IN THE SUPREME COURT OF THE STATE OF NEVADA

ELISEO DAVID BAUTISTA,
Appellant,
vs.
CASSIE L. RISING,
Respondent.

No. 46879

FILED

MAY 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a new trial in a personal injury action. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Cassie Rising filed a personal injury complaint against Eliseo David Bautista following an automobile accident in Reno on July 18, 2001. Rising claimed lower back injuries consisting of herniated, bulging disks that pressed against her cervical nerves. Bautista admitted responsibility for the accident, but denied that Rising was injured. The issue at trial was limited to damages. The parties argued about whether Rising's injuries existed prior to the accident, and Bautista claimed that Rising lied during testimony, asserting that the responding officer's report stated that no injuries were suffered during the collision. Although Bautista received a defense verdict from the jury, the district court entered a judgment awarding Rising nominal damages of $1 and costs related to the litigation.

At issue in a motion for new trial filed by Rising after the verdict was the conduct of Bautista's counsel, Phillip Emerson. Specifically, Rising alleged that Emerson's conduct during trial, and particularly during his closing argument, caused the jury to reach an improper verdict. Although Rising failed to object to Emerson's conduct during closing argument, the district court gave both parties a copy of

DeJesus v. Flick[1] prior to closing arguments. The court distributed DeJesus "to remind counsel of the ethical limits placed on [closing] argument." The district court granted Rising's motion on February 2, 2006, following a hearing. The hearing on Rising's motion was initially consolidated with a show cause hearing as to why Emerson should not be sanctioned. However, the show cause hearing eventually was conducted separately and was subsequently suspended pending our decision in Lioce v. Cohen.[2]

Emerson committed misconduct warranting a new trial

We review orders denying or granting motions for a new trial for an abuse of discretion.[3] Further, "[w]hether an attorney's comments are misconduct is a question of law, which we review de novo."[4] However, "we give deference to the district courts' factual findings and their application of the standards to the facts."[5]

We recognize that Rising did not object to Emerson's misconduct during closing argument. However, we addressed the issue of unobjected-to attorney misconduct in Lioce, and held that unobjected-to attorney misconduct may be reviewed by this court for plain error when

---

[1]116 Nev. 812, 7 P.3d 459 (2000).

[2]122 Nev. ___, 149 P.3d 916 (2006), vacated on rehearing and new opinion issued, 124 Nev. ___, 174 P.3d 970 (2008).

[3]Lioce, 124 Nev. at ___, 174 P.3d at 982 (citing Langon v. Matamoros, 121 Nev. 142, 143, 111 P.3d 1077, 1078 (2005)).

[4]Id. (citing Bronneke v. Rutherford, 120 Nev. 230, 232, 89 P.3d 40, 42 (2004)).

[5]Id.

"'no other reasonable explanation for the verdict exists.'"[6] Further, we unequivocally established a standard for the district court to follow when deciding a motion for a new trial on the basis of unobjected-to attorney misconduct. The standard we stated in Lioce is:

> (1) [T]he district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists. In deciding whether plain error exists the district court must then determine
>
> (2) [W]hether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error. In the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.[7]

Pursuant to our decision in Lioce, we hold that the district court did not abuse its discretion in granting Rising's motion for a new trial. We so conclude, despite Rising's failure to object, on the basis of Emerson's misconduct. The conduct at issue in this case is the same conduct we reviewed and found to be misconduct in Lioce. The misconduct in the consolidated cases in Lioce and here consisted of jury nullification,

---

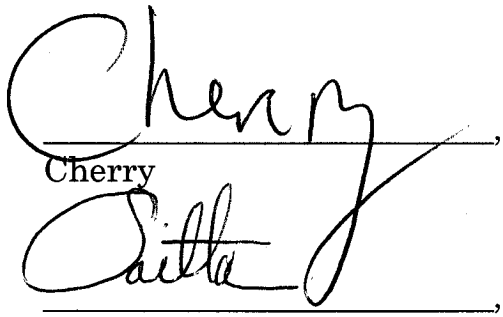
[6]Id. at ___, 174 P.3d at 982 (citing to Ringle v. Bruton, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)).

[7]Id. at ___, 174 P.3d at 982 (citing in part to Ringle, 120 Nev. at 95, 86 P.3d at 1040).

statement of personal opinion, and golden rule arguments, which we held were irreparable and fundamental error.

Here, Emerson made substantially the same closing argument as in all four consolidated cases reviewed in Lioce. Additionally, the evidence in this case was insufficient to show that the verdict would have been the same but for Emerson's misconduct. Applying the standard for district court review of a motion for a new trial developed in Lioce, we conclude that the district court did not abuse its discretion in this case. Therefore, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Robert H. Perry, District Judge
Lester H. Berkson, Settlement Judge
Emerson & Manke, LLP
Lemons Grundy & Eisenberg
Hale Lane Peek Dennison & Howard/Reno
Kevin D. Rising
Washoe District Court Clerk

MAUPIN, J., dissenting:

I would reverse the district court's decision and reinstate the jury verdict because, in my view, the misconduct here did not rise to the level of plain error as required for reversal. In this, the majority today overstates the reach of our recent decision in Lioce v. Cohen.[1]

DISCUSSION

In Lioce, we held that when a party fails to object to misconduct during trial, the issue will not generally be preserved for review by the district court or appeal.[2] However, an exception exists when the unobjected to misconduct rises to the level of plain error.[3] If plain error exists, we, and the district court, may review the unobjected to misconduct.[4] Plain error exists in the rare instance when "'no other reasonable explanation for the verdict exists' except for the misconduct."[5]

The majority mechanically applies the rule set forth in Lioce based upon factual similarity in the arguments given by defense counsel in the matter below, and the fact that defense counsel in this case was also the defense counsel in Lioce.[6] In doing so, it sub silentio creates an

---

[1]123 Nev. ___, 174 P.3d 970 (2008).

[2]Id. at 981.

[3]Id. at 980, 982.

[4]Id. at 982.

[5]Id. at 980, 982.

[6]Because this case was tried prior to our decision in Lioce, it is, in my further view, inappropriate to apply the law established in that case

continued on next page . . .

unjustifiable per se rule in which the types of misconduct outlined in Lioce automatically constitute plain error. In placing undue emphasis on the similarity of the arguments given by defense counsel in this case to those given in Lioce, the majority fails to apply the Lioce standard; whether an explanation for the verdict existed other than the misconduct.

In my view, there was a reasonable explanation in the instant case for the verdict other than the misconduct. For example, the jury could have reasonably disbelieved the medical testimony of Rising's witnesses, believed that Rising's injuries were a result of a degenerative disk disease as one witness stated, or believed that Rising was not candid about her injuries. In short, the level of misconduct demonstrated in this record did not compel judicial intervention. It is therefore inappropriate for us, as it was for the district court, to sua sponte review the unobjected to misconduct that occurred in this case.

CONCLUSION

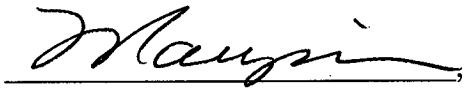
Reliance upon the similarity of the defense arguments in Lioce to find that such misconduct per se constitutes plain error is contrary to our decision in Lioce. Moreover, it is beyond dispute that a failure to object to an obnoxious argument may be the product of a tactical or strategic decision. In my view, judicial intervention in cases in which plain error does not exist deprives attorneys of the ability to make

---

. . . continued

here. Until then, the questionable and practically unenforceable standard of DeJesus v. Flick governed instances involving unobjected to misconduct. 116 Nev. 812, 7 P.3d 459 (2000). As discussed in this separate opinion, even under Lioce, I dissent to the majority's reasoning.

fundamental decisions about their case strategy and unduly interferes with the functioning of the jury system. Accordingly, this court should continue to view plain error in the context of attorney misconduct as a rare occurrence, and in this case, reverse the decision of the district court and reinstate the jury verdict.

 , J.

Maupin