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Michaels v. Pentair Water Pool & Spa, Inc., 131 Nev. Adv. Op. 81 (Oct. 1, 2015)

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CIVIL PROCEDURE : ATTORNEY MISCONDUCT AT TRIAL

Summary

The Court of Appeals considered an appeal from a district court order denying the plaintiff's post-trial motion for a new trial, which alleged that the defendant's attorney committed misconduct during closing arguments at trial. The Court held that the district court failed to make the detailed findings required by the Nevada Supreme Court for claims of attorney misconduct and remanded the case for the district court to reconsider the matter and make the necessary findings.

Background

Emmett Michaels ("Appellant") filed suit against Pentair Water Pool and Spa, Inc. ("Respondent"), seeking damages for injuries caused by the allegedly spontaneous explosion of a swimming pool filter manufactured by Respondent. Appellant alleged that the design of the filter was legally defective and that Respondent failed to give him proper warnings pertaining to the risk of explosion. After a two-week trial, the jury returned a jury verdict in favor of Respondent on all claims. Appellant filed a post-trial motion for a new trial, alleging that defense counsel committed misconduct by making impermissible statements during closing arguments. The trial court denied that motion and Appellant appealed.

Upon reviewing the district court's denial of Appellant's post-trial motion for a new trial, the Court of Appeals determined that the district court did not make the detailed findings required by the Nevada Supreme Court for claims of attorney misconduct.² However, rather than simply remanding the case to the district court for consideration in light of the neglected precedent, the Court used this case as an opportunity to provide guidance to the lower courts by synthesizing and articulating the Nevada Supreme Court's recent decisions pertaining to attorney misconduct. Further, in order to better describe the types of findings the district court should have made in this case, the Court analyzed the basic issues addressed at trial.

As a preliminary matter, the Court briefly discussed the operation of swimming pool filters in order to provide a better understanding of the arguments presented at trial. The Court identified as particularly relevant to this case the fact that air can bleed into a residential pool filtration system when it is turned off, and that when the system is turned back on, the air can get trapped between flowing water and a clogged filter grid, causing a buildup of pressure in the filter canister. This pressure can eventually rise to such a level that it causes the filter canister to explode. The Court further noted that the instruction manual accompanying the filter at issue in this case recommended that the consumer manually bleed excess air from the system whenever the system is turned off and on, but that consumers cannot comply with this recommendation when they, as most residential pool owners do, connect the filtration system to a timer that automatically shuts the system on and off.

¹ By F. Shane Jackson.

² See generally *Gunderson v. D.R. Horton, Inc.*, 130 Nev. ___, 319 P.3d 606 (2014); *BMW v. Roth*, 127 Nev. 122, 252 P.3d 649 (2011); *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

The Court then discussed the evidence and arguments presented at trial. Appellant argued that the known risks of explosion rendered Respondent’s filter design inherently unsafe and presented expert witnesses who testified accordingly. Further, Respondent’s chief engineer confirmed that the phenomenon of exploding filters was known within the industry and that Respondent had sold other filter models that successfully prevented such explosions. The engineer further conceded that Respondent designed the filter at issue to be cleaned by consumers and that manufacturers could foresee the possibility that consumers would accidentally create exploding filter canisters through improper cleaning or by turning the system on and off.

Respondent countered that the Appellant’s negligent maintenance and installation of the filter, not an inherent design defect, caused the explosion in this case. Respondent implied such misuse through two different arguments: (1) that Appellant negligently disposed of parts of his pool filtration system after the explosion but before trial, and (2) that Appellant’s account of what happened was not credible. Based on the former argument, Respondent requested—and the trial court gave—an instruction to the jury permitting them to infer that the evidence disposed of would have been unfavorable to Appellant. As to the latter argument, Respondent challenged Appellant’s assertion that the filter exploded spontaneously by introducing evidence tending to show that Appellant was conducting some kind of maintenance on the filter when it exploded. Ultimately, Respondent argued that Appellant failed to meet his burden of showing either that the design of the filter was unsafe or that it was the proximate cause of the explosion.

After the jury returned a verdict in favor of Respondent on all claims, Appellant filed the instant motion. The Court concluded that the trial court failed to properly analyze the claims of attorney misconduct as required by the Nevada Supreme Court in *Lioce v. Cohen*.³

Discussion

According to *Lioce*, when considering a motion for a new trial because of attorney misconduct allegedly committed at trial, the district court must make detailed findings about the role of the alleged misconduct and how it likely affected the jury’s verdict.⁴ In this case, the district court’s order denying the motion merely stated that it did not find grounds for a new trial considering Appellant’s allegations under *Lioce*, and thus it failed to make the requisite findings.

On appeal, the Court must review the district court’s decision to deny the motion for an abuse of discretion,⁵ viewing the evidence and all inferences most favorably to Respondent.⁶ According to *Lioce*, an attorney may not “encourage the jurors to look beyond the law and the relevant facts in deciding the case before them.”⁷ “Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party’s substantial rights.”⁸

Determining whether misconduct warrants a new trial is a three-step analysis. First, a court must determine whether misconduct occurred.⁹ Whether an attorney’s comments amount to

³ 124 Nev. 1, 174 P.3d 970.

⁴ *Id.* at 20, 174 P.3d at 982.

⁵ *Id.*

⁶ *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009).

⁷ 124 Nev. at 6, 174 P.3d at 973.

⁸ *Gunderson*, 130 Nev. at ___, 319 P.3d at 611.

⁹ *Id.*

misconduct is a question of law reviewed on appeal *de novo*.¹⁰ If misconduct has occurred, the court must then determine the proper legal standard to apply to the question of whether the misconduct warrants a new trial.¹¹ Lastly, the appellate court must determine whether the district court abused its discretion in applying that standard.¹²

The proper legal standard to apply depends on whether the moving party made a timely objection to the alleged misconduct at trial.¹³ When the moving party failed to make a timely objection, the district court must treat the issue as though the moving party waived it, unless plain error exists.¹⁴ In determining whether there is plain error, the district court must determine whether the moving party demonstrated that the attorney misconduct resulted in error constituting “a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.”¹⁵ In accomplishing this, the district court must weigh the misconduct against the reasonableness of the jury’s verdict in light of the evidence in the record.¹⁶

Further, the district court must consider the context of the misconduct.¹⁷ Misconduct that touches directly upon the central questions the jury needed to resolve is more likely to result in plain error than misconduct that was collateral to the main issues of the case.

Finally, the district court must consider the frequency of the misconduct. Persistent misconduct is more likely to have resulted in plain error than isolated instances.¹⁸

Here, the Court stated that if its review of the record had clearly shown that either no attorney misconduct occurred or that, if it did, it could not have affected the jury’s verdict, then there would be no need to remand the case to the district court for further findings. However, the record revealed that Respondent’s trial counsel did make statements during closing arguments that could constitute misconduct, including providing personal opinions of witnesses in violation of Nevada Rule of Professional Conduct 3.4(e) and inviting the jury to apply the adverse instruction discussed earlier to matters unrelated to Appellant’s failure to preserve evidence. Since this potential misconduct related to key elements of Respondent’s defense strategy and the most important issues the jury needed to consider, the Court concluded that more detailed findings from the trial court were needed to determine whether there was no other reasonable explanation for the verdict other than the alleged misconduct.

The Court held that, on remand, the district court must at least clarify whether it found that no misconduct occurred or that the misconduct was harmless in view of

- (1) the nature of the claims and defenses asserted by the parties;
- (2) the relative strength of the evidence presented by the parties;
- (3) the facts and evidence that were either disputed or not substantively disputed during the trial;
- (4) the type, severity, and scope of any attorney misconduct;
- (5) whether any misconduct was isolated and incidental on the one hand or repeated and persistent

¹⁰ *BMW v. Roth*, 127 Nev. 122, 132, 252 P.3d 649, 656 (2011).

¹¹ *Gunderson*, 130 Nev. at ___, 319 P.3d at 611.

¹² *Id.*

¹³ *See Lioce*, 124 Nev. at 17-19, 174 P.3d at 980-82.

¹⁴ *Id.* at 19, 174 P.3d at 982.

¹⁵ *Id.*

¹⁶ *Gunderson*, 130 Nev. at ___, 319 P.3d at 614.

¹⁷ *Id.*

¹⁸ *See id.* at ___, 319 P.3d at 612.

on the other; (6) the context in which any misconduct occurred; (7) the relationship of any misconduct to the parties' evidence and arguments; and (8) any other relevant considerations.¹⁹

The district court's goal in reviewing these considerations is to determine whether the jury's verdict was the product of the alleged misconduct,²⁰ and it must do so assuming that the jury believed all of the evidence favorable to the non-moving party.²¹

Conclusion

When ruling on a post-trial motion for a new trial based upon the alleged misconduct of the non-moving party's attorney, the district courts must make the detailed findings required by the Nevada Supreme Court. In this case, the district court failed to do so and the case was remanded for consideration in light of the Court of Appeals' articulation of the governing precedent.

¹⁹ Michaels v. Pentair Water Pool & Spa, Inc., 131 Nev. Adv. Op. 81 at 27 (Oct. 1, 2015).

²⁰ Grosjean v. Imperial Palace, Inc., 125 Nev. 349, 363, 212 P.3d 1068, 1079 (2009).

²¹ *Id.* at 366, 212 P.3d at 1080.