United States Court of Appeals
For the Eighth Circuit

No. 22-2012

Marco Gonzalez

Plaintiff - Appellant

v.

Salem Shahin, MD; Carol Gilmore, MD; Richard Martin, MD; Paul Andelin, MD; Jeffrey Adams, PA-C; Mercy Medical Center; McKenzie County Healthcare Systems, Inc.

Defendants - Appellees

Appeal from United States District Court
for the District of North Dakota - Western

Submitted: February 16, 2023
Filed: August 16, 2023

Before COLLOTON, BENTON, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Marco Gonzalez was prescribed an antibiotic and suffered serious adverse effects. He sued the healthcare providers and hospitals that were involved in his treatment for medical negligence, and a jury found in favor of the defendants. Gonzalez filed a motion for a new trial, challenging the district court's comments to

the jury and its evidentiary rulings. The district court[1] denied the motion, and then awarded costs to the defendants as the prevailing parties. Gonzalez now appeals the judgment entered pursuant to the jury's verdict, the denial of his new-trial motion, and the award of costs. Because we lack jurisdiction to review Gonzalez's appeal of the underlying judgment, we review only the district court's denial of his motion for a new trial and the award of costs. We affirm.

I.

After experiencing symptoms of urinary urgency, frequency, and straining, Gonzalez went to a urology clinic on July 16, 2015, and was seen by Dr. Salem Shahin, a urologist employed by Mercy Medical Center. A urine test came back negative for infection, but Dr. Shahin determined that Gonzalez's symptoms were consistent with a chronic prostate infection and prescribed Bactrim, an antibiotic. He instructed Gonzalez to take the antibiotic twice daily for a month.

A few weeks later, on July 30, Gonzalez experienced blurred vision and drainage from his eyes. He went to the emergency room at Mercy Medical, where he was seen by another doctor, Dr. Richard Martin. Dr. Martin was aware that Gonzalez was taking Bactrim, but seeing no "Bactrim rash"—a common symptom of an adverse reaction to Bactrim—he did not believe Gonzalez was having a reaction to the antibiotic and decided not to discontinue it. Dr. Martin instead believed Gonzalez had a viral eye infection and prescribed a medicated ointment for his eyes.

By that evening, Gonzalez had developed sores on his lips, and his eyes were red and painful. Gonzalez went to the emergency room at McKenzie County Healthcare Systems, where he was seen by physician assistant Jeff Adams. Gonzalez expressed that he felt his symptoms were possibly a reaction to the

[1]The Honorable Daniel Mack Traynor, United States District Judge for the District of North Dakota.

Bactrim. He still had not developed any rash, however. Adams took note of Gonzalez's concern. But Adams, believing the symptoms were not indicative of a reaction to Bactrim and knowing that it was prescribed by a urologist, decided it would not be wise to discontinue the Bactrim and instead instructed Gonzalez to return to Dr. Shahin. Based on Gonzalez's symptoms that evening, Adams diagnosed him with a viral infection, and possibly an environmental allergy, and treated him accordingly.

The next day, July 31, Gonzalez returned to the Mercy Medical emergency room due to pain, particularly in his eye. There, an emergency room provider, Dr. Carol Gilmore, conducted a physical exam and ordered a CT scan. Based on her assessment, Dr. Gilmore diagnosed Gonzalez with bilateral conjunctivitis, a tonsil infection, and an infection of the gums. She developed a plan of care for Gonzalez and discharged him. She did not discontinue the Bactrim and instructed Gonzalez to continue taking the antibiotic as prescribed.

The following day, Gonzalez returned to the Mercy Medical emergency room, reporting worsening symptoms. He had also developed a rash. Gonzalez was admitted to the hospital, where he was again examined by Dr. Gilmore. Dr. Paul Andelin was consulted, and he decided to discontinue the Bactrim. Soon after, Dr. Andelin diagnosed Gonzalez with Stevens-Johnson Syndrome, a rare disorder that can be caused by taking Bactrim. Some of Gonzalez's symptoms improved on August 2, but when Dr. Andelin saw that Gonzalez's rash was worsening, he transferred Gonzalez to a burn center for treatment.[2]

Gonzalez sued doctors Shahin, Gilmore, Martin, and Andelin; physician assistant Adams; and Mercy Medical Center and McKenzie County Healthcare

[2]Gonzalez received extensive treatment and underwent eye surgery at the burn center. According to a medical expert who testified at trial, Gonzalez has since regained function in his eyes but has lingering symptoms like mild dry eye and inflammation.

Systems for medical negligence. An eleven-day jury trial was held. At trial, Gonzalez offered into evidence the Physicians' Desk Reference[3] drug label for Bactrim (the Bactrim label), which noted that Bactrim's "most common adverse effects" include "allergic skin reactions (such as rash and urticaria)." The label also cautioned that fatalities, "although rare, have occurred due to severe reactions, including Stevens-Johnson Syndrome . . . ." Gonzalez argued that his medical providers had negligently treated him with Bactrim and failed to discontinue the antibiotic without consulting the Bactrim label. The defendants argued in response that the providers reasonably prescribed the Bactrim and acted with due care given Gonzalez's symptoms.

Both Gonzalez and the defense presented testimony from expert witnesses, for which the district court set time limits to manage the length of the trial. As relevant to this appeal, Dr. Gordon Leingang, an expert witness for the defense, was allotted one hour for direct examination and 30 minutes for cross-examination. After cross-examining Dr. Leingang for the allotted 30 minutes, Gonzalez requested 10 additional minutes, which the district court denied.

On November 18, 2021, the jury returned a verdict in favor of all defendants, and the next day the district court entered judgment accordingly. Gonzalez requested an extension of time to file post-trial motions, and the defendants did not object. The district court granted the extension, instructing Gonzalez to file his post-trial motions by January 13, 2022. On January 13, Gonzalez filed a motion for new trial, see Fed. R. Civ. P. 59(a)(1), challenging some of the district court's comments to the jury and the district court's limitations on his cross-examination of Dr. Leingang. The defendants—without raising any objection to the timeliness of Gonzalez's motion—responded on the merits. The defendants also filed motions for costs as the prevailing parties, which Gonzalez opposed.

[3]The Physicians' Desk Reference is a collection of information about medical drugs, including information from drug manufacturers.

On April 27, 2022, the district court denied Gonzalez's motion for new trial and granted the defendants' motions for costs. Gonzalez now appeals, seeking a reversal of the judgment, a remand for a new trial, and a reversal of the award of costs.

II.

At the outset, we address the question of jurisdiction. See Dill v. Gen. Am. Life Ins. Co., 525 F.3d 612, 616 (8th Cir. 2008). The defendants contend we lack jurisdiction to review the underlying judgment on the verdict because Gonzalez filed an untimely notice of appeal. Central to our consideration of this issue is the timeliness of Gonzalez's Rule 59 motion.

Generally, a party in a civil case "must file a notice of appeal 'within 30 days after entry of the judgment.'" Perficient, Inc. v. Munley, 43 F.4th 887, 889 (8th Cir. 2022) (quoting Fed. R. App. P. 4(a)(1)(A)); see id. (explaining that "a timely notice of appeal is mandatory and jurisdictional"). But if a party timely files a Rule 59 motion for a new trial, then the 30-day period in which to file the notice of appealing the judgment is tolled under Federal Rule of Appellate Procedure 4(a)(4). See Fed. R. App. P. 4(a)(4)(A)(v) (explaining that a timely Rule 59 motion causes "the time to file an appeal" to "run[] for all parties from the entry of the order disposing of the . . . motion").

A Rule 59 motion for a new trial is timely if filed "no later than 28 days after the entry of judgment." Fed. R. Civ. P. 59(b). A court may not extend this 28-day deadline. See Fed. R. Civ. P. 6(b)(2) (providing that "[a] court must not extend the time to act under" Rule 59(b)). Here, the district court granted Gonzalez an extension of time to file his Rule 59 motion. The district court later denied that motion on April 27, 2022, and Gonzalez subsequently filed his notice of appeal on May 13—well beyond the 30-day period after entry of the judgment, but within 30 days of the order denying his Rule 59 motion.

We only have jurisdiction to review the judgment, then, if the time to file the notice of appeal was tolled by Gonzalez's Rule 59 motion. We conclude it was not. Although the district court granted Gonzalez an extension of time to file his Rule 59 motion, such an extension was granted in error. See Fed. R. Civ. P. 6(b)(2). Accordingly, because the Rule 59 motion was not "file[d] in the district court . . . within the time allowed by" the applicable rules, the time for Gonzalez to file his appeal was not tolled. Fed. R. App. P. 4(a)(4).

Gonzalez contends that the defendants failed to object when the district court granted the extension and thus forfeited their timeliness challenge. The defendants indeed failed to raise any concerns about the extension to the district court. And Rule 6(b)—the rule that prohibits extending the deadline for Rule 59 motions—is a nonjurisdictional rule subject to forfeiture. See Dill, 525 F.3d at 619 (explaining that Rule 6(b)'s "prohibition against extending" the time periods for filing certain motions is a "nonjurisdictional claim-processing rule[]," meaning that such "timeliness requirements may be forfeited if they are not timely raised"); cf. Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 17 (2017) (holding that the time prescription in Appellate Rule 4(a)(5)(C) "is not jurisdictional" because it is "a time limit prescribed only in a court-made rule," not one set by Congress).

However, the defendants' failure to object means only that the district court had the authority to rule on Gonzalez's Rule 59 motion. It does not mean that we have jurisdiction to review the underlying judgment. Cf. Arnold v. Wood, 238 F.3d 992, 998 (8th Cir. 2001) (explaining that an appeal from a denial of a Rule 60(b) motion does not present the underlying judgment for appellate review). As the Advisory Committee Notes on Appellate Rule 4 explain, the time within which to file a notice of appeal under Rule 4 "is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules" or a party's "*failure to object to the motion's lateness*." Fed. R. App. P. 4 advisory committee's note to 2016 amendments (emphasis added). In other words, the defendants' failure to object to the extension did not alter Gonzalez's deadline for appealing the judgment within 30 days after its entry.

In sum, because Gonzalez filed the notice of appeal more than 30 days after the entry of the judgment on the verdict, we lack jurisdiction to review the judgment. We do, however, have the authority to review the district court's ruling on the Rule 59 motion because Gonzalez's notice of appeal[4] was filed within 30 days of that ruling. See Fed. R. App. P. 4(a)(1)(A). We therefore review only the district court's denial of the motion for a new trial, and not the underlying judgment.[5]

III.

Gonzalez contends that the district court improperly denied his motion for a new trial. He maintains that the district court (1) made improper comments about the Bactrim label and about his lawyer; and (2) erroneously limited his cross-examination of Dr. Leingang.[6] "We review the denial of a motion for a new trial for a 'clear' abuse of discretion." White Commc'ns, LLC v. Synergies3 Tec Servs., LLC, 4 F.4th 606, 613 (8th Cir. 2021) (quoting Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 462 (8th Cir. 2013)).

[4]To the extent Gonzalez argues that the defendants should have anticipated that his notice would be late-filed and thus should have raised a timeliness objection to the district court, we disagree. The defendants were not required to preemptively object to a notice of appeal before it was filed.

[5]For the same reason, we have the authority to review the district court's award of costs, which was granted on the same day as the Rule 59 ruling.

[6]To the extent the defendants argue that the district court was required to treat Gonzalez's late-filed Rule 59 motion as a Rule 60 motion, the defendants did not raise this argument before the district court, and we see no need to address it here given that we affirm the denial of the motion.

A.

Gonzalez first challenges the district court's comments to the jury about the Bactrim label. "We review whether a district court's comment on the evidence was improper under an abuse of discretion standard." Reed v. Malone's Mech., Inc., 765 F.3d 900, 910 (8th Cir. 2014). A district court "has broad discretion in commenting on evidence and may do so in order to give appropriate assistance to the jury." Id. at 910 (quoting Warren v. State Farm Fire & Cas. Co., 531 F.3d 693, 698 (8th Cir. 2008)). Thus, a court "may express [its] opinion upon the facts" so long as it does so "fairly and impartially" and "makes it clear to the jury that all matters of fact are submitted to their determination." Id. at 911 (quoting Gant v. United States, 506 F.2d 518, 520 (8th Cir. 1974)). "The only limitation" is that the district court's "comments must not preclude a fair evaluation of the evidence by the jury." Id. at 910–11 (quoting Warren, 531 F.3d at 701). The propriety of the district court's comments "must be viewed in the context of the complete charge to the jury." United States v. Neumann, 867 F.2d 1102, 1104 (8th Cir. 1989).

After the Bactrim label was admitted into evidence at trial, the district court read Jury Instruction 19, which addressed the label. But the district court first stated that it wanted to "make sure" the jury did not "give [the label] more weight than it deserves." And after reading the instruction, the court told the jury that such manufacturer-provided materials "are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a lawsuit like this." The parties stipulated to the instruction, but not to this additional commentary.

We acknowledge Gonzalez's concerns—the district court's supplemental comments were ill-advised. Nevertheless, the district court emphasized that it was the jury's choice to determine the "measure of weight" and the importance of the label. And the court instructed the jury that manufacturer information was "competent evidence" to consider "in determining whether each medical professional met the standard of care in this case." On the whole, it was made clear

to the jury that all factual questions—including the import of the Bactrim label to Gonzalez's case—were to be resolved by them. We conclude, after considering "the complete charge to the jury," that the district court did not abuse its discretion. Neumann, 867 F.2d at 1104.

Gonzalez next challenges the district court's commentary about his lawyer. Because Gonzalez did not raise this objection at trial, we review for plain error. See Russell v. Anderson, 966 F.3d 711, 719–20 (8th Cir. 2020) (reviewing "only for plain error" because the appellant "did not object at trial" to the district court's comments to the jury). Gonzalez points to a single remark where the district court opined that his lawyer would "love to take on" a lawsuit involving drug companies and their labels. But Gonzalez does not explain how this comment affected the outcome of the trial. Without more, we cannot conclude that this remark was sufficiently pervasive or that it resulted in a miscarriage of justice. See id. at 722 ("When reviewing for plain error, this court 'will reverse only when a judge's comments were so pervasive as to affect the outcome of the trial and result in a miscarriage of justice.'" (citation omitted)).

B.

Gonzalez also argues that the district court erred by limiting his cross-examination of Dr. Leingang, the emergency-medicine expert for defendant Adams. A district court has broad discretion over evidentiary and trial management decisions. See Russell, 966 F.3d at 730 ("This court reviews for abuse of discretion evidentiary rulings and reverses only for clear and prejudicial abuse of discretion." (cleaned up and citation omitted)); Jackson v. Allstate Ins. Co., 785 F.3d 1193, 1203 (8th Cir. 2015) (explaining that a trial court's imposition of time limits on the presentation of evidence is "reversed only for an abuse of discretion").

Specifically, Gonzalez asserts that the district court erroneously precluded him from questioning Dr. Leingang about an admitted exhibit: McKenzie County Healthcare's policy on medication administration. We need not address whether this

ruling by the district court was an abuse of discretion because any error was harmless. See Cooper v. City of St. Louis, 999 F.3d 1138, 1140 (8th Cir. 2021) (declining to "address the merits of whether the [expert testimony] exclusion was a gross abuse of discretion" because "any error was harmless" (cleaned up and citation omitted)); Hall v. Arthur, 141 F.3d 844, 850 (8th Cir. 1998) (holding that this court will consider an erroneous evidentiary ruling as harmless unless "the jury was substantially swayed by the result of that error" (cleaned up and citation omitted)).

At trial, Dr. Leingang testified that he had never seen or reviewed the policy document and did not know whether such a policy was in effect at the time Adams examined Gonzalez. Accordingly, when defense counsel objected to additional cross-examination of Dr. Leingang about the policy document, the district court sustained the objection because Leingang "indicated an unfamiliarity with" the document. Gonzalez does not specify what testimony he would have elicited from Dr. Leingang had he been able to continue questioning the doctor about the policy document. We see no reversible error here. See Cooper, 999 F.3d at 1140 (holding that the exclusion of expert testimony did not merit a new trial because any error was harmless, since that testimony would not have added anything to the admitted evidence).

Gonzalez also contends that the district court erroneously denied his request for an additional ten minutes to cross-examine Dr. Leingang. A trial court may "impose reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." Cedar Hill Hardware & Constr. Supply, Inc. v. Ins. Corp. of Hannover, 563 F.3d 329, 352 (8th Cir. 2009) (quoting Life Plus Int'l v. Brown, 317 F.3d 799, 807 (8th Cir. 2003)). To preserve this issue, the party "must have timely objected and made an offer of proof of the evidence excluded by the time limits." Harris v. Chand, 506 F.3d 1135, 1141 (8th Cir. 2007).

Gonzalez failed to make an offer of proof at trial,[7] so we review for plain error. See id. (noting that plain error review may be appropriate when "no offer of proof was made at trial"). Accordingly, we will reverse "only if the error was so prejudicial as to have affected substantial rights resulting in a miscarriage of justice." Walker v. Kane, 885 F.3d 535, 541 (8th Cir. 2018) (citation omitted). Gonzalez is unable to articulate how the district court's denial of an additional ten minutes to cross-examine Dr. Leingang resulted in a miscarriage of justice. He merely asserts that Dr. Leingang was an important witness whose opinions he needed to adequately "explore." This broad assertion, without more, does not persuade us that Gonzalez was prejudiced.[8] Indeed, with his last few minutes remaining, Gonzalez asked generalized questions that were not focused on the particular facts of his case. Although we caution district courts to ensure that time limits are "sufficiently flexible" during trial, we discern no plain error here. Harris, 506 F.3d at 1141.

IV.

Lastly, Gonzalez challenges the district court's award of costs for certain deposition transcripts and videos, which we review for an abuse of discretion. Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 762 (8th Cir. 2006). Federal Rule of Civil Procedure 54(d) provides that costs other than attorneys' fees "should be allowed to the prevailing party." See 28 U.S.C. § 1920 (enumerating costs that are recoverable). A district court may tax deposition transcript and video costs if the deposition was "necessarily obtained for use in a case' and was not 'purely investigative.'" Marmo, 457 F.3d at 762 (quoting Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 889 (8th Cir. 2006)); see Craftsmen Limousine, Inc. v. Ford

[7]Gonzalez concedes that he did not "make an express offer of proof" at trial. To the extent Gonzalez argues that one was implied in his "cross-examination questions, Defendants' objections, and the Court's rulings," we are unpersuaded.

[8]Gonzalez also asserts that he would have elicited testimony from Dr. Leingang about the hospital policy document, but as discussed above, the district court precluded that line of questioning, and we discern no reversible error as to that ruling.

Motor Co., 579 F.3d 894, 898 (8th Cir. 2009) (holding that the "costs of video depositions are included under § 1920").

Gonzalez makes a conclusory assertion that the depositions whose costs he challenges were unnecessary, but he "fails to offer any specific basis to rebut the presumption in favor of awarding" the defendants their costs. Craftsmen Limousine, 579 F.3d at 897. Gonzalez points to the fact that there were "disparate" transcript and video charges "claimed by the Defendants for the same deposition," but he does not dispute the veracity of the charges. And an inconsistency in the costs submitted by the defendants, alone, does not bear on the district court's ability to impose them. See Marmo, 457 F.3d at 762. The district court did not abuse its discretion.

V.

For the foregoing reasons, we affirm.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2012

Marco Gonzalez

Plaintiff - Appellant

v.

Salem Shahin, MD; Carol Gilmore, MD; Richard Martin, MD; Paul Andelin, MD; Jeffrey Adams, PA-C; Mercy Medical Center; McKenzie County Healthcare Systems, Inc.

Defendants - Appellees

Appeal from U.S. District Court for the District of North Dakota - Western
(1:17-cv-00157-DMT)

JUDGMENT

Before COLLOTON, BENTON and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

August 16, 2023

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2012

Marco Gonzalez

Appellant

v.

Salem Shahin, MD, et al.

Appellees

Appeal from U.S. District Court for the District of North Dakota - Western
(1:17-cv-00157-DMT)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Erickson did not participate in the consideration or decision of this matter.

September 21, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Marco Gonzalez, Plaintiff, vs. Salem Shahin, M.D.; Carol Gilmore, M.D.; Richard Martin, M.D.; Paul Andelin, M.D.; Jeffrey Adams, PA-C; Mercy Medical Center; and McKenzie County Healthcare Systems, Inc., Defendants.	Case No. 1:17-cv-157

ORDER DENYING MOTION FOR NEW TRIAL

[¶1] THIS MATTER comes before the Court on Plaintiff Marco Gonzalez's ("Gonzalez") Motion for New Trial filed on January 13, 2022. Doc. No. 281. Defendant McKenzie County Healthcare Systems, Inc. ("McKenzie County") filed its Response on February 16, 2022. Doc. No. 295. Defendant Salem Shahin, MD ("Dr. Shahin") filed his Response on February 17, 2022. Doc. No. 296. Defendants Jeffrey Adams, PAC, ("PA Adams") filed his Response on February 18, 2022. Doc. No. 297. Finally, Defendants Paul Andelin, MD ("Dr. Andelin"), Carol Gilmore, MD ("Dr. Gilmore"), Richard Martin, MD ("Dr. Martin") and Mercy Medical Center ("Mercy Medical) filed their Response on February 18, 2022. Doc. No. 298. Gonzalez filed Reply briefs on March 10, 2022. Doc. Nos. 302, 303, 304, 305. For the reasons set forth below, Gonzalez's Motion for New Trial is **DENIED**.

LEGAL STANDARDS

[¶2] Gonzalez brings his Motion for New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure. A court may grant a new trial "after a jury trial, for any reasons for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). In reviewing a motion for new trial, the Court considers "whether a new trial is necessary to prevent a miscarriage of justice." Hallmark Cards, Inc. v. Murley, 703 F.3d 456, 462 (8th Cir. 2013). The Eighth Circuit has cautioned, "[a] new trial should be granted only if the evidence weighs heavily against the verdict." Id. A new trial may be ordered "only if the error misled the jury or had a probable effect on its verdict." Id. (citation and quotation marks omitted). "Deciding a motion for new trial is a matter committed to the sound discretion of the trial court." O'Dell v. Hercules, Inc., 904 F.2d 1194, 1200 (8th Cir. 1990).

DISCUSSION

[¶3] Gonzales moved for a new trial on four separate grounds. First, Gonzalez contends the Court made improper comments relating to the Bactrim label and trial counsel. Second, Gonzalez argues the Court improperly limited the time of trial and examination and cross-examination of witnesses. Third, Gonzalez claims the Court improperly overruled his objections to the cross-examination of defense expert Dr. Leingang while limiting and sustaining objections to Plaintiff's cross-examination of Dr. Leingang. Finally, Gonzalez argues the Court allowed impermissible cross-examination of Gonzalez's lifecare planner relating to his ability to afford treatment. The Court will take each in turn.

I. Comments Relating to Bactrim Insert and Plaintiff's Counsel

[¶4] Gonzalez argues the Court improperly commented on the purpose of the Bactrim label being to prevent liability for the drug manufacturer. Gonzalez further argues the Court improperly

commented on trial counsel's hypothetical desire to sue a drug manufacturer on behalf of an injured person. The Defendants all argue the Court did not err in these comments.

[¶5] Gonzalez never made this specific objection relating to the Court's statement about the purpose of the Bactrim insert or the Court's comment regarding trial counsel at the time the statement was made. Absent a specific objection at that time, the Court's analysis is limited to plain error. See Rush v. Smith, 56 F.3d 918, 922 (8th Cir. 1995) ("When the complaining party has failed to object to the court's statements at trial, our review is for plain error only.") "Under plain error review, an error not identified by a contemporaneous objection is grounds for reversal only if the error prejudices the substantial rights of a party and would result in a miscarriage of justice if let uncorrected." Id.

[¶6] The Court's instruction on the Bactrim label properly informed the jury it is not conclusive evidence of the medical providers' standard of care. See Doc. No. 254, ¶ 33. As to the Court's comment on drug companies' avoiding liability, this was likewise appropriate. See Morlino Medical Center of Ocean County, 706 A.2d 721, 729 (N.J. 1998) ("Manufacturers write drug package inserts and PDR warnings for many reasons including compliance with FDA requirements, advertisement, the provision of useful information to physicians, and an attempt to limit the manufacturer's liability."). The Final Jury Instructions likewise gave the jury the requirements for establishing the standard of care, "Evidence as to the standard of care, the failure to meet that standard of care, and proximate cause **must be established by expert testimony**." Doc. No. 254, ¶ 32. Accordingly, there was no plain error in the Court explaining the purpose of the Bactrim label.

[¶7] Finally, as to the Court's comment relating to Mr. Leventhal's desire to sue a drug manufacturer, the Court concludes there was no harm in making this comment. The comment must

be viewed in the context of the length and nature of the trial. It was a comment made in a matter of seconds during the course of a twelve-day complex medical malpractice jury trial. It was also a joke. Gonzalez merely contends the Court's comment was inappropriate. Even assuming it was, or maybe it was a bade joke, Gonzalez has failed to show it impacted the jury's decision or prejudiced his case in any way. See Reed v. Malone's Mechanical, Inc., 765 F.3d 900, 910-11 (8th Cir. 2014) ("The trial court has broad discretion in commenting on evidence and may do so in order to give appropriate assistance to the jury. The only limitation on the discretion is that the comments must not preclude a fair evaluation of the evidence of the jury." (internal citations and quotation marks omitted)); see also Rush, 56 F.3d at 922 ("While this court previously stated that a few improper comments are not necessarily enough to require reversal, we also recognized at the same time that each case of allegedly prejudicial comments made by the trial judge must turn on its own circumstances." (citation and quotation marks omitted)).

[¶8] The potential prejudicial impact of these comments was also effectively cured by the Court in the final instructions. The Court instructed the Jury at the close of trial, "I have not intended to suggest what I think your verdict should be by any of my rulings or comments during trial." Doc. No. 254, ¶ 4. "A jury is presumed to follow the instructions given." In re Prempro Products Liability Litigation, 514 F.3d 825, 832 (8th Cir. 2008). The Court therefore presumes the jury followed the instruction that the Court's comments do not suggest what the Court believes the verdict should be. Gonzalez has failed to provide any basis the jury failed to follow the instruction that the Court's comments are not intended to suggest what the verdict should be.

[¶9] Accordingly, Gonzalez has failed to show a new trial is warranted based on the Court's comments on the Bactrim package insert.

II. Court Imposed Time Limitations

[¶10] Gonzalez argues a new trial is necessary because the Court improperly restricted his time to present his case and in cross-examining the Defendants and their experts. The Defendants argue the Court did not abuse its discretion in limiting the time for trial and applied the restrictions evenhandedly.

[¶11] It is well established trial courts have wide discretion in placing "reasonable time limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence." Johnson v. Ashby, 808 F.2d 676, 678 (8th Cir. 1987). The overcrowded dockets of courts require the courts to "exercise strict control over the length of trials." Id. (quoting Flaminio v. Honda Motor Co., Ltd., 733 F.2d 463, 473 (7th Cir. 1984)). Limiting the length of trial that results in exclusion of "probative, non-cumulative evidence" may be an abuse of discretion. Id. When limiting the length of trial, courts should be flexible enough to recognize when the restrictions may be too rigid. Id.

[¶12] The time restrictions in this case were reasonable. The Court evenhandedly restricted the presentation of Gonzalez and the Defendants. When the Parties could not agree on how to split the twelve days available for trial, they asked the Court to intervene. The Parties submitted proposed times for each witness and the Court made reductions to those times to accommodate for the trial length. Multiple times throughout the trial, the Court permitted additional questioning by the Parties when requested. Sometimes the Court denied such requests when it was apparent the evidence sought with additional questioning was going to be cumulative or a waste of time. In addition, Gonzalez has not made an offer of proof or even a suggestion of what evidence was omitted due to the time constraints put in place by the Court. Gonzalez simply asserts probative,

non-cumulative evidence was omitted without illustrating any information relating to what evidence was not admitted.

[¶13] Accordingly, Gonzalez has failed to show a new trial is warranted based on the time restrictions imposed by the Court.

III. Evidentiary Rulings Regarding Dr. Leingang's Testimony

[¶14] Gonzalez next argues the Court erred in limiting his ability to cross-examine Dr. Leingang, specifically regarding Exhibit 17, which was McKenzie County's policy on medication administration. Gonzalez also argues the Court erred in overruling his objections to the leading questions by Defense Counsel on re-direct examination. Finally, Gonzalez contends the objections and time limitations prevented him from fully questioning Dr. Leingang. The Defendants argue the Court properly ruled on the objections during Dr. Leingang's testimony.

[¶15] "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence" in order to ensure the process effectively determines the truth, avoids wasting time, an protects witnesses from harassment and embarrassment. Fed. R. Evid. 611(a). Cross-examination generally should not go beyond the scope of direct examination. Fed. R. Evid. 611(b). Generally, leading questions should be prohibited on directed examination but permitted on cross-examination or when a hostile witness, adverse party, or witness identified with an adverse party is called. Fed. R. Evid. 611(c). The Court may allow for leading questions on direct examination when "necessary to develop the witness's testimony." Id. The Court has discretion over the use of leading questions during trial. United States v. Butler, 56 F.3d 941, 943 (8th Cir. 1995).

[¶16] The Court explained to the jury the reason for prohibiting Dr. Leingang from testifying regarding Exhibit 17 was due to Dr. Leingang not being familiar with the contents of the exhibit.

Without that knowledge, he would be unable to testify about the exhibit. Any further questioning would have been a waste of time. As for the leading questions on re-direct examination, the court permitted it as an efficient and necessary way to develop Dr. Leingang's testimony. See Fed. R. Evid. 611(c). Finally, as to the general assertion of the objections and time limitations preventing full examination of Dr. Leingang, Gonzalez did not raise this objection at the time of trial. He has not provided what, if any, additional testimony he would have elicited from Dr. Leingang. The final question asked by Gonzalez's counsel was how many physician's assistants are there in America? With that being the final question, the Court concluded no additional time was necessary to cross-examine Dr. Leingang.

[¶17] Accordingly, Gonzalez has failed to show a new trial is warranted based on the Court's evidentiary rulings relating to Dr. Leingang's testimony.

IV. Evidentiary Rulings Regarding Gonzalez's Lifecare Planner Testimony

[¶18] Gonzalez argues the Court erred in allowing the Defense to cross-examine his lifecare planner's on Gonzalez's ability to afford his treatment. The Defendants argues Gonzalez misconstrues the cross-examination and that the cross-examination was on the treatment he did or did not receive since 2019.

[¶19] Gonzalez misconstrues what occurred during his lifecare planner's testimony. The lifecare planner estimated what needs Gonzalez will have beginning in 2019. The Defense questioned her on his actual costs in 2019. The questions did not relate to his ability to pay. Rather, the Defense focused on the lifecare planner's projections and how they compared to the actual medical expenses Gonzalez had in that time. This goes directly to the heart of the lifecare planner's credibility. The Defense did not improperly question her on Mr. Gonzalez's ability to pay. It was the lifecare planner who on her own began to explain Gonzalez had a lack of funds. The Court

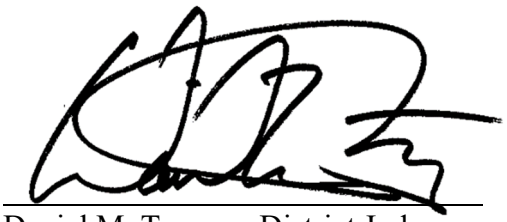
specifically struck this testimony from the record. In other words, the Court told the jury to disregard that testimony. The Court presumes the jury followed the instruction to disregard the testimony and Gonzalez has now shown any probability the jury was unable to do so. See Stults v. American Pop Corn Co., 815 F.3d 409, 415 (8th Cir. 2016) ("We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions." (citations and quotation marks omitted)).

CONCLUSION

[¶20] In sum, Gonzalez has failed to establish a new trial is necessary in this matter. He has failed to show any of the Court's rulings prejudiced him in any way. The Court concludes there was no error in the comments or rulings made at trial. Accordingly, Gonzalez's Motion for New Trial is **DENIED**.

[¶21] **IT IS SO ORDERED**.

DATED April 27, 2022.



Daniel M. Traynor, District Judge
United States District Court

[Transcript pp. 375:14-377:9]

November 5, 2021. The parties, counsel, and the jury is in the courtroom. Members of the jury, for purposes of scheduling, I want to let you know that we're going to try to complete -- I've told the attorneys we need to be done at four o'clock today to give everybody an opportunity to get home perhaps during daylight. We're not going to finish by noon so if you're a deer hunter, I'm sorry about that. But, in any event, you can plan your schedule accordingly. On Monday I would like to start at nine o'clock again so if that requires some travel back to the Bismarck/Mandan area, you may want to plan your Sunday accordingly and get to the courthouse about a quarter to nine and we'll try to get on the record at nine o'clock as we are today.

I also need to give you an additional instruction. I've allowed Exhibit 78 into the record, and it will go back with you for your consideration during your deliberations. I can tell you that not every court would do that in a case like this. It's a discretionary matter. I made the decision to allow that to go back with you. Sometimes -- if it's not, it's flashed up on the screen, you're told that that's an opportunity for you to take a look at it. You have to keep notes and try to remember everything that it says, but the concern and the reason why it doesn't always go back is they don't -- judges, lawyers, parties, are concerned about the weight that jurors will give a particular item of evidence like

that. And so the measure of weight or how important something like that is, is a decision that you get to make. But we want to make sure that you don't give it more weight than it deserves. So I'm giving you an additional instruction regarding manufacturer information.

The information issued by manufacturers for the use of a drug are competent evidence to use in determining whether the appropriate standards of care are followed. However, they are not to be used as conclusive evidence of or to establish the standards of care required of each medical professional on their own.

Instead, you may consider them along with the other testimony presented in determining whether each medical professional met the standard of care in this case.

I'll include that as part of the closing instructions so that you have that item as an additional reference point but that applies to Exhibit 78, Plaintiff's Exhibit 78, which you'll recall is the Bactrim insert.

There may be some additional exhibits that we allow from the manufacturer. Keep in mind these are written by drug companies and lawyers that include all sorts of information to protect principally drug companies from having a lawsuit like this; so they'll include all sorts of information in those documents. Because if they know of a concern and they don't put it into an insert like that and they have a lawsuit as a

result, it's a case that I'm sure Mr. Leventhal would love to take on behalf of somebody who is injured as a result of that type of conduct. So keep it in perspective.

All right. I've also informed the attorneys that some members of the jury are having a difficult time hearing witnesses. I've told the attorneys that the jury may go like that (indicating) if they need to hear better and so please do so and we'll try to make sure that the microphone is brought in the face of the person who is testifying.

And it appears that we are ready to proceed with the continuation of the plaintiff's case.

Mr. Leventhal, you may call your next witness.

MR. LEVENTHAL: Thank you, Your Honor. Good morning everyone. Your Honor, at this time we would call Dr. Kenneth Corre.

THE COURT: Dr. Corre, please come forward to the courtroom deputy and raise your right hand.

KENNETH CORRE,

having been first duly sworn, was examined and testified as follows:

THE COURT: Mr. Corre, please have a seat.

Mr. Leventhal, I imagine you're going to be examining Dr. Corre on direct examination. You may or may not need to have the deposition in front of him. But I suspect defense counsel may want it at some point and I would suggest that that

[Transcript pp. 440:15-443:10]

from the clerk's office.

MS. KOLB: Yeah, I know. I hear you. I didn't want to interrupt Mr. Leventhal but I hear you, Your Honor. I will do that if it comes up.

THE COURT: Okay. Very good. If there's nothing else, we are -- stand adjourned for just a few minutes, and you'll be back on the stand when we do.

(Recess taken from 10:59 a.m. to 11:15 a.m.)

THE COURT: And we're back on the record in Marco Gonzalez versus Salem Shahin, M.D., et al., Defendants, Civil Case 17-cv-157. I'm District Judge Dan Traynor. We're just about to return from the first break of the day on November 5, 2021, in the third day of the jury trial. Counsel and parties are in the courtroom. The jury is not in the courtroom.

Mr. Leventhal, did you have an objection you wanted to make?

MR. LEVENTHAL: I do, Your Honor. The Court, when we began the session today, read your instruction about the label.

THE COURT: Right.

MR. LEVENTHAL: It also introduced to the jury evidence which is not endorsed from any expert witness from the defense, from the plaintiff, even though we've known the label is at issue about what the purpose of the label is and that the purpose of the label clearly protecting the drug companies from liability if they don't put something in the label. I want to

register an objection to that. I would request that the Court not allow the defense to pile on to that and question people do you agree with the judge or whether they use those words or not, that the label really -- the main purpose is to protect the drug companies. We don't think that it would be appropriate given that not one expert witness is endorsed to say that. This is not evidence that would come in. I suspect that if I had a witness try to say, well, what's the purpose of the label and not -- and they had objected, the Court probably would have sustained the objection.

And because of that I render -- I'm making a record with my objection, and also request that the defense not be allowed to open that up and even suggest that that's the purpose of the label at any other time during this trial.

THE COURT: Mr. Leventhal, your objection is noted. It's common sense.

But any response from the defense?

MS. KOLB: I will say this on behalf of my clients. I know my colleagues here want to comment as well. I did not plan to ask a question like that of Dr. Corre so to the extent there might be a concern about that.

THE COURT: Mr. Schwegman or Mr. Hanson?

MR. SCHWEGMAN: Your Honor, there was testimony -- there's testimony but certainly in my opening statement I talked about the Bactrim label in that introductory paragraph

and the purpose of that. So I don't think Mr. Leventhal's objection goes to the content of the Bactrim label and comments within that label because, for example, in that first paragraph when he reads the mandate that the Bactrim should only be prescribed if there is a proven or strongly suggested infection initially left out the part that talked about to prevent the development of bacteria-resistant antibiotics. So I fully intend to cross-examine witnesses on that and I just don't want his objection to be so overbroad that it prevents me from using portions of the sort of self-evident contents of the label.

THE COURT: It's not overbroad. I don't believe my comments were in any way inappropriate. I think that it's a matter of common sense that these items are drafted by drug companies when they are released as part of the offering of the prescription and the drug.

And so your objection is noted for the record, Mr. Leventhal, if you want to preserve the matter for an appeal, but I'm not going to sustain the objection. I'm going to overrule it. Counsel can use it. Refer to the matter if they deem it appropriate but I don't, frankly, think that they're going to. It's just a matter of common sense that these things are produced by drug companies for the purpose of protecting them.

MR. LEVENTHAL: And as far as the second part of my request which was that they not be --

THE COURT: Denied.

MR. LEVENTHAL: Pardon me?

THE COURT: Denied. I'm not going to place any limitations on the defense counsel based upon something that I said as an offhanded comment which is a matter of common sense, Mr. Leventhal, in my opinion.

MR. LEVENTHAL: Thank you.

THE COURT: Okay? You have a problem with it, take it to an appeals court.

You can call the jury.

(In open court, parties and jury present.)

THE COURT: And we are continuing on the record in Marco Gonzalez, plaintiff, versus Salem Shahin, MD, et al., defendants, Civil Case Number 17-cv-157. I'm District Judge Dan Traynor.

The jury has returned to the courtroom. We are proceeding with the cross-examination of one of the plaintiff's witnesses, Dr. Kenneth Corre. It's my understanding, Ms. Kolb, you'll be cross-examining Dr. Corre, at least initially; and you may proceed.

MS. KOLB: Thank you Your Honor.

CROSS-EXAMINATION

BY MS. KOLB:

Q. Good morning, Dr. Corre.

A. Yes, it is still good morning.

[Transcript pp. 724:11-725:11]

the lesions are getting worse, was it substandard care for Dr. Andelin not to transfer this patient to a burn unit?

A. Yes.

Q. Was that substandard care a proximate cause of his injuries, damages, and losses?

MS. KOLB: Objection to foundation.

THE COURT: Overruled.

You can answer. You can answer.

THE WITNESS: Oh, I can. Yes, it was substandard care. I'm sorry.

Q. (MR. LEVENTHAL CONTINUING) And I want you to go to the top of that page because at the top of that page -- under shift summary -- for 2:08 in the morning on August 3rd, it includes "skin is getting more sensitive," it's about -- "skin is getting more sensitive for the patient, noted on the posterior upper back that the skin is starting to peel. Blister-like skin noted on the nose." Is skin peeling, skin sloughing a sign of Stevens-Johnson syndrome?

A. Yes, it's a sign, a late sign.

Q. I want you to go to 172, 3:20 in the morning, August 3rd. Bottom of that page, please. This is an addendum added by Nurse Eva Apolis: "Patient started to have hallucination. Patient asked if I could call his friend and I said yes; and he asked me also what room is he in now. I said ICU 2. And even given him directions if he's coming through the ER, unaware

that the patient was calling 911. He looks anxious and his heart rate has increased to 140 -- 140s to the 150s. Security came. Then the police came to see the patient. He claimed he can see things even if his eyes are closed. No sleep in the last two days." Are hallucinations a sign or something that can occur with Stevens-Johnson syndrome?

A. It's a sign that his brain as an organ is being adversely affected by the stress of the situation and obviously if Stevens-Johnson syndrome or many other things get severe enough, you can have that. It's also very frequent with sleep deprivation to begin to have hallucinations.

I might add it's also possible with heavy doses of opioid pain medicines and other sedative-type medicines to have hallucinations.

Q. What's the significance of his heart rate being 140 to 150?

A. In an adult, the heart rate at 150 begins to not allow the heart to fill. I think we've all probably knocked over a glass of water on the table and picked it up really quick and not all the water ran out of the glass before we got it turned upright. With a heart rate of 150 and your heart is beating really fast (indicating) -- I'd have to clap about this fast to get 150 -- there's no time for the blood to run into the heart between beats. So the cardiac output drops very low and the patient effectively has a greatly diminished heart rate. A sustained