IN THE SUPREME COURT OF THE STATE OF NEVADA

ETT, INC.,
Appellant,
vs.
JUAN DELEGADO, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ROSA DELEGADO; AND ARIZONA LABOR FORCE, INCORPORATED, D/B/A LABOR EXPRESS,
Respondents.

JUAN DELEGADO, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ROSA DELEGADO,
Appellant,
vs.
TERRIBLE HERBST, INC., A NEVADA CORPORATION; HERBST SUPPLY, INC.; AND ETT, INC.,
Respondents.

No. 46901

FILED

APR 29 2010

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

ORDER OF AFFIRMANCE

This is an appeal and cross-appeal from an amended district court judgment, certified as final under NRCP 54(b), in a wrongful death action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Appellant/cross-respondent ETT, Inc. (ETT) purchased Jackpot Enterprises, Inc., and the companies' assets were consolidated with one another. To help facilitate this process, facilities manager, Jeff Dearman, used temporary employees provided by Arizona Labor Force, Incorporated, d/b/a Labor Express (Labor Express). Two of the temporary

employees Labor Express provided for ETT, were Darwin Ray Ellison and Russell Foster.

On March 16, 2001, Ellison and Foster consumed alcohol before reporting to work at ETT. Upon arriving at ETT's facility, Ellison and Foster were permitted to enter onto the grounds by ETT's security guard. Dearman was on vacation that day and not present to supervise Ellison and Foster. Shortly after Ellison and Foster arrived at the facility, they entered ETT's truck and drove away. The two drove around Las Vegas for several hours and consumed more alcohol. While driving under the influence, Ellison struck and killed Rosa Delegado. At the time of the accident, Ellison's blood alcohol level was three times over the legal limit.

Respondent/cross-appellant Juan Delegado, Rosa's husband, brought a wrongful death action against ETT, Labor Express, and Ellison. After a jury trial, ETT was found liable for negligence, negligent entrustment, negligent retention, and negligent supervision. The jury found ETT 75% at fault and Ellison 25% at fault, and awarded Delegado $4,183,250.50 in compensatory damages and $10,000,000 in punitive damages. After a post-trial motion, the district court reduced the punitive damages award to the same amount as the compensatory damages award. This appeal followed.

On appeal, ETT assigns numerous errors. ETT argues that (1) the district court abused its discretion when it sanctioned ETT by excluding Foster's deposition testimony and the audiotape of his voicemail; (2) there was insufficient evidence supporting the jury's punitive damages award; (3) the punitive damages award was excessive; (4) the district court erred when it denied ETT's motion for judgment as a matter of law as to Delegado's negligence claims; (5) the district court abused its discretion

when it dismissed Labor Express; (6) it is severally liable, as opposed to jointly and severally liable; and (7) it was prejudiced by attorney misconduct. On cross-appeal, Delegado asserts that the district court abused its discretion by reducing the punitive damages award.

For the reasons set forth below, we disagree with ETT's arguments on appeal. We also conclude that Delegado's contention is without merit. Accordingly, we affirm the judgment of the district court.

Sanctions

ETT argues that the district court abused its discretion when it sanctioned ETT by excluding Foster's deposition testimony and the audiotape recording of his voicemail. ETT contends that the sanction was not warranted pursuant to any of Nevada's Rules of Civil Procedure and that the factors set forth in Young v. Johnny Ribeiro Building, 106 Nev. 88, 787 P.2d 777 (1990), do not support the district court's sanction.

Standard of review

Discovery sanctions lie within the discretion of the district court. Arnold v. Kip, 123 Nev. 410, 417, 168 P.3d 1050, 1054-55 (2007). Therefore, we will not reverse a discovery sanction "absent a clear showing of abuse of discretion." E.g. Hamlett v. Reynolds, 114 Nev. 863, 865, 963 P.2d 457, 458 (1998). Further, we only apply the somewhat heightened standard of review pursuant to Young, where the district court strikes a party's pleadings, resulting in dismissal with prejudice. Foster v. Dingwall, 126 Nev. ___, ___ P.3d ___ (Adv. Op. No. 6, February 25, 2010); Arnold, 123 Nev. at 417, 168 P.3d at 1054-55.

NRCP 16.1

Pursuant to the 2004 version of NRCP 16.1(b),[1] attorneys must, at each case conference,

> (1) Exchange all documents then reasonably available to a party which are then contemplated to be used in support of the allegations or denials of the pleading filed by that party, including rebuttal and impeachment documents;
>
> . . .
>
> (3) Identify, describe or produce all tangible things which constitute or contain matters within the scope of Rule 26(b) and, upon request, arrange for all other parties to inspect and copy, test or sample the same;

Under the 2004 version of NRCP 26(b)(1), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Lastly, the 2004 version of NRCP 16.1(e)(3)(B)

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[1]We note that both parties address the 2004 version of NRCP, as well as the 2005 amendments. Pursuant to the order amending the Nevada Rules of Civil Procedure filed in ADKT 276, the 2005 NRCP amendments became effective on January 1, 2005, and governed "all proceedings brought after that date and all further proceedings in actions pending on that date." Order Amending the Nevada Rules of Civil Procedure, July 26, 2004, ADKT 276. Therefore, we conclude that the 2004 version of NRCP applies because discovery ended in this case in 2004. Moreover, we note that even if we were to apply the 2005 amendments, our result would be the same given that the 2005 amendment to NRCP 16 is even broader. NRCP 16.1(a)(1)(B) (2005) (requiring a party to produce all "tangible things . . . in the[ir] possession . . . which are discoverable under Rule 26(b)").

establishes that if a party fails to comply with NRCP 16, the district court may impose appropriate sanctions, such as "prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to subdivision (b)." With NRCP 16.1 and NRCP 26(b) now in mind, we turn to whether the audiotape recording of Foster's voicemail falls within the scope of those rules.

Pursuant to NRCP 16.1(b)(1), ETT was required to produce every document contemplated "to be used in support of the allegations or denials of the pleading filed by that party, including rebuttal and impeachment documents." Therefore, NRCP 16.1(b)(1) is broad and not limited to the production of documents intended to be used at trial. Accordingly, ETT's argument is without merit.

The audiotape also falls within the scope of NRCP 16.1(b)(3). Pursuant to NRCP 16.1(b)(3), ETT was required to "produce all tangible things" within the scope of Rule 26(b). The audiotape is a tangible thing that falls within the scope of NRCP 26(b) because it was relevant to the underlying action and related to ETT's defense. Further, Delegado served request for production no. 8 on ETT, which in our determination, required ETT to produce the audiotape. Because ETT did not comply with NRCP 16.1(b)(1) and (3), the district court acted within its discretion by excluding Foster's deposition and the audiotape pursuant to NRCP 16.1(e)(3)(B) which permits the district court to "prohibit[ ] the use of any witness, document or tangible thing which should have been disclosed, [or] produced."

Young is inapplicable here

We also conclude that Young is inapplicable to the instant case. First, ETT does not cite any Nevada authority in support of its argument that the sanctions were "outcome determinative" or an "ultimate sanction." Moreover, Young does not require lower courts to examine its factors in every sanction case.

In Arnold v. Kip, 123 Nev. 410, 168 P.3d 1050 (2007), the district court dismissed the complaint, without prejudice, as a sanction for the plaintiff's failure to comply with NRCP 16.1. Id. at 413, 168 P.3d at 1052. We affirmed the district court, holding that it did not abuse its discretion in granting the motion to dismiss. Id. at 412, 168 P.3d at 1051. Thus, although there was a dismissal of the case, we rejected the utilization of the Young factors because the dismissal was without prejudice. Id. at 414-17, 168 P.3d at 1052-54.

In addition, in Clark County School District v. Richardson Construction, 123 Nev. 382, 168 P.3d 87 (2007), we did not require a Young analysis in reviewing sanctions ordered by the district court. In that case, the district court struck all affirmative defenses raised by the appellant. Id. at 391-92, 168 P.3d at 93. This court did not cite to Young nor in any way suggest that the district court should have conducted a Young analysis. Id.

Here, the district court merely precluded ETT from using Foster's deposition testimony and the audiotape recording of his voicemail. No affirmative defenses were stricken as in Richardson and the Richardson sanctions were more severe. However, as set forth above, Richardson did not require the district court to do an analysis under Young. Therefore, because the district court issued a lesser sanction in

this case and did not strike ETT's pleadings, resulting in dismissal with prejudice, the Young analysis is inapplicable.

Accordingly, the district court did not abuse its discretion in sanctioning ETT pursuant to the 2004 version of NRCP 16 and was not required to perform a Young analysis in doing so. We further conclude that the district court did not abuse its discretion when it sanctioned ETT by excluding Foster's deposition and the audiotape recording of his voicemail.

Punitive damages

ETT argues that there was insufficient evidence supporting the jury's punitive damages award. It contends that (1) the facts do not demonstrate that it acted with express or implied malice and (2) that it cannot be held vicariously liable for Dearman's actions.

Standard of review

"An award of punitive damages will not be overturned if it is supported by substantial evidence of implied malice or oppression." Countrywide Home Loans v. Thitchener, 124 Nev. ___, ___, 192 P.3d 243, 252 (2008). "'Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting Bongiovi v. Sullivan, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). "In reviewing a jury's punitive damage award, we 'assume that the jury believed all [of] the evidence favorable to the prevailing party and drew all reasonable inferences in [that party's] favor.'" Id. (quoting Bongiovi, 122 Nev. at 581, 138 P.3d at 451) (alterations in original).

Malice

A plaintiff may recover punitive damages where a defendant is found guilty of express or implied malice. NRS 42.005. Express or implied

malice "means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). A defendant has a "conscious disregard" of a person's rights and safety when he knows of "the probable harmful consequences of a wrongful act and [ ] willful[ly] and deliberate[ly] fail[s] to act to avoid those consequences." NRS 42.001(1).

We conclude that there was substantial evidence supporting the jury's finding that ETT acted with malice. ETT gave Dearman authorization to use temporary employees from Labor Express during its consolidation project. In doing so, Dearman did not inform Labor Express that the temporary employees would be driving. Dearman proceeded to use the temporary employees to drive the trucks, even though neither he nor Labor Express performed background checks on the employees or determined whether they possessed a valid driver's license. Dearman made this decision knowing that Ellison was a "drunk," having smelled alcohol on him, and was aware that Ellison had asked for permission to drink alcohol during lunch breaks. Accordingly, there was substantial evidence supporting the jury's determination that ETT consciously disregarded the safety of others by allowing Ellison to drive. Therefore, punitive damages were proper.

Vicarious liability

An employer may be liable for punitive damages based upon an employee's wrongful actions if:

> (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

> (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
>
> (c) The employer is personally guilty of oppression, fraud or malice, express or implied.

NRS 42.007(1).

Where the employer is a corporation, however, it may only be held liable for the actions of its employees if the above-mentioned factors, NRS 42.007(1)(a)–(c), "are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation." NRS 42.007(1). In determining whether an agent acts in a managerial capacity, we look at, among other things, whether the agent is "'of sufficient stature and authority to have some control and discretion and independent judgment over a certain area of [the] business with some power to set policy for the company.'" Nittinger v. Holman, 119 Nev. 192, 197, 69 P.3d 688, 691 (2003) (quoting Steinhoff v. Upriver Restaurant Joint Venture, 117 F. Supp. 2d 598, 605 (E.D. Ky. 2000) (alteration in original) (quoting Fitzgerald v. Mountain States Tel. & Tel. Co., 46 F.3d 1034, 1045 n.24 (10th Cir.), vacated on rehearing, 60 F.3d 837 (10th Cir. 1995)).

ETT is a corporation of which Dearman was a managing agent. Dearman was the facilities manager for ETT. Dearman was authorized by ETT to use temporary employees and had complete discretionary authority over the hiring and use of those employees. Dearman also had complete discretionary authority over the warehouse consolidation project and decided how to use the temporary employees within that project. This amounted to setting policy for ETT. Accordingly,

there was substantial evidence demonstrating that Dearman was a managerial agent within the meaning of NRS 42.007(1).

We also conclude that there was substantial evidence demonstrating that Dearman's actions met the requirements of NRS 42.007(1)(a)-(c). To begin with, Dearman temporarily employed Ellison in connection with the consolidation project and allowed him to drive despite knowing that Ellison was a "drunk," having smelled alcohol on him, and being aware that Ellison had asked for permission to drink alcohol during lunch breaks. Next, Ellison testified that Dearman gave him permission to drive the truck while Dearman was on vacation. Lastly, Dearman is personally guilty of malice because he acted with a conscious disregard of the public's safety when he allowed a known "drunk" to drive the truck, without having performed a background check, verifying his driver's license, and with lack of supervision. Therefore, there was substantial evidence to support finding ETT vicariously liable for Dearman's actions.

Accordingly, we conclude that the jury properly awarded punitive damages to Delegado because there was substantial evidence demonstrating ETT's malice and its vicarious liability.

Excessiveness of punitive damages award

ETT asserts that the district court's reduced punitive damages award is excessive pursuant to Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006).

Standard of review

We review the excessiveness of a punitive damages award de novo. Id. at 583, 138 P.3d at 452. We consider three factors in determining whether punitive damages are excessive: "(1) 'the degree of reprehensibility of the defendant's conduct,' (2) the ratio of the punitive

damage award to the 'actual harm inflicted on the plaintiff,' and (3) how the punitive damages award compares to other civil or criminal penalties 'that could be imposed for comparable misconduct.'" Id. at 582, 138 P.3d at 452 (quoting BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-75 (1996)). In reviewing punitive damages, we look to "'ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.'" Bongiovi, 122 Nev. at 582-83, 138 P.3d at 452 (quoting State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003)).

Applying the three guideposts here, first, ETT's conduct was reprehensible because of Dearman's reckless disregard for the safety of others given his knowledge of Ellison's drinking, lack of oversight of Ellison, and failure to verify Ellison's driver's license. Next, the ratio of the punitive damages to Delegado's actual harm, or compensatory damages, is one-to-one, which is clearly not excessive according to NRS 42.005(1). Lastly, the punitive damages award in this case is well within the range of damages that could be imposed for comparable misconduct because, pursuant to NRS 42.005(1), the jury was permitted to award three times the amount of the compensatory damages, or more than $12,000,000. Therefore, we conclude that the punitive damages award was not excessive because it is both reasonable and proportionate to the amount of harm to Delegado and to the compensatory damages award.

Reduction of punitive damages award

On cross-appeal, Delegado argues that the district court erred by reducing the punitive damages award from $10,000,000 to $4,183,250.50.

We review a district court's decision to order remittitur of a punitive damage award for abuse of discretion. Harris v. Zee, 87 Nev. 309, 311, 486 P.2d 490, 491 (1971). We afford deference to the district court because it "had the opportunity to weigh evidence and evaluate the credibility of witnesses—an opportunity foreclosed to this court." Id. at 311, 486 P.2d at 491-92.

The district court reduced the punitive damages award from $10,000,000 to $4,183,250.50. It did so based on its review of Bongiovi v. Sullivan, 122 Nev. 556, 138 P.3d 433 (2006), and ETT's financial strength. The evidence pertaining to ETT's financial viability was not presented to the jury. Rather, the evidence was presented in post-trial motions. Because the district court had the benefit of reviewing relevant evidence as to ETT's financial strength and the opportunity to weigh the evidence presented at trial, we conclude that it did not abuse its discretion in reducing the punitive damages award.

Judgment as a matter of law

ETT contends that the district court erred when it denied its post-trial motion for judgment as a matter of law because Delegado failed to prove his claims of (1) general negligence, (2) negligent supervision and retention, and (3) negligent entrustment.

Standard of review

We review a district court's denial of a motion for judgment as a matter of law de novo. Winchell v. Schiff, 124 Nev. ___, ___, 193 P.3d 946, 952 (2008). In doing so, we "'view the evidence and all inferences in favor of the nonmoving party.'" Id. at ___, 193 P.3d at 952 (quoting Nelson v. Heer, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007)). A motion for judgment as a matter of law is properly denied "if the nonmoving party

has presented sufficient evidence such that the jury could grant relief to that party." Id. at ___, 193 P.3d at 951-52.

Negligence

"To prevail on a negligence theory, a plaintiff generally must show that: (1) the defendant owed a duty of care to the plaintiff; (2) the defendant breached that duty; (3) the breach was the legal cause of the plaintiff's injury; and (4) the plaintiff suffered damages." Wiley v. Redd, 110 Nev. 1310, 1315, 885 P.2d 592, 595 (1994).

The evidence at trial demonstrated that ETT temporarily employed Ellison and allowed him to drive in connection with the consolidation project. The evidence also demonstrated that Dearman permitted Ellison, a known "drunk," to drive the truck, without verifying his driver's license or providing sufficient supervision while he was on vacation. These actions or inactions, on the part of ETT, were clearly the legal cause of Rosa's death because Dearman knew that Ellison was a "drunk," but nonetheless, allowed Ellison to drive the truck, thereby making Ellison's actions foreseeable. Accordingly, we conclude, in viewing the evidence in favor of the nonmoving party, that Delegado presented sufficient evidence to support a finding that ETT was liable for general negligence.

Delegado also presented sufficient evidence to show that Ellison was an ETT employee on the day of the accident and that he was acting within the scope of his employment when the accident occurred. Labor Express instructed Ellison to report for work at the ETT warehouse. Despite his failure to sign-in at the ETT warehouse on the day of the accident, Ellison's conduct was generally consistent with days when he was considered an employee. Further, Ellison testified that he took the

truck to retrieve pallets for ETT. Therefore, the evidence demonstrated that Ellison was acting within the scope of his employment when the accident occurred.

Negligent supervision/retention

To prove negligent supervision/retention, a plaintiff must establish that the "employer knew or should have known its employee behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." Giles v. Shell Oil Corp., 487 A.2d 610, 613 (D.C. 1985).

At trial, Dearman testified that he had smelled alcohol on Ellison and knew that he had asked for permission to drink alcohol during lunch breaks. Dearman also testified that he was aware that Ellison was a "drunk." Despite this knowledge, Dearman did not assign anyone to supervise Ellison while he was on vacation and allowed him to drive the truck. Viewing this evidence and all inferences in favor of Delegado, we conclude that there was sufficient evidence from which the jury could have concluded that ETT negligently supervised/retained Ellison.

Negligent entrustment

To prevail on a negligent entrustment claim, a plaintiff must establish that an entrustment existed and that such entrustment was negligent. Zugel v. Miller, 100 Nev. 525, 528, 688 P.2d 310, 312 (1984).

Ellison testified that Dearman gave him permission to drive the truck while Dearman was on vacation. The evidence demonstrated that Dearman did so, knowing that Ellison was a "drunk," having previously smelled alcohol on him, and aware that Ellison had asked for permission to drink alcohol during lunch breaks. Therefore, there was

sufficient evidence to establish that an entrustment existed and that such entrustment was negligent. Accordingly, we conclude that Delegado presented sufficient evidence to support a finding that ETT was liable for negligent entrustment.

Dismissal of Labor Express

ETT argues that the district court abused its discretion when it dismissed Labor Express without permitting ETT to file a third-party complaint against Labor Express.

The decision to grant or deny a motion to amend pleadings rests within the district court's sound discretion and we will not overturn that decision absent a showing of abuse of discretion. Whealon v. Sterling, 121 Nev. 662, 665, 119 P.3d 1241, 1244 (2005).

Delegado voluntarily dismissed Labor Express after the issue regarding Foster's audiotape arose during trial. ETT moved to amend its pleadings to bring a third-party claim against Labor Express. The district court denied the request because the motion was made in the middle of trial and determined that Labor Express was prejudiced by the non-disclosure of the audiotape of Foster's voicemail. The district court also determined that ETT was not prejudiced by its denial of the motion to amend because ETT could still bring an action for contribution and indemnity. We conclude that this was not an abuse of discretion and that the district court properly denied ETT's motion to amend the pleadings.

Several liability

ETT contends that the district court erred when it found it jointly and severally liable, as opposed to severally liable.

In an action "in which comparative negligence is asserted as a defense, the comparative negligence of the plaintiff or [his] decedent does

not bar a recovery" if the plaintiff's negligence was not greater than the negligence of the parties to the action. NRS 41.141(1) (emphasis added). Further, "[w]here recovery is allowed against more than one defendant in such an action, . . . each defendant is severally liable to the plaintiff only for that portion of the judgment which represents the percentage of negligence attributable to him." NRS 41.141(4).

To implicate NRS 41.141, however, a plaintiff's contributory negligence must be a bona fide issue. Stapp v. Hilton Hotels Corp., 108 Nev. 209, 211 n.3, 826 P.2d 954, 956 n.3 (1992). To be a bona fide issue, a plaintiff's contributory negligence must be a viable defense. Buck v. Greyhound Lines, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989).

ETT asserted Rosa Delegado's contributory negligence as an affirmative defense. The evidence presented at trial, however, did not establish that Rosa was negligent. Rather, the evidence showed that her car was parked in an appropriate spot and upon exiting her vehicle she was struck by Ellison, an inebriated driver. Because there was no evidence to suggest that Rosa was negligent, her contributory negligence was not a viable defense and therefore not a bona fide issue. Accordingly, we conclude that NRS 41.141 is not implicated and ETT was properly found jointly and severally liable.

Attorney misconduct

ETT contends that it was prejudiced by the misconduct of Delegado's counsel. It asserts that the cumulative effect of the attorney misconduct warrants a new trial.

Standard of review

Attorney misconduct is a question of law that we review de novo. Lioce v. Cohen, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). "Although

counsel 'enjoys wide latitude in arguing facts and drawing inferences from the evidence,' counsel nevertheless may not make improper or inflammatory arguments that appeal solely to the emotions of the jury." Grosjean v. Imperial Palace, 125 Nev. ___, ___, 212 P.3d 1068, 1078 (2009) (citations omitted) (quoting Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993)).

In determining whether a new trial is warranted on the basis of attorney misconduct, we consider whether counsel objected to the conduct at trial. See, e.g., Grosjean, 125 Nev. at ___, 212 P.3d at 1079. When a party objects to the conduct and the objection is sustained, "reversal is warranted only if the misconduct is so extreme that the objection and admonishment could not remove the misconduct's effect." Id. Where purported misconduct is objected to, but the district court does not sustain the objection and admonish the jury, then a new trial is warranted if the district court's failure, coupled with the egregious conduct, affected the party's substantial rights. See Lioce, 124 Nev. at 18, 174 P.3d at 981.

When a party does not object to the alleged misconduct, however, we "will reverse the judgment only when the misconduct amounted to 'irreparable and fundamental 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.'" Grosjean, 125 Nev. at ___, 212 P.3d at 1079 (quoting Lioce, 124 Nev. at 19, 174 P.3d at 982). "That standard essentially amounts to plain error review, under which the party claiming misconduct must show 'that no other reasonable explanation for the verdict exists.'" Id. (quoting Lioce, 124 Nev. at 19, 174 P.3d at 982).

Responsibility for death

ETT argues that Delegado committed attorney misconduct when he stated in his opening and closing arguments that ETT was not accepting responsibility for Rosa's death.

ETT objected to Delegado's statement during opening arguments, but failed to do so during closing arguments. The district court sustained ETT's objection during opening arguments. Therefore, any prejudice which may have resulted from the statements made during opening arguments was removed. We also conclude that ETT has failed to demonstrate plain error as to Delegado's comment during closing arguments. Accordingly, we conclude that a new trial is not warranted.

ETT's economic size

ETT contends that Delegado improperly focused on ETT's economic size during the liability and compensatory damages phase of the trial. ETT argues that Delegado took a "David and Goliath" approach that inflamed the jury.

ETT objected to Delegado's comments concerning ETT's financial strength. The district court did not sustain the objection or admonish the jury. However, we conclude that Delegado's conduct was not so egregious that it affected ETT's substantial rights.

Rhetoric concerning "lies," "murder," and "killing"

ETT asserts that Delegado improperly used inflammatory rhetoric when he repeatedly claimed that ETT's case was "all lies" and when he characterized Rosa's death as a "murder" and "killing."

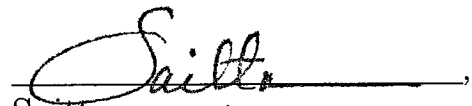
ETT objected to Delegado's statements during closing arguments that it had lied throughout trial, but the district court did not specifically rule on the objection or admonish the jury. Nonetheless,

earlier in the proceedings, the district court had admonished the jury that it was not to be swayed by Delegado's attorney's comments that ETT had lied. Therefore, we conclude that any prejudice that Delegado's comments created was removed and the misconduct did not affect ETT's substantial rights.

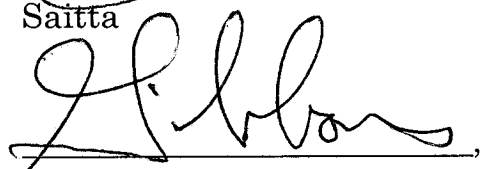
With regard to Delegado characterizing Rosa's death as a "killing" and "murder," ETT did not object to these comments. We conclude that ETT has failed to demonstrate plain error.

Therefore, we conclude that the comments of Delegado's counsel do not warrant a new trial. Accordingly, for the foregoing reasons we

ORDER the judgment of the district court AFFIRMED.[2]



Saitta, J.



Gibbons, J.

[2]We have considered the other arguments of the parties and conclude that they are without merit.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
William C. Turner, Settlement Judge
Lewis & Roca, LLP/Las Vegas
Parnell & Associates
Arin & Associates, PC
Mainor Eglet Cottle, LLP
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP/Fresno
McCormick, Barstow, Sheppard, Wayte & Carruth, LLP/Las Vegas
Parker, Nelson & Associates
Eighth District Court Clerk

CHERRY, J., concurring in part and dissenting in part:

I concur with the majority in upholding the compensatory damages award. However, I do not agree with the majority that punitive damages are appropriate in this case.

An employer may be liable for punitive damages based upon an employee's wrongful actions if:

> (a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed the employee with a conscious disregard of the rights or safety of others;
>
> (b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or
>
> (c) The employer is personally guilty of oppression, fraud or malice, express or implied.

NRS 42.007(1).

Where the employer is a corporation, however, it may only be held liable for the actions of its employees if the above-mentioned factors, NRS 42.007(1)(a)-(c), "are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation." NRS 42.007(1). In determining whether an agent acts in a managerial capacity, we look at, among other things, whether the agent is ""of sufficient stature and authority to have some control and discretion and independent judgment over a certain area of [the] business with some power to set policy for the company."" Nittinger v. Holman, 119 Nev. 192, 197, 69 P.3d 688, 691 (2003) (quoting Steinhoff v. Upriver Restaurant Joint Venture, 117 F. Supp. 2d 598, 605 (E.D. Ky. 2000) (alteration in original) (quoting

Fitzgerald v. Mountain States Tel. & Tel. Co., 46 F.3d 1034, 1045 n.24 (10th Cir.), vacated on rehearing, 60 F.3d 837 (10th Cir. 1995))).

Nittinger is clear on what evidence is needed to establish liability for punitive damages due to the "status" of an employee such as Dearman. Certainly, the employee must have had such control as to establish policy for the employer. Further, the employee's position must be managerial and important. A managerial agent must be of sufficient authority and stature to have some control over a certain area of the business with some power to set policy for the employer.

There was no evidence that Dearman had any authority to deviate from the established policies regarding the use of company vehicles. Dearman disobeyed the established company policy that prohibited temporary employees, especially unlicensed ones, from operating company vehicles. Since Dearman operated outside his authority, he is not a managerial agent for the purposes of awarding punitive damages.

In light of the failure of respondent to present substantial evidence that Dearman was, in fact, acting in a managerial capacity and was a managing agent, I would vacate the award of punitive damages.

Cherry, J.

Cherry