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Evans-Waiiau vs. Tate 138 Nev. Adv. Op. 42 (June 16, 2022)

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Moving for a New Trial under *Lioce*

Summary

Both a procedural and substantive question were presented in this appeal. The procedural question asked whether a party must move for a new trial in district court to preserve attorney-misconduct claims on appeal. The Court recently held that a party is not necessarily required to move for a new trial to preserve its trial error-based arguments or ability to seek a new trial as an appellate remedy.²

Respondents argue that the Court's decision in *Lioce v. Cohen* requires a party to move for a new trial to preserve a specific claim that attorney misconduct warrants a new trial.³ The Court determined that Respondents read too much into *Lioce* and ignored the procedural nature of that case. The Respondents were only concerned with whether the complaining parties preserved their attorney misconduct arguments with contemporaneous objections.

Facts and Procedural History

The case was about a car accident that occurred in October of 2015. Desire Evans-Waiiau was driving westbound on Flamingo Boulevard. Guadalupe Parra-Mendez was a passenger in the vehicle along with several children who are not parties to the appeal. According to Evans-Waiiau she stopped abruptly to avoid hitting a pedestrian in the crosswalk at the intersection of Flamingo and Linq Lane. Babylyn Tate, Respondent, was driving behind Evans-Waiiau. Evans-Waiiau braked suddenly, and Tate struck the rear of Evans-Waiiau's vehicle. Tate testified that she did not seek either a brake light or a turn signal. Tate testified that she swerved and braked to avoid the collision. No injuries were reported at the scene. Appellants filed a complaint several months after the accident and after obtaining medical treatment had been obtained alleging that Tate negligently operated her cause and caused appellants injury. Tate responded asserting that Evans-Waiiau was comparatively negligent as an affirmative defense and that appellants could not otherwise prove that their medical treatment was casually related to the October accident.

At trial, appellants called Jorge Parra-Meza who is Evan-Waiiau's significant other Parra-Mendez's brother as a witness. Parra-Meza owned the vehicle involved in the accident. He is also the father of the children who were also in the vehicle. Parra-Meza stated that he had "smoked-out" taillight covers on the vehicle which he installed after purchasing the vehicle.

¹ By Anne-Greyson Long.

² *Rives v. Farris*, Nev. Adv. Op. 17, 506 P.3d 1064 (2022).

³ *Lioce v. Cohen*, 124 Nev. 1 at 19, 174 P.3d 970 (2008).

Parra-Meza also testified that the vehicle had been rear-ended twice after he added the smoke-out lights. Tate introduced an audio/video recording that Parra-Meza made the night of the accident in which he uses profanities. Appellants argued that the profanity-laced video carried a potential for unfair prejudice that outweighed any probative value of the recording. The district court concluded that the recording was relevant. The district court also allowed Tate to ask appellant's medical providers questions "regarding the existence of any past working relations with appellants' counsel involving medical liens only." Tate called Dr. Schifini, a board-certified anesthesiologist, as a witness. Dr. Schifini did not form an opinion as to whether the accident caused the injuries but addressed whether the treatment the appellants received was reasonable and necessary. Appellants moved to strike Dr. Schifini's testimony. The district court denied the motion. Before closing arguments, the district court provided two jury instructions related to Evans-Waiiau's potential comparative negligence, No. 34 and No. 35.

During closing argument, Tate's attorney discussed "the value of the dollar," as it related to appellants' requested damages. Appellants objected on the basis that the argument improperly suggested that Tate would be unable to pay appellants' projected damages. The district court sustained the objection as it assumed facts not in evidence but allowed Tate to make a hypothetical argument about how long it would take a family to save the requested damages. Appellants did not object to this argument. The jury found Tate not negligent, and the district court entered judgment on the verdict. The court of appeals affirmed, the Court granted review.

Discussion

Appellants did not waive their attorney-misconduct claims by not moving for a trial in district court

The plaintiff argues that the appellants waived their attorney-misconduct claims because they did not move for a new trial before filing the appeal. Tate cited *Lioce v. Cohen*. The Court disagreed. The Court recently addressed whether a party must move for a new trial to raise a preserved issue on appeal in *Rives*.⁴ Noting, "a party need not file a motion for a new trial to raise a preserved issue on appeal or request a new trial as a remedy for alleged errors below." *Lioce* rose from a post-trial motion process, but the procedural stance does not work as a barrier to appellate review.

The Court addressed in *Lioce* "the issue of which standards district courts are to apply when deciding motions for a new trial based on attorney misconduct," noting that the issue was framed that way because the underlying appeals were taken from orders granting or denying motions for a new trial based on alleged attorney misconduct. A requirement that a party must move for a new trial based on alleged attorney misconduct to preserve that issue for appeal was never imposed. The Court concluded accordingly.

⁴ *Rives*, 138 Nev., Adv. Op. 17, 506, P.3d at 1068.

Tate did not make an improper ability-to-pay argument

Appellants contend that Tate made an improper ability-to-pay argument in closing that constituted reversible attorney misconduct. The Court disagreed. Specifically, all the cases on which appellants rely focus on whether the defendant explicitly mentioned or asked the jury to consider the defendant's lack of wealth or inability to pay. Tate did not do that. Tate's attorney did, however, discuss the value of a dollar, and told the jury to determine what amount would compensate the appellants and "what that money means to them." There was no mention of Tate's inability to pay a judgment nor was Tate's financial circumstances discussed.

The appellants contend that this argument also improperly encouraged jury nullification. The Court determined that this was not the case. Rather, a hypothetical provided in the context of the value of money and Tate thus argued that the evidence did not support negligence or the necessary element of causation.

The argument did not constitute an impermissible golden-rule argument and the focus on Tate's statement that if a family was able to save \$5,000 "they'd be doing - that's better than most of us," met with no objection from the appellants in this revised closing argument and thus the waiver applied.⁵ The appellants objected to the initial hypothetical only on the ground that it was an impermissible ability-to-pay argument. No golden-rule objection was made even though a golden-rule objection is distinct from an ability-to-pay objection.⁶

While a party must object to an improper attorney argument to preserve the issue for appeal, when a party fails to object, the Court may still review allegations of such misconduct for plain error. A party must show "that no reasonable explanation of the verdict exists," in order to succeed on a plain-error review of an unobjected-to attorney misconduct. In Tate, the statement regarding saving \$5,000 does not offset the evidence supporting the jury's verdict. The Court spelled out evidence reviewed by the jury supporting the verdict.

Appellants' remaining arguments do not warrant reversal

The Appellants argue that the court abused its discretion when it (1) admitted the Parra-Meza audio/visual recording. The Court determined that the district court did not abuse its discretion when admitting the recording. Citing that the recording was relevant to the case as it spoke to both credibility and motivation in testifying.⁷ The recording and subsequent testimony could show Para-Meza was motivated to inflate Evans-Waiiau's injuries, especially in light of the minor damage to the vehicle.⁸ Evidence was presented to show Parra-Meza's motivation in testifying about Evans-Waiiau's injuries, it is not hearsay. Finally, the use of profanity does not make the recording unduly prejudicial.⁹ The profanity used in the recording has become

⁵ See *Lioce*, 124 Nev. at 19, 174 P.3d at 981

⁶ Compare *Lioce*, 124 Nev. at 22, 174 P.3d at 984 with *Geddes*, 559 F.2d at 560.

⁷ See *Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 232, 445, P.3d 846, 848 (2019).

⁸ *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991).

⁹ See *United States v. Bufalino*, 683 F.2d 639, 647 (2d Cir. 1982).

commonplace and therefore the district court did not abuse its discretion by admitting the recording as evidence. The jury would not be surprised at the profanity in light of the circumstances in which Parra-Meza made the recording. (2) gave two comparative-negligence jury instructions regarding appellants' taillights. The district court did not abuse its discretion when it gave comparative-negligence jury instructions. Both Evans-Waiiau and Parra-Meza testified that Parra-Meza installed aftermarket taillight covers that "smoked out" the rear taillights. In testimony, Parra-Meza agreed that regular taillights are more visible and that he had been rear-ended twice after he installed the "smoked out" taillight covers. Tate's testimony included that she did not see "any turn signal" or brake lights.¹⁰ (3) allowed Dr. Schifini to testify as an expert witness. The Court was not persuaded that the district court abused its discretion by allowing Dr. Schifini's testimony.¹¹ Dr. Schifini's testimony assumed that the appellants were injured in the crash and suffered the symptoms they reported. He concluded that several aspects of the medical care appellants received were not reasonable. Dr/ Schifini's testimony included the plaintiff's causation theory in his analysis and therefore the district court properly allowed it as rebuttal expert testimony.

Conclusion

An appellant need not move for a new trial to raise claims of improper attorney arguments on appeal if they preserved the issue with an objection. The Court concluded that the alleged improper ability-to-pay argument and golden-rule arguments did not warrant reversal. The Court further determined that the other alleged trial errors, abuse of discretion, did not occur in the three areas of concern (1) admittance of the audio/video recording of Para-Meza met the relevancy criteria, (2) giving comparative-negligence jury instructions in light of undisputed testimony regarding the alternation of the taillight covers and turn signal use, and (3) allowing Dr. Schifini to testify as an expert witness. Dr. Schifini met the requirement for an expert witness testimony on causation. The Court affirmed the district court's judgment on the jury verdict.

Dissent

Justices Stiglich, Silver, and Hendron dissented, noting that Tate's counsel's comments during closing amounted to an impermissible ability-to-pay argument. The dissenting Justices would reverse the judgment and remand for a new trial.

¹⁰ See *Banks v. Sunrise Hosp.*, 120 Nev. 822, 832, 102 P.3d 52, 59 (2004).

¹¹ *FGA, Inc. v. Giglio*, 128 Nev. 271, 278 P.ed 490, 498 (2012).