IN THE SUPREME COURT OF THE STATE OF NEVADA

MELINDA STULTZ N/K/A MELINDA VAN DOREN,
Appellant,
vs.
BELLAGIO, LLC, A LIMITED LIABILITY COMPANY,
Respondent.

No. 56164

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment, pursuant to a jury verdict, in a tort action. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

Appellant Melinda Stultz brought suit against respondent Bellagio, LLC for personal injuries that she sustained during a slip and fall on a staircase located on the Bellagio's premises. The trial resulted in a verdict in favor of Stultz, but the jury incorrectly determined comparative fault damages. The district court sua sponte ordered a new trial. The second trial resulted in a jury verdict in favor of the Bellagio. This appeal followed.

On appeal, the primary issues are: (1) whether this court has jurisdiction to consider issues from the first trial, (2) whether the district court abused its discretion in the second trial by refusing to allow Stultz's expert to testify, and (3) whether the district court's references in the second trial to Stultz's health insurance co-pay require reversal. For the reasons set forth below, we affirm the judgment of the district court. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

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This court lacks jurisdiction to consider issues from the first trial

The Bellagio asserts that this court lacks jurisdiction to consider any of the issues arising from the first trial. Specifically, it argues that this court does not have jurisdiction because the district court's sua sponte order granting a new trial at the conclusion of the first trial was appealable and Stultz did not appeal that order within 30 days.

Stultz asserts that this court should excuse her failure to appeal within 30 days of the district court's order because the order is "more akin to an order granting a mistrial" and, unlike an order granting a new trial, an order granting a mistrial is not appealable. She also contends that a district court's sua sponte order granting a new trial is not appealable under NRAP 3A(b)(2), unlike an order granting a motion for a new trial.

The district court ordered a new trial

A mistrial occurs when an error prevents the jury from reaching a verdict or the court from entering judgment. Carlson v. Locatelli, 109 Nev. 257, 260, 849 P.2d 313, 315 (1993). In contrast, a new trial occurs when a trial is completed and a verdict or judgment is rendered but set aside. Id. (citing 58 Am. Jur. 2d New Trial § 10 (2d ed. 1989)). In Carlson, the district court declared a mistrial after the jury's verdict had been returned and the trial had been completed. Id. at 259, 849 P.2d at 314. On appeal, we concluded that despite the fact that the district court had purported to declare a mistrial, it had actually granted a new trial. Id. at 260, 849 P.2d at 315. We reasoned that the district court's order was "clearly one granting a new trial," because when it issued its order, the jury had returned its verdict, the trial had been concluded, and the district court had held a post-trial hearing. Id.

Generally, an order granting a mistrial is not appealable. Id. at 259, 849 P.2d at 314. On the other hand, an appeal may be made from "[a]n order granting . . . a motion for a new trial." NRAP 3A(b)(2). Pursuant to NRAP 4(a)(5), an appeal must be filed "no later than 30 days from the date of service of written notice of entry" of an order granting a new trial. "This court lacks jurisdiction to consider an appeal that is filed beyond the time allowed under NRAP 4(a)." Winston Products Co. v. DeBoer, 122 Nev. 517, 519, 134 P.3d 726, 728 (2006).

Here, no error prevented the jury from returning a verdict. There was a complete trial, after which the jury deliberated and returned a verdict. In its post-trial hearing, the district court cited NRCP 59 and expressly ordered a new trial because the jury manifestly disregarded the district court's comparative fault instructions. See NRCP 59(a)(5) ("A new trial may be granted . . . [due to a m]anifest disregard by the jury of the instructions of the court."); NRCP 59(d) ("[T]he court, on its own, may order a new trial for any reason that would justify granting one on a party's motion."). Thus, we conclude that the district court ordered a new trial.

A sua sponte order granting a new trial is appealable

NRAP 3A(b)(2) provides that an order granting a motion for a new trial is appealable. A sua sponte court order is, by definition, an order by a court granting its own motion. See Black's Law Dictionary 1560 (9th ed. 2009) (defining sua sponte as "on its own motion"); see also U.S. v. Fernandez, 388 F.3d 1199, 1251 (9th Cir. 2004) (indicating that the court's sua sponte actions are those taken on the court's "own motion"); People v. Cowan, 236 P.3d 1074, 1141-42 (Cal. 2010) (treating a court's "sua sponte duty" as the equivalent of a court's duty to act "on its own motion"); Lane v. District Court, 104 Nev. 427, 455, 760 P.2d 1245, 1263 (1988) (using the

term "'sua sponte'" synonymously with "'own motion'" (quoting State ex rel. Preissler v. Dostert, 260 S.E.2d 279, 284-87 (W. Va. 1979))). Thus, when the district court grants a motion for a new trial—including its own motion—such an order is appealable. Indeed, on at least one occasion, we have considered an appeal taken from the district court's sua sponte order granting a new trial. Hale v. Riverboat Casino, Inc., 100 Nev. 299, 301, 682 P.2d 190, 191 (1984), abrogated on other grounds by Ace Truck v. Kahn, 103 Nev. 503, 746 P.2d 132 (1987), abrogated on other grounds by Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006). Therefore, we conclude that a district court's sua sponte order granting a new trial is appealable under NRAP 3A(b)(2).

In August 2008, notice of entry of the district court's sua sponte order granting a new trial was served. Stultz did not file her notice of appeal until June 2010, nearly two years later.[1] Thus, her appeal was not timely made under NRAP 4(a)(5), which provides that an appeal must be made within 30 days after service of notice of entry of an order granting a new trial. Accordingly, this court lacks jurisdiction to consider the district court's order granting a new trial. In addition, it lacks jurisdiction to consider any of the other issues that Stultz attempts to raise from the first trial because those issues immediately became appealable upon the district court's entry of judgment on the jury's verdict. See NRAP 3A(b)(1) ("An appeal may be taken from . . . [a] final judgment entered in an action

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[1]During the hearing in which the district court stated its intention to grant a new trial, Stultz indicated that she planned to appeal the district court's order. This shows that she was fully aware that she could immediately file an appeal but made a tactical decision not to do so.

or proceeding commenced in the court in which the judgment is rendered."). Accordingly, we conclude that this court lacks jurisdiction to consider issues from the first trial.

The district court did not abuse its discretion in the second trial by refusing to allow Stultz's expert to testify

Stultz contends that the district court abused its discretion in the second trial by not permitting her expert, David Ingebretsen, to testify.

The Bellagio contends that the district court properly refused to allow Ingebretsen to testify because the experiment from which he derived his opinion was unreliable.

Standard of review

The district court's determination of whether an expert witness's testimony is admissible is reviewed for an abuse of discretion. Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

Stultz's expert did not meet the NRS 50.275 assistance requirement

A witness qualified as an expert may testify if his or her testimony "will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. An expert's testimony will assist the trier of fact only if it is relevant and is "the product of reliable methodology." Hallmark, 124 Nev. at 500, 189 P.3d at 651. To determine whether an expert's opinion is the product of reliable methodology, the district court should consider whether the opinion is

> (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community . . . ; and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

Id. at 500-01, 189 P.3d at 651-52 (citations omitted).

If an expert derives his or her opinion from an experiment, the district court should consider additional factors; namely, whether

> (1) the technique, experiment, or calculation was controlled by known standards; (2) the testing conditions were similar to the conditions at the time of the incident; (3) the technique, experiment, or calculation had a known error rate; and (4) it was developed by the proffered expert for purposes of the present dispute.

Id. at 501-02, 189 P.3d at 652 (citations omitted). These factors are non-exhaustive, may be accorded differing weights, and are not necessarily applicable in every case. Id. at 502, 189 P.3d at 652.

Here, Ingebretsen's opinions regarding Stultz's injury and the friction coefficient of the Bellagio staircase appear to fall within the field he identifies as biomechanical engineering. It is unclear whether biomechanics is a recognized field of expertise. See id. (failure to offer evidence that biomechanics was within a recognized field of expertise weighed against admitting such testimony). It does not appear that Stultz submitted evidence showing that Ingebretsen's opinion was capable of being tested or that it had been tested. His curriculum vitae shows that he co-authored a textbook entitled Notes on Real-Time Vehicle Simulation, but the district court could reasonably conclude that the link between the subject matter of this textbook and his opinion with respect to the friction coefficient of the staircase where Stultz slipped is attenuated, at best. Ingebretsen is a member of several nationwide biomechanics organizations, but it is not apparent from the record whether these organizations are representative of the scientific community or whether they would accept the type of opinion that Ingebretsen expressed regarding the staircase where Stultz slipped.

The most problematic aspect of Ingebretsen's proposed testimony was the friction coefficient experiment that he conducted in order to reach his opinion. He did not conduct his experiment on the staircase where Stultz slipped. Rather, he purchased a piece of stainless steel and bent it to form a nose shape. There was no opinion from Ingebretsen as to whether the angle and surface area of this exemplar matched the Bellagio staircase. Because the pair of flip-flops that Stultz was wearing at the time of the accident was not available, Ingebretsen used his own flip-flops to test the friction coefficient of his exemplar. Finally, it is unclear whether Ingebretsen used water to run his test on the steel exemplar and, if he did, whether the amount of water he used was similar to the amount of water that was on the Bellagio staircase at the time of Stultz's accident. In sum, Ingebretsen's opinion was so speculative and riddled with assumptions that it would not have been of assistance to the jury.[2] See Hallmark, 124 Nev. at 502, 189 P.3d at 652-53 (biomechanics expert should not have been permitted to testify in negligence action involving an auto accident where he formed his opinion without knowing "(1) the vehicles' starting positions, (2) their speeds at impact, (3) the length of time that the vehicles were in contact during

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[2]Stultz asserts, for the first time on appeal and without citing authority, that any deficiencies in Ingebretsen's opinion should have affected only its weight, not its admissibility. We decline to consider this argument. See Edwards v. Emperor's Garden Rest., 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (when an appellant fails to present relevant authority on an issue, we need not address it); Diamond Enters., Inc. v. Lau, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997) ("It is well established that arguments raised for the first time on appeal need not be considered by this court.").

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impact, or (4) the angle at which the vehicles collided"); see also O'Neill v. Windshire-Copeland Associates, 372 F.3d 281, 284-85 (4th Cir. 2004) (proposed testimony of a biomechanics professor was properly excluded because his "opinion appear[ed] to be based more on supposition than science"); Smelser v. Norfolk Southern Ry. Co., 105 F.3d 299, 305 (6th Cir. 1997) (biomechanical expert should not have been permitted to testify where his opinion was the product of an unreliable methodology, as he did not consider critical pieces of information and relied heavily on assumptions), abrogated on other grounds as recognized by Morales v. American Honda Motor Co., Inc., 151 F.3d 500 (6th Cir. 1998). Accordingly, we conclude that the district court did not abuse its discretion in the second trial by refusing to allow Stultz's expert to testify.[3]

The district court's references in the second trial to Stultz's health insurance co-pay do not require reversal

Stultz asserts that the district court admitted collateral source evidence during the second trial when the Bellagio attempted to cross-examine her about the cost of her medications and when the district court twice blurted out the term "co-pay." She argues that although the district court sustained her objection to the introduction of collateral source evidence, the revelation that she made a co-payment for her medications

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[3]Stultz argues that the fact that Ingebretsen was permitted to testify in the first trial shows that he should have been permitted to testify in the second trial. Any disparity in the district court's rulings is explained by the fact that Hallmark, which provided a comprehensive framework regarding the admissibility of the precise type of expert opinion involved here, was decided after Ingebretsen testified in the first trial.

implied that she was receiving compensation from her insurance and that it forever tainted the jury.

The Bellagio contends that even if the district court improperly referenced Stultz's insurance co-payments, the reference did not cause any prejudice.

Standard of review

We review de novo whether the district court permitted collateral source evidence to be admitted. See Bass-Davis v. Davis, 122 Nev. 442, 454, 134 P.3d 103, 110-11 (2006).

The district court did not permit collateral source evidence to be admitted

Under the collateral source rule, "'if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor.'" Proctor v. Castelletti, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996) (quoting Hrnjak v. Graymar, Incorporated, 484 P.2d 599, 602 (Cal. 1971)). We have adopted a "per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose" because such 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." Id. at 90, 911 P.2d at 854.

Here, the Bellagio's question on cross-examination was tailored to inquire solely into the amount that Stultz paid for her medications and did not stray into collateral source evidence. Moreover, Stultz did not answer the question because her counsel promptly objected to the Bellagio's cross-examination. The district court sustained Stultz's

objection, and the Bellagio's line of questioning ended. Thus, although the district court twice referred to Stultz's insurance co-pay, no evidence of a collateral source was admitted. Nonetheless, the district court's mention of a co-pay was improper because it may have inferentially suggested to the jury that Stultz had received compensation for her injury from a collateral source.

We have not, however, established a rule of per se prejudice when insurance is merely mentioned in passing by the district court. Rather, the rule of per se prejudice is limited to instances where collateral source evidence is admitted. In Proctor, we reversed the district court where it admitted evidence concerning disability insurance payments that the plaintiff received. 112 Nev. at 91, 911 P.2d at 854. And, in Bass-Davis, we reversed the district court where it permitted the plaintiff to be cross-examined regarding compensation that she received from her employer during her leave of absence. 122 Nev. at 454, 134 P.3d at 110-11. In other words, the rule of per se prejudice is inapplicable here because, although insurance was mentioned, collateral source evidence was not admitted.[4] Therefore, we consider whether the district court's

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[4]As the Supreme Court of Pennsylvania aptly explained when discussing its precedent on this issue, "we have never said that the mention of insurance, per se, like dynamite with a live fuse, will blow up the case." O'Donnell v. Bachelor, 240 A.2d 484, 487 (Pa. 1968). Other jurisdictions are in accord. See City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749, 758 (6th Cir. 1980) ("[W]here disclosure of insurance was accidental, inadvertent, or an ambiguous or oblique reference," the trial court need not declare a mistrial.); Corbett v. Borandi, 375 F.2d 265, 271 (3d Cir. 1967) ("[T]he mere mention of the word 'insurance' in the trial of a case is not fatal, but the context in which it is laid is of controlling importance."); Cervantes v. Rijlaarsdam, 949 P.2d 56, 58 (Ariz. Ct. App.

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improper reference to a co-pay prejudiced Stultz. See NRCP 61 (a defect in a proceeding only requires reversal if it affects a party's substantial rights).

Stultz expressly informed the district court that she did not want the court to declare a mistrial to cure the court's references to her co-pay. She asked the district court to simply sustain her objection to the Bellagio's line of questioning, and the court did so. To alleviate any prejudice from the mention of Stultz's co-pay, the district court informed the jury that at $12 per day, the cost of Stultz's medications totaled $6,067, and the court instructed the jury not to discuss or consider whether Stultz had any insurance to cover her damages. In sum, Stultz suffered no prejudice from the district court's fleeting references to a co-pay. See Foster v. Bd. of Trustees of Butler Cty. Com. Col., 771 F. Supp. 1122, 1128 (D. Kan. 1991) ("[T]he mere mention of the word 'insurance'" does not result in unfair prejudice and can be cured by a limiting instruction); Safeway Stores, Inc. v. Buckmon, 652 A.2d 597, 605 (D.C. 1994) ("[T]he mere mention of insurance does not always require a mistrial if the jury is properly instructed."). We therefore conclude that although the district court's references in the second trial to Stultz's

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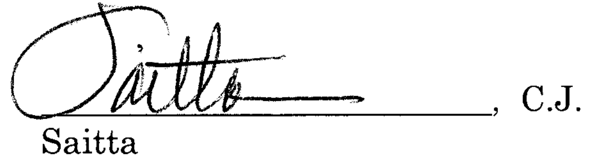
1997) ("The mere mention of insurance is not automatically grounds for a mistrial."); Dias v. Healthy Mothers, Healthy Babies, 60 P.3d 986, 989 (Mont. 2002) ("A district court is not required to grant a new trial simply because the word insurance is spoken during trial."); C. R. Owens Trucking Corporation v. Stewart, 509 P.2d 821, 823 (Utah 1973) ("The mere mention of insurance does not in all cases lead to the conclusion that the jury was prejudiced, or likely to be to such an extent that a fair trial could not be had.").

insurance co-pay were improper, reversal is not warranted. For the reasons set forth above, we

ORDER the judgment of the district court AFFIRMED.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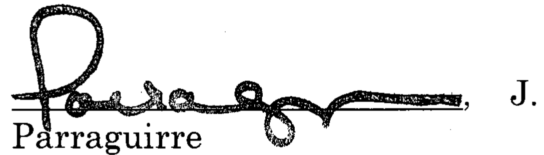
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cc: Hon. Jackie Glass, District Judge
William C. Turner, Settlement Judge
Hutchison & Steffen, LLC
Bailey Kennedy
Eighth District Court Clerk