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Khoury v. Seastrand, 132 Nev. Adv. Op. 52 (July 28, 2016)

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CIVIL LAW: PERSONAL INJURY: VOIR DIRE

Summary

The Court considered three consolidated appeals from a district court judgment, pursuant to a jury verdict, and post-judgment orders awarding costs and denying a new trial in a personal injury action. While the Court addressed numerous issues, the following three questions comprised the bulk of the consolidated appeals: (1) whether an attorney may ask prospective jurors questions concerning a specific verdict amount to determine potential bias or prejudice; (2) whether repeatedly asking questions about that specific amount results in jury indoctrination warranting a mistrial; and (3) when a district court abuses its discretion in dismissing jurors for cause under *Jitnan v. Oliver*.[2]

The Court determined that a party may use specific verdict amounts when conducting voir dire so long as the questioning is kept within reasonable limits. The questioning used in the current case did not amount to jury indoctrination warranting a mistrial. The district court, however, did abuse its discretion by dismissing for cause five jurors because their statements, when taken as a whole—the standard set forth in *Jitnan*[3]—indicated that they could be impartial and follow the law and jury instructions. The district court also abused its discretion by excluding evidence of the medical lien's existence to prove bias in Seastrand's medical providers. However, the Court determined that both errors were harmless.

Finally, the Court determined that the district court abused its discretion by awarding respondent Seastrand expert witness fess in excess of $1,500 per expert because it did not state a basis for its award. The Court reversed and remanded this portion of the consolidated appeals, instructing the district court to redetermine the amount of expert fess or, if awarding fees in excess of $1,500 per witness, to explain the reasoning behind its decision.

Background

Khoury and Seastrand were involved in an automobile accident where Khoury's vehicle rear-ended Seastrand's vehicle. Seastrand received extensive treatment to both her neck and back following the accident and brought the underlying personal injury action against Khoury to recover damages. While Khoury stipulated to liability for the accident, he argued that Seastrand's injuries leading to the treatment and surgeries predated the accident.

During voir dire, Seastrand questioned jurors about whether they had any hesitations about potentially awarding a verdict for $2 million. After this questioning, the district court granted Seastrand's motion to dismiss several jurors for cause, but denied Seastrand's motion to dismiss five other jurors for cause. However, the district court reconsidered the motion to dismiss the next day and dismissed the other five jurors for cause.

After a ten-day trial, in which several expert witnesses testified, the jury awarded Seastrand $719,776. Seastrand then filed a motion for attorney fees and a memorandum of costs for $125,238.01. Khoury opposed the motion and moved to retax costs. The district court

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[1] By Ronni N. Boskovich.

[2] 127 Nev. 424, 254 P.3d 623 (2011)

[3] *Id.*

awarded Seastrand $75,015.61 in costs, denied her motion for attorney's fees, and denied Khoury's motion to retax costs. Khoury then motioned for a new trial, which the district court denied.

Discussion

Khoury raises the following issues on appeals: whether the district court abused its discretion by (1) denying Khoury's motion for a mistrial due to jury indoctrination; (2) dismissing jurors for cause that displayed concerns about their ability to award large verdicts and/or damages for pain and suffering; (3) admitting causation and opinion testimony by one of Seastrand's treating physicians; (4) admitting testimony by one of Seastrand's expert witnesses that was outside the scope of his specialized knowledge and/or undisclosed in a timely expert report; (5) excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens; (6) excluding evidence of her medical liens; (7) refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments; and (8) awarding costs to Seastrand.

Questioning jurors during voir dire about specific amounts is not per se indoctrination

Khoury asserted that Seastrand's voir dire questions pertaining to a $2 million verdict amount indoctrinated the jury to have a disposition towards a large verdict, making such questioning "*per se* improper." Such questions are not improper; however, the district court retains discretion to refuse questions pertaining to a specific amount if the questions could lead to jury indoctrination.

Voir dire is designed to ensure that jurors "will consider and decide the facts impartially and conscientiously apply the law as charged by the court."[4] Counsel, however, may not "indoctrinate or persuade the jurors."[5]

Because jury indoctrination in the civil context was a matter of first impression, the Court looked to outside jurisdictions that have addressed the particular issues raised in this case. The Appellate Court of Illinois determined that questioning jurors about specific verdict amounts was not indoctrination because it "tended to uncover jurors who might have bias or prejudice against large verdicts."[6] Other jurisdictions, alternatively, have determined that it is within a district court's discretion to refuse to allow counsel to ask jurors about specific dollar amounts.[7]

The Court determined that using a specific dollar amount when conducting voir dire may be appropriate in order to determine whether jurors are biased towards large verdicts. Use of specific dollar amounts in voir dire is not per se improper, and allowing a party to use such questioning is within the district court's discretion.

Courts should remain vigilant of the danger of indoctrination during voir dire

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[4] Lamb v. State, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (internal quotation marks omitted).

[5] Scully v. Otis Elevator Co., 275 N.E.2d 905, 914 (Ill. App. Ct. 1971).

[6] Kinsey v. Kolber, 431 N.E.2d 1316, 1325 (Ill. App. Ct. 1982).

[7] Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n, 181 N.W.2d 754, 759 (N.D. 1970); *see also* Henthorn v. Long, 122 S.E.2d 186, 196 (W. Va. 1961). While these courts have determined that district courts retain discretion to refuse questions about specific amounts, they did not determine that those types of questions were *per se* improper.

The Court, after examining jury questionnaires and the voir dire transcript, determined that Seastrand's attorney actions bordered on badgering and were dangerously close to indoctrination. The Court ultimately held that the district court did not abuse its discretion when denying Khoury's motion for mistrial because Seastrand's counsel did not indoctrinate the jury.

A juror's bias against large verdict amounts or pain and suffering damages is a form of bias

"[B]ias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and instructions of the court in deciding the verdict."[8]

The district court abused its discretion by dismissing jurors for cause that displayed a "potential" bias against large verdicts

The Court next considered whether bias against large verdicts existed in the jurors dismissed for cause by the district court. The Court ultimately determined that such a bias did not exist; however, the district court's error was harmless.

In *Jitnan*, the Court determined that "if a prospective juror expresses a preconceived opinion or bias about the case, that juror should not be removed for cause if the record as a whole demonstrates that the prospective juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court."[9]

Here, the district court did not take into account the record as a whole when dismissing the five jurors for cause, and therefore, the district court abused its discretion. Upon cross-examination by Khoury, the five jurors all admitted that they would be able to set aside their preconceived opinions, follow the law, and award a large verdict amount and/or pain and suffering damages. When examining the record as a whole, the five jurors only expressed a *potential* for bias rather than an *actual* bias, which is not enough, under *Jitnan*, to warrant dismissal.

The error was harmless

Khoury argued that dismissing jurors who expressed bias towards large verdict amounts was a reversible error because it prevented the jury from being a fair cross-section of society. The Court disagreed. Relying on outside jurisdictions[10], the Court determined that an abuse of discretion in dismissing jurors is not a reversible error because when the district court improperly dismisses a juror, it does not prejudice the appellant. Since Khoury was unable to provide any persuasive authority in support of his argument[11], the Court held that the district court's error was not reversible.

The district court did not abuse its discretion by admitting Dr. Muir's testimony

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[8] Sanders v. Sears-Page, 131 Nev. Adv. Op. 50, 354 P.3d 201, 206 (Ct. App. 2015).

[9] *Jitnan*, 127 Nev. at 431-32, 254 P.3d at 628-29.

[10] *See* Jones v. State, 982 S.W.2d 386, 392 (Tex. Crim. App. 1998); *see also* Basham v. Commonwealth, 455 S.W.3d 415, 421 (Ky. 2014).

[11] Khoury predominantly relied on Powers v. Ohio, 499 U.S. 400, 422 (1991), which held that dismissing juror because of their race prevented a jury from being "a fair cross section of the community." The Court was unable to equate dismissal on the basis of race to dismissal due to bias towards large verdicts.

Khoury argued that the district court should have precluded Dr. Muir's testimony because Seastrand did not follow the testifying expert witness disclosure requirements when presenting Dr. Muir as a witness. The Court, however, disagreed.

Treating physicians are exempt from the report requirements, so long as it pertains to "opinions [that] were formed during the course of treatment."[12] When, however, a treating physician's testimony goes beyond opinions formed during the course of treatment, the physician becomes an expert and is required to conform the expert requirements.[13]

During direct examination of Dr. Muir, Seastrand's attorney inquired whether Dr. Muir believed that the previous doctor, Dr. Belsky, performed adequate treatment.[14] Khoury argued that Dr. Muir's response constituted an opinion not formed during the course of Dr. Muir's treatment of Seastrand. However, counsel presented substantial evidence at trial demonstrating that Dr. Muir formed his opinion during the course of his treatment of Seastrand. Because Dr. Muir's testimony constituted opinion formed during the course of treatment, the district court did not abuse its discretion in admitting the testimony.

The district court did not abuse its discretion by admitting testimony by Dr. Gross because it was not outside the scope of his specialized knowledge

At trial, Dr. Gross testified that Seastrand's arm injuries were likely unrelated to the neck injuries she sustained in the automobile accident and that they were likely related to her preexisting heart problems. Khoury argued that the district court abused its discretion in admitting Dr. Gross's testimony because it was outside the scope of Dr. Gross's specialized knowledge as a neurosurgeon and was not disclosed in his export report. The Court, however, determined otherwise.

When testifying, an expert witness must limit their testimony "to matters within the scope of [his or her specialized] knowledge."[15] Dr. Gross, a neurological surgeon who specializes in neck and back injuries, testified to the extensive examinations he performs on newly referred patients. Using a patient's past medical history and the results of the physical examination he performs, Dr. Gross is able to reach a diagnosis and determine the cause of the patient's symptoms. Because Dr. Gross based his opinions on a reliable foundation and years of experience, Dr. Gross's testimony was within the scope of his specialized knowledge.

Dr. Gross's opinion was disclosed in a supplemental expert report

Pursuant to NRCP 16.1(a)(2)(B), an expert's report must "contain a complete statement of all opinions to be expressed and the basis and reasons therefore [and] the data or other information considered by the witness in forming the opinions." On September 29, 2012, Dr. Gross disclosed a supplemental report in response, at least in part, to disclosures made by Khoury's expert witnesses. Throughout the report, Dr. Gross proffered opinions reflecting the opinions he made during trial.

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[12] FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014) (quoting Goodman v. Staples the Office Superstore, LLC, 644 F.3d 817, 826 (9th Cir. 2011)) (internal quotations omitted).

[13] *Id.*

[14] Specifically, Seastrand's attorney asked "Dr. Muir, No. 1, do you feel that there was an adequate workup of the patient prior to getting to you?" Dr. Muir responded, "Yes."

[15] Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008).

The Court held that the district court did not abuse its discretion when admitting Dr. Gross's expert testimony because it was within the scope of his specialized knowledge and Dr. Gross had previously disclosed the opinions in his expert report.

The district court did not abuse its discretion by excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens

At trial, Khoury attempted to admit evidence of the amount Seastrand's medical providers received for the sale of her medical liens to a third part in an effort to prove the reasonable amount of Seastrand's medical costs. The district court refused to admit this evidence, determining that the evidence was per se inadmissible under the collateral source rule. Khoury argued that the district court abused its discretion by refusing to admit this evidence.

The Court determined that the district court did not abuse its discretion in refusing to admit this evidence because evidence of medical payments and liens illustrating provider discounts or write-downs to third-part insurers is "irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion."[16] Write-downs concern the relationship between the medical provider and third-party insurer more than they demonstrate the reasonable value of the medical services.[17] The Court analogized Seastrand's medical liens to write-downs made to third-party insurers and determined that evidence regarding the sale of the medical liens is irrelevant to a jury's determination of the reasonable value of medical services provided.

Evidence of the existence of medical liens to prove bias does not invoke the collateral source rule

Khoury argued that the district court abused its discretion by excluding evidence of Seastrand's medical liens to prove bias on the part of Seastrand's treating physicians that testified at trial. Furthermore, Khoury argued that the district court incorrectly invoked the collateral source rule in excluding this evidence. The Court agreed that the district court abused its discretion in excluding this evidence; however, the Court also determined that the error was harmless.

"The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect form the tortfeasor."[18] While the Court has created a "*per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any purpose*"[19], the question of whether evidence of a medical lien implicates the collateral source rule had not been considered before in Nevada.

Because a medical lien is nothing more than "an oral or written promise to pay the medical provider from the plaintiff/patient's personal injury recovery,"[20] a medical lien does not represent compensation that a third party has paid to the plaintiff. Evidence of the existence of a medical lien to prove bias, therefore, does not invoke the collateral source rule.

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[16] Tri-City Equip. & Leasing v. Klinke, 128 Nev. 352, 360, 286 P.3d 593, 598 (2012) (Gibbons, J., concurring).
[17] *Id.*
[18] Proctor v. Castelletti, 122 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996) (internal quotation marks omitted).
[19] *Id.* at 91, 911 P.2d at 854 (second emphasis added).
[20] State Bar of Nev. Standing comm'n on Ethics and Prof'l Responsibility, Formal Op. 31, (2005), *available at* http://nvbar.org/wp-content/uploads/Opinion-31-Client-Funds-Reissued_4-1-15.pdf (last visited July 29, 2016) (internal quotation marks omitted).

The district court's error was harmless. To illustrate that an error was prejudicial and not harmless, a party "must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."[21] Khoury did not present any arguments or evidence supporting his contention that the jury would have reached a different verdict had evidence of the medical liens been introduced.

The district court did not abuse its discretion by refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments

During opening arguments, Seastrand's attorney used the word "claim" when referring to a rollover automobile accident Seastrand was involved in 1981.[22] Khoury contended that by using the word "claim," Seastrand improperly informed the jury that she had insurance coverage. The Court determined that Khoury based his argument on a mistaken belief that the word "claim" is a purely insurance term. The Court referenced *Black's Law Dictionary* to define "claim" as "[a] demand for money, property, or a legal remedy."[23] In the context that Seastrand's counsel used the term, "claim" could have meant an insurance claim, but it could have also meant a claim for relief in a court of law. Furthermore, Seastrand's use of the word "claim" was concerning a 1981 car accident; it had nothing to do with whether Khoury possessed insurance in the current case.

The district court abused its discretion by awarding costs to Seastrand without stating a basis for its decision

NRS 18.005 allows the recovery of "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee."[24] The district court retains discretion in awarding more than $1,500 in expert witness fees, but it must state a basis for its decision.[25]

Here, Khoury contends that the district court abused its discretion in awarding $42,750 in expert witness fees for Seastrand's five witnesses. The district court did not state a basis for its award of expert witness fees. The Court held that the district court abused its discretion because it did not state a basis for its excessive award.

Conclusion

While parties may use specific award amounts in voir dire, the district court must ensure that the level of questioning does not reach jury indoctrination. The district court was within its

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[21] Wyeth v. Rowatt, 126 Nev. 446,465, 244 P.3d 765, 778 (2010).

[22] Specifically, counsel stated the following: "But you'll hear from [Seastrand] and she'll tell you, yeah, in that rollover I was the passenger and I wasn't hurt. I went to the ER and the ER physicians checked me out, and then I went to a holistic doctor one or two time and then I didn't have any problems. *I didn't make a claim.* I didn't do anything like that. I didn't have any issues with it." (Emphasis added).

[23] BLACK'S LAW DICTIONARY (8th ed. 1999).

[24] NEV. REV. STAT. § 18.005(5); *see also* Gilman v. State, Bd. of Veterinary Med. Exam'rs, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006 (2004) (recognizing that a district court retains discretion in awarding more than $1,500 for an expert witness).

[25] Frazier v. Drake, 131 Nev. Adv. Op. 64, 357 P.3d 365, 378 (Ct. App. 2015).

discretion in denying Khoury's motions for a mistrial and new trial relating to the voir dire process.

The district court did not abuse its discretion in admitting testimony from Dr. Muir because Dr. Muir formed his opinions during the course of Seastrand's treatment. Furthermore, the district court did not abuse its discretion in admitting Dr. Gross's testimony because Dr. Gross testified to opinions that were within the scope of his specialized knowledge as a neurological surgeon. Additionally, Dr. Gross disclosed those opinions in a supplemental expert report.

The district court did not abuse its discretion when excluding evidence of the amount that Seastrand's medical liens were sold for because it was irrelevant to the issue of the reasonable value of her medical care. Admitting such evidence would have likely confused the jury. While the court did abuse its discretion in excluding evidence of Seastrand's medical liens for establishing bias in the testimony of her medical providers, the error was harmless.

The district court did not abuse its discretion in denying Khoury's motion for a mistrial due to Seastrand's use of the word "claim." Finally, the district court abused its discretion by award costs in excess of $1,500 per witness without stating a basis for its decision.