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Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. Adv. Op. 37 (June 22, 2017)

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Pizarro-Ortega v. Cervantes-Lopez, 133 Nev. Adv. Op. 37 (June 22, 2017)[1]

TORTS: COMPUTATION OF FUTURE MEDICAL DAMAGES

Summary

The court held that future medical expenses are a category of damages to which NRCP 16.1(a)(1)(C)'s computation requirement applies, and that a plaintiff is not absolved of complying with NRCP 16.1(a)(1)(C) simply because the plaintiff's treating physician has indicated in medical records that future medical care is necessary.

Background

Appellant Miriam Pizarro-Ortega caused a car accident that injured respondents Christian Cervantes-Lopez and Maria Avarca. Respondents filed suit against Pizarro-Ortega for Negligence. During litigation, Dr. Stuart Kaplan, a neurosurgeon, informed Christian that he would require a lumbar fusion surgery at some point in the future as treatment for his injuries sustained in the accident. Christian's medical records noted this recommendation, and were provided to appellant as part of respondent's initial disclosures.

However, respondents never provided appellant with a cost computation for the future surgery. Appellant argues that respondents were required by NRCP 16.1(a)(1)(C) to provide a cost computation for future medical expenses. They therefore filed a motion in limine seeking to prevent respondents from introducing evidence at trial in support of Christian's future medical expenses. The district court denied this motion and allowed Dr. Kaplan to testify at trial that the surgery would cost $224,100. Appellants then called her own expert witness who testified that $120,000 was an accurate estimate of what a lumbar fusion surgery would cost. Ultimately, the jury awarded Christian $200,000 for his future lumbar fusion surgery.

Appellant subsequently filed a motion for a new trial arguing that the court had committed reversible error in allowing respondents to introduce evidence of Christian's future medical expenses because respondents had not provided a computation of those expenses. The district Court denied appellant's motion giving rise to the subject appeal.

Discussion

Appellant argued that the district court abused its discretion when it denied her request for a new trial. NRCP 59(a) lists several grounds upon which a new trial may be awarded, including an abuse of discretion that prevents a party from having a fair trial. However, the existence of one or more grounds for mistrial listed in NRCP 59(a) does not warrant a new trial unless it "materially affect[ed] the substantial rights of [the] aggrieved party."[2]

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[1] By Andrew Hart.

[2] *See* Gunderson v. D.R. Horton, Inc., 130 Nev. 67, 74, 319 P.3d 606, 611 (2014).

NRCP 16.1(a)(1)(C) and future medical expenses

Under NRCP 16.1(a)(1)(C), a party is required to produce, "without awaiting a discovery request … [a] computation of any category of damage claimed." Respondents cited the Court's decision in *FCH1, LLC v. Rodriquez*[3] to argue that the Court has approved of the general understanding amongst Nevada attorneys practicing in state court that there is no requirement to provide a cost computation for future medical expenses. However, respondent's interpretation of the decision in *FCH1* was incorrect. That case addressed a plaintiff's required disclosures under NRCP 16.1(a)(2)(B) and did not address, much less abrogate, a plaintiff's responsibilities under NRCP 16.1(a)(1)(C). Additionally, the difficulty of providing a precise dollar figure for a future surgery is not a valid basis for disregarding NRCP 16.1(a)(1)(C). Therefore, to the extent that the district court absolved respondents of their obligation to provide a computation of Christian's future medical expenses based on *FCH1* or a general understanding amongst Nevada practitioners, doing so was an error of law.

However, to grant a new-trial based on one of the grounds outlined in NRCP 59(a), that ground must have "materially affect[ed] the substantial rights of [the] aggrieved party." In this case, the appellant did not contest that Christian's future surgery is necessary, but only whether the testified-to cost of that surgery is reasonable. She elicited opinions from her own medical expert about what a reasonable price of that surgery would be. Also, she gave no explanation about what further testimony her expert witness could have provided had he been given more time to review Dr. Kaplan's cost estimate. Finally, there is evidence to suggest that the jury did give credence to appellant's medical expert because the amount awarded for Christian's surgery was less than Dr. Kaplan's estimate. For these reasons, the district court was within its discretion to deny a new trial.

Additional arguments

Appellant raised several additional arguments in support of her new trial motion. However, she did not demonstrate that her substantial rights were materially affected by any of these possible grounds for granting a new trial.

Exclusion of appellant's medical billing expert

Appellant proffered a registered nurse, Tami Rockholt, to testify as a "medical billing expert" regarding the reasonableness of respondents' past medical expenses and argued that the district court's decision to strike Rockholt as a witness is grounds for a new trial. However, Appellant failed to demonstrate that her substantial rights were materially affected by this decision and so the issue does not warrant a new trial. Especially considering that appellant's medical expert was allowed to testify regarding the reasonableness of respondents' past medical expenses based on Nurse Rockholt's opinions.

Attorney misconduct

Next, appellant argued that respondents counsel engaged in misconduct during closing arguments by making a "golden rule" argument, which is prohibited under *Lioce v. Cohen*.[4] Under

[3] 130 Nev. Adv. Op. 46, 335 P.3d 183 (2014).
[4] 124 Nev. 1, 20-23, 174 P.3d 970, 982-84 (2008).

Lioce, "attorneys violate the 'golden rule' by [(1)] asking the jurors to place themselves in the plaintiff's position or [(2)] nullify the jury's role by asking it to 'send a message' to the defendant *instead of evaluating the evidence.*"[5] However, counsel did not necessarily ask jurors to place themselves in respondents' position. Also, to the extent that counsel's comments could be construed as asking the jurors to "send a message," counsel asked the jury to do so based on the evidence, which is permissible.[6] Thus, counsel's comments did not amount to an improper golden rule argument, and a new trial due to attorney misconduct is unwarranted.[7]

Exclusion of medical lien evidence

Finally, appellant argued that a new trial is warranted because the district court abused its discretion by excluding evidence that respondents' treating doctors who had obtained medical liens. While appellant is correct that evidence of medical liens may be relevant to show bias depending upon the lien's terms, this Court recently recognized that the degree of relevance is "limited," particularly when the medical liens indicate the plaintiff will still be responsible for his or her medical bills if he or she does not obtain a favorable judgment.[8] The district court excluded the evidence of the medical liens finding that the lien's probative value would be substantially outweighed by the unfairly prejudicial effect of coloring respondents' doctors as liars.[9] In light of the medical liens' limited relevance and appellant's failure to address the district court's basis for determining the liens unfairly prejudicial, the Court held that the district court did not abuse its discretion. Accordingly, this alleged error does not warrant a new trial.

Conclusion

The Court's opinion in *FCH1, LLC v. Rodriquez* does not absolve a party of his or her obligation under NRCP 16.1(a)(1)(C) to provide a computation of future medical damages that are to be sought at trial. The district court erred in permitting respondents to introduce evidence in support of future medical damages. However, because appellant has not shown that her substantial rights were not materially affected, this error does not warrant a new trial. The district court's judgment on the jury verdict was affirmed.

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[5] Grosjean v. Imperial Palace, Inc., 125 Nev. 349, 368-69, 212 P.3d 1068, 1082 (2009) (quoting Lioce, 124 Nev. at 20-23, 174 P.3d at 982-84 (emphasis added)).

[6] Gunderson, 130 Nev. at 77-78, 319 P.3d at 613-14.

[7] Lioce, 124 Nev. at 20, 174 P.3d at 982; *see* NEV. R. CRIM. P. 59(a)(2)

[8] Khoury v. Seastrand, 132 Nev. Adv. Op. 52, 377 P.3d 81, 94 (2016).

[9] *See* NEV. REV. STAT. § 48.035(1) (2015).