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### Summary of BMW v. Roth, 127 Nev. Adv. No. 11

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*BMW v. Roth*, 127 Nev. Adv. No. 11 (April 14, 2011)<sup>1</sup>  
Civil Procedure – Order for a New Trial

**Summary**

Consolidated appeals from the Eighth Judicial District Court order granting a new trial in a tort action and from post-judgment orders regarding an award of attorney fees and costs.

**Disposition/Outcome**

The Court reversed both the District court’s judgment granting a new trial and the award of attorney fees and costs because there was no contemporaneous objection when the asserted instances of attorney misconduct occurred.

**Factual and Procedural History**

Alyson Roth (“Roth”) was involved in a single-car rollover accident. At the time of the accident, Jennifer Stapleton (“Stapleton”) was driving Roth’s BMW while Roth slept in the front seat. The car strayed off the side of the road, swerved back across the highway, and then rolled into the desert before landing on its roof. Roth was ejected from the car and suffered a spinal cord injury that rendered her paraplegic.

Roth sued Stapleton for negligence and BMW for strict product liability. Roth alleged that although she was wearing her seatbelt, defects in BMW’s safety restraint system allowed her to be thrown from the car. Roth’s experts testified that roof support between the car’s front and rear side windows separated from the roof rail during the crash, causing Roth’s seatbelt to become slack. BMW countered that Roth was not wearing her seatbelt and was ejected from the passenger window before the vehicle began its second roll.

Prior to trial, Roth filed a motion in limine requesting that the court allow her to present evidence she was wearing her seatbelt, and prohibit BMW from presenting evidence to the contrary. Roth based her motion on Nevada’s Seatbelt Statute that prohibits a fact-finder from considering evidence that a party was not wearing a seatbelt when determining causation or negligence in a civil action.<sup>2</sup> However, the district court found that in order for Roth to establish the seatbelt was defective, she also had to prove that she was wearing the seatbelt at the time of the collision. Thus, BMW was entitled to present evidence that Roth was not wearing her seatbelt to defend itself against Roth’s crashworthiness claim. Before opening statements, the district court gave the jury a limiting instruction, ordering it to only consider evidence suggesting Roth was not wearing her seatbelt for the purpose of evaluating Roth’s claim that the subject vehicle was defective and unreasonably dangerous.

Throughout the trial, argued extensively on whether Roth was belted and how she was thrown from the car. However, Roth did not object to BMW’s claims that she was not wearing her seatbelt until BMW made the assertion during closing arguments. The district court sustained the objection on the basis the comment was too broad and in violation of the order in limine. The court then struck the statement and reread the limiting instruction. Roth again

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<sup>1</sup> By Danielle Woodrum.

<sup>2</sup> NEV. REV. STAT. § 484D.496(4) (2007).

objected during closing arguments when BMW opined that Roth's structural defect claims were "red herrings" because Roth was not wearing her seatbelt. The court sustained the objection and directed BMW to clarify its statement. BMW did so by emphasizing that the evidence showed that Roth was not wearing her seatbelt so there was no proof that a defect in the seatbelt caused Roth's injuries.

The jury found that Stapleton was negligent in causing Roth's injuries. The jury also found, by answering special interrogatories, that the vehicle was not defective. Because the jury found that the vehicle was not defective, they never reached the issue of causation.

Roth filed a motion for a new trial pursuant to N.R.C.P. 59(a)(2), which allows the court to grant a new trial if the prevailing party engaged in misconduct that materially affects the substantial rights of the aggrieved party.<sup>3</sup> The district court found that BMW intentionally, repeatedly, consistently and persistently violated the order in limine during voir dire, opening statements and closing arguments and therefore granted the motion for a new trial.

## **Discussion**

### *Attorney Misconduct Under N.R.C.P. 59(a)(2)*

Justice Pickering, writing for the Court sitting en banc, stated that an attorney's violation of an order in limine can amount to misconduct, sufficient to justify a new trial under NRCP 59(a)(2), if the standards of *Lioce v. Cohen*<sup>4</sup> are met. The Court reviews attorney's comments for misconduct de novo. The three elements that must be satisfied for a new trial due to attorney misconduct are that the order in limine must be specific in its prohibition, the violation must be clear, and unfair prejudice affecting the reliability of the verdict must be shown.

The Court held that the standard a district court is to apply for a motion for a new trial based on misconduct depends on whether or not the counsel objected to the misconduct during trial.<sup>5</sup> For objected-to misconduct, a party moving for a new trial bears the burden of demonstrating that the conduct is so extreme that objection, admonishment and curative instruction cannot remove its effect.<sup>6</sup> If the misconduct is not objected to, the district court should deem the issue waived unless it is plain error. Moreover, the court emphasized that usual deference to the lower court's findings was not owed if the lower court committed a legal error.

The Court examined each of the three instances of attorney misconduct that the district court identified. First the Court examined the alleged misconduct during voir dire. During voir dire, BMW stated that "plaintiff claims she was seatbelted [and] BMW claims that the physical evidence shows that she was not wearing her seatbelt." The district court admonished BMW's attorney to refrain from arguing the case. Roth pointed to this as an example of BMW's misconduct violating the motion in limine. The district court found that this was misconduct, but the Supreme Court found this "clearly erroneous" because the order in limine allowed the introduction of seatbelt evidence.

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<sup>3</sup> Nev. R. Civ. P. 59 (a)(2).

<sup>4</sup> *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008).

<sup>5</sup> *Id.* at 6-7, 174 P.3d at 973.

<sup>6</sup> *Id.*

The Court next examined the four instances during opening statements that the district court found to be violations of the order in limine. Roth did not object at each instance and the district court did not admonish BMW's counsel sua sponte for making the comments. Nevertheless, the district court viewed the instances as objected-to misconduct under *Lioce*, because its order in limine and associated limiting instruction were definitive and clear. Furthermore, the district held that Roth's motion in limine constituted adequate objection to what it found were BMW's violations of the order.

The Court found the district court in error on both counts. The order was definitive in permitting evidence to be introduced on Roth's behalf, but not definitive or specific as to the limitations imposed on the use of seatbelt evidence. Additionally, while Roth's motion in limine may have preserved her objection to the admission of the seatbelt evidence, that objection was neither the basis for her appeal or the order granting it. A contemporaneous objection is required to claim misconduct associated with an asserted violation of an order in limine.

#### *Order in Limine does not Serve as a Continuing Objection*

The Court next considered whether the *Lioce* requirement to object to a party's violation of an order in limine to preserve the error for a subsequent motion for a new trial was consistent with *Richmond v. State*.<sup>8</sup> *Richmond* held that once an objection had been fully briefed and the district court decided on the motion, the motion in limine is preserved for appeal.<sup>9</sup> *Lioce*, on the other hand, generally held that, regardless of a motion in limine, unobjected-to attorney misconduct is waived unless it constitutes plain error.<sup>10</sup> However, the Court stated that whether an order in limine preserves error depends on whether the alleged error violates the court's previous ruling on the motion. The Court concluded that an objection is required when an opposing party or the court violates an order in limine.

#### *Objections would have Clarified the Order in Limine*

The Court next examined the conferences held before and during closing arguments as examples of the confusion over the limitations that the order in limine placed on arguments. The Court noted that the order in limine lacked specificity because the law regarding when seatbelt evidence can be introduced in a crashworthiness case is unclear. Although, the Court did not clarify the law regarding seatbelt evidence, it did note that objecting to BMW's statements would have prompted the district court to clarify what the order in limine actually allowed and prohibited. The Court ultimately reaffirmed that a fully briefed and definitively ruled-on motion in limine on an evidentiary question preserves error for challenges to whether the district court properly ruled on the motion. However, the motion in limine itself does not serve as an objection for violation of the order in limine, including attorney misconduct for that violation.

The Court reviewed the two objected-to statements during closing arguments. BMW's first objected to statement was that Roth was not wearing her seatbelt, so a defective seatbelt could not have caused her injuries. The Court found that this statement did not violate the order in limine and thus did not constitute misconduct. The second objected to comment that BMW made was Roth's defective seatbelt claims were "red herrings" because Roth was not wearing

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<sup>8</sup> *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249, 1254 (2002).

<sup>9</sup> *Id.* at 932, 59 P.3d at 1254.

<sup>10</sup> *Lioce*, 124 Nev. at 19, 174 P.3d at 981-82.

her seatbelt. At trial, Roth's objection to this statement was sustained, and the jury was instructed to disregard the statement. BMW clarified the statement, and Roth did not object to the clarified statement. The court questioned whether this statement was indeed improper, but because the admonition and instruction occurred so quickly, the court analyzed that statement as involving objected-to and admonished misconduct under *Lioce*.<sup>12</sup>

In *Lioce*, the Court reasoned that when a party moves for a trial they must demonstrate that the objected-to and admonished misconduct were so extreme that objection and misconduct could not remove the misconduct's effect.<sup>13</sup> Here, the objected-to misconduct did not warrant a new trial because the admonishment and instruction sufficiently cured the misconduct.

The Court reversed the order for a new trial and consequently reversed the award of attorney fees and costs as well.

### **Conclusion**

Three elements are required for a violation of an order in limine to constitute attorney misconduct requiring a new trial under N.R.C.P. 59(a)(2). The order in limine must be specific, the violation must be clear, and unfair prejudice must be shown. The standards of review set forth in *Lioce* apply where a new trial is sought under N.R.C.P. 59(a)(2).

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<sup>12</sup> *Lioce*, 124 Nev. 1, 174 P.3d 970 (2008).

<sup>13</sup> *Id.* at 17, 174 P.3d at 981.