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Rish v. Simao, 132 Nev. Adv. Op. 17 (Mar. 17, 2016)

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TORTS

Summary

The Nevada Supreme Court held that the District Court wrongly excluded evidence of low-impact defense when it required a biomechanical expert testify about the nature of the accident, erroneously interpreting *Hallmark v. Eldgridge*[2] Instead, *Hallmark* requires sufficient foundation for admission of testimony and evidence, specifically excluding a biomechanical expert's testimony under NRS 50.275. The Court additionally held that the District Court erred when it ultimately struck the defendant's answer for violations of the pretrial order precluding defendant from raising a minor or low impact defense.

Background

Jenny Rish rear-ended William Simao on April 15, 2005 in stop-and-go traffic. Rish had passengers in her vehicle, Simao did not. Neither vehicle sustained significant damage and although ambulances were called to the scene, none involved in the accident went to the hospital. Simao later alleged painful head and neck injures, requiring continuing medical treatment. He brought suit against Rish to recover damages for his injuries while his wife, Cheryl, brought suit to recover for loss of consortium.

Before trial, the Simaos brought a motion in limine asking the District Court to prohibit any testimony that the accident was not significant enough to cause William's injuries (the "low-impact defense"). Citing *Hallmark*,[3] Simao argued that because Rish failed to include a biomechanical expert's testimony about whether the accident was low-impact or not, the defense was precluded. Rish opposed the motion, asserting that doctors are usually allowed to testify about injuries sustained during an accident.

The District Court agreed with Simao that Rish could not lay the foundation for a low impact defense without a biomechanical expert, therefore prohibiting Rish's medical expert, Dr. Fish, and her other experts from testifying to that effect. The District Court additionally excluded photographs of the cars and invoices regarding property damages.

During opening statements, Rish's attorney described the accident without objection. Included in his description were the following facts: all at the scene denied help from the paramedics, Rish's car was operable and she drove it away, and no one claimed to lose consciousness. Rish's attorney later faced objections, and was ultimately threatened with a progressive sanction order, when he asked Simao's physician experts about Rish and her passengers or whether Simao was transported to the hospital by ambulance.

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[2] 124 Nev. 492, 500–02, 189 P.3d 646, 651–53 (2008).

[3] *Id*. at 496–97, 189 P.3d at 649. Simao also cited the following cases: Choat v. McDorman, 86 Nev. 332, 335, 468 P.2d 354, 356 (1970), Levine v. Remolif, 80 Nev. 168, 171–72, 390 P.2d 718, 719–20 (1964).

The District Court ultimately decided that Rish violated the pretrial order denying the low-impact defense eight times. These violations included: (1) Rish's attempt to play a videotaped deposition during opening statements, (2) four questions posed by Rish's attorney to Simao and his experts asking what happened to Rish following the accident, (3) questions posed by Rish's attorney to Simao about the traffic during the accident, and (4) Dr. Fish's answers during either cross or redirect. Because of these violations, the District Court granted Simao's motion to strike Rish's answer, entering default against Rish and dismissing the jury.

The District Court awarded damages after a prove-up hearing.[4] The damages included the following: for William Simao, (1) $194,390.96 for past medical expenses; (2) $1,378,209 for past pain, suffering, and loss of enjoyment of life; (3) $1,140,552 for future pain, suffering, and loss of enjoyment of life; to Cheryl Simao: $681,286 for loss of consortium; and attorney's fees: $1,078,125; for a total of close to $4.5 million. Rish appealed.

Discussion

On appeal, Rish challenged the District Court's order of final sanctions striking her answer and entering a default. The question posed to the Nevada Supreme Court was whether it was erroneous to exclude the evidence of her low-impact defense as a matter of law.

The district court erred in extending Hallmark *to preclude all argument of a low-impact defense*

While the trial court can broadly determine whether or not to admit or exclude evidence,[5] the higher court will overturn that decision when the district court abuses that discretion.[6]

The District Court incorrectly relied on *Hallmark* when excluding evidence of a low-impact defense. *Hallmark* held that because he failed to review important information when forming his opinion, a physician (who was also a mechanical engineer) could not testify whether an accident was too low-impact to cause injuries.[7] Additionally, because the biomechanical engineer's testimony was less science based and more supposition based, he was not a qualified expert under NRS 50.275.[8] Finally, in *Hallmark*, the expert could not testify because testimony could not be tested and his theories and methods were not subject to peer review.[9] What *Hallmark* requires is that all expert testimony have a sufficient foundation on which to base testimony.[10]

A low-impact defense does not require testimony from a certified biomechanical engineer or other similar expert.[11] Requiring testimony from this type of expert deprives juries of hearing about the accident and other injuries without an expert first explaining it. As it is up to the jury to

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[4] After hearing testimony from both sides about damages.
[5] NEV. REV. STAT. 48.035(1); S. Pac. Transp. Co. v. Fitzgerald, Nev. 241, 243, 577 P.2d 1234, 1235 (1978).
[6] Land Res. Dev. V. Kaiser Aetna, 100 Nev. 29, 34, 676 P.2d 235, 238 (1984).
[7] *Hallmark*, 124 Nev. at 497, 502, 189 P.3d at 649, 649, 652, 654.
[8] *Id.* at 500–02, 189 P.3d at 651–53.
[9] *Id.*
[10] *Id*. at 504, 189 P.3d at 654.
[11] *Id.* at 503 – 04, 189 P.3d at 653 – 54; *see also* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993); City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043 (9th Cir.), *cert. denied* ___ U.S. ___, 135 S. Ct. 870 (2014); Howard Entm't, Inc. v. Kudrow, 146 Cal. Rptr. 3d 154, 170 (Ct. App. 2012).

determine which testimony is credible and how to weigh the evidence, not allowing it to hear this evidence is impermissible.[12] Additionally, the jury decides causation and taking away its ability to make this determination is in error.[13]

Medical doctors can explain injuries to the jury.[14] Not only is this common practice in other jurisdictions, but *Hallmark* explained that the if the expert proffered by the defense, also a medical doctor, had either examined the plaintiff or reviewed her medical records, he could testify as a means of laying a proper causation foundation.[15] Therefore, a medical doctor is allowed to testify about causation, so long as a proper foundation is also laid.

The district court erred in striking the answer

Validity of sanctions are reviewed with heightened scrutiny[16] and, even if the order is in error, the party under a sanction order must follow it unless the order is overturned or it ends.[17] Following the factors enumerated in *Young v. Johnny Ribeiro Building, Inc.*,[18] the District Court issued a written order granting Simao's motion to strike Rish's answer. In finding that Rish violated the pretrial order eight times,[19] the District Court granted the motion to strike, dismissed the jury and entered a default judgment for Simao and his wife.

However, for violations of an order in limine to rise to the level of attorney misconduct, "the order must be specific, the violation must be clear, and unfair prejudice must be shown."[20]

Specificity of the order

The pretrial order disallowed the low-impact defense, but, other than stopping Dr. Fish and other defense witnesses from testifying that Simao's injuries were not caused by this collision, it was unclear. The definition of a low-impact defense is "describ[ing] [an] incident of 'low-impact,'" likening it to "common, everyday experiences."[21] The order here, however, disallows evidence of all facts happening at any time around the accident, including those before or after it.

The District Court inconsistently applied the order. Rish described the accident in her opening statement, sans objection, with later sustained objections to questions directed towards experts and statements from witnesses describing the accident and its aftermath.

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[12] *See* Banks v. Sunrise Hosp., 120 Nev. 822, 838, 102 P.3d 52, 63 (2004).
[13] Nehls v. Leonard, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981); Barreth v. Reno Bus Lines, Inc., 77 Nev. 196, 198, 360 P.2d 1037, 1038 (1961).
[14] *See* Mattek v. White, 695 So. 2d 942, 943 (Fla. Dist. Ct. App. 1997); Santos v. Nicolos, 879 N.Y.S.2d 701, 704 (Sup. Ct. 2009); Straight v. Conroy (566 P.2d 1198, 1200 (Or. 1977).; Wilson v. Rivers, 593 S.E.2d 603, 605 (S.C. 2004); John v. Im, 559 S.E. 2d 694, 697 (Va. 2002).
[15] *Hallmark*, 124 Nev. at 504, 189 P.3d at 654 (the expert at question did not examine the plaintiff, he only offered his opinion).
[16] *See* Foster v. Dingwall, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).
[17] Walker v. City of Birmingham, 388 U.S. 307, 320–21 (1967); *see also* Howat v. Kansas, 258 U.S. 181, 190 (1922).
[18] 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).
[19] *See* discussion *supra*.
[20] BMW v. Roth, 127 Nev. 122, 126, 252 P.3d 649, 652 (2011).
[21] Roxanne Barton Conlin & Gregory S. Cusimano, *Litigating Tort Cases* § 53:22 (2014).

Clarity of the violation

At least two of the violations were witness statements made by defense witness Dr. Fish. One statement was made during cross-examination by Simao's attorney and the other was made on redirect. Neither statement was directly caused by Rish's attorney. The other instances violating the pretrial order did not explain the accident, just Rish's injuries and the traffic that day. Those incidents were did not clearly violate the pretrial order.

Unfair prejudice

Unfair prejudice follows when a violation occurs that an objection and admonition to the jury cannot eliminate.[22] Here, the District Court provided no explanation for why jury instructions could not eliminate prejudice.

The District Court's instructions were unclear on how Rish could show the jury whether or not Simao's injuries were caused by the accident. They instructions also failed to explain how causation and proximate causation differ. However, those instructions could still clarify any possible misconduct.

While at least two of the violations rose to the level of a pretrial order violation, the questions were stricken by the District Court and left unanswered. Therefore, the violations were not misconduct rising to the level of case-ending sanctions.

Conclusion

The order striking Rish's answer is vacated and the case reversed and remanded for a new trial. The District Court erred requiring biomechanical expert testimony to lay the foundation for low-impact defense, and medical experts may testify as to injuries sustained in a low-impact defense. Although a party under a sanction order must follow it until overturned, here, the violations of the sanction order were insignificant enough that a case ending order striking Rish's answer was unwarranted.

[22] Lioce v. Cohen, 124 Nev. 1, 17, 127 P.3d 970, 981 (2008).