IN THE COURT OF APPEALS OF THE STATE OF NEVADA

SHAWNA MORROW,
Appellant,
vs.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT; AND MICHAEL FORD, AN INDIVIDUAL,
Respondents.

No. 61446

ORDER OF AFFIRMANCE

This is an appeal from a final judgment and post-judgment orders awarding attorney fees and denying appellant's motion for a new trial in a torts action.[1] Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

This appeal arises from a jury verdict in a personal injury claim for damages following a car accident in May 2008. Respondent Sergeant Michael Ford—an on-duty employee of respondent Las Vegas Metropolitan Police Department (LVMPD)—rear-ended appellant Shawna Morrow's car while she was stopped at a traffic light.[2] Morrow sued Ford

[1]Morrow's notice of appeal indicates that this appeal is taken from a post-judgment order awarding attorney fees; however, Morrow failed to argue for a reversal of the award of attorney fees. Given that failure and our decision to affirm the final judgment and order denying Morrow's tolling motions, we need not consider the issue of attorney fees. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n.38 (2006) (recognizing arguments not cogently argued or supported by relevant authority need not be considered on appeal).

[2]The parties dispute the severity of the collision. Morrow testified that the impact was "pretty forceful," and that the impact launched her cellular phone from her hand to the rear of her Ford Excursion. Ford

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and LVMPD (collectively "LVMPD") for negligence, seeking to recover $6,549.18 in medical expenses and general damages. LVMPD admitted liability, but contested causation and damages.

On the final two days of discovery, nearly two years after filing her complaint, Morrow filed her fifth and sixth supplemental disclosures. These disclosures revealed previously undisclosed medical providers and medical records which increased her claimed medical expenses from $6,549.18 to $48,198.78. LVMPD filed a motion in limine to exclude those supplemental disclosures as a discovery sanction under NRCP 37(b)(2). The district court granted the motion, which limited the medical expenses Morrow could potentially recover.

At trial, Morrow's expert, Dr. Roger Russell, testified Morrow suffered from discogenic pain associated with a disk protrusion and annular tear. Similarly, Morrow's treating physician, Dr. Walter Kidwell, testified Morrow suffered from discogenic pain with radiculitis. Both experts testified, to a reasonable degree of medical probability, the car accident caused Morrow's condition.

LVMPD countered, presenting medical records demonstrating Morrow sought treatment for back pain on numerous occasions prior to the car accident, including a record showing Morrow suffered back pain after a fall down stairs. Based on these records, Dr. Michael Elkanich, LVMPD's expert, testified to a reasonable degree of medical probability Morrow suffered from a preexisting degenerative condition, and the car

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testified he was speaking on his cellular phone while at a complete stop behind Morrow. According to Ford, he dropped his cellular phone, and while reaching down to retrieve it, he lifted his foot off the brake, allowing his vehicle to coast into Morrow's car on a flat surface.

accident aggravated that condition. Without stating his opinion to a reasonable degree of medical probability, Dr. Elkanich further testified Morrow might have suffered the injury when she fell down the stairs. Finally, Dr. Elkanich testified to a reasonable degree of medical probability Morrow's treatment was reasonable for the first eight to twelve weeks following the car accident, but any treatment after twelve weeks should be apportioned on a sliding-scale.

The jury found the car accident did not proximately cause Morrow's injuries, and, therefore, the jury did not consider whether Morrow sustained damages. Following entry of judgment, LVMPD moved for an award of attorney fees, which the district court granted. Thereafter, Morrow moved for judgment notwithstanding the verdict, for a new trial, or to alter or amend the judgment, which the district court denied. This appeal followed.

On appeal, Morrow contends the district court abused its discretion by (1) admitting testimony from Dr. Elkanich regarding causation and apportionment, (2) failing to instruct the jury that all expert opinions regarding medical causation must be stated to a reasonable degree of medical probability, (3) excluding the documents disclosed in her fifth and sixth supplemental disclosures, and (4) denying her post-judgment motions.

The district court did not abuse its discretion by admitting testimony from Dr. Elkanich

We first consider Morrow's argument the district court abused its discretion by admitting testimony from Dr. Elkanich regarding causation, as Dr. Elkanich did not state his opinion to a reasonable degree

of medical probability.[3] We will not reverse a district court's decision to admit expert testimony absent an abuse of discretion. *Leavitt v. Siems*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014). A district court abuses its discretion when "no reasonable judge could reach a similar conclusion under the same circumstances." *Id.* The purpose of the expert testimony determines whether the reasonable degree of medical probability standard applies. *Williams v. Eighth Judicial Dist. Court*, 127 Nev. ___, ___, 262 P.3d 360, 368 (2011). If a party proffers an expert opinion to establish an independent alternative causation theory, then the reasonable degree of medical probability standard applies. *Id.* But where a party uses the testimony to cross-examine an opposing party's expert or to "contradict the [opposing party's] causation theory by comparing that theory to other plausible causes," the expert testimony need not satisfy that standard. *Id.*

Here, Dr. Russell testified, to a reasonable degree of medical probability, the car accident caused Morrow's injuries. In response, LVMPD elicited testimony from Dr. Elkanich, who did not state his opinion to a reasonable degree of medical probability, that Morrow's injuries *could be* consistent with a fall, and that her back injuries could have resulted from the fall down stairs. LVMPD did not use Dr. Elkanich's testimony to establish the alternative causation theory that

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[3]Morrow also argues Dr. Elkanich did not state specific apportionment percentages, and, therefore, the district court abused its discretion by admitting testimony from Dr. Elkanich regarding apportionment. Because Morrow failed to provide any legal authority supporting that proposition, her argument lacks merit. *See Weddell v. H2O, Inc.*, 128 Nev. ___, ___ n.11, 271 P.3d 743, 752 n.11 (2012); *see also Edwards*, 122 Nev. at 330 n. 38, 130 P.3d at 1288 n.38 (2006) (providing arguments not cogently argued or supported by relevant authority need not be considered).

Morrow's injury resulted from a fall down stairs rather than the car accident. Instead, LVMPD relied on Dr. Elkanich's testimony to "furnish reasonable alternative causes to that offered by [Morrow]." *Id.* Because LVMPD used Dr. Elkanich's testimony to contradict Morrow's causation theory rather than to establish an independent alternative causation theory, Dr. Elkanich was not required to state his opinion to a reasonable degree of medical probability, and we conclude the district court did not abuse its discretion by admitting that testimony.[4]

The district court did not abuse its discretion by striking Morrow's fifth and sixth supplemental disclosures

We next turn to Morrow's argument that the district court abused its discretion by striking her fifth and sixth supplemental disclosures under NRCP 37(b)(2). We review a district court's imposition of discovery sanctions under NRCP 37(b)(2) for an abuse of discretion. *See Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010). When a party fails to make the initial disclosures required by NRCP 16.1, a district court must impose sanctions, which can include any of the sanctions available under NRCP 37(b)(2). NRCP 16.1(e)(3). If a party fails to supplement initial disclosures, provides incomplete responses to

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[4]For these reasons, Morrow's contention that the district court was required to instruct the jury that medical expert opinions regarding causation must necessarily meet the reasonable degree of medical probability standard is incorrect. Such an instruction would be contrary to *Williams*, and, therefore, the district court did not abuse its discretion in refusing to give an erroneous instruction. *See Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 463, 134 P.3d 698, 702-03 (2006) (reviewing decision to admit or refuse jury instructions for abuse of discretion or judicial error); *Harris v. State*, 83 Nev. 404, 407, 432 P.2d 929, 931 (1967) ("[A party] can claim no right to have requested instructions given when they do not correctly state the law.").

requests for production or interrogatories, or fails to amend a prior discovery response, a district court may impose sanctions, including an order excluding evidence. NRCP 37(b)(2)(B); NRCP 37(c)(1); NRCP 37(d). By waiting until the final two days of discovery to divulge her treatment at the Surgical Arts Center and the Pain Institute of Nevada, Morrow failed to comply with the provisions governing initial disclosures in NRCP 16.1, provided incomplete responses to LVMPD's requests for production and interrogatories, and failed to amend her disclosures and responses notwithstanding continued visits to the providers during the pendency of her underlying action for a period of nearly two years. We conclude that the district court did not abuse its discretion by striking Morrow's fifth and sixth supplemental disclosures.

The district court did not abuse its discretion by denying Morrow's motion for a new trial

Finally, we turn to Morrow's contention that the district court abused its discretion in denying her motion for a new trial or to alter or amend the judgment.[5] "[F]ailure to timely object to the filing of the

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[5]In addition to challenging the denial of her motion for a new trial and her motion to alter or amend the judgment, Morrow also challenges the district court's denial of her motion for judgment notwithstanding the verdict. Although the denial of a motion to alter or amend and the denial of a motion for judgment notwithstanding the verdict are not appealable determinations, *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1434 n.4, 148 P.3d 710, 713 n.4 (2006), the denial of a motion to alter or amend a judgment may be reviewed for an abuse of discretion on appeal from a final judgment. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Nonetheless, Morrow raises the same arguments in challenging the denial of each of these motions, and our resolution of this matter would be unchanged if we addressed the merits of her appeal of the denial of her motion for judgment notwithstanding the verdict.

verdict or to move that the case be resubmitted to the jury constitutes a waiver of the issue . . . ." *Cramer v. Peavy*, 116 Nev. 575, 583, 3 P.3d 665, 670 (2000) (internal quotations omitted). Had Morrow raised her objection before the jury's discharge, the district court would have had an opportunity to consider whether the jury's verdict was impossible as a matter of law. Because Morrow did not timely object, she is precluded from raising this argument on appeal. *Id.*

Accordingly, we affirm the final judgment and the post-judgment orders.

It is so ORDERED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Susan Johnson, District Judge
M. Nelson Segel, Settlement Judge
Bowen Law Offices
Marquis Aurbach Coffing
Eighth District Court Clerk