IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GEORGE PAZ, INDIVIDUALLY,
Appellant,
vs.
RENT-A-CENTER, A FOREIGN CORPORATION; AND IRIS MARROQUIN, INDIVIDUALLY,
Respondents.

No. 77520-COA

FILED

APR 09 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

George Paz appeals from a judgment upon jury verdict in a tort action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge; Linda Marie Bell, Chief Judge.[1]

While driving a truck for Rent-A-Center, Iris Marroquin rear-ended a vehicle in which Paz was a passenger.[2] Following the accident, Paz received periodic treatment, including surgery, for ongoing back and neck pain. Paz filed a complaint against Rent-A-Center and Iris Marroquin (respondents) alleging negligence and negligence per se.

Prior to trial, the parties conducted extensive discovery. A primary issue throughout discovery was the disclosure and scope of Paz's expert witnesses. In particular, Paz did not disclose Dr. Steven V. Kozmary as an expert witness until after the initial expert disclosure deadline had passed. Nevertheless, after receiving the late report, respondents deposed Dr. Kozmary. Respondents also filed a motion in limine to exclude or limit Dr. Kozmary's testimony. The district court held that Dr. Kozmary was

[1]This case was reassigned from Judge Bell to Judge Gonzalez prior to the October 19, 2018, filing of the notice of entry of the judgment.

[2]We do not recount the facts except as necessary to our disposition.

qualified to opine as to future care, but not future surgery because he was not a surgeon.

Trial was originally set to commence in October 2016; however, the district court continued trial to February 6, 2017, because several motions remained pending shortly before trial and the parties failed to meet and confer prior to the trial date. The parties stipulated that pretrial disclosures would be due by January 20, 2017. But Paz failed to file his pretrial disclosures by the deadline. On January 25, 2017 at 11:01 a.m., respondents filed a motion to dismiss, alleging that Paz failed to—among other things—provide proper pre-trial disclosures under NRCP 16.1 or properly convene as required by EDCR 2.67. At 5:11 a.m. that same day, Paz belatedly filed his pretrial disclosures that, rather than specify Dr. Kozmary individually, listed only "Person Most Knowledgeable and/or Custodian of Records" at Kozmary Center for Pain Management. Three days later, Paz filed his pretrial memorandum.

At the hearing on respondents' January 25, 2017 motion to dismiss, the district court declined to dismiss Paz's complaint but instead imposed a $1,000 sanction to be paid to Legal Aid of Southern Nevada. The district court also instructed the parties to complete their meet and confer conference. On February 7, 2017, the district court continued trial to March 27, 2017. The next day, the parties completed their meet and confer conference. Paz arrived without copies of his exhibits and brought only stock jury instructions and voir dire questions. During the conference, Paz realized that he had failed to name Dr. Kozmary in his untimely pretrial disclosures. He subsequently amended his pretrial disclosure to replace "Person Most Knowledgeable and/or Custodian of Records" at Kozmary Center for Pain Management with "Steven V. Kozmary M.D."

Respondents filed an objection to the amended pretrial disclosure, arguing that Paz violated EDCR 2.67, NRCP 16.1(a)(3), and the court's order by filing untimely disclosures and being unprepared at the conference. On March 7, 2017, the district court considered respondents' objection. After expressing concern over the prejudice the late disclosure caused respondents, the district court excluded Dr. Kozmary from testifying at trial, stating, "You know, were that an isolated incident, it would be a little easier for me to understand that, but given the lack of regard to the rules altogether, I am going to exclude Dr. Kozmary because he was not timely designated in the pretrial." The district court then instructed respondents to prepare an order, but, for whatever reason, the district court never entered a written order.

After additional continuances, trial finally commenced on February 26, 2018. During the 12-day trial, the jury heard testimony from Paz, Marroquin, investigating officers, and various expert witnesses, including Dr. Dunn, Dr. Rosen, Dr. Rothman, and Dr. Burkehead. During the course of trial, Paz objected to lines of questioning about his preexisting injuries and medical conditions. More specifically, respondents referenced Paz's diabetes diagnosis, prior workers' compensation claim for a work-related injury, and a prior vehicle accident. Respondents also asked a detective about a "swoop and squat,"[3] to which Paz objected. The district court sustained the objection and provided a limiting instruction.

At the end of trial, the jury rendered a verdict for Paz, awarding him $30,000 to cover only his past medical expenses. The jury declined to award damages for future medical costs or pain and suffering. Before

[3]A "swoop and squat" is a form of fraud where one driver "swoops" in front of a victim's car and stops suddenly, causing a rear-end collision.

releasing the jury, the district court asked if the parties had any additional matters to address, to which Paz responded, "Nothing." Paz did not move for a new trial or request additur.

On appeal, Paz argues that the district court abused its discretion by excluding Dr. Kozmary because his disclosure was timely in light of the continued March 27 trial date and respondents suffered no prejudice from his delayed disclosure. Additionally, Paz argues that he is entitled to a new trial because respondents committed misconduct at trial during questioning when they suggested that Paz committed insurance fraud and suggesting alternate causation for his pain by asking about his preexisting diabetes diagnosis, back injury related to a work injury, and prior vehicle accident. Paz also argues that this court should order a new trial on damages because the jury award was inadequate.

We first consider the exclusion of Dr. Kozmary as an expert witness. We review a district court's decision to issue sanctions for an abuse of discretion. *Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 249, 235 P.3d 592, 596 (2010). "An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). To warrant reversal, "an error must be prejudicial and not harmless." *Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) (citing NRCP 61). "To demonstrate that an error is not harmless, a party 'must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.'" *Id.* (quoting *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010)).

"It is generally not an abuse of discretion for a court to exclude evidence based upon failure to timely designate." *Santana v. City & County*

of Denver, 488 F.3d 860, 867 (10th Cir. 2007) (citing *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 749 (4th Cir. 1993)) (finding no abuse of discretion and upholding the denial of motion for additional discovery because there had been adequate time for discovery and the requesting party had not made a timely request); *Turnage v. Gen. Elec. Co.*, 953 F.2d 206, 208-09 (5th Cir. 1992) (finding no abuse of discretion and upholding the denial of a discovery motion because requesting party had failed to make the request until trial was imminent and the discovery deadline was impending).

Here, however, we need not resolve whether the district court abused its discretion[4] in excluding Dr. Kozmary's trial testimony because the district court admitted his entire report into evidence and furthermore permitted other experts called by both sides to discuss the pros and cons of his report during their trial testimony. Consequently, the jury was fully aware of the nature and scope of his opinions, and the exclusion of his oral testimony (which would have been limited to subjects reasonably included in the report) constituted harmless error.

Paz speculates that the damages award for future medical expenses and pain and suffering would have been different but for the district court excluding Dr. Kozmary, but he offers no factual or legal

---

[4]We note that it is within a district court's discretion to exclude an untimely disclosed expert, unless the failure was substantially justified or was harmless. *See* NRCP 37(c)(1). While we agree with the district court that Paz's failure to identify Dr. Kozmary in his pretrial disclosures was not substantially justified, we need not decide whether it was harmless under the facts and circumstances presented here. Because Dr. Kozmary's opinions in his report were introduced into evidence by other expert witnesses and therefore considered by the jury, exclusion of Dr. Kozmary as a witness, while perhaps error, is not grounds for granting a new trial. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 268, 396 P.3d 783, 789 (2017).

support for this argument, only general assertions that Dr. Kozmary was a critical witness who would have tied issues together. Moreover, other expert witnesses opined as to Paz's future medical care and costs. While Dr. Kozmary's testimony could have perhaps supported Paz's claims of past and future pain and suffering, Paz has not demonstrated that this additional testimony on the same subject would have resulted in a different outcome. *See, e.g., Pizzaro-Ortega*, 133 Nev. at 266, 396 P.3d at 788. It was ultimately the jury's responsibility to evaluate the evidence and the credibility of the witnesses and determine whether this case warranted an award for pain and suffering. *See Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) ("A jury is permitted wide latitude in awarding tort damages, and the jury's findings will be upheld if supported by substantial evidence."). Thus, the district court's exclusion of Dr. Kozmary did not affect Paz's substantial rights even if it could be said to have been an abuse of discretion. *Cf.* NRCP 61.

Next, we conclude that Paz is not entitled to a new trial for respondents' trial conduct. Paz argues that respondents' counsel committed misconduct by suggesting Paz committed insurance fraud and referencing Paz's prior medical history. However, "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 981 (2008) (providing that "single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent"); *see generally Craig v. Harrah*, 65 Nev. 294, 306, 195 P.2d 688, 693 (1948) ('The reason of the long established rule for requiring that a motion for a new

trial be made, and passed upon, before a consideration of the evidence can be had, is. . . that the trial court may first have an opportunity to rectify an error, if one was made, without subjecting the parties to the expense and annoyance of an appeal."). Here, Paz failed to move for a new trial, which would have allowed the district court to consider first whether respondents' comments were severe and persistent enough to warrant a new trial. Additionally, Paz has not shown from the record as a whole that respondents' comments were severe and pervasive in such a way that the comments altered the jury verdict.[5]

Lastly, Paz waived his ability to challenge the jury award because he failed to move for additur or a new trial before the district court. "The district court has broad discretion in determining motions for additur, and we will not disturb the court's determination unless that discretion has been abused." *Lee v. Ball*, 121 Nev. 391, 394, 116 P.3d 64, 66 (2005). "The [district] court *upon appropriate motion* should first determine whether the damages are clearly inadequate and, if so, whether the case would be a proper one for granting a motion for a new trial limited to damages. If both conditions exist, the court in its discretion may issue an order granting the motion for a new trial, unless the defendant consents to an additur set by the court, within the time it allows." *Drummond v. Mid-W. Growers Co-op. Corp.*, 91 Nev. 698, 712, 542 P.2d 198, 208 (1975) (emphasis added). "[I]f damages are clearly inadequate or shocking to the court's conscience, additur is a proper form of appellate relief." *Donaldson v. Anderson*, 109

[5]During oral argument, counsel cited to NRS 34.240, but this rule is not mentioned anywhere in the briefing and parties may not raise new matters during oral argument not raised in the briefing. *See* NRAP 28(a)(10); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 671-72 n.3 (2011).

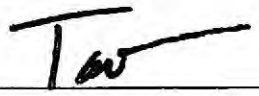
Nev. 1039, 1042, 862 P.2d 1204, 1206 (1993) (internal quotation marks omitted) (citing *Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 614, 707 P.2d 1137, 1139 (1985)).

Here, after the jury awarded Paz $30,000 for past medical expenses, Paz neither requested additur nor moved for a new trial. As such, Paz waived this argument on appeal. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983. Nevertheless, we conclude that the record indicates that there was conflicting evidence regarding Paz's damages. In light of the conflicting evidence, the verdict, while arguably unusual, is not clearly inadequate nor does it shock the conscience of the court. *See, e.g., Miller v. San Diego Gas & Elec. Co.*, 28 Cal. Rptr. 126, 129 (Ct. App. 1963) ("[A] verdict may properly be rendered for an amount less than, or for no more than the medical expenses.").

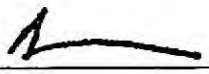
Therefore, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao



_____, J.
Bulla

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Hon. Linda Marie Bell, Chief Judge
The Wasielewski Law Firm, Ltd.
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Eighth District Court Clerk