

IN THE SUPREME COURT OF THE STATE OF NEVADA

ACUITY, A MUTUAL INSURANCE
COMPANY,
Appellant,
vs.
GIDGET SWANSON,
Respondent.


No. 85090

ACUITY, A MUTUAL INSURANCE
COMPANY,
Appellant,
vs.
GIDGET SWANSON,
Respondent.

No. 85486

FILED

DEC 27 2023

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

These are consolidated appeals from a district court judgment following a jury verdict and order awarding attorney fees and costs in an insurance action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

In this case, the jury found appellant Acuity liable for breach of contract, breach of the covenant of good faith and fair dealing, and violations of the Nevada Unfair Claims Practices Act, and granted respondent Gidget Swanson \$150,000 in compensatory damages. The jury further found by clear and convincing evidence that Acuity acted with oppression, fraud, malice, or reckless disregard in its conduct and, after the punitive damages stage of trial, awarded Swanson \$1,350,000 in punitive damages. The district court's judgment on the jury verdict granted Swanson interest and attorney fees and costs in addition to compensatory and punitive damages. Acuity filed a motion for a new trial, which the district court denied. The

district court issued an amended judgment in the amount of \$2,266,338.64 plus post judgment interest. Acuity appeals.

We affirm the jury's verdict that Acuity breached its contract with Swanson, breached the covenant of good faith and fair dealing, and violated the Nevada Unfair Claims Practices Act. We affirm the compensatory damages award of \$150,000. We also affirm the jury's finding that Acuity acted with oppression, fraud, malice, or reckless disregard in its conduct, which warrants punitive damages. However, we reverse the punitive damages award and remand to the district court for a new punitive damages hearing. Finally, we vacate the awards of attorney fees and costs, and decline to assign this case to a new district court judge on remand.

Acuity first argues that the jury's finding of bad faith is not supported by substantial evidence because Acuity had a reasonable basis to deny Swanson's claim due to their bona fide dispute. We will not overturn a jury verdict supported by substantial evidence unless it is clearly wrong. *Albert H. Wohlers & Co. v. Bartgis*, 114 Nev. 1249, 1261, 969 P.2d 949, 958 (1998). Swanson provided evidence that Acuity denied Swanson's claim without a reasonable basis, including evidence that there was a third vehicle involved in the crash and that Acuity declined to thoroughly investigate the rear bumper, despite requests from Swanson's attorneys to do so. Although Acuity disputes these allegations, we conclude that there was sufficient evidence for a jury to find that Acuity acted in bad faith and that punitive damages were warranted. *See Yamaha Motor Co v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998) ("This court is not at liberty to weigh the evidence anew, and where conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party.").

Acuity next argues that Professor Jeffrey Stempel's testimony violated pretrial orders precluding some of Stempel's proposed testimony. Acuity also argues that Stempel was not qualified to be an expert witness. Violation of an order in limine can warrant a new trial. *See Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 126, 252 P.3d 649, 652 (2011). Additionally, to testify as an expert, a witness must be qualified as an expert in an area of scientific, technical, or other specialized areas. NRS 50.275; *Hallmark v Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). In this case, the order in limine at issue explicitly permitted Stempel to testify on the "yardstick" testimony. The district court denied the part of the motion seeking to preclude Stempel from testifying on that subject. Therefore, Stempel did not violate the order in limine. Furthermore, Stempel was qualified to be an expert. As an insurance law professor, Stempel had specialized knowledge of insurance. He has testified in over 97 cases, is a member of the Academy of Insurance, and has written law review articles, treatises, and books on insurance liability. The alleged inaccuracies in Stempel's expert report do not detract from his other qualifications, but instead go to the weight of his testimony. *See Nev. Power Co. v. 3 Kids, LLC*, 129 Nev. 436, 443, 302 P.3d 1155, 1159 (2013) (explaining that concerns about an expert's methodology went to weight, not admissibility). Accordingly, we conclude the district court did not abuse its discretion in this regard.

Acuity next argues that the district court erred in permitting witness Sam Terry to change his opinions at the time of trial. In his deposition testimony, Terry said that the question of whether a red sedan hit Swanson's car was "inconclusive" because he did not know the materials of the two bumpers. At trial, Swanson asked Terry if he could explain what

he meant by “inconclusive,” and Terry said that the composition of the paint of the vehicles was inconclusive. He said he could not formulate opinions about contact between a red sedan and Swanson’s vehicle because he did not have the red sedan and did not know the material of the bumper or the paint. These two answers are not materially different, and the district court did not abuse its discretion in permitting Terry’s testimony.

Acuity further argues that Terry’s trial testimony undermined Acuity’s defenses, created a trial by ambush, and may have been a significant factor in the jury’s bad faith determination. However, Acuity does not identify any authority supporting this claim, and therefore we need not consider it. *See Edwards v. Emperors Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). Even if Acuity had provided relevant authority supporting this claim, its argument fails because Terry’s trial testimony did not materially differ from his deposition testimony, as noted above. Accordingly, we affirm the jury’s finding of liability and the compensatory damages award.

Acuity next argues that several errors compromised the punitive damages stage of the trial, requiring reversal of the punitive damages award. To begin, Acuity contends that Swanson failed to timely disclose Attorney Matthew Pfau as a testifying witness. The purpose of discovery is to prevent surprises at trial. *Washoe Cty. Bd. of Sch. Trs. v. Pirhala*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968). If a witness is not timely disclosed, a district court may nonetheless permit the witness to testify if the failure to disclose is substantially justified or harmless. NRCP 37(c)(1). If the failure to disclose is not substantially justified, the party will not be able to use the improperly disclosed witness or information. *Capanna v. Orth*, 134 Nev. 888, 894, 432 P.3d 726, 733 (2018). Here, the disclosure was

untimely, as Swanson identified Pfau the night before trial. Because Swanson does not substantially justify this late disclosure, we conclude that it was not excused.

Acuity further argues that Swanson's disclosure of Pfau was incomplete as she failed to provide the information required under NRCP 16.1, including the subjects of information known to the witness, the opinions the witness would express, and the basis and reasons for their opinions. Acuity argues that such information must be disclosed during discovery under NRCP 16.1, and that a party must also provide supplemental pretrial disclosure information. NRCP 37(c)(1) provides that if a party fails to timely disclose the information required under NRCP 16.1, the party is prohibited from using the information at trial, unless the failure was substantially justified. We conclude that Swanson's disclosure of Pfau was incomplete because Swanson failed to identify the topics to which Pfau would testify. Although she may have orally disclosed this information, this is not equivalent to the written disclosure required under NRCP 16.1, and she did not show that her failure to disclose the requisite information was substantially justified. Accordingly, we conclude that the district court abused its discretion in allowing Pfau to testify.

Acuity further argues that the district court should have excluded evidence of certain settlement negotiations between Acuity and Swanson which occurred the week before trial pursuant to NRS 48.105(1). Swanson argues that the settlement negotiation evidence was admissible because it falls under the exception that settlement negotiation testimony is admissible when it is used for a purpose other than to prove liability. Swanson argues that Acuity was already deemed liable, so the evidence was instead offered to determine the amount of the punitive damage award.

Settlement negotiation testimony is typically inadmissible. See NRS 48.105(1); NRS 48.109(2). Such testimony may be admissible, however, if it is offered for another purpose, such as proving bias or proving an effort to obstruct a criminal investigation. NRS 48.105(2). Here, we conclude that Pfau's testimony that Acuity rejected Swanson's version of the settlement agreement and ultimately withdrew its offer was inadmissible. Evidence illustrating the level of reprehensibility of Acuity's actions during the settlement negotiations is irrelevant to demonstrate Acuity's conduct in denying Swanson's insurance claim. Moreover, a party's decision to withdraw from a settlement agreement is not an indication that a party deserves punitive damages. Therefore, we conclude that the district court abused its discretion in allowing Pfau to testify regarding the pretrial settlement negotiations.

Acuity next argues that the district court abused its discretion when it permitted Pfau's testimony on Acuity's prior lawsuits, which was irrelevant and highly prejudicial. It further argues that Pfau improperly testified as an expert witness on these cases because he was only permitted to testify as a lay witness. Swanson argues that Pfau properly testified to his involvement in Acuity's prior lawsuits, including the case *Humes v. Acuity* where his law firm represented the plaintiff against Acuity.

Evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. NRS 48.035(1). A lay witness generally may only testify on a matter if the witness has personal knowledge. NRS 50.025(1)(a). Further, lay opinion testimony must be "[r]ationally based on the perception of the witness." NRS 50.265(1). We conclude that the district court should have excluded evidence of Acuity's six prior cases. These other

cases, including *Humes*, were irrelevant. *Humes*, in particular, lacked a factual connection to Swanson's case. Further, Pfau's testimony regarding the amount the jury awarded *Humes* in compensatory and punitive damages, was also unfairly prejudicial because it suggested an outcome.

Pfau's testimony on *Humes* also exceeded the scope of lay witness testimony because Pfau had no personal knowledge of the case. Similarly, Pfau only knew about Acuity's five other cases through Acuity's written discovery responses. The evidence of Acuity's prior lawsuits suggests that Acuity was a serial violator, which is unfairly prejudicial and substantially outweighs any probative value. See NRS 48.035(1); NRS 48.045(1). Therefore, we hold that the district court abused its discretion in allowing Pfau to testify regarding Acuity's prior cases.¹

Acuity further argues that Pfau exceeded the scope of a lay witness when he testified about a typical punitive damages award. Pfau, a purported lay witness, testified as to the formula the jury should use to calculate punitive damages against Acuity (suggesting that the jury should multiply the compensatory damages award by a factor of nine). Unsurprisingly, the jury awarded Swanson the exact amount of punitive damages suggested by Pfau. As a lay witness, Pfau should not have been permitted to testify as to a typical punitive damages award. Because this testimony exceeded the scope of lay testimony, we hold that the district

¹Acuity also argues that Pfau's testimony regarding *Humes* violated a pretrial order. Acuity failed to object on this basis when Pfau testified and therefore waived this objection. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("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.").

court abused its discretion when it allowed Pfau to testify as to the typical punitive damages award.

Acuity next argues that the court should have allowed supplemental defense discovery due to Swanson's untimely disclosure of Pfau. We agree. Nevada's discovery rules grant broad powers to litigants by allowing those litigants an adequate means of discovery during the period of trial preparation. *See Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 229, 276 P.3d 246, 249 (2012). Generally, discovery matters are "within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Id.* at 228, 276 P.3d at 248. Failure to provide reasons for denying the reopening of discovery may result in an abuse of discretion. *Pickett v. McCarran Mansion, LLC*, No. 77124-COA, 2019 WL 7410795 (Nev. Ct. App. Dec. 31, 2019) (Order of Reversal and Remand); *see also* NRCP 52(a)(3). Here, due to Swanson's untimely and incomplete disclosure, Acuity was unable to conduct any discovery as to Pfau, even after Acuity asked to depose him. Acuity's multiple requests for such discovery were ignored by the district court. Accordingly, we conclude that the district court abused its discretion in disallowing supplemental discovery.

Because of the numerous errors in the punitive damages stage of trial, we reverse the punitive damages award and remand for a new punitive damages hearing. Because we reverse and remand the punitive damages award for further proceedings, we necessarily vacate the award of

attorney fees and costs for further consideration by the district court after the new punitive damages hearing.²

Finally, Acuity argues that this case should be assigned to a different district court judge because Judge Sturman has seen inadmissible evidence and expressed opinions on the strengths and weaknesses of the evidence. However, there must be a compelling reason to warrant disqualification or recusal of a judge, such as an extreme showing of bias. *Matter of Dunleavy*, 104 Nev. 784, 788, 769 P.2d 1271, 1274 (1988). A judge must also not make statements on the ultimate merits of the case. *FCH1 LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014). We do not discern evidence of bias in the record. None of Judge Sturman's comments are remarks on the ultimate merits of the case. Instead, her comments relate to the admissibility of evidentiary matters. Furthermore, this was a jury trial rather than a bench trial, meaning that Judge Sturman did not serve as the factfinder. Therefore, we see no reason why she would have difficulty taking a fresh approach to the case, free from any previously expressed views or from bias.

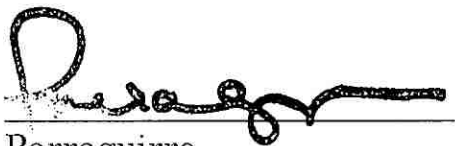
²Acuity argues that the district court's "erroneous rulings" necessitate reversal due to cumulative error. We do not reach the issue of cumulative error because relief is warranted on other grounds.

Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.


_____, J.
Herndon


_____, J.
Lee


_____, J.
Parraguirre

cc: Hon. Gloria Sturman, District Judge
Kristine M. Kuzemka, Settlement Judge
Resnick & Louis, P.C./Las Vegas
Lemons, Grundy & Eisenberg
H&P Law, PLLC
Eighth District Court Clerk