IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDY L. HIGHT, N/K/A BRANDY L. SMITH,
Appellant,
vs.
CAROL PRESLEY BOWLER; CAPITOL CAB COMPANY, A SOLE PROPRIETORSHIP; AND ROY STREET, OWNER OF CAPITOL CAB COMPANY,
Respondents.

No. 40203

FILED

JAN 0 8 2004

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING FOR FURTHER PROCEEDINGS

This is an appeal from a final judgment upon a jury verdict in a personal injury action.

Appellant Brandy L. Hight[1] initiated a complaint alleging that respondent Carol Presley Bowler negligently rear-ended her at a low speed. During trial, the parties stipulated to Bowler's negligence. The jury found that Hight incurred no damages as a legal cause of the accident. Respondents made no offer of judgment to Hight. The main issues on appeal revolve around the district court's procedural rulings.

Bowler is a taxi driver for respondent Capitol Cab Company, a sole proprietorship. Respondent Roy Street is Capitol's owner. On July 19, 1999, Bowler failed to notice the sudden traffic stop and rear-ended Hight's car at approximately ten to fifteen miles per hour.

[1]Following a divorce, appellant's name is now Brandy L. Smith.

After the accident, Hight visited Dr. Christenson, her chiropractor, to determine whether she sustained injuries in the accident. Hight complained about pain in her neck, low back, and shoulder. Upon examining Hight, Dr. Christenson concluded that she suffered a whiplash[2] and began treating her.

Dr. Christenson had been previously treating Hight for a preexisting low back condition since March 30, 1999. Because Hight was on Medicare, Dr. Christenson charged her only $30.00 per visit. After July 19, 1999, he discontinued Hight's Medicare plan, advised her to seek counsel, and took a lien on this case. Dr. Christenson then started billing Hight $45.00-$65.00 per visit because he no longer had to comply with Medicare restrictions. Dr. Christenson continued treating Hight after the accident. Allegedly, she had severe headaches, low back pain, and neck pain for months afterwards.

At trial, Dr. Christenson appeared as Hight's treating chiropractic physician and expert witness. He testified about Hight's injuries and attempted to synthesize medical research articles dealing with the long-term consequences of whiplash. The court did not permit the "synthesis" testimony because it exceeded Dr. Christenson's area of expertise.

On cross-examination of Dr. Christenson, defense counsel commented on two points, which are in contention on appeal. First, counsel alleged that Dr. Christenson's notes regarding Hight's post-accident symptoms and treatment were substandard and requested a

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[2]Dr. Christenson testified that whiplash is a strain/sprain trauma to the neck, resulting from a rapid forward/backward motion.

"stronger evidence" instruction. The judge instructed the jury that the lack of proper notation in Dr. Christenson's notes suggested that such notation would have been adverse to Hight.

Second, defense counsel commented on the fact that Dr. Christenson charged Hight only $30.00 before the accident, but began charging her $45.00-$65.00 after the accident. Pursuant to the motions in limine and the collateral source rule, defense counsel did not disclose that Medicare paid for Hight's pre-accident visits. The court allowed the testimony.

During trial, the parties stipulated that Bowler was negligent and that her negligence caused Hight property damage in the amount of $292.00. The only issue for the jury was whether Bowler's negligence was the legal cause of Hight's injuries and the amount of damages she sustained. The jury found that Hight's injuries did not result from the July 19, 1999 accident.

Hight filed an application for attorney fees and costs. The court denied Hight's application stating that she did not prevail in the jury trial. The judge entered judgment for Hight in the amount of $292.00 based on the property damage stipulation. He entered judgment for respondents as to all other claims. The court also awarded $2,795.76 in costs to respondents as the prevailing party under NRS 18.020. Hight appeals.

DISCUSSION

On appeal, appellant Hight raises six issues: (1) as a matter of law, she was entitled to damages for a diagnostic chiropractic examination, (2) the district court violated the collateral source and relevancy rules in admitting the amounts Dr. Christenson charged her per

visit before and after the accident, (3) the court abused its discretion in giving the "stronger evidence" instruction to the jury, (4) Hight was the prevailing party, (5) the court erred in refusing to let Dr. Christenson testify as to his "synthesis" of research articles, and (6) the jury verdict was manifestly wrong. We will address each issue in turn.

1. Diagnostic costs

Hight contends that she should have received compensation for her first chiropractor visit after the accident, despite the jury finding that she suffered no personal injuries. We agree.

While no Nevada precedent on point exists, other jurisdictions[3] have considered recovery of diagnostic examination costs in situations where the jury finds that plaintiff suffered no actual physical injury or there is no causal connection between defendant's negligence and plaintiff's injuries.[4] The District of Columbia, Florida, New York, Oklahoma, Pennsylvania, and Tennessee permit recovery for diagnostic tests reasonably necessary to determine whether a plaintiff suffered injuries in an accident.[5] Although many cases allow such recovery,

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[3]District of Columbia, Florida, Missouri, New York, Oklahoma, Pennsylvania, and Tennessee.

[4]See Noralyn O. Harlow, Annotation, Recoverability from Tortfeasor of Cost of Diagnostic Examinations Absent Proof of Actual Bodily Injury, 46 ALR 4th 1151 (1986).

[5]See Friends for All Children, Inc. v. Lockheed Aircraft Corp., 746 F.2d 816 (U.S. App. D.C. 1984); Whitney v. Akers, 247 F. Supp. 763 (W.D. Okla. 1965); Dibenedetto v. Ford, 764 So. 2d 788 (Fla. Ct. App. 2000); Sparks-Book v. Sports Authority, Inc., 699 So. 2d 767 (Fla. Ct. App. 1997); Blanford v. Polk County, 410 So. 2d 667 (Fla. Ct. App. 1982); Laino v. Jamesway Corp., 460 N.Y.S.2d 175 (App. Div. 1983); Macina v. McAdams,

continued on next page . . .

Friends for All Children, Inc. v. Lockheed Aircraft Corp.,[6] Blanford v. Polk County,[7] Sparks-Book v. Sports Authority, Inc.,[8] and Macina v. McAdams[9] deal with the precise issue before this court.[10] The holdings of these cases are essentially the same: where defendant's liability is not in dispute, the jury must award plaintiff's diagnostic examination costs, although the jury may find that plaintiff suffered no injuries as a result of defendant's negligence.[11]

Although in Lauber v. Buck[12] the Missouri court upheld the jury's decision not to award diagnostic examination costs, we find the court's reasoning unpersuasive. The Lauber court refused to reverse the jury's finding because determining damages is the province of the jury and the jury had ample opportunity to consider medical expenses during

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421 A.2d 432 (Pa. Super. Ct. 1980); Newsom v. Markus, 588 S.W.2d 883 (Tenn. Ct. App. 1979).

[6]746 F.2d 816.

[7]410 So. 2d 667.

[8]699 So. 2d 767.

[9]421 A.2d 432.

[10]Dibenedetto is distinguishable because the court found no negligence on defendant's part. Whitney, Laino, and Newsom, are also inapposite because the courts there affirmed the jury's diagnostic costs award. In contrast, Hight asks this court to reverse the jury's finding.

[11]Friends for All Children, 746 F.2d at 825-26; Sparks-Book, 699 So. 2d at 768; Blanford, 410 So. 2d at 669; Macina, 421 A.2d at 434.

[12]615 S.W.2d 89 (Mo. Ct. App. 1981).

deliberations.[13] However, fairness dictates that plaintiff receive diagnostic costs where defendant admits liability because the defendant's wrongful conduct created the need for examination. Although determining damages is generally the jury's province,[14] juries will not award diagnostic costs if they find that plaintiff suffered no personal injuries. Such result defies equity because the need for a diagnostic examination is not contingent upon the outcome of the examination.

As a matter of policy, allowing diagnostic costs will encourage injured parties to seek early diagnosis and treatment. We hold that where defendant's liability is not in dispute, the plaintiff can recover diagnostic examination costs. Therefore, we conclude that the district court erred in refusing to award Hight's diagnostic examination costs, and we remand the case for proper determination of these damages.

2. Collateral source rule

On appeal, Hight contends that the district court violated the collateral source and relevancy rules in admitting evidence of what Dr. Christenson charged her per visit before and after the accident because Medicare covered the prior visits. We do not need to reach the conclusion

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[13]The court distinguished Wise v. Towse, 366 S.W.2d 506 (Mo. Ct. App. 1963), stating that it turned on the issue of whether a trial judge should have submitted the question of medical examination and expenses thereof as an item of damages to the jury; and in the instant case, the jury properly considered the diagnostic examination charges. Lauber, 615 S.W.2d at 92.

[14]Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 24, 16 P.3d 415, 418 (2001) (citing Stackiewicz v. Nissan Motor Corp., 100 Nev. 443, 454-55, 686 P.2d 925, 932 (1984)).

of whether this testimony is relevant or if it violates the collateral source rule.

A. Harmless error

Although the district court may have erred in admitting the Medicare payments testimony, the error was harmless. Harmless error occurs if the district court incorrectly admits evidence which does not affect the substantial rights of the parties.[15] Where admissible evidence has the same effect as the inadmissible evidence the court erroneously allowed, the district court's error was harmless.[16]

The district court's error was harmless for two reasons: (1) admissible testimony established Dr. Christenson's possible bias, and (2) the decision did not violate the policy behind the collateral source rule.

First, Dr. Christenson's own trial testimony established that he took a lien on the case. By introducing the pre- and post-accident payment disparity, defense counsel attacked Dr. Christenson's credibility and highlighted his financial interest in the litigation. Admitting the lien evidence accomplished the same purpose.

Second, the policy behind the collateral source rule is to avoid the "likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation."[17] The

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[15]NRCP 61.

[16]Pandelis Constr. Co. v. Jones-Viking Assoc., 103 Nev. 129, 131, 734 P.2d 1236, 1237 (1987) (contractor was not prejudiced by admission of certain summaries of financial documents as statements of builder's position because the court allowed the builder's witness to present testimony to the same effect as the summary contents).

[17]Proctor, 112 Nev. at 90, 911 P.2d at 854.

harm the rule sought to prevent never arose in this case because the jury found that Hight suffered no personal injuries and awarded no damages.

3. "Stronger evidence" instruction

Hight argues that the district court erred in instructing the jury that it could draw a negative inference from the lack of proper notation in Dr. Christenson's notes. We conclude that the district court abused its discretion in giving the instruction, but that the court's error was harmless.

A. The court erred in giving the instruction

The court informed the jury that "if weaker and less satisfactory evidence is offered by a party, and it is within such party's ability to produce stronger and more satisfactory evidence, we may infer that the stronger evidence would have been adverse to the party who failed to produce it." (Emphasis added.) The court based the instruction on NRS 47.250(4), which states that "[h]igher evidence would be adverse from inferior being produced." However, the presumption applies only upon a showing that a party actually possesses better and stronger evidence, but fails to present it.[18] The presumption did not apply to Hight's case because Hight had no control over Dr. Christenson's notes and thus no ability to produce stronger and more satisfactory evidence.

Respondents' argument that Hight and her "litigation team were in control of the information and did not provide it" lacks merit. Dr. Christenson was not a part of Hight's litigation team on July 19, 1999. At

[18]Langford v. State, 95 Nev. 631, 637, 600 P.2d 231, 235 (1979).

that time, he was just her treating physician. We conclude that the district court erred in giving the instruction.

B. Harmless error

Although the district court erred in instructing the jury, the error was harmless. "A judgment cannot be reversed by reason of an erroneous instruction unless upon a consideration of the entire proceedings it shall appear that such error has resulted in a miscarriage of justice. Prejudice is not presumed."[19] The appellant has the burden to show that omitting the erroneous instruction would probably lead to a different result.[20]

Hight fails to meet her burden. The record is replete with information sufficient to justify the jury verdict, even absent the erroneous jury instruction. Testimony showed that Bowler rear-ended Hight at ten to fifteen miles per hour. The parties stipulated that the property damage to Hight's car was only $292.00. The jury also learned that Hight injured her low back while pulling weeds on March 30, 1999. She aggravated the injury by tripping on her dog eleven days before the July 19, 1999 accident. Three days before the accident, Dr. Christenson treated Hight's neck, low back, and shoulders. Three days after the accident, Dr. Christenson treated these same areas. Susan Jackson, Hight's manicurist, testified that Hight told her she was not really injured, but wanted to sue respondents for financial gain. Hight cannot show that but for the erroneous instruction, the verdict would have probably been

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[19]NRCP 61; Truckee-Carson Irr. Dist. v. Wyatt, 84 Nev. 662, 666, 448 P.2d 46, 49 (1968), cert. denied, 395 U.S. 910 (1969).

[20]Truckee-Carson, 84 Nev. at 667, 448 P.2d at 50.

different. Absent such showing, we will not disturb the district court's ruling.

4. Prevailing party

Hight contends that she was the prevailing party and is therefore entitled to attorney fees and costs under NRS 18.010 and NRS 18.020. We conclude that Hight may be entitled to attorney fees and should have recovered costs under NRS 18.020.

NRS 18.010 states, in pertinent part, that "the court may make an allowance of attorney's fees to a prevailing party."[21] Unlike NRS 18.020, where the court "must" allow costs to a prevailing party, NRS 18.010 does not mandate attorney fees awards. Such awards are within the sole discretion of the district court.

Pursuant to NRS 18.020, "[c]osts must be allowed . . . to the prevailing party against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500."[22] A district court's award of attorney fees and costs will not be disturbed on appeal unless the district court abused its discretion in making the award.[23]

The real issue is: what constitutes a "prevailing party" under NRS 18.020? A plaintiff is the prevailing party for attorney fees purposes

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[21]NRS 18.010(2) (emphasis added).

[22]NRS 18.020(3).

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

if she succeeds on any significant issue in litigation, which achieves some of the benefit sought in bringing the suit.[24]

Hornwood v. Smith's Food King,[25] is particularly analogous to the case at bar. In Hornwood, the lessors brought action against their tenant, Smith's Food King, seeking compensatory and consequential damages for breach of lease and bad faith. At trial, the district court held that Smith's breached the lease, but no damage to the Hornwoods resulted. The court awarded Smith's attorney fees as a prevailing party. This court reversed, holding that the Hornwoods prevailed because they achieved a benefit in bringing the suit, i.e., an entitlement to consequential damages.[26]

Similar to Hornwood, the jury found against Hight on the personal injuries claim, but Hight recovered on the property damage claim. As in Hornwood, Hight achieved some benefit in bringing the suit. Had respondents made an offer of judgment in an amount in excess of the property damage amount and the diagnostic costs, respondents would have been entitled to costs and may have been entitled to attorney fees pursuant to NRCP 68 and NRS 17.115.

Hight is the prevailing party. The district court erred in awarding costs to respondents and denying Hight's costs request. We,

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[24]Women's Federal S & L Ass'n. v. Nevada Nat. Bank, 623 F. Supp. 469, 470 (D. Nev. 1985), quoted in Sack v. Tomlin, 110 Nev. 204, 214, 871 P.2d 298, 305 (1994); Chowdhry v. NLVH, Inc., 109 Nev. 478, 486, 851 P.2d 459, 464 (1993); Hornwood v. Smith's Food King, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989).

[25]105 Nev. 188, 772 P.2d 1284.

[26]Id. at 192, 772 P.2d at 1287.

therefore, remand the case for proper determination of the costs Hight should have received and the attorney fees which Hight may, in the court's discretion, receive as a prevailing party under NRS 18.010.

5. "Synthesis" testimony

Hight urges that the district court erroneously precluded Dr. Christenson's testimony regarding the percentage of patients in the industry suffering permanent consequences after a whiplash injury. At trial, Dr. Christenson proposed to synthesize research studies by medical doctors and research scientists he had read over the course of his practice. The purported "synthesis" method involved gathering all the research on the subject, averaging it out, giving more weight to recent studies, and synthesizing an opinion from all the evidence. The district court found that the synthesis exceeded Dr. Christenson's area of expertise and precluded the testimony. We agree.

Pursuant to NRS 50.275, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge . . . may testify to matters within the scope of such knowledge." The expert need not disclose the facts or data underlying his opinion.[27] "'The competency of an expert witness is a question for the sound discretion of the district court, and we will not disturb the ruling absent a clear abuse of discretion.'"[28] "The district court is better suited to rule on the qualifications of persons presented as expert witnesses and we

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[27]NRS 50.305.

[28]Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 241, 955 P.2d 661, 666 (1998) (quoting Brown v. Capanna, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989)).

will not substitute our evaluation of a witness's credentials for that of the district court absent a showing of clear error."[29]

Dr. Christenson was not competent to synthesize these studies because he is a chiropractor, not a medical doctor or a research scientist. Dr. Christenson did not merely attempt to recite the results of industry research, he wanted to perform statistical analysis based on all the evidence. We conclude he was not qualified to do so. Dr. Christenson's chiropractic training did not involve research and synthesis. His chiropractic education included courses in orthopedics, neurology, radiology, and biomechanics, but not courses in medical statistics. The court properly allowed Dr. Christenson to testify about the long-term effects of whiplash among his patients because he had first-hand knowledge and expertise on the subject. Medical research synthesis is outside the scope of Dr. Christenson's chiropractic knowledge. Hight fails to show abuse of discretion.

6. Jury verdict

Hight urges the court to overturn the jury verdict as "clearly wrong" because respondents did not logically rebut the evidence Dr. Christenson presented about Hight's injuries. Hight's argument lacks merit because there is substantial evidence to support the jury's verdict.

The standard of review for a jury verdict is whether substantial evidence supports the verdict.[30] "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a

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[29]Hanneman v. Downer, 110 Nev. 167, 179, 871 P.2d 279, 287 (1994).

[30]Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000).

conclusion.'"[31] The court will not overturn the jury's verdict if it is supported by substantial evidence, unless the verdict was clearly wrong.[32] Where conflicting evidence exists, the court is not free to weigh the evidence and must draw all inferences in favor of the prevailing party.[33] We conclude that the record is replete with evidence sufficient to support the jury verdict.

CONCLUSION

Hight should recover her diagnostic examination costs as an additur as a matter of law. She should also recover her litigation costs as a prevailing party under NRS 18.020. In addition, as the prevailing party she may seek, subject to the district court's discretion, attorney fees under NRS 18.010. Accordingly, we reverse and remand the case to the district court for entry of judgment in accordance with this order. We affirm the district court's judgment with respect to all other issues. It is so ORDERED.

_____, C.J.
Shearing

_____, J.
Becker

_____, J.
Gibbons

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[31]Yamaha Motor, 114 Nev. at 238, 955 P.2d at 664 (quoting State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986)).

[32]Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 555-56, 779 P.2d 956, 957 (1989).

[33]Smith v. Timm, 96 Nev. 197, 202, 606 P.2d 530, 532 (1980).

cc: Hon. William A. Maddox. District Judge
Law Offices of Jon M. Yaple
Jack D. Campbell
Carson City Clerk