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Summary of Banks v. Sunrise Hospital, 120 Nev. Adv. Op. No. 89

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Banks v. Sunrise Hospital, 120 Nev. Adv. Op. No. 89, 102 P.3d 52 (2004)[1]

EVIDENCE – EXPERT TESTIMONY

CIVIL PROCEDURE – DAMAGES, TRIAL MOTIONS, JURY AWARDS

Summary

Appeal and cross-appeal from a judgment on a jury verdict in a medical malpractice suit in the Eighth Judicial District Court, State of Nevada. Appeal from an order denying a motion for a new trial

Disposition/Outcome

Affirmed. The Respondent failed to demonstrate error that would entitle it to reversal or a new trial, and the Petitioner failed to demonstrate that the reduction of the jury award was improper.

Factual and Procedural History

On August 25, 1995, fifty-one year old James Banks, Jr. (James) was admitted to Sunrise Hospital (Sunrise) for rotator cuff surgery. Before the surgery, the orthopedic surgeon, Dr. James Manning, and the anesthesiologist, Dr. Robert L. Kinsman, discussed the risks of the surgery and anesthesia. James signed an informed consent form.

Doctors performed surgery on James utilizing the hospital's equipment, which included a Narkomed II anesthesia machine. The machine presented no problems while being used on a different patient in the same operating room prior to James' surgery. However, during the end of James' surgery, Dr. Kinsman noticed a decrease in James' blood pressure. Dr. Kinsman checked the anesthesia equipment, but found nothing wrong. However, James subsequently suffered cardiac arrest. A cardiologist was summoned and assisted Doctors Manning and Kinsman in resuscitating James. Physicians then finished the surgery because of concern that the shoulder wound would become infected and lead to further surgeries. The physicians continued to use the same equipment to complete the surgery. However, James failed to regain consciousness and persists in a permanent vegetative state.

Immediately after the incident, Sunrise completed an occurrence report, which did not indicate problems with the anesthesia equipment. The equipment continued to be used in operating rooms until November 1995, when it was sold pursuant to a contract executed by Sunrise several months before James' surgery.

On April 24, 1996, James and Otho Lee Banks (Banks), as guardian ad litem for James, brought negligence claims against Sunrise, Dr. Kinsman and Dr. Manning in a complaint to the Medical Legal Screening Panel (Panel). Banks did not allege negligent maintenance or equipment malfunction. The Panel determined there was no reasonably probability of medical malpractice by Dr. Manning or Sunrise, but did not reach a decision as to Dr. Kinsman. Shortly

[1] By Beth Rosenblum.

thereafter, Banks sued the same parties. The complaint did not allege negligent maintenance against Sunrise but did contain a Doe/Roe allegation of negligent maintenance of equipment.

On March 2, 1999, Banks was granted, over Sunrise's objections, to file a first amended complaint which asserted an additional claim of negligence as to the anesthesia equipment. The district court directed Banks to file a second amended complaint alleging fault or negligent maintenance of equipment and to include a *res ipsa loquitur* claim. The district court dismissed all other claims. On the eve of trial, Banks settled with Doctors Manning and Kinsman.

Before trial, Banks sought sanctions against Sunrise for failing to preserve the anesthesia equipment. The district court held that Sunrise's failure to identify the specific machines used during James' surgery before selling the equipment constituted spoliation of evidence. Thus, the district court instructed the jury that it could infer that had Sunrise preserved the equipment for testing, it would have been found to be operating improperly.

The first jury trial resulted in a hung jury. The jury in the second trial received the same instructions and rendered a verdict for $5.4 million to Banks. The district court subsequently reduced the award by the amount paid in the settlement with the surgeons, and entered a second amended judgment for $4.8 million. The district court denied Sunrise's motion for judgment notwithstanding the verdict. Both Sunrise and Banks appeal.

The Nevada Supreme Court determined that the hospital had a duty to preserve anesthesia equipment used in James' surgery, and the district court did not err in allowing the *res ipsa loquitur* instruction. The district court also properly allowed opinion testimony regarding possible equipment malfunction, and expert testimony concerning the value of hedonic loss. Finally, the district court properly reduced the jury award by the settlement amounts from the surgeons.

Discussion

Sanctions and Adverse Inference Instruction

The Nevada Supreme Court will not reverse discovery sanctions imposed absent a showing of abuse of discretion.[2] When potential for litigation exists, the litigant has a duty to preserve evidence which "it knows or reasonable should know is relevant to the action."[3]

Here, James' cardiac arrest during surgery put Sunrise on notice that an error may have occurred in the operating room and that litigation was foreseeable. Consequently, Sunrise had a duty to preserve information relating to the physicians and equipment. At the very least, Sunrise had a duty to record the serial numbers of the anesthesia equipment. The district court did not abuse its discretion in imposing sanctions and instructing the jury to draw an adverse inference, even though there was no evidence that Sunrise willfully disposed of the machines to frustrate discovery. However, this holding is limited to the facts of this case, considering the nature of the catastrophic injury.

Res Ipsa Loquitur

The Nevada Supreme Court will not reverse decisions to give particular instructions absent a showing of abuse of discretion.[4] Nevada Revised Statute 41A.100 has replaced the

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[2] GNLV Corp. v. Serv. Control Corp., 111 Nev. 866, 869 (1995).
[3] *Id.* (quoting Fire Ins. Exch. v. Zenith Radio Corp., 103 Nev. 648, 651 (1987)).

doctrine of *res ipsa loquitur* in medical malpractice cases.[5] A rebuttable presumption of medical malpractice applies when the plaintiff provides some evidence of one of the factual predicates enumerated in NRS 41A.100(1).[6] NRS 41A.100(1)(d) provides that a rebuttable presumption of medical malpractice arises when a patient suffers an injury "during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto."[7]

Here, James underwent surgery for treatment to his shoulder but suffered permanent injury to his brain, which is not proximately related to the rotator cuff. Therefore, the district court did not abuse its discretion when it submitted a *res ipsa loquitur* instruction to the jury.

Expert Testimony

The district court may generally admit expert testimony on matters outside the average person's common understanding, so long as the probative value of such testimony is not substantially outweighed by the danger of unfair prejudice.[8] Here, Sunrise contends that the district court abused its discretion when it permitted Banks to introduce expert testimony on Sunrise's duty to preserve anesthesia equipment. However, the evidence assisted the jury in relation to its prerogative to draw a negative inference from Sunrise's sale of the equipment. Because this evidence assisted the jury in understanding the pertinent issue of whether the anesthesia equipment malfunctioned during surgery, the district court did not abuse its discretion.

Opinion Testimony

Nevada Revised Statute 41A.100(1) provides that expert testimony is required in medical malpractice cases to establish the standard of care, a breach of that standard and causation.[9] Generally, a medical expert can only testify to matters that conform to the reasonable degree of medical probability standard.[10] In other words, such testimony cannot be speculative.[11]

During his deposition, Banks' expert, Robert Morris (Morris), testified that he had to use his "experience and knowledge [to] come up with possible causes of things related to devices

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[4] Ringle v. Burton, 120 Nev. 82, 90 (2004).

[5] Johnson v. Egtedar, 112 Nev. 428, 432 (1996) (upholding lower court instruction on NRS 41.A.100(1)(d) because appellant sought treatment for her lower back but suffered injury to her colon and ureter, parts not directly related to lower back surgery).

[6] NEV. REV. STAT. 41A.100(1) (2005) provides, in pertinent part:

> [A] rebuttable presumption that the personal injury or death was caused by negligence arises where evidence is presented that the personal injury or death occurred in any one or more of the following circumstances:
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> (a) A foreign substance other than medication or a prosthetic device was unintentionally left within the body of a patient following surgery;
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> (b) An explosion or fire originating in a substance used in treatment occurred in the course of treatment;
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> (c) An unintended burn caused by heat, radiation or chemicals was suffered in the course of medical care;
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> (d) An injury was suffered during the course of treatment to a part of the body not directly involved in the treatment or proximate thereto; or
>
> (e) A surgical procedure was performed on the wrong patient or the wrong organ, limb or part of a patient's body.

[7] NEV. REV. STAT. 41A.100(1)(d) (2005).

[8] NEV. REV. STAT. 48.035, 50.275 (2005); K-Mart Corp. v. Washington, 109 Nev. 1180, 1186 (1993).

[9] NEV. REV. STAT. 41A.100(1) (2005).

[10] Brown v. Capanna, 105 Nev. 665, 671-72 (1989).

[11] United Exposition Serv. Co. v. SIIS, 109 Nev. 421, 424 (1993).

that might have contributed to the adverse event." At trial, Morris testified as to the possible ways in which the interlock system on a Narkomed II could fail. He also testified that "[e]veryone I have spoken to who had Narkomed 2's for any length of time experience failures in the interlock system." Still, Morris admitted that he could not determine whether equipment failure contributed to James' injury since he was unable to examine the equipment that Sunrise subsequently sold.

Morris' testimony and opinions established that it was possible for the equipment's interlock device to malfunction intermittently. His testimony assisted the jury in understanding how the machines could have failed and why it was reasonable to draw an adverse inference from Sunrise's failure to identify the machines. Thus, the district court did not err in permitting Morris to give opinion testimony.

Hedonic Damages

Sunrise also contends that the district court erred in permitting expert testimony concerning the monetary range of hedonic damages, i.e., loss of enjoyment of life damages. The term "hedonic" is derived from the Greek language and refers to the pleasures of life. [12] Hedonic damages are therefore monetary remedies awarded to compensate injured persons for their non-economic loss of life's pleasures.

While the majority of jurisdictions recognize hedonic loss as a recoverable element of damages, opinions differ as to how hedonic loss should be presented and awarded. While some jurisdictions will not permit expert testimony,[13] the Nevada Supreme Court adopts the view that expert testimony can assist juries in computing damages. This view is tempered by NRS 48.035(1), which prohibits the admission of relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice.[14] Furthermore, the jury must find that the party will probably suffer damages in the future.[15]

Here, Banks offered testimony from Robert Johnson (Johnson), a forensic economist, who testified that the tangible value of a person's life ranged from $2.5 million to $8.7 million. Johnson's testimony assisted the jury in understanding the amount of damages that would compensate James for the loss of his enjoyment of life. Johnson testimony was within the scope of his specialized knowledge and had probative value. Thus, the district court properly allowed his testimony.

With respect to an award of hedonistic damages, some jurisdictions permit the award as a separate and distinct compensatory award.[16] Other jurisdictions, including California, treat hedonistic loss as a factor in determining a general damage award of pain and suffering.[17] Like California, Nevada does not restrict a plaintiff's attorney from arguing hedonic damages. Moreover, by including hedonic losses as a component of pain and suffering, it is less likely that there will be confusion or duplication of awards by the jury. However, the district court

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[12] THE AMERICAN HERITAGE DICTIONARY 610 (1980).
[13] *E.g.*, Mercado v. Ahmed, 974 F.2d 863, 871 (7th Cir. 1992); Scharrel v. Wal-Mart Stores, Inc. 942 P.2d 89, 92 (Colo. Ct. App. 1998).
[14] NEV. REV. STAT. 48.035(1) (2005).
[15] Sierra Pac. v. Anderson, 77 Nev. 68, 76 (1961).
[16] *See, e.g.*, Thompson v. Nat'l R.R. Passenger Corp., 621 F.2d 814, 824-25 (6th Cir. 1980); Fantozzi v. Sandusky Cement Prod. Co., 597 N.E.2d 474, 486-87 (Ohio 1992).
[17] *See, e.g.*, Loth v. Truck-A-Way Corp., 70 Cal. Rptr. 2d 571, 575 (Cal. Ct. App. 1998); Poyzer v. McGraw, 360 N.W.2d 748, 753 (Iowa 1985).

permitted the jury to award hedonic damages as a separate award, but the error was not prejudicial because the jury could have easily added the value to the pain and suffering award.

Directed Verdict Motion

Nevada Rule of Civil Procedure 50(a) states that a motion for a directed verdict shall be denied "[i]f the evidence is sufficient to sustain a verdict for the opponent."[18] Further, "[i]f there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court."[19] In ruling on a directed verdict motion, the district court must view the evidence and any inferences in a light most favorable to the non-moving party.[20]

Viewing the evidence and any inferences as most favorable to Banks, the district court properly denied Sunrise's motion for directed verdict. The jury could have reasonably determined from the evidence that Sunrise departed from the accepted standards of care by not preserving the anesthesia equipment, and this failure to maintain equipment actually and proximately caused James' injury.

New Trial

Sunrise contends that a new trial is warranted pursuant to NRCP 59(a)(5)[21] because the jury manifestly disregarded instructions (1) requiring Banks to prove negligence by a preponderance of the evidence and that negligence proximately caused of the James' injuries; (2) defining proximate cause; (3) defining preponderance of evidence; (4) stating that the plaintiff had the burden of establishing all facts necessary to prove negligence and causation, except as stated in the *res ipsa loquitur* and adverse inference instructions; (5) setting forth the hospital's duty to use reasonable care to maintain equipment; and (6) stating that "[t]he fact that a particular injury suffered by a patient as a result of an operation is something that rarely occurs does not in itself prove that the injury was probably caused by negligence." Based on the evidence and testimony presented at trial, Sunrise's argument is without merit.

Sunrise also contends that it was deprived a fair trial as a result of jury instructions numbers 22, 27,[22] 28,[23] and 32. Jury instruction Number 22 read:

> There may be more than one proximate cause of an injury. When negligent conduct of two or more persons contributes concurrently as proximate causes of an injury, the conduct of each of said persons is a proximate cause of the injury regardless of the extent to which each contributes to the injury. A cause is concurrent if it was operative at the moment of injury and acted with another

[18] NEV. R. CIV. P. 50(a) (2005).
[19] Broussard v. Hill, 100 Nev. 325, 327 (1984).
[20] Chowdhry v. NLVH, Inc., 109 Nev. 478, 482 (1993).
[21] NEV. R. CIV. P. 59(a)(5) (2005) provides that the district court may grant a new trial if "[m]anifest disregard by the jury of the instructions of the court" materially affected a party's substantial rights.
[22] As noted, the Nevada Supreme Court determined that the district court properly submitted Jury Instruction Number 27, the res ipsa loquitur instruction.
[23] As noted, the Nevada Supreme Court determined that the district court properly submitted Jury Instruction Number 28, the adverse inference instruction.

cause to produce the injury. It is no defense that the negligent conduct of a person not joined as a party was also a proximate cause of the injury.

This instruction is substantively identical to Nevada Pattern Civil Jury Instruction Number 405. It cautions jurors that even if Sunrise was not the sole cause of the injury, but a contributing cause, the jury could still find Sunrise liable. This is consistent with this court's previous holding that "[w]here two or more causes proximately contribute to the injuries complained of, recovery may be had against either one or both of the joint tort-feasors."[24]

Jury Instruction Number 32 instructed the jury that there is no definite method of calculating compensation for pain and suffering. Sunrise argues that this instruction was an error of law because such awards require that the injured person be conscious of pain. James' nurse testified that he did occasionally show reactions to his environment, although this testimony was contradicted by testimony from Sunrise's physician expert, who stated that persons with hypoxic brain injuries are unable to react to their environment. Nevertheless, the jury was free to weigh the credibility of each witness, and the instruction simply told the jury that it was responsible for calculating damages. Thus, a new trial is not warranted.

Reduction of Jury Award

Banks contends that because the right of offset is an equitable remedy, and Sunrise has unclean hands, it is not entitled to a reduction of the jury award. This argument would prevail if Sunrise were an intentional tortfeasor.[25] While Sunrise acted improperly in its failure to preserve anesthesia equipment, the hospital did not intend or design to cause harm to James.

Banks also maintains that Sunrise was not entitled to an offset for the sum paid in settlement of his claim against Dr. Kinsman because the jury heard evidence of Dr. Kinsman's negligence, and therefore properly accounted for its judgment. To prevent double recovery to the plaintiff, NRS 17.245(1)(a) provides that claims against non-settling tortfeasors must be reduced by the amount of any settlement,[26] but the parties cannot inform the jury as to either the existence of a settlement or the sum paid.[27]

Here, Sunrise did not expose the jury to the fact that Dr. Kinsman settled with Banks, and NRS 17.245 does not prevent a defendant from pointing the blame at another defendant. Thus, Sunrise was free to argue that Dr. Kinsman's negligence proximately caused James' injury.

Furthermore, there is no evidence that the jury reduced the verdict based on violations of NRS 41.141(3).[28] The statute has no bearing on the issues of whether Sunrise could argue a non-party's fault in this instance and whether such an argument per force leads to the conclusion that the jury reduced the award based on the non-party's relative culpability.

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[24] Mahan v. Hafen, 76 Nev. 220, 225 (1960).
[25] *See* Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 609-10 (2000).
[26] NEV. REV. STAT. 17.245(1)(a) (2005).
[27] Moore v. Bannen, 106 Nev. 679, 680-81 (1990).
[28] NEV. REV. STAT. 41.141(3) provides:

> If a defendant in such an action settles with the plaintiff before the entry of judgment, the comparative negligence of that defendant and the amount of the settlement must not thereafter be admitted into evidence nor considered by the jury. The judge shall deduct the amount of the settlement from the net sum otherwise recoverable by the plaintiff pursuant to the general and special verdicts.

Banks also argues that the district court improperly reduced the jury award by the sum paid on the settlement against Dr. Manning because the arbitrator did not find Dr. Manning negligent. NRS 17.245(1)(a) provides:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.[29]

The Nevada Supreme Court reviews issues of statutory interpretation de novo,[30] and gives words in statutes their plain meaning unless it would violate the spirit of the statute.[31] If a statute is ambiguous, the plain meaning rule does not apply, and the court looks to the statute's terms and context, along with reason and public policy to determine the legislative intent.[32]

Here, the express language of the statute contemplates that the defendant and the plaintiff have worked out a settlement prior to a final judgment of liability. Thus, the plain meaning of NRS 17.245(1)(a) does not require a party be found liable. Because the arbitrator determined that Dr. Manning was not negligent, the arbitrator awarded Banks $100,000 as agreed by the parties, who participated in good faith. Thus, the district court properly reduced the award by the amount of Dr. Manning's settlement.

Finally, Banks asserts that the settlements were given, in part, in exchange for the release of potential wrongful death claims by prospective heirs. Thus, reducing the jury award by the settlement amounts pertaining to wrongful death claims does not promote the policy against double recovery. However, wrongful death claims pertain to injuries suffered by heirs, and the record here is devoid of any evidence indicating that the potential wrongful death claimants benefited from the settlement.[33] It appears the entire settlement amount went to Banks. Therefore, Banks would have received double recovery if the district court failed to reduce the jury award by the settlement amounts.

Concur/Dissent

MAUPIN, J.:

Justice Maupin agreed that expert evidence is admissible on questions of evidence spoliation; that general damage awards may include hedonic damages for conscious loss of enjoyment of life; that expert testimony may assist the fact-finder in resolving hedonic damage claims; and that defendants are entitled to equitable offsets in negligence actions regardless of whether the settlement monies are paid pursuant to an arbitration agreement and regardless of

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[29] NEV. REV. STAT. 17.245(1)(a) (2005).
[30] Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 545 (2000).
[31] McKay v. Bd. of Supervisors, 102 Nev. 644, 648 (1986).
[32] *Id*. at 659-51.
[33] Fernandez v. Kozar, 107 Nev. 446, 449 (1991).

whether a defendant at trial argues that the settling defendant was at fault. However, Justice Maupin concluded that the district court erred in its sanction instruction concerning preservation of evidence and in its application of *res ipsa loquitur*, requiring retrial.

Conclusion

The majority opinion in Banks addressed several undecided issues concerning tort litigation in Nevada, including the duties of potential defendants to preserve evidence, the scope of expert testimony concerning preservation issues, the scope of the *res ipsa loquitur* doctrine, the concept of hedonistic damages, and the extent to which defendants are entitled to equitable offsets for pretrial settlements. It is likely the *Banks* decision will have a lasting impact on medical malpractice cases in Nevada for years to come.