

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROSE CROCETTI,
Appellant,
vs.
TERENCE M. CONE, M.D.,
Respondent.

No. 41507

FILED

APR 21 2005

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a final judgment on a jury verdict and an order denying a motion for a new trial in a medical malpractice matter. Eighth Judicial District Court, Clark County; David Wall, Judge.

Rose Crocetti filed a medical malpractice suit against Terence M. Cone, M.D., alleging that Dr. Cone negligently administered a cervical epidural injection, causing her spinal cord damage and rendering her permanently injured and wheelchair dependent. The case proceeded to trial before a jury, and the jury returned a unanimous verdict in favor of Dr. Cone. Crocetti filed a motion for judgment notwithstanding the verdict (JNOV), or in the alternative, for a new trial, which the district court denied. Crocetti appeals the original judgment and the order denying the motion for a new trial.

FACTS

In 1991, Rose Crocetti suffered a work-related injury while employed as a dealer at Caesar's Palace in Las Vegas, Nevada. The injury caused Crocetti to suffer from neck and shoulder pain. In 1994, Crocetti's orthopedic surgeon, Dr. Rimoldi, recommended that she have a cervical epidural injection to reduce the pain caused by a disc herniation between the fourth and fifth cervical vertebrae. Crocetti then saw Dr. Cone for a consultation regarding the epidural injection and requested to have the

injection that day because of a scheduled breast implant removal surgery the following week. Dr. Cone agreed to perform the epidural that afternoon.

The parties dispute what exactly occurred during the epidural injection and whether Dr. Cone complied with the standard of care. According to Dr. Cone, he read Crocetti's MRI report, and concluded that the source of her pain was the C4-5 spinal area, and that the C4-5 area was constricted by stenosis. Dr. Cone attempted to inject the pain medication to the C4-5 area using the "loss of resistance" method, which involves slowly advancing the needle and syringe into the spinal cord, feeling for the loss of resistance, which indicates entry into the epidural space. Dr. Cone stated that while inserting the needle, Crocetti suddenly raised up and indicated that she felt a sudden pain. Dr. Cone then attempted an unsuccessful injection at C5-6 before successfully entering the epidural space at C6-7, where he injected pain medication. Dr. Cone monitored Crocetti for an hour, was given nurse reports that Crocetti's numbness was subsiding, and discharged Crocetti after being told she could move her legs quite a bit.

According to Crocetti, when Dr. Cone inserted the needle, she felt a big jolt and started screaming and begged Dr. Cone to stop. Crocetti stated that after the injection she needed assistance walking and eventually became confined to a wheelchair.

In addition to their own testimony, both parties produced expert testimony during trial to support their positions. Crocetti's expert, Dr. Kraft, testified that Dr. Cone punctured the dura, and he hit the spinal cord during the C4-5 injection. Dr. Kraft testified that the use of

fluoroscopy¹ was prevalent in 1994 and that pain management doctors insisted there be an x-ray available to do the more sophisticated procedures.²

Dr. Prager, one of Dr. Cone's experts, testified that it is common for a patient to jump back when a nerve is hit, which could cause the dura to be nicked. However, he testified that this does not mean that the doctor was negligent. He further testified that Crocetti's condition and symptoms were not consistent with a spinal cord injury inflicted on the day of the injection. Furthermore, Dr. Prager testified that Dr. Cone's decision to inject at the C4-5 area did not violate the standard of care, and that Crocetti's experts were using the wrong standard of care by basing their testimony on the current 2003, rather than the 1994, standard of care.

Dr. Hyson also testified that Crocetti's symptoms were inconsistent with a spinal cord injury. If persons cannot use their legs for an extended period of time, they suffer from disuse atrophy, a symptom Dr. Hyson concluded Crocetti did not have.

Crocetti testified that following the epidural, she continued to have pain, numbness and tingling. Three days after the injection, she had breast implant removal surgery. Following this surgery, Crocetti returned to Dr. Cone, who ordered another MRI examination. The results of this examination were sent to Dr. Rimoldi, who noted the presence of a spinal

¹Fluoroscopy is a live x-ray technique used in performing epidural injections.

²However, there was no unequivocal testimony by any expert that the giving of the epidural without the use of the fluoroscopy violated the standard of care.

cord injury that did not exist in Crocetti's earlier MRI report. Furthermore, Dr. Rimoldi noted substantial changes in Crocetti's physical examination and admitted her to the hospital to receive intravenous steroid medication to decrease her spinal cord swelling. Upon discharge from the hospital, Dr. Rimoldi noted that Crocetti's neurological status was intact and that she could move about without support. However, following her hospital release, Crocetti's condition deteriorated.

In 1995, Crocetti visited Dr. Venger, a neurosurgeon, who testified that the only possible cause for Crocetti's injury was a spinal cord injury. Dr. Venger performed decompression surgery on the C4-5 region of Crocetti's back to relieve pressure on the spinal cord or nerve, and noted that he believed Crocetti was permanently disabled from the epidural injection.

Crocetti filed a complaint against Dr. Cone, alleging that Dr. Cone negligently administered a cervical epidural injection, which caused severe permanent injury and rendered her wheelchair dependent. The case proceeded to trial. Crocetti objected to comments made by Dr. Cone's counsel during voir dire, asking the jury to put themselves in Dr. Cone's shoes, but failed to object to alleged inappropriate comments in closing arguments. At the conclusion of the trial, the jury returned a unanimous verdict for Dr. Cone. The district court entered judgment based on this verdict.

Crocetti filed a motion for JNOV, or in the alternative, for a new trial and a motion to retax costs. The district court denied Crocetti's motion for JNOV or new trial and reduced the costs awarded to Dr. Cone.

DISCUSSION

Disregard of jury instructions

Crocetti argues that the district court abused its discretion by failing to grant a new trial pursuant to NRCP 59(a) on the ground that the jury manifestly disregarded the court's instruction.

Specifically, Crocetti argues that the jury manifestly disregarded the instruction of the court regarding the method by which the jury must evaluate expert opinion testimony. Jury Instruction No. 27, the instruction Crocetti argues was disregarded, instructs that the jury is to evaluate each medical expert opinion and resolve any conflict in the testimony of the witnesses by weighing each opinion against the other, taking into consideration the reason for the opinion, and the witness's credibility, knowledge, skill, experience, training and education.

Crocetti contends that Dr. Cone's expert, Dr. Prager, used non-existent facts in his testimony, and that his opinions were tenuous when compared to those of Crocetti's expert, Dr. Kraft. Crocetti also argues that the jury should not have accepted Dr. Prager's testimony because he had limited knowledge of the standard of care exercised by Las Vegas physicians. Consequently, Crocetti contends that the district court's denial of her motion for a new trial was plain error and resulted in manifest injustice. We disagree.

The standard of review of a district court's denial of a motion for new trial is abuse of discretion.³ This court will not disturb that decision "in the absence of a clear showing of abuse."⁴

NRCP 59(a)(5) states that a new trial may be granted when the jury manifestly disregards the court's instructions. "In determining the propriety of the granting of a new trial under NRCP 59(a)(5), the question is whether [this court is] able to declare 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."⁵ It is important to note that the credibility of competing expert witnesses is a matter for the jury,⁶ and the jury is invested with the authority to resolve conflicts in testimony.⁷

This court has held that where there is conflict in the evidence, a verdict will not be disturbed on appeal unless there is plain

³Edwards Indus. V. DTE/BTE, Inc., 112 Nev. 1025, 1036, 923 P.2d 569, 575 (1996).

⁴Sparks v. State, 96 Nev. 26, 30, 604 P.2d 802, 804 (1980).

⁵Weaver Brothers, Ltd. v. Misskelley, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982).

⁶Scanner Technologies v. ICOS Vision Systems, 253 F.Supp. 2d 624, 641 (S.D.N.Y. 2003).

⁷Ferris v. Albright's Electric Co., 70 Nev. 528, 532, 275 P.2d 755, 757 (1954).

error or the verdict results in manifest injustice.⁸ Manifest injustice results when a verdict is obviously and palpably contrary to the evidence.⁹

In reviewing the evidence, we conclude the district court did not abuse its discretion when it denied Crocetti's motion for a new trial pursuant to NRCP 59(a)(5). The jury did not reach a verdict that would indicate that it manifestly disregarded the court's instructions. The jury was told to evaluate each opinion and to give each opinion the weight to which it was entitled. The jury could render a verdict for Dr. Cone when following the district court's instructions.

Dr. Cone presented two expert witnesses to refute Crocetti's experts about the nature of her injury and whether Dr. Cone violated the standard of care. Based on the experience, education, and history of Dr. Prager, Dr. Cone's primary expert witness, the jury could have resolved any conflicting testimony among the experts in favor of Dr. Cone. Dr. Prager testified that Dr. Cone did not violate the standard of care when he performed the cervical epidural injection based on a review of Crocetti's medical records, records from Dr. Rimoldi, records from the pain center where Dr. Cone worked and where the injection was performed, and the depositions of Crocetti and Drs. Cone, Rimoldi, and Kraft. Based on the jury's authority to determine the credibility of expert witnesses and to resolve conflicts in competing testimony, it was not impossible for the jury to render a verdict in favor of Dr. Cone based on Dr. Prager's testimony.

⁸Frances v. Plaza Pacific Equities, 109 Nev. 91, 94, 847 P.2d 722, 724 (1993).

⁹Meyer v. Estate of Frances Swain, 104 Nev. 595, 598, 763 P.2d 337, 339 (1988).

Furthermore, the jury verdict did not result in manifest injustice. Although Crocetti argues that the only way to make sense of the jury verdict is to conclude that the jury refused to follow the district court's instructions, a review of the record establishes that there is sufficient evidence presented by Dr. Cone to justify the jury's verdict.

In M & R Investment v. Anzalotti, this court held that the jury did not manifestly disregard the district court's instructions when it rendered a verdict in favor of the defendants because the plaintiff's testimony was "fraught with inconsistencies."¹⁰ Similar to M & R, Crocetti's case involved the presentation of several inconsistencies. For example, there were inconsistencies regarding whether and when Crocetti lost the use of her legs. Richard Crocetti, Rose's husband, testified that following the epidural, Crocetti was permanently wheelchair bound. However, there was significant evidence that Crocetti could walk, including the hospital's discharging doctor's notes that Crocetti could ambulate without lateral support. Furthermore, Dr. Hyson testified that Crocetti's symptoms were inconsistent with a spinal cord injury, and that Crocetti did not have atrophy, a symptom commonly found in patients who cannot use their legs for an extended period of time.

Dr. Cone presented evidence to support the jury verdict. It was possible for the jury to render a verdict for Dr. Cone while following the district court's instruction regarding the evaluation of expert testimony. In addition, this verdict did not result in manifest injustice. Consequently, the district court did not abuse its discretion in denying Crocetti's motion for a new trial.

¹⁰105 Nev. 224, 226, 773 P.2d 729, 731 (1989).

Misconduct by prevailing party

Crocetti also argues that the district court abused its discretion in failing to grant Crocetti a new trial pursuant to NRC 59(a)(2) on the ground of misconduct by a prevailing party. We disagree.

Crocetti argues that defense counsel engaged in misconduct when counsel made inappropriate statements to the jury. Crocetti objected to defense counsel's inappropriate comment during voir dire, but failed to object to any statements made during closing argument.

Reversal of a district court's decision regarding the grant or denial of a motion for new trial is warranted if attorney misconduct "sufficiently permeat[es] an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict."¹¹ The standard of review on a district court's ruling on a motion for a new trial under NRC 59(a) is an abuse of discretion.¹²

A party must timely and specifically object to instances of attorney misconduct in order to preserve the issue for appeal.¹³ If a party fails to object, "any error resulting from the misconduct is deemed waived."¹⁴ However, alleged acts of unobjected-to attorney misconduct will be considered in "rare circumstances" when the misconduct had such a

¹¹Standard Oil California v. Perkins, 347 F.2d 379, 388 (9th Cir. 1965) (quoted in DeJesus v. Flick, 116 Nev. 812, 816, 7 P.3d 459, 462 (2000)).

¹²DeJesus, 116 Nev. at 816, 7 P.3d at 462.

¹³Ringle v. Bruton, 120 Nev. 82, 95, 86 P.3d 1032, 1041 (2004).

¹⁴Id.

“sinister influence as to constitute irreparable and fundamental error.”¹⁵ Irreparable and fundamental error is “error that, if not corrected, would result in a substantial miscarriage of justice or denial of fundamental rights and is only present when it is plain and clear that no other reasonable explanation for the verdict exists.”¹⁶

Because Crocetti failed to object to defense counsel’s allegedly inappropriate remarks during closing arguments, this court will not consider those remarks on appeal. Crocetti’s alleged inappropriate comment during voir dire consisted of defense counsel’s asking whether any juror would have trouble putting themselves in Dr. Cone’s shoes and walking through the day of Crocetti’s procedure with Dr. Cone. Crocetti objected, stating that counsel was making a prohibited golden rule argument but did not ask for a mistrial because of a potential conflict with the five-year rule.

A golden rule argument asks the jury members to place themselves in the shoes of the victim and to render a verdict accordingly.¹⁷ This type of argument is forbidden because it interferes with the jury’s objectivity.¹⁸ In DeJesus v. Flick, this court held that counsel made a golden rule argument when counsel asked the jurors to place themselves

¹⁵LeRetilley v. Harris, 354 So. 2d 1213, 1215 (Fla. Dist. Ct. App. 1978) (quoted in Ringle, 120 Nev. at 96, 86 P.3d at 1041).

¹⁶Ringle, 120 Nev. at 96, 86 P.3d at 1041.

¹⁷Williams v. State, 113 Nev. 1008, 1020, 945 P.2d 438, 445 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

¹⁸DeJesus, 116 Nev. at 819, 7 P.3d at 464.

in his client's position.¹⁹ In that case, counsel "asked the jurors to 'allow such recovery as they would wish if in the same position.'"²⁰

It is questionable whether the statement made to the jury in voir dire was a golden rule argument. Although counsel asked if the jury members had trouble putting themselves in Dr. Cone's shoes, the question was not intended to have the jurors consider how they would feel being sued, but rather was intended to verify that the jurors could look at the case with the information that Dr. Cone had available at that time. But even if we consider the voir dire question a violation of the golden rule argument and it was error for the trial judge not to sustain the objection and admonish the jury, one improper question at the beginning of trial is not sufficient grounds to reverse this case.²¹

Motion for JNOV

Crocetti's final argument is that the district court erred in refusing to grant her motion for JNOV because there is not substantial evidence to support the jury's verdict.


¹⁹Id.

²⁰Id.

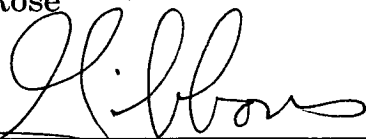
²¹Ringle, 120 Nev. at 96, 86 P.3d at 1041.

This court has held that a district court's post-judgment order denying a motion for a JNOV is not appealable.²² Therefore, the court will not address this argument.

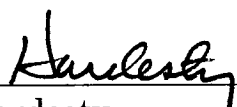
Accordingly, we ORDER the judgment and order of the district court AFFIRMED.


_____, J.

Rose


_____, J.

Gibbons


_____, J.

Hardesty

cc: Hon. David Wall, District Judge
Mainor Eglet Cottle, LLP
John H. Cotton & Associates, Ltd.
Clark County Clerk

²²Krause Inc. v. Little, 117 Nev. 929, 933, 34 P.3d 566, 569 (2001).