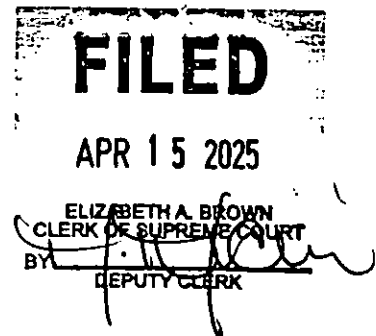


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ZACHARY TAMBEAGBOR,  
INDIVIDUALLY,  
Appellant,  
vs.  
MELAKU TEFERA, AN INDIVIDUAL;  
AND HENDERSON TAXI, A NEVADA  
CORPORATION,  
Respondents.

No. 88239-COA



*ORDER OF AFFIRMANCE*

Zachary Tambeagbor appeals from a judgment entered after a jury verdict and post-verdict decisions in a personal injury matter. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

In February 2017, Tambeagbor was involved in a single car traffic accident where he drove his vehicle over an item referred to as either a stanchion or short pole in the median of a roadway. The collision caused the airbags of his vehicle to deploy and Tambeagbor was later taken to a hospital in an ambulance. Tambeagbor reported to medical providers that he had pain in his left shoulder and that the pain level was at seven on a one-to-ten scale. X-rays conducted at the hospital did not reveal broken bones but revealed a bone spur in the shoulder joint. The hospital providers ultimately concluded he had contusions but directed him to visit his primary care physician.

In May 2017, Tambeagbor was involved in a second traffic accident, which is the subject of this case, when a vehicle driven by respondent Melaku Tefera rear-ended his vehicle. Respondent Henderson Taxi employed Tefera as a taxicab driver and Tefera was driving a taxicab on behalf of Henderson Taxi when the accident occurred. Tambeagbor was stopped at a traffic signal and Tefera rear-ended him at approximately 14 miles per hour. A video recording of the accident revealed that Tambeagbor exited his vehicle and exhibited signs of discomfort in his left hand. Tambeagbor subsequently proceeded to drive his vehicle to a casino and later to his place of employment. Tambeagbor thereafter sought treatment at a medical facility. He reported pain in his left hand and fingers. The treating physician assessed that Tambeagbor had a contusion of his left hand.

In the weeks that followed, Tambeagbor visited a chiropractor and another physician and he began to complain of pain in his left arm, left shoulder, and back. Tambeagbor's pain continued and he visited Dr. Mary Shannon, an orthopedic surgeon. Dr. Shannon ultimately performed surgery on Tambeagbor's left shoulder in order to correct issues stemming from soft tissue tears and impingements.

Tambeagbor later filed suit against Tefera and Henderson Taxi (respondents), contending that his injuries were caused by the May 2017 traffic accident and that respondents were liable for monetary damages stemming from those injuries. Respondents answered, and this matter proceeded to discovery. Of note, Tambeagbor provided expert witness disclosures and he disclosed Dr. Shannon as a non-retained expert witness. Tambeagbor further disclosed that Dr. Shannon would testify as to the

cause of Tambeagbor's injuries and that "she may answer hypothetical questions that are based upon the facts, evidence, or testimony developed at trial." The record also indicates that the parties disclosed Tambeagbor's relevant medical information and the additional expert witnesses' reports.

Respondents submitted an offer of judgment to Tambeagbor in the amount of \$140,001, inclusive of costs, prejudgment interest, and recoverable attorney fees. However, Tambeagbor did not accept the offer of judgment and this matter proceeded to trial.

Tambeagbor filed several motions in limine concerning the admission of evidence at trial. The district court granted several of those motions, including precluding reference to any additional traffic accidents Tambeagbor may have been involved in, except for information concerning the February 2017 accident as such information was relevant to this matter. The court also precluded the parties from referring to this matter as an attorney driven case or a medical build-up case but allowed questioning concerning medical liens to ascertain whether a witness was biased. In addition, the district court precluded respondents from stating that either Tambeagbor or his witnesses were liars.

The district court also emailed the parties concerning its procedures for jury selection. Within that email, the court explained that the parties were permitted to first ask questions to the jury panel as a whole and they could thereafter conduct follow-up questions to the panel members. The court further explained that, if a party feels that a juror has not answered questions, the court will allow individual questions at that time. Tambeagbor subsequently filed a motion requesting permission to conduct questioning of individual jurors. However, the district court

explained that Tambeagbor would have the opportunity to question individual jurors after he first asked general questions. Jury selection ensued and the parties conducted extensive questioning of the jurors, including questions posed to individual jurors.

The parties thereafter presented opening statements. Tambeagbor explained his belief that the evidence presented at trial would show that his injuries were sustained in the May 2017 accident. Respondents acknowledged they were responsible for the May accident and that Tambeagbor suffered injuries from that accident. Respondents further accepted that they were liable for monetary damages based on the injuries that actually occurred as a result of the May 2017 accident. However, respondents asserted that the evidence would show that Tambeagbor's shoulder problems were not caused by the May 2017 accident and that they should not be held responsible for damages stemming from issues involving Tambeagbor's shoulder. The parties thereafter proceeded to present testimony and evidence to the jury.

Tambeagbor testified concerning both the February 2017 and the May 2017 accidents, his injuries, and difficulties stemming from his shoulder issues. Tambeagbor also presented testimony from a retained expert witness, Dr. Andrew Cash, an orthopedic surgeon. Dr. Cash testified concerning his review of the medical records and stated that he concluded that Tambeagbor's shoulder issues stemmed from the May 2017 accident.

Tambeagbor also presented testimony from Dr. Shannon, and she testified concerning the surgical procedure she performed on Tambeagbor's shoulder and her opinion on causation of his shoulder issues. She testified that Tambeagbor had reported to her that his pain stemmed

from the May 2017 accident and she explained that her opinion as to causation was based in part on Tambeagbor's statements. She explained that, during surgery, she noted that he had several tears in his labrum that had since healed, and there were indications that his shoulder had been dislocated at some point in the past. She further noted that there were degenerative conditions, including a bone spur, and that those conditions would have taken a long time to develop. She testified that she ultimately concluded his shoulder problems stemmed from the May 2017 accident but, again, explained that was in part based on Tambeagbor's statements that he had not had issues with his shoulder prior to that accident.

On cross-examination, respondents asked Dr. Shannon if she was aware that Tambeagbor had been in a traffic accident in February 2017 and had reported to the medical providers directly after the accident that his shoulder had a high amount of pain. Tambeagbor objected and argued that Dr. Shannon should not be questioned concerning the February 2017 accident because she had not been made aware of that accident prior to trial. The district court overruled the objection and permitted her to be questioned concerning that information. Dr. Shannon responded that she had not been aware of the February 2017 accident or Tambeagbor's report of shoulder pain following that accident. She acknowledged that her opinion on the cause of Tambeagbor's shoulder issues may have been altered had he reported that accident to her and explained that doctors have to rely on patient honesty to properly evaluate the cause of an injury. She further explained that tears to the rotator cuff and labrum caused by a trauma, as opposed to degenerative tears, typically involve immediate pain and dysfunction.

Respondents later presented testimony from their expert witness, Dr. John Herr, an orthopedic surgeon who typically treats patients with shoulder problems. Dr. Herr testified that he compared the medical records stemming from the February 2017 accident with those from the May 2017 accident and noted that Tambeagbor complained of high pain in his shoulder following the February accident but not following the May accident. Dr. Herr also explained that traumatic tears in the shoulder typically result in immediate pain but the pain will decrease over time. Dr. Herr testified that, had Tambeagbor torn his rotator cuff or labrum in the May 2017 accident, he likely would have had meaningful pain following that accident. Herr also testified that, based on his review of Dr. Shannon's surgical notes, the nature of the tears in Tambeagbor's labrum and the spur meant that he likely had degenerative problems in his shoulder. Based on the foregoing information, Herr testified that he did not believe that Tambeagbor's shoulder problems were caused by the May 2017 accident.

During closing arguments, Tambeagbor urged the jury to find that all of his injuries, including those to his shoulder, were caused by the May 2017 accident and that respondents were accordingly liable for monetary damages stemming from those injuries. Tambeagbor accordingly urged the jury to award him more than one million dollars in damages. Respondents acknowledged they were liable for the May 2017 accident and explained that they accepted responsibility for monetary damages from the injuries Tambeagbor sustained as a result of the May accident but argued that the evidence demonstrated Tambeagbor did not suffer a shoulder injury in that accident.

The jury thereafter returned a verdict, awarding Tambeagbor past medical expenses of \$10,259.48; past lost earnings in the amount of \$5,600; past pain, suffering, disability and loss of enjoyment of life in the amount of \$30,000; and no damages for Tambeagbor's claim of future pain, suffering, disability and loss of enjoyment of life. The monetary damages awarded to Tambeagbor totaled \$45,859.49. The district court later entered a judgment on the jury verdict.

Tambeagbor thereafter urged the district court to award him costs as the prevailing party and he filed a memorandum of costs. Respondents opposed the award of costs, arguing that Tambeagbor did not obtain a more favorable judgment than the offer of judgment and he was therefore not entitled to costs pursuant to NRCP 68. Respondents also contended they were entitled to an award of costs under NRCP 68. Tambeagbor opposed respondents' request for costs and argued that he obtained a more favorable judgment than the offer of judgment when including counsel's contingent fee in the amount of 40 percent of all money recovered, including costs and prejudgment interest. Tambeagbor also noted that respondents filed their memorandum of costs more than five days after entry of the judgment and urged the district court to retax Dr. Herr's expert witness fees as he believed they were not reasonable. In addition, Tambeagbor filed a motion for a new trial, arguing the district court abused its discretion concerning jury selection and by permitting questioning of Dr. Shannon concerning the February 2017 accident, and that respondents' counsel committed misconduct during opening statements and improperly displayed an unredacted medical record to the jury. Respondents opposed the motion for a new trial.

The district court later held a hearing in which it explained that Tambeagbor did not obtain a more favorable judgment than the offer of judgment. The court found that respondents made an inclusive offer of judgment and, therefore, Tambeagbor's attorney fees should only be included in the calculation to ascertain whether he obtained a more favorable judgment if he was entitled to recover such fees by law or contract pursuant to NRCP 68(g). The court found that Tambeagbor did not demonstrate that any law or contract permitted him to recover attorney fees. Absent those fees, Tambeagbor had not obtained a judgment more favorable than the \$140,001 offer provided by respondents. The court accordingly found that Tambeagbor was not entitled to an award of costs as NRCP 68(f)(1)(A) precludes such an award for parties that did not obtain a more favorable judgment than the offer of judgment.

The district court also found that there was good cause for respondents to file an untimely memorandum of costs as they had to wait until Tambeagbor filed his memorandum of costs in order to calculate whether he had beat their offer of judgment. *See* NRS 18.110(1) (providing that a memorandum of costs must be filed "within 5 days after the entry of judgment, or such further time as the court or judge may grant"). In addition, the court found that respondents were entitled to an award of costs, including the expert witness fees for Dr. Herr. *See* NRCP 68(f)(1)(B) (stating that the offeree that fails to obtain a more favorable judgment after rejecting an offer of judgment must pay the offeror's reasonable post-offer trial-related expenses, including expert witness fees). The district court noted that it had to make findings to support an expert fee in excess of \$15,000 pursuant to NRS 18.005(5), and it concluded that Dr. Herr's fees in



the amount of \$21,950 were reasonable in light of the depth of the findings in his report and the nature of his trial testimony, which the court found to have been excellent.

The district court thereafter entered a written order denying Tambeagbor's request for costs, denying Tambeagbor's request to retax respondents' expert witness fees, and awarding respondents' costs in the amount of \$26,403.81. The district court also entered a written order denying Tambeagbor's motion for new trial, concluding he failed to demonstrate any issues raised in the motion warranted a new trial. This appeal followed.

#### *Jury Selection*

First, Tambeagbor argues the district court abused its discretion by refusing to permit the parties to ask questions of individual jurors. "The judge shall conduct the initial examination of prospective jurors and the parties or their attorneys are entitled to conduct supplemental examinations which must not be unreasonably restricted." NRS 16.030(6). "The scope of voir dire nonetheless rests within the sound discretion of the district court, whose decision will be given considerable deference by this court." *Thomas v. Hardwick*, 126 Nev. 142, 148, 231 P.3d 1111, 1115 (2010) (internal quotation marks omitted); *see also Whitlock v. Salmon*, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988) (stating a trial judge may "reasonably control and limit an attorney's participation in voir dire," and such restrictions are "within the discretion of the district court").

As previously stated, the district court informed the parties that they could ask individual jurors questions after first asking general questions. Here, the district court simply required Tambeagbor to first pose

general questions to the potential jurors before asking follow-up questions to individual jurors. The record plainly demonstrates that the court permitted Tambeagbor to pose questions to individual jurors, and he posed numerous questions to individual jurors. Moreover, Tambeagbor does not identify any potential jurors that he was unable to adequately question. Considering the foregoing information, Tambeagbor fails to demonstrate that the district court abused its discretion by restricting questioning during jury selection. *See Thomas*, 126 Nev. at 148, 231 P.3d at 1115.

Second, Tambeagbor argues the district court abused its discretion by declining to strike a juror for cause. Tambeagbor contends the juror indicated she was biased against plaintiffs in personal injury matters. This court analyzes a district court's ruling on a challenge for cause against a juror for an abuse of discretion. *Sayedzada v. State*, 134 Nev. 283, 291, 419 P.3d 184, 192 (Ct. App. 2018). "[I]f a juror manifests potential bias, further questioning may either rehabilitate the juror or demonstrate impermissible bias if the juror's answers, taken as a whole, demonstrate the juror's state of mind substantially impairs the juror's ability to apply the law and the instructions of the court in deciding the verdict." *Id.* (internal quotation marks omitted). "It is well-established that trial judges are in the best position to view the prospective juror's demeanor and judge the veracity of the juror's assertion of impartiality . . . ." *Sanders v. Sears-Page*, 131 Nev. 500, 509, 354 P.3d 201, 207 (Ct. App. 2015).

In response to questions posed by Tambeagbor, one juror indicated that, based on her knowledge of the facts of a personal injury action involving a friend, she had a little bit of skepticism of such matters. However, upon further questioning from both Tambeagbor and

respondents, the juror stated she would need to hear testimony before she could evaluate the merits of this matter, stated she would treat both parties the same, and that she could set aside her previous experience and decide this matter solely on the evidence presented at trial. Tambeagbor moved to strike the juror for cause, arguing the juror had not sufficiently indicated she would be fair and impartial. The district court denied that request in light of the juror's statements that she would be fair and evaluate this matter based on the evidence presented at trial.

The district court was in the best position to view the juror's demeanor and to evaluate her veracity, and the record supports the district court's findings concerning her statements. Thus, Tambeagbor fails to demonstrate the district court abused its discretion by finding that the juror's assertion of impartiality was accurate or by denying his for-cause challenge.

#### *Opening statements*

Next, Tambeagbor argues that respondents' counsel committed misconduct during opening statements. "Whether an attorney's comments are misconduct is a question of law subject to de novo review." *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009). "Still, we give deference to the district court's factual findings and to how it applied the standards to those facts." *Id.* The party alleging misconduct bears the burden of demonstrating that a new trial based on the alleged misconduct is warranted. *Lioce v. Cohen*, 124 Nev. 1, 17-19, 174 P.3d 970, 981-82 (2008). Moreover, "[a]n attorney's violation of an order in limine can amount to misconduct justifying a new trial" but "[a] violation of an order granting a motion in limine may only serve as a basis for a new trial when

the order is specific in its prohibition and the violation is clear.” *Bayerische Motoren Werke Aktiengesellschaft v. Roth*, 127 Nev. 122, 132, 252 P.3d 649, 656 (2011) (internal quotation marks omitted). In addition, “[w]here the record demonstrates that the jury’s verdict is strongly supported by overwhelming evidence, the verdict can generally be explained by the evidence itself and even serious misconduct may not warrant a new trial.” *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 816, 357 P.3d 387, 396 (Ct. App. 2015); *see also Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009) (stating a jury verdict will be upheld if it is supported by substantial evidence).

First, Tambeagbor argues respondents’ counsel committed misconduct by stating Tambeagbor was taking advantage of the situation by seeking damages for his shoulder issues. A party seeking a new trial based on misconduct after a district court sustained an objection to that misconduct must demonstrate that the district court’s actions “were insufficient to remove the attorney misconduct’s effect.” *Lioce*, 124 Nev. at 17-18, 174 P.3d at 981. “[A]n attorney’s statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases and may amount to prejudicial misconduct necessitating a new trial.” *Id.* at 21-22, 174 P.3d at 983.

During respondents’ opening statement, respondents’ counsel stated that Tambeagbor had taken advantage of the situation to seek damages for his shoulder problems. Tambeagbor did not object initially but did object when counsel again stated that Tambeagbor had taken advantage of the situation. Tambeagbor argued counsel improperly offered his opinion

on the matter. The district court sustained the objection and admonished counsel to refrain from making such statements.

Respondents' counsel improperly offered his opinion that Tambeagbor was taking advantage of the situation by seeking damages for his shoulder issues. However, Tambeagbor objected and the district court admonished counsel to refrain from again presenting that opinion. The district court correctly concluded that respondents' statements were improper and accordingly admonished counsel.<sup>1</sup> See *id.* at 17, 174 P.3d at 980.

As previously discussed, there was significant evidence presented demonstrating that Tambeagbor did not sustain a shoulder injury in the May 2017 accident, but rather that he sustained it either during the February 2017 accident or that his shoulder issues were degenerative. In particular, Dr. Herr explained that he specialized in surgical procedures for shoulder issues and he testified at length to his

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<sup>1</sup>Generally, when a district court sustains an objection to attorney misconduct, it "should not only sustain the objection but admonish the jury and counsel." *Id.* at 17, 174 P.3d at 980. Here, the district court admonished counsel but did not admonish the jury concerning the statement. However, Tambeagbor did not request an admonishment to the jury and he does not challenge any failure to give such an admonishment in his opening brief. As a result, we decline to address this issue, which was raised for the first time in Tambeagbor's reply brief. 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."); *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

conclusion that Tambeagbor did not sustain a significant shoulder injury during the May 2017 accident. Dr. Shannon also acknowledged that Tambeagbor had not provided her with sufficient information concerning the February 2017 accident and that such information would have been very important for her opinion as to causation. Finally, both Dr. Herr and Dr. Shannon agreed that a traumatic tear of the tissues in the shoulder would have caused immediate pain, and the evidence demonstrated that Tambeagbor suffered immediate pain as a result of the February 2017 accident but not the May 2017 accident. In light of the foregoing evidence, the verdict is explained by the evidence presented at trial and, therefore, Tambeagbor fails to demonstrate that the aforementioned misconduct warranted a new trial. *See Michaels*, 131 Nev. at 816, 357 P.3d at 396. Accordingly, we conclude that Tambeagbor is not entitled to relief based on this argument.

Second, Tambeagbor argues that respondents' counsel committed misconduct by stating the facts would show that he was not being honest and forthcoming. Tambeagbor asserts that statement improperly offered counsel's opinion on his credibility and violated an order in limine that directed respondents to refrain from calling him a liar. When a party objects to purported misconduct and the objection is overruled, reversal is only warranted if this court determines that the district court incorrectly overruled the objection and that failure to sustain the objection affected the moving party's substantial rights. *See Lioce*, 124 Nev. at 18, 174 P.3d at 981. It is improper for an attorney to characterize a witness as a liar or inject a personal opinion regarding a witness's credibility. *See DeJesus v. Flick*, 116 Nev. 812, 816-17, 7 P.3d 459, 462-63 (2000), *overruled*

on other grounds by *Lioce*, 124 Nev at 17, 174 P.3d at 980; *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990); RPC 3.4(e). However, it is permissible to demonstrate to a jury through inferences that a witness's version of events is untrue. See *Ross*, 106 Nev. at 927, 803 P.2d at 1106.

Here, respondents' counsel stated that the evidence would prove that Tambeagbor was not being honest and forthcoming regarding his shoulder and the February 2017 traffic accident. Tambeagbor objected but the district court overruled his objection.

Counsel did not offer his personal opinion on Tambeagbor's credibility. Counsel also did not violate an order in limine as he did not specifically call Tambeagbor a liar. See *Bayerische Motoren Werke Aktiengesellschaft*; 127 Nev. at 132, 252 P.3d at 656. Rather, counsel stated that the evidence to be produced at trial would not support Tambeagbor's contentions about the cause of his shoulder issues. As counsel did not offer a personal opinion as to Tambeagbor's credibility or call Tambeagbor a liar, we conclude that counsel did not commit misconduct and the district court did not err by overruling Tambeagbor's objection. Accordingly, Tambeagbor fails to demonstrate attorney misconduct warranting a new trial. See *Lioce*, 124 Nev. at 19, 174 P.3d at 982.

Third, Tambeagbor argues that respondents' counsel committed misconduct by implying that no other persons involved in the accident had been injured. During opening statements, respondents' counsel stated that there were four people involved in the accident and said, "only one person," but before he could finish his sentence Tambeagbor objected. At a bench conference, Tambeagbor stated his belief that counsel intended to state that Tambeagbor was the only person injured and

contended that lack of injury to others was not relevant. The district court agreed with Tambeagbor and admonished counsel to move on from that issue. Counsel accordingly turned to a different topic when he resumed his opening statement. As the district court instructed counsel to refrain from making the challenged statement to the jury, and in consideration of the strong evidence presented supporting the jury's verdict, Tambeagbor fails to demonstrate that this amounts to the rare circumstance in which the attorney misconduct warrants a new trial. *See id.*; *Michaels*, 131 Nev. at 816, 357 P.3d at 396. Accordingly, we conclude that Tambeagbor is not entitled to relief based on this argument.

Fourth, Tambeagbor argues respondents' counsel committed misconduct by discussing the opinions of a non-testifying expert. During opening statements, respondents' counsel stated that respondents retained a medical expert and that expert informed them that several of Tambeagbor's injuries were caused by the May 2017 accident. Tambeagbor objected, arguing that counsel did not intend to present testimony from that expert and that he should not be permitted to mention information from a non-testifying expert. However, the district court overruled the objection, finding it was permissible as it amounted to an admission of respondents' liability. Because the district court overruled Tambeagbor's objection, reversal is only warranted if this court determines that the district court incorrectly overruled the objection and that failure to sustain the objection affected the moving party's substantial rights. *See Lioce*, 124 Nev. at 18, 174 P.3d at 981. Here, the challenged statements consisted of respondents' counsel providing explanation for respondents' admission of liability for several of Tambeagbor's injuries. In light of the foregoing, and the



significant evidence presented at trial indicating that Tambeagbor did not injure his shoulder in the May 2017 accident, Tambeagbor fails to demonstrate that the district court incorrectly overruled the objection or that its decision affected his substantial rights. Accordingly, we conclude that Tambeagbor is not entitled to relief based on this argument.

Fifth, Tambeagbor argues respondents' counsel committed misconduct by mentioning other, post-May 2017 accidents Tambeagbor had been involved in. He contends mention of post-May 2017 accidents violated an order in limine. During opening statements, respondents' counsel noted that Tambeagbor had been served with interrogatories, which included a question concerning whether he had been involved in car accidents after May 2017. Tambeagbor objected, and at a resulting bench conference, respondents' counsel explained that he was not referring to post-May 2017 accidents but to Tambeagbor's interrogatory response where he described the accident that was substantially similar to the February 2017 but stated it occurred in September 2018. Tambeagbor's counsel acknowledged that Tambeagbor had been confused about the interrogatory because of a language barrier and that was reflected in his response. The court reminded respondents' counsel that he was not permitted to discuss post-May 2017 accidents but permitted him to refer to the interrogatory response and overruled the objection. Respondents' counsel thereafter continued his opening statement, noting that Tambeagbor had provided an inconsistent and inaccurate response to the interrogatory. Here, the record plainly demonstrates that respondents' counsel did not refer to a post-May 2017 accident but instead to Tambeagbor's inaccurate response to an interrogatory. Therefore, Tambeagbor fails to demonstrate counsel

committed misconduct or that the district court's decision to overrule the objection was erroneous or that its decision affected his substantial rights. *See id.* Accordingly, we conclude that Tambeagbor is not entitled to relief based on this argument.

### *Evidence*

Next, Tambeagbor argues the district court abused its discretion by allowing questioning of Dr. Shannon concerning the February 2017 accident and that respondents' counsel committed misconduct posing such questions. Tambeagbor contends that Dr. Shannon was a treating physician, had not reviewed medical records outside of those involved in her treatment of Tambeagbor, and that NRCP 16.1 bars parties from presenting information to a treating physician when that physician did not learn of such information during the course of treatment.

We review a district court's decision to exclude or allow evidence, as well as its decision to allow expert testimony, for an abuse of discretion. *LVMPD v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013) (reviewing evidentiary decisions for an abuse of discretion); *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (reviewing the decision to allow or exclude expert testimony for an abuse of discretion). When a plaintiff has presented evidence concerning its theory of causation, a defendant may counter that theory by: (1) undermining the plaintiff's expert testimony via cross-examination, (2) providing an alternative theory of causation, or (3) contradicting the plaintiff's expert testimony with its own expert testimony. *Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. 518, 530, 262 P.3d 360, 368 (2011).

Here, as previously explained, Tambeagbor disclosed his intention to call Dr. Shannon as a non-retained expert witness and that she would testify concerning her treatment of Tambeagbor. See NRCP 16.1(2)(D) (discussing disclosure requirements for treating physicians). Tambeagbor further disclosed that Dr. Shannon would testify as to the cause of Tambeagbor's injuries and that "she may answer hypothetical questions that are based upon the facts, evidence, or testimony developed at trial." In addition, the record indicates that the parties disclosed Tambeagbor's relevant medical information and the additional expert witnesses' reports. At trial, Tambeagbor questioned Dr. Shannon concerning the treatment she provided to Tambeagbor but also concerning her opinion as to the causation of Tambeagbor's shoulder problems. The district court later concluded that respondents could question Dr. Shannon whether she had been aware of the February 2017 accident and whether information from that accident bore upon her causation opinion.

Because Tambeagbor presented evidence concerning his causation theory via Dr. Shannon's testimony, respondents were thus permitted to cross-examine Dr. Shannon in an attempt to undermine her opinion as to that issue and did not commit misconduct by so doing. See *Williams*, 127 Nev. at 530, 262 P.3d at 368. While Tambeagbor contends that this cross-examination was barred by NRCP 16.1, the record indicates that Tambeagbor's medical information was disclosed to both parties and was within the scope of Tambeagbor's disclosures related to Dr. Shannon. In light of the foregoing, we conclude that the district court did not abuse its discretion by permitting respondents to cross-examine Dr. Shannon

concerning the February 2017 accident and related information. Accordingly, Tambeagbor is not entitled to relief based on this argument.

Next, Tambeagbor argues the district court abused its discretion by permitting questioning of Dr. Shannon concerning a medical lien and that respondents' counsel committed misconduct by posing such questions. Tambeagbor contends that admission of evidence concerning a medical lien violated an order in limine precluding reference to this matter as attorney driven or a medical build-up case.

A district court's "decision to admit or exclude evidence [is reviewed] for abuse of discretion" and will not be disturbed "absent a showing of palpable abuse." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). There is "a per se rule barring the admission of a collateral source of payment for an injury into evidence for any purpose" but "evidence of the existence of medical liens to prove bias does not invoke the collateral source rule." *Khoury v. Seastrand*, 132 Nev. 520, 538-39, 377 P.3d 81, 94 (2016). A pretrial order in limine barred reference to this matter as attorney driven or a medical build-up case but it also specifically permitted questioning concerning medical liens for bias purposes. During trial, the district court allowed questioning of Dr. Shannon concerning the existence of a medical lien for proof of bias, and Tambeagbor fails to demonstrate the district court palpably abused its discretion in so doing. In addition, counsel also did not commit misconduct or violate an order in limine as he did not refer to this matter as attorney driven or a medical build-up case. *See Bayerische Motoren Werke Aktiengesellschaft*, 127 Nev. at 132, 252 P.3d at 656. Because Tambeagbor does not demonstrate the district court committed a

palpable abuse of discretion by allowing the aforementioned questioning or that counsel violated the relevant order in limine, we conclude he is not entitled to relief based on this argument.

Next, Tambeagbor argues respondents' counsel committed misconduct by briefly displaying an unredacted medical record to the jury. Tambeagbor contends the medical record contained information concerning motor vehicle collisions that occurred after May 2017.

When a party fails to make a timely objection concerning misconduct during trial "we will reverse the judgment only when the misconduct amounted to irreparable and fundamental error . . . that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different." *Grosjean*, 125 Nev. at 364, 212 P.3d at 1079 (internal quotation marks omitted). During questioning of Dr. Herr, respondents' counsel displayed a document to the jury. Tambeagbor immediately requested respondents' counsel to take the document down and then conferred with counsel. The record indicates that respondents' counsel thereafter asked the district court for permission to make a split display on the ELMO device and resumed questioning. Tambeagbor did not object or request the court to instruct the jury concerning the unredacted document.

It is not clear from the record how long the document was displayed to the jury or if they were actually able to read it. Moreover, as previously discussed, there was significant evidence presented in support of the verdict such that Tambeagbor fails to demonstrate that, but for this alleged misconduct, the verdict would have been different. Accordingly, we conclude Tambeagbor fails to demonstrate the alleged misconduct

amounted to irreparable and fundamental error that resulted in a substantial impairment of justice or denial of his fundamental rights. Therefore, we conclude Tambeagbor is not entitled to relief based on this argument.

### *Costs*

Next, Tambeagbor argues the district court abused its discretion by declining his request for costs and by awarding costs in favor of respondents. This court reviews awards of costs for an abuse of discretion. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005). A district court abuses its discretion when its findings are not supported by substantial evidence. *Miller v. Miller*, 134 Nev. 120, 125, 412 P.3d 1081, 1085 (2018). Substantial evidence “is evidence that a reasonable person may accept as adequate to sustain a judgment.” *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

First, Tambeagbor contends that he was the prevailing party and thus should have been awarded costs pursuant to NRS 18.020. Tambeagbor also contends that the court erroneously concluded he did not obtain a judgment more favorable than the offer of judgment because, when his contingent fees are included, his monetary award exceeded the \$140,001 provided in the offer of judgment.

The Nevada Supreme Court has explained that NRS 18.020 does “not preclude the application of the penalty provisions of NRCP 68.” *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). “Thus, when an offeree rejects a valid offer and does not obtain a more favorable judgment, . . . NRCP 68(f)(1) preclude[s] the offeree from recovering any costs, attorney fees, or interest for the period after the

service of the offer and before the judgment.” *Id.* Under NRCP 68, an inclusive offer of judgment “includes[ ] a valuation for both their claims and their costs, expenses, interest, and allowable attorney fees.” *Aguilar v. Lucky Cab Co.*, 140 Nev., Adv. Op. 1, 540 P.3d 1064, 1067 (2024) (emphasis omitted). When a district court compares inclusive offers to the amount of the judgment, the court only factors in attorney fees authorized by “law or contract.” NRCP 68(g); *see also Lee v. Patin*, No. 83213, 2024 WL 238082, at \*2 (Nev. Jan. 22, 2024) (Order of Affirmance) (stating courts applying the current version of NRCP 68(g) consider “only those attorney fees that the offeree would be entitled to at the end of litigation, i.e., those authorized by law or contract” when evaluating whether a party obtained a judgment more favorable than the offer (internal quotation marks omitted)).

Tambeagbor’s argument that he was entitled to an award of costs pursuant to NRS 18.020 is thus misplaced as that statute does not preclude application of the penalty provisions of NRCP 68. Thus, Tambeagbor’s request for an award of costs turns on whether he obtained a judgment more favorable than the \$140,001 offer provided by respondents. The district court found that respondents submitted an inclusive offer of judgment and, thus, the comparison of the offer with Tambeagbor’s judgment included pre-offer costs, expenses, interest, and attorney fees authorized by law or contract. The district court further found that Tambeagbor failed to demonstrate he was authorized by law or contract to recover attorney fees in this matter.<sup>2</sup> Thus, inclusive of the damages

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<sup>2</sup>We note Tambeagbor does not present cogent argument as to why he was entitled to recover attorney fees. *See Edwards v. Emperor’s Garden*

awarded at trial together with appropriate interest and costs, the court calculated that Tambeagbor obtained a judgment of \$111,839.19. The judgment Tambeagbor obtained was thus plainly less favorable than the offer of \$140,001 provided by respondents.

The district court's factual findings are supported by substantial evidence. Moreover, Tambeagbor did not identify, both before the district court and on appeal, any law or contract under which he was authorized to recover attorney fees in this matter. Accordingly, we conclude the district court did not abuse its discretion by concluding that Tambeagbor did not obtain a judgment more favorable than the offer of judgment and that he was therefore precluded from recovering costs pursuant to NRCp 68(f)(1)(A).

Second, Tambeagbor argues the district court abused its discretion by declining to strike respondents' memorandum of costs because it was untimely filed. Tambeagbor also argues that the court abused its discretion by awarding respondents expert witness fees in excess of \$15,000 and declining to retax those fees, as Tambeagbor argues Dr. Herr was not a credible witness and the amount of his fees was not reasonable.

We review the district court's decision to accept an untimely memorandum of costs pursuant to NRS 18.110(1) for an abuse of discretion. *Valladares v. DMJ, Inc.*, 110 Nev. 1291, 1293, 885 P.2d 580, 582 (1994). NRS 18.110(1) provides that the prevailing party must serve a memorandum of costs on the adverse party "within 5 days after the entry of

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*Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues unsupported by cogent argument).



judgment, or such further time as the court or judge may grant.” Moreover, a district court must make appropriate findings in support of its decision to award expert witness fees in excess of the \$15,000 allowed pursuant to NRS 18.005(5). *Frazier v. Drake*, 131 Nev. 632, 650, 357 P.3d 365, 377 (Ct. App. 2015) (reviewing an award for expert fees under the prior version of NRS 18.005(5)).

Here, as previously explained, the district court permitted respondents to file an untimely memorandum of costs because they had to wait until Tambeagbor filed its memorandum of costs in order to calculate whether he had beat their offer of judgment. The court further found that respondents filed their memorandum of costs only three days after it was due pursuant to NRS 18.110(1) and that they filed it within a reasonable time after learning of Tambeagbor’s requested costs. Substantial evidence supports the district court’s findings, and we conclude Tambeagbor fails to demonstrate the district court abused its discretion in permitting respondents to file their memorandum of costs more than five days after entry of the judgment. *See Miller*, 134 Nev. at 125, 412 P.3d at 1085; *Valladares*, 110 Nev. at 1293, 885 P.2d at 582.

In addition, the district court made findings in support of its decision to award expert witness fees in excess of \$15,000. As previously explained, the court found that Dr. Herr’s fees were reasonable given the depth of his expert witness report and the nature of his trial testimony. In particular, the district court noted that Tambeagbor had two expert witnesses and that Dr. Herr had to review information from both of those witnesses in his preparation. The court further found that Dr. Herr’s trial testimony was excellent. Based on the foregoing, the court concluded that

Dr. Herr's fees in the amount of \$21,950 were reasonable. *See Frazier*, 131 Nev. at 650-51, 357 P.3d at 377-78 (noting the factors a district court may consider when evaluating a request for excess expert witness fees). The court's findings concerning the request for expert witness fees are supported by substantial evidence. Accordingly, we conclude that Tambeagbor fails to demonstrate the district court abused its discretion by declining to retax Dr. Herr's fees and awarding respondents expert witness fees. *See Sheehan & Sheehan*, 121 Nev. at 493, 117 P.3d at 227; *see also Frazier*, 131 Nev. at 652, 357 P.3d at 378 (reviewing an award of expert witness fees as costs for an abuse of discretion).

In light of the foregoing analysis, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Westbrook

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<sup>3</sup>To the extent Tambeagbor contends the district court abused its discretion by denying his motion for new trial, for the reasons previously identified, we conclude that he failed to demonstrate that his underlying arguments concerning jury selection, cross-examination of Dr. Shannon, and allegations of attorney misconduct had merit. Accordingly, we conclude the district court did not abuse its discretion by denying the motion for new trial. *See Michaels*, 131 Nev. at 815, 357 P.3d at 395 ("A district court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion."). In addition, insofar as Tambeagbor raises arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.

BULLA, C.J., concurring:

While I agree with the majority to affirm the judgment, I write separately due to my concerns regarding the application of the penalty provisions of NRCP 68(g) in a personal injury case where an inclusive offer of judgment has been rejected by the plaintiff offeree. Yet to be clearly addressed by Nevada appellate courts is whether the plaintiff's rejection of an *inclusive* offer of judgment requires the district court to factor in the attorney fees incurred by the plaintiff after receiving a favorable judgment when deciding whether that judgment was more favorable than the rejected offer.

In this case, Tambeagbor, the plaintiff, received a verdict at trial in the amount of \$45,859.49. Therefore, the amount of attorney fees he incurred based on the verdict was approximately \$18,343.79 (or 40 percent governed by a contingency fee agreement). However, Tambeagbor did not serve an offer of judgment such that he could potentially recover his fees under NRCP 68. *See generally O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 562-63, 429 P.3d 664, 673-74 (Ct. App. 2018) (affirming that attorney fees may be recovered in contingency fee cases under the previous version of NRCP 68).

Rather, in this case, Tefera as the defendant was the offeror and served Tambeagbor with an offer of judgment in the amount of \$140,001. On its face, Tefera's offer far exceeded the judgment Tambeagbor obtained at trial. But Tefera's offer of judgment was inclusive of costs, expenses, interest, and attorney fees, if permitted by law or contract. Thus, in comparing Tefera's offer of judgment to the verdict, these inclusive amounts

must be added to the verdict to determine if Tambeagbor obtained a more favorable judgment. See NRCP 68(g). Assuming Tambeagbor's judgment was more favorable than Tefera's offer, he would not have been entitled to attorney fees and costs, because he was not the offeror, but he also would not have been responsible for any penalty incurred under the rule.

Here, the district court appropriately added Tambeagbor's pre-offer interest and costs to the amount of the verdict to find that Tambeagbor had obtained a judgment of \$111,839.19. However, the court declined to include Tambeagbor's attorney fees incurred based on his contingency fee agreement, reasoning that Tambeagbor was not entitled to attorney fees either by law or contract. Based on these calculations, the district court concluded that Tambeagbor's total judgment was *not* more favorable than Tefera's offer of judgment. Therefore, the penalty provisions of NRCP 68 applied and the district court awarded Tefera certain costs pursuant to that rule.

One issue on appeal is whether Tambeagbor was entitled to recover his attorney fees by law or contract such that those fees should have been included in the judgment before evaluating whether his judgment was more favorable than Tefera's inclusive offer of judgment. Clearly, Tambeagbor did not have a contract with Tefera which would have potentially allowed him to recover attorney fees.<sup>4</sup> NRCP 68 would have

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<sup>4</sup>If this were a breach of contract case, for example, and the prevailing party was entitled to attorney fees under the contract, then the district court would add in the pre-offer fees into the plaintiff's judgment when determining if the plaintiff's judgment was more favorable than the rejected, inclusive offer of judgment. This example illustrates the potential

allowed for the recovery of his attorney fees had Tambeagbor made an offer to Tefera that he rejected and Tambeagbor received a verdict greater than his offer. *See generally O'Connell*, 134 Nev. at 554, 429 P.3d at 668. But these are not the circumstances here. So, does the fact that Tambeagbor potentially could have recovered his attorney fees under NRCP 68 qualify as a law under which Tambeagbor was permitted to receive fees, had he made an offer, such that the district court should have also added his attorney fees to the judgment before imposing the penalty provisions of the rule because he rejected an inclusive offer?


In my opinion, the attorney fees should have been included in the calculation of the judgment Tambeagbor recovered when evaluating the rejection of an inclusive offer of judgment. If Tefera has the benefit of the NRCP 68 to make an offer inclusive of attorney fees, such that Tambeagbor would not be entitled to seek a separate award of attorney fees upon accepting the offer, then Tambeagbor should be allowed to add his attorney fees to the judgment when evaluating whether he obtained a more favorable judgment upon rejecting an inclusive offer of judgment. *See, e.g., Aguilar v. Lucky Cab Co.*, 140 Nev., Adv. Op. 1, 540 P.3d 1064, 1068 (2024) (citing *Rateree v. Rockett*, 668 F.Supp 1155, 1159 (N.D. 1987) for its rejection of “an interpretation of an offer of judgment that would allow the offeror to unfairly argue that the plain language [of NRCP 68] excluded fees and costs had the offeree rejected it but included fees and costs once the offeree accepted it”). And this is the conundrum courts face when evaluating an

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unfairness to parties litigating a personal injury case versus a contract case when evaluating an inclusive offer of judgment under NRCP 68.

inclusive offer of judgment within the parameters of NRCP 68, particularly in a personal injury case where an award of attorney fees is governed by a contingency fee agreement and the plaintiff is the offeree who rejects an inclusive offer.

Based on the foregoing, I would have added Tambeagbor's attorney fees in the amount of approximately \$18,343.79 to the judgment of \$111,839.19 when evaluating whether Tambeagbor obtained a more favorable judgment after rejecting Tefera's inclusive offer. In this case, he would not have, so I concur in the majority order.<sup>5</sup>

  
\_\_\_\_\_, C.J.  
Bulla

cc: Hon. Jacqueline M. Bluth, District Judge  
Nicolas M. Bui, Ltd.  
Hall Jaffe & Clayton, LLP  
John H. Cotton & Associates, Ltd.  
Kathryn Werner Collins  
Mark E. Trafton  
Eighth District Court Clerk

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<sup>5</sup>Tambeagbor argues that his contingency fee agreement required him to pay 40 percent of his contingency fee, interest and costs combined. I decline to entertain this argument because the district court accounted for his pre-offer interest and costs in the amount of \$111,839.19, and because of the requirements for contingency fee agreements governed by the Rules of Professional Conduct.