

IN THE SUPREME COURT OF THE STATE OF NEVADA

RALPHS GROCERY COMPANY, D/B/A  
FOOD 4 LESS; AND KROGER GROUP  
COOPERATIVE,  
Appellants,  
vs.  
MARGARITA CELIS,  
Respondent.

No. 51027

**FILED**

**JUN 30 2009**

ORDER OF REVERSAL

TRACIE K. LINGEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

This is an appeal from a district court post-judgment order granting a new trial in a personal injury action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. On appeal, appellant Ralphs Grocery Company alleges that the district court abused its discretion in granting respondent Margarita Celis's motion for a new trial on the basis that Ralphs' counsel committed misconduct and the jury manifestly disregarded the instructions of the court. For the following reasons, we agree and therefore reverse the district court's order granting Celis's motion for a new trial. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Ralphs' counsel did not engage in misconduct

Ralphs contends that the district court erred in determining that its counsel repeatedly engaged in attorney misconduct during his closing arguments by (1) violating the parties' stipulation regarding liability, (2) referring to Celis as a liar, and (3) implying that Celis intentionally withheld her prior medical records.

While this court reviews a district court's order granting or denying a motion for a new trial for an abuse of discretion, the determination of whether an attorney's comments are misconduct is a

question of law that is reviewed de novo. Lioce v. Cohen, 124 Nev. \_\_\_\_, \_\_\_\_, 174 P.3d 970, 980-82 (2008).

Stipulation regarding liability

At trial, Ralphs stipulated to liability, agreeing that the cause of the fall was due to jelly on the floor of the supermarket aisle; however, Ralphs reserved the right to argue that Celis was comparatively at fault. In so doing, Ralphs argued that Celis was being inattentive prior to her fall and repeatedly asked the jury to examine video footage that showed Celis collide with her daughter.<sup>1</sup> Although Celis failed to specifically object to Ralphs' comments at trial as a violation of their stipulation, the district court determined that Ralphs impermissibly implied that Celis's daughter caused her to fall, noting specifically that Ralphs was trying to absolve itself of liability by saying it had nothing to do with the fall.

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<sup>1</sup>Specifically, Ralphs' counsel argued that,

The video showed that just prior to the fall we saw Ms. Celis. She wasn't really watching where she was going. Also showed that she walked right into her daughter . . .

Now, Ms. Celis wants you to believe that the only thing that caused her to fall was that jelly on the floor. But the videotape that you'll see shows that this isn't true. Clearly showed that she was walking unsteadily down the aisle, and she and her daughter collided . . .

This video clearly showed that Ms. Celis made contact with her daughter and fell straight down onto her right knee and hand. [ ] It was this contact that threw her off balance, and not the jelly on the floor.

(Emphasis added).

Here, based on our review, we do not agree with the district court's characterization that Ralphs' counsel absolved his client of all liability and therefore violated the parties' stipulation. Instead, because he commented that the jelly was not the only thing that caused Celis to fall, alluding to Celis's own inattentiveness and the collision with her daughter, Ralphs' counsel merely argued that Celis was comparatively negligent. Because this argument was permissible under the parties' stipulation agreement, we conclude that Ralphs' counsel did not violate the stipulation.

Reference to Celis as a liar

This court has repeatedly stated that it is improper for an attorney to characterize a witness as a liar or inject a personal opinion regarding a witness's credibility. See Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990); RPC 3.4(e). However, it is permissible to demonstrate to a jury through inferences that a witness's testimony is untrue. See id. at 927, 803 P.2d at 1106.

Attacking Celis' story that she fell on her left knee, when video footage of the incident showed that she initially fell on her right knee, Ralphs' counsel stated that Celis was "trapped in a lie" and implied that her doctors assisted Celis in furthering her story. Here, although Ralphs' counsel treaded close to impermissible commentary, it does not appear from the record that he directly called Celis, or any other witness, a liar. Instead, because Ralphs' counsel merely commented on the credibility of Celis's story, we conclude that the comment was not impermissible.

Comment that Celis withheld prior medical records

During closing argument, Ralphs' counsel implied that Celis was withholding prior medical records that would demonstrate some preexisting condition. The district court sustained Celis's prompt

objection that Ralphs' counsel was arguing facts not in evidence. However, Ralphs' counsel proceeded, stating that, "[t]he only thing her doctors had to go off of was her own word. And you can infer that none of the doctors you heard from are familiar with what her actual medical history was."

Here, there was no evidence that Celis had any prior medical treatment, symptoms, or a preexisting knee or back injury. By insinuating that Celis was hiding her prior medical records and had a preexisting medical condition, Ralphs' counsel may have improperly referred to facts not in evidence. However, because the allegedly improper statements were objected to and sustained, we conclude that any potential misconduct did not warrant a new trial. See Lioce, 124 Nev. at \_\_\_, 174 P.3d at 981.

The jury's verdict was not impossible

Ralphs argues that the district court erred by granting Celis' motion for a new trial on the grounds that the jury manifestly disregarded the instructions of the court. We agree.

Under NRCP 59(a)(5), the district court may grant a new trial on the basis that the jury manifestly disregarded its instructions. However, in reviewing a district court's order granting a new trial under NRCP 59(a)(5), this court examines whether a jury's verdict would have been impossible had the jurors properly applied the instructions of the court. M & R Investment v. Anzalotti, 105 Nev. 224, 226, 773 P.2d 729, 730 (1989).

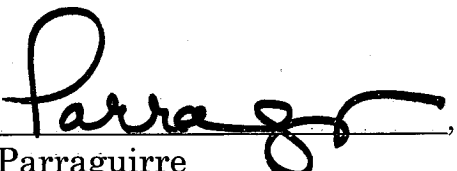
Here, the district court instructed the jury regarding the parties' stipulation, comparative negligence, and witness credibility. Based on these instructions, the jury's verdict awarding Celis \$155,000 in

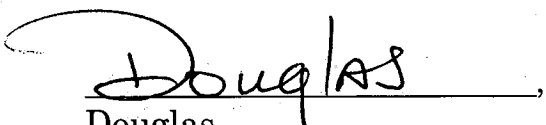
damages and finding her 50% at fault was not "impossible" for two reasons.

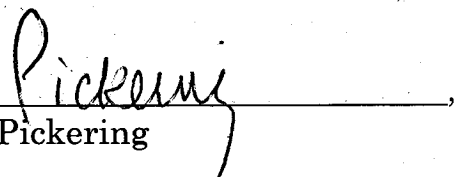
First, there was significant video footage that showed that Celis initially fell on her right knee, instead of her left knee as she had claimed, thus affecting her credibility. Second, the same video footage showed that Celis was being inattentive and may have collided with her daughter before she slipped on the jelly, thus providing a basis for the jury's finding that she was comparatively negligent for her injuries. For those reasons, we conclude that district court erred in granting a new trial under NRCP 59(a)(5).

Based on the above, we conclude that Ralphs' counsel did not engage in misconduct warranting a new trial and that the jury did not manifestly disregard the instructions of the court. Accordingly, we,

ORDER the district court's order granting a new trial REVERSED.

  
Parraguirre J.

  
Douglas J.

  
Pickering J.

cc: Hon. Michelle Leavitt, District Judge  
William F. Buchanan, Settlement Judge  
Brady, Vorwerck, Ryder & Caspino

Christiansen Law Offices  
Simon Law Office  
Eighth District Court Clerk