

Nevada Supreme Court Confirms NRCP 16.1 “Computation of Damages” Requirement Applies to Future Medicals

Thomas E. McGrath, Esq.

Nevada’s Rules of Civil Procedure closely mirror federal court civil procedural rules. Nevada Rule of Civil Procedure 16.1 generally requires parties to serve initial disclosures of witnesses and exhibits without awaiting a discovery request from other parties. And NRCP 16.1(a)(1)(C) requires parties to provide with their initial disclosures, “a computation of any category of damages claimed by the disclosing party.”

In *Pizarro-Ortega v. Cervantes-Lopez*, (2017) 396 P.3d 783, the Nevada Supreme Court considered an appeal from a defendant in a bodily injury case tried in Clark County District Court. In *Pizarro*, the plaintiffs filed suit against a defendant driver, seeking damages for injuries sustained in automobile accident. A jury found in favor of plaintiffs at trial

and the trial Judge denied the defendant’s motion for new trial.

The defendant appealed on various ground related to the trial judge’s failure to admit evidence from defendants and her denial of defendant’s motion in limine to exclude plaintiffs’ claim for future damages regarding a lumbar fusion surgery recommended by plaintiffs’ experts. The trial judge denied defendant’s motion in limine, based on Nevada case law holding that plaintiffs are not required to designate their treating physicians as experts.

As part of their initial disclosures, plaintiffs provided defendant with a computation of their past medical expenses and a copy of medical records concerning their treatment. The records included records from plaintiffs’ orthopedic surgeon, Dr. Kaplan confirming his recommendation that one of the two plaintiffs (Christian) undergo a lumbar reconstructive surgery at L5-S1. But plaintiffs never provided defendant, before trial, with a cost computation for Christian’s future lumbar fusion surgery.

The evening before Dr. Kaplan testified at trial, plaintiffs’ provided defendant with a dollar figure for Christian’s lumbar surgery. The following day, Dr. Kaplan opined that the surgery would cost \$224,100. Defense counsel objected to this testimony. Defendant’s medical expert, Dr. Derek Duke, opined

that Dr. Kaplan’s projected cost for the surgery “looked very high” and on cross-examination, he testified that \$120,000.00 was the typical cost for lumbar fusion.”

Ultimately, the jury awarded Christian \$200,000 for his future lumbar fusion surgery. The jury also awarded the other plaintiff (“Maria”) \$85,000 in damages for future medical expenses. The jury also awarded each plaintiff damages for past medical expenses, as well as past and future pain and suffering. In total, the jury awarded Christian roughly \$499,000 and Maria roughly \$222,000.

Trial Court’s Erroneous Admission of Evidence Regarding Future Damages

The Nevada Supreme Court confirmed NRCP 16.1 requires a plaintiff to include future medical damages in his/her computation of damages. The Court held future medical expenses are a category of damages to which [NRCP 16.1\(a\)\(1\)\(C\)](#)’s computation requirement applies. 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.

The Court declared it is error for a trial court to admit evidence of future damages when plaintiff fails to comply with this obligation. But it denied the

defendant/appellant's request for a new trial because appellant failed to show she was unable to contest the reasonableness of the amounts requested. Therefore, the Court concluded appellant's substantial rights were not materially affected so as to warrant a new trial.

The Court explained,

[W]hen one of [NRCP 59\(a\)](#)'s new-trial grounds has been established, the established ground must have “materially affect[ed] the substantial rights of [the] aggrieved party” to warrant a new trial. Here, we conclude that the district court was within its discretion in determining that a new trial was not warranted. [citations omitted]. Important to our conclusion is that appellant is not contesting whether Christian's future lumbar surgery is necessary, but only whether the testified-to cost of that surgery is reasonable. In this regard, the district court observed that appellant was able to elicit opinions from her medical expert, Dr. Duke, as to whether Dr. Kaplan's \$224,100 cost estimate was reasonable, to which Dr. Duke responded that the estimate “look[ed] very high.” Likewise, on cross-examination, Dr. Duke further opined that “[\$]120,000 is what I've

seen in the past for the [lumbar] fusion.”

Appellant contends that these opinions did not carry as much weight for the jury as they might have if Dr. Duke had been given more time to review Dr. Kaplan's cost estimate. However, appellant made no offer of proof, submitted no affidavits, and provided no further medical opinions in conjunction with her new trial motion, nor has she otherwise explained on appeal what additional testimony Dr. Duke would have provided or what testimony her proffered medical billing expert (discussed below) could have provided regarding Dr. Kaplan's estimate for the surgery. [citations omitted].

The Court reasoned the above “circumstances” supported their conclusion that defendant's substantial rights were not materially affected by allowing Dr. Kaplan to testify regarding the cost of Christian's lumbar surgery without having provided a cost computation under [NRCP 16.1\(a\)\(1\)\(C\)](#).

Exclusion of Testimony from Defendant's Medical Billing Expert

Interestingly and as referenced above, the trial judge also excluded testimony from defendant's billing expert, a

registered nurse defendant designated to proffer testimony regarding the “reasonable costs” of plaintiffs' past medical expenses. The Court analysis is not satisfying.

Appellant proffered a registered nurse, Tami Rockholt, to testify as a “medical billing expert” regarding the reasonableness of respondents' past medical expenses. From what can be determined from the record, it appears that Nurse Rockholt reviewed the costs for each medical procedure respondents underwent and was prepared to testify that the costs for those procedures were higher than the average cost that doctors in southern Nevada charge for those procedures. On this subject, Nurse Rockholt sought to opine that although Christian was seeking roughly \$57,000 in past medical expenses, the reasonable cost was roughly \$36,000. Likewise, Nurse Rockholt sought to opine that although Maria was seeking roughly \$43,000 in past medical expenses, the reasonable cost was roughly \$24,000.

The district court struck Nurse Rockholt as a witness, and although the record is unclear, the decision appears to have been based on one or more of the following

reasons: (1) she was not qualified to provide an expert opinion on medical billing, (2) her opinion would not be helpful to the jury, and/or (3) her opinion implicated the collateral source rule. Nevertheless, the district court permitted Dr. Duke to read to the jury Nurse Rockholt's opinions from her report—i.e., to opine on Nurse Rockholt's behalf that \$36,000 in past medical expenses was reasonable for Christian and that \$24,000 in past medical expenses was reasonable for Maria.

The jury ultimately awarded Christian and Maria all of the past medical expenses they had requested, and appellant raised the exclusion of Nurse Rockholt as a basis for a new trial. Without revisiting whether the exclusion of Nurse Rockholt had actually been proper, the district court determined that appellant's substantial rights had not been materially affected because Dr. Duke had been able to opine on Nurse Rockholt's behalf.

On appeal, appellant continues to argue that the exclusion of Nurse Rockholt's testimony warrants a new trial. We disagree. Although we cannot determine from the record whether the

district court properly exercised its discretion in excluding Nurse Rockholt under any of the three aforementioned reasons, [citations omitted] we nevertheless conclude that this issue does not warrant a new trial because appellant has not demonstrated that her substantial rights were materially affected.

Exclusion of Existence of Medical Liens

The trial judge also excluded evidence regarding the existence of plaintiffs' medical providers' medical liens regarding their treatment of plaintiffs. The trial occurred before the Nevada Supreme Court issued its opinion in *Seastrand v. Khoury*, wherein it held that evidence of the existence of medical liens is not prohibited by Nevada's strict collateral source rule.

The Court explained,

While appellant is correct that evidence of medical liens may be relevant to show bias depending upon the terms of the medical lien, this court recently recognized in *Khoury v. Seastrand*, 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. Here, and despite not having the

benefit of the subsequently issued *Khoury* decision, the district court determined the liens would be of limited relevance for the same reason put forth in *Khoury*. Additionally, the district court believed that introduction of medical liens would not simply show that respondents' treating doctors were biased, but that they "would have a motivation to lie." Thus, the district court excluded evidence of the medical liens based on the court's belief that the limited probative value of the liens would be substantially outweighed by the unfairly prejudicial effect of coloring respondents' doctors as liars.

While we recognize that the district court's distinction between "bias" and "motivation to lie" is nuanced, appellant has not addressed on appeal whether the district court erred in drawing that distinction. Thus, in light of the medical liens' limited relevance and appellant's failure to address the district court's basis for determining the liens would be unfairly prejudicial, we are not persuaded that the district court necessarily abused its discretion in excluding that evidence, particularly when the district court did not have the benefit of

this court's [*Khoury*](#) opinion at the time it made its decision.

While the Court denied every aspect of defendant's appeal, the *Pizarro* decision at least provides defense counsel with published case law to support a motion in limine barring plaintiffs from recovering categories of damages the plaintiffs fail to disclose in their initial 16.1 disclosures. But if the trial judges denies defendant's motion, after *Pizarro*, defendants must question how and if they can establish in their appeal, a sufficient record to persuade the Nevada Supreme Court that a trial judge's "errors" materially affected their substantial rights.

ABOUT THE AUTHOR

Tom McGrath is the managing partner of Tyson & Mendes' Las Vegas, NV office. Mr. McGrath specializes in insurance defense, personal injury, professional liability, and general civil litigation. Contact him at (702)724-2648 or tmcgrath@tysonmendes.com.