is a litigious person who was overcompensated for her prior injuries. Finally,

Katherine argues that allowing evidence of the settlement amounts had the same prejudicial effect as the admission of a collateral source for payment for an injury, which this court has ruled should be excluded.¹ She asserts that the jury verdict may reflect an attempt to prevent Katherine from receiving a double recovery rather than a true assessment of her damages.

We will not disturb a district court's evidentiary rulings absent an abuse of discretion.² However, to be admissible, the contested evidence must not only be relevant but also its prejudicial effect must not substantially outweigh its probative value.³ Relevant evidence must have a "tendency to make the existence of any fact that is of consequence to the

¹See Proctor v. Castelletti, 112 Nev. 88, 90-91, 911 P.2d 853, 854 (1996) (adopting a "per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose" because "no matter how probative the evidence of a collateral source may be, it will never overcome the substantially prejudicial danger of the evidence").

²Hall v. SSF, Inc., 112 Nev. 1384, 1392-93, 930 P.2d 94, 99 (1996) (stating that "[t]he decision to admit or exclude testimony rests within the sound discretion of the trial court and will not be disturbed unless it is manifestly wrong"); see also NRS 47.040(1)(a), which provides in pertinent part that "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record, stating the specific ground of objection."

³NRS 48.025; see Dow Chemical Co. v. Mahlum, 114 Nev. 1468, 1506, 970 P.2d 98, 123 (1998), disapproved on other grounds by GES, Inc. v. Corbitt, 117 Nev. 265, 271, 21 P.3d 11, 14-15 (2001); see also NRS 48.025.

determination of the action more or less probable than it would be without the evidence."⁴

Here, although the district court determined that Katherine had opened the door to admission of this evidence by providing testimony regarding her prior injuries, which were from vehicular accidents, and the fact that she had filed claims in those accidents, she did not testify at any time to settlements obtained as a result of those accidents. Evidence concerning the cause of her prior injuries, not the claims, settlements or the sums, was relevant to the determination of their contribution to her current injuries. Although the settlement amounts were relevant to Lois and Peggy's theory that Katherine was a "professional plaintiff," the record does not reflect that the district court balanced the prejudicial effect of this evidence against its probative value. The district court merely stated that the evidence was "a two-edged sword" and that the jury could infer that "[i]f she got that much for the other [accident], this is more maybe."

This situation is analogous to our per se exclusion of a collateral source of payment for injury.⁵ Although the collateral source rule applies to payments received by the injured party "from a source

⁴NRS 48.015.

⁵Proctor, 112 Nev. at 90, 911 P.2d at 854 ("We now adopt a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose. Collateral source evidence inevitably prejudices the jury because it greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation.").

wholly independent of the tortfeasor”⁶ for the plaintiff’s current injury, the reasoning behind the exclusionary rule is applicable to the situation in which evidence of prior settlement amounts are used to show that the plaintiff has successfully recovered monetary compensation in the past. The prejudicial effect of a collateral source of a payment on the jury may result in the jury’s misuse of the evidence to reduce an award to the plaintiff.⁷ The same reasoning is applicable here. Lois and Peggy’s primary defense was that Katherine’s current complaints were not caused by the salon chair accident but from her prior injuries, and that Katherine was a “professional plaintiff.” The amounts of her prior settlements, while somewhat probative of whether Katherine was malingering or was a professional plaintiff, were outweighed by the danger of unfair prejudice. It was reasonably probable that the jury, after hearing that Katherine had twice recovered \$100,000.00 for two prior car accidents, would infer that Katherine had already been overly compensated for her injuries or that the prior settlements were more than sufficient to cover her current injuries. Therefore, we conclude that the district court abused its discretion by admitting this evidence. We cannot say that the admission of this evidence was harmless⁸ because the jury’s verdict in favor of Lois and Peggy could have been premised on the idea that Katherine had already been sufficiently compensated, without even reaching the question of liability.

⁶Id. at 90 n.1, 911 P.2d at 854 n.1 (quoting Hrnjak v. Graymar, Inc., 484 P.2d 599, 602 (Cal. 1971).

⁷Id. at 91, 911 P.2d at 854.

⁸See NRS 47.040; NRCP 61.

We now turn to the issue of whether the district court abused its discretion in allowing Mary Manna to testify as to her interpretation that Peggy and Lois did not violate any statutes by allowing Katherine to blow-dry her own hair in the salon. As an initial matter, we note that the record reflects that a sufficient foundation was laid for Mary Manna to testify as an expert as to how the statutes and the standards created statutorily would be applied in the field. Furthermore, after reviewing the record, we conclude that the district court did not abuse its discretion by determining, after a motion in limine outside of the jury's presence, that the potential that the jury would give too much weight to Mary Manna's testimony by virtue of her position as Executive Director of the Board of Cosmetology was not so prejudicial that it would substantially outweigh the probative value of her testimony.

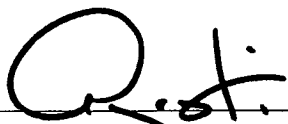
We now turn to the heart of the issue. The record reveals that Katherine tied her own witnesses' testimony to the statute. Not only did she try to use the statute to establish the standard of care, she asked whether drying one's own hair in a salon violated the statute. Peggy and Lois then attempted to rebut that testimony with Mary Manna's testimony that blow-drying one's own hair in a salon would not violate the statute. We have previously stated that the determination of whether a statute may be used to define the standard of care is a question of law that should be decided solely by the district court and not left to the jury.⁹ The district court did not do so here. We therefore conclude that the district court erred by allowing this testimony. Katherine, however, invited the

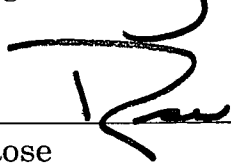
⁹Vega v. Eastern Courtyard Assocs., 117 Nev. 436, 439, 24 P.3d 219, 221 (2001).

error by eliciting testimony from her own experts that blow-drying one's own hair in a salon violated the statutes governing the practice of cosmetology. Because Katherine invited the error, we do not reverse on this ground.¹⁰

Because we have decided that the jury's verdict and judgment for Lois and Peggy should be vacated due to the improper admission of Katherine's prior settlement amounts, we need not reach the merits of Lois and Peggy's cross-appeal from an order reducing the award of costs and attorney fees. Accordingly, we

ORDER both the judgment of the district court and the order retaxing costs and attorney fees VACATED AND REMAND this matter to the district court for a new trial.¹¹


_____, J.
Agosti


_____, J.
Rose

cc: Hon. Mark R. Denton, District Judge
Kirby R. Wells & Associates
Kravitz Schnitzer & Sloane, Chtd.
Clark County Clerk

¹⁰Desert Cab v. Marino, 108 Nev. 32, 36, 823 P.2d 898, 900 (1992) (stating that “[w]e are loathe to disturb a jury verdict where the alleged error is seemingly invited by the complaining party”).

¹¹This matter was submitted for decision to a panel of this court comprised of Justices Deborah A. Agosti, Robert E. Rose and Myron E. Leavitt. The Honorable Myron E. Leavitt, Justice, having died in office on January 9, 2004, this matter was decided by a two-justice panel.