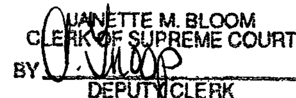
IN THE SUPREME COURT OF THE STATE OF NEVADA

WAL-MART STORES, INC., Appellant, vs. BETTY FRANZE, INDIVIDUALLY AND AS HEIR AND SPECIAL ADMINISTRATRIX OF THE ESTATE OF ELIZABETH FRANZE, DECEASED, Respondent.	No. 34817
WAL-MART STORES, INC., Appellant, vs. BETTY FRANZE, INDIVIDUALLY AND AS HEIR AND SPECIAL ADMINISTRATRIX OF THE ESTATE OF ELIZABETH FRANZE, DECEASED, Respondent.	No. 35261



MAY 14 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY ______ DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a consolidated appeal from a final judgment in an action for negligence and related claims. On appeal, appellant argues that a new trial pursuant to NRCP 59(a) is warranted because the cumulative error in the trial prejudiced the jury's determination of damages, as evidenced by the excessive verdict. Specifically, appellant contends that respondent's counsel committed numerous instances of misconduct, that the jury was erroneously instructed, and that the jury was improperly allowed to consider disfigurement in awarding damages. We disagree.

In Barrett v. Baird, we stated that "NRCP 59(a)(2) provides that a new trial may be granted due to misconduct of the prevailing

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party."[1] This court, however, will not grant a new trial on the grounds of attorney misconduct unless the misconduct permeated the entire proceeding evoking passion and prejudice in the jury.[2] In order to determine whether misconduct permeated the entire proceeding, this court looks at the record as a whole and places a greater emphasis on error when there is a sharp conflict in the evidence presented.[3]

Appellant contends that respondent's counsel improperly represented to the jury that appellant was an unfeeling corporation, unlike humans who feel guilt. This court has affirmed the district court's granting of a new trial, based in part on the passion and prejudice created against the large corporate defendant.[4]

Here, respondent's counsel did not discuss the size, wealth, or foreign status of appellant.[5] Rather, he commented that while appellant maintains the same legal status as a human, it might not feel the emotion of guilt. Therefore, we conclude that counsel's characterization of appellant as a corporation did not create passion and prejudice on the part of the jury in a way prohibited by this court.

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[1]111 Nev. 1496, 1514-15, 908 P.2d 689, 702 (1995).

[2]Id. at 1515, 908 P.2d at 702 (citations omitted).

[3]Boyd v. Pernicano, 79 Nev. 356, 359, 385 P.2d 342, 343 (1963).

[4]Hazelwood v. Harrah's, 109 Nev. 1005, 1010, 862 P.2d 1189, 1192 (1993), overruled on other grounds by Vinci v. Las Vegas Sands, 115 Nev. 243, 984 P.2d 750 (1999).

[5]See Duke v. American Olean Tile Co., 400 N.W.2d 677, 681 (Mich. Ct. App. 1986); see also City of Cleveland v. Peter Kiewit Sons' Co., 624 F.2d 749 (6th Cir. 1980).

Appellant also argues that respondent's counsel improperly interjected his personal opinion into his argument. Specifically, respondent's counsel stated that he thought this was a straightforward case; commented that "as her lawyers" they felt that respondent deserved to be compensated for justice to be served; and commented on the experience of his senior partner in assessing the value of a life.

"During closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence."[6] However, an attorney may not express personal opinions as to the guilt of the accused or the veracity of a witness.[7]

In DeJesus v. Flick, we concluded that the offending attorney used improper tactics when he claimed to be in a better position than the jury to know the fair amount of damages and that he would not trade places with his client for $10 million.[8] While the remarks made by respondent's counsel in the instant case border on the improper introduction of personal opinion in closing argument, his remarks were not as egregious as those made in DeJesus. Therefore, due to the wide latitude given attorneys to draw inferences from the facts during closing argument, the district court did not err in overruling appellant's objections to respondent's closing argument.

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[6]Jain v. McFarland, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993) (citations omitted).

[7]Owens v. State, 96 Nev. 880, 885, 620 P.2d 1236, 1239 (1980); Hotel Riviera, Inc. v. Short, 80 Nev. 505, 510-11, 396 P.2d 855, 859 (1964).

[8]116 Nev. at 818, 7 P.3d at 461-64.

Appellant further argues that respondent's counsel improperly suggested that appellant manufactured issues to escape liability and that respondent's counsel improperly suggested that the case had to go to trial because appellant would not settle out of court. However, upon careful review of the record, we conclude that respondent's counsel merely provided vigorous argument for his version of who should be responsible, and this argument was not improper.

Appellant contends that closing argument by respondent's counsel was improper because he allegedly asked the jury to send a message to appellant and defendants like them when he stated that "only the jury can make Wal-Mart or defendants like them accept responsibility." While we have held that more egregious arguments made by an attorney constituted misconduct, the comment here does not rise to such a level.

In Barrett, an attorney argued that the damages sought were the "kind of numbers that necessitate the high health care cost in this country."[9] We determined that this comment constituted misconduct when considered in conjunction with several other incidents of misconduct, and thus permeated the entire proceeding.[10] In the instant case, we conclude that respondent's counsel did not "[t]ime and time again . . . push the limits of propriety."[11] Thus, reversal is not warranted.

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[9]111 Nev. at 1514, 908 P.2d at 702 (citing Davidoff v. Segert, 551 So.2d 1274 (Fla. Dist. Ct. App. 1989)).

[10]Id. at 1515, 908 P.2d at 702.

[11]Id.

Appellant claims that respondent's counsel committed misconduct because he referred to appellant's expert as a "hired gun." We have previously held that other types of attacks on expert witnesses made by attorneys were improper.[12] In Sipsas v. State, we held that the prosecution's characterization of a defense expert witness as a "hired gun" was so prejudicial as to warrant court intervention without an objection.[13] Here, like the prosecutor in Sipsas, appellant's counsel improperly characterized respondent's expert witness as a "hired gun." The trial court's failure to intervene, even in the absence of a contemporaneous objection, was error.

Appellant also asserts that respondent's counsel acted improperly because he made a "golden rule" argument. "Golden rule" arguments - arguments that ask the jurors to place themselves in the shoes of the victim - are impermissible because they interfere with the objectivity of the jury.[14]

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[12]See DeJesus v. Flick, 116 Nev. 918, 7 P.3d 459 (2000) (noting that numerous arguments by counsel were improper and inflammatory, constituting egregious misconduct); Yates v. State, 103 Nev. 200, 204, 734 P.2d 1252, 1255 (1987) (noting that it was improper to characterize a doctor's testimony as "melarky," "outright fraud" or accuse the doctor of "crawl[ing] up on the witness stand"); Sipsas v. State, 102 Nev. 119, 125, 716 P.2d 231, 234 (1986) (noting that it was improper to call a medical expert a "hired gun from Hot Tub Country" and "a living example of Lincoln's law. . . [who] can fool all of the people enough of the time"); see also SCR 173, which prohibits a lawyer from stating a personal opinion as to the credibility of a witness.

[13]102 Nev. at 125, 716 P.2d at 234.

[14]DeJesus v. Flick, 116 Nev. at 819, 7 P.3d at 464; see also Boyd v. Pernicano, 79 Nev. at 358, 385 P.2d at 343; DuBois v. Grant, 108 Nev. 478,

continued on next page . . .

Here, remarks by respondent's counsel did not directly ask the jurors to place themselves in the shoes of the victim. However, comments by respondent's counsel conveyed the same improper message. In essence, respondent's counsel asked the jury to value the loss of a loved one as if the jury had suffered the loss. We also find this argument to be improper.

While we conclude that respondent's counsel improperly referred to appellant's expert witness as a "hired gun" and made an improper "golden rule" argument, we must now determine whether this improper conduct permeated the entire proceeding, warranting reversal.

Unlike DeJesus, where the jury awarded the plaintiff much more than the plaintiff requested, the jury here awarded less than one-third the amount requested in closing argument. In addition, the conduct here was far less egregious than in Canterino v. The Mirage Casino Hotel,[15] where we held that the district court abused its discretion in granting a new trial despite the attorney misconduct, because the misconduct did not permeate the entire trial.[16] Therefore, while respondent's counsel's remarks were improper, we conclude that they were not so pervasive as to permeate the entire proceeding, considering the evidence presented at trial.

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481, 835 P.2d 14, 16 (1992); McGuire v. State, 100 Nev. 153, 157, 677 P.2d 1060, 1064 (1984).

[15]117 Nev. ___, 16 P.3d 415 (2001), modified on other grounds, 118 Nev. ___, ___ P.3d ___ (Adv. Op. No. 21, March 19, 2002). Upon rehearing, this court modified its previous opinion and remanded for a new trial on the issues of liability and damages. However, our decision with respect to attorney misconduct was not affected.

[16]Id.

Appellant next claims that the jury was confused by instruction 24-A, which directed that "liability will lie" with appellant where appellant causes a foreign object to be on the floor and it causes a patron to slip-and-fall.

We have held that "an erroneous instruction as to the duty or standard of care owing by one party to the other is substantial error requiring another trial."[17] However, this court also held that even if one instruction is not technically correct, reversal is not required where the jury was sufficiently and fairly instructed, taking all instructions into consideration.[18]

Here, the jury was instructed to "consider all the instructions as a whole." In addition, the trial court instructed the jury that respondent was required to prove that appellant was negligent and that a breach of a duty of care occurred. In jury instruction 24-A, the jury was also instructed that "in the absence of negligence, no liability lies." Therefore, considering the jury instructions as a whole, the instructions were not erroneous and the jury was sufficiently and fairly instructed.

Appellant also argues that there could be no award for disfigurement because there was no substantial, permanent injury. Appellant contends that injuries, which are not substantial and permanent, are not appropriate injuries for an award for disfigurement.[19]

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[17] Otterbeck v. Lamb, 85 Nev. 456, 463, 456 P.2d 855, 860 (1969).

[18] Gordon v. Hurtado, 96 Nev. 375, 380, 609 P.2d 327, 330 (1980).

[19] See, e.g., Wolkenhauer v. Smith, 822 F.2d 711, 716 (7th Cir. 1987) (holding that a plaintiff who was partially disabled as a result of an accident did not automatically prove disfigurement, and even if there were scars, there was no evidence that they were disfiguring); Keeler v.

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However, the cases relied upon by appellant do not require that this court reverse the award for disfigurement in the present case. NRS 41.085 provides that the jury may award damages for disfigurement of the decedent. However, the statute does not require that the disfigurement be permanent. Further, we will not disturb an award of punitive damages unless the trial record lacks substantial evidence to support it.[20]

Here, unlike the cases relied upon by appellant, respondent suffered an injury to her face, an area not commonly covered by clothing in public. In addition, respondent was not able to testify regarding the disfiguring nature of her injuries because she died shortly after the trip-and-fall. Photographs of respondent were shown and the district court concluded that they constituted sufficient evidence of disfigurement to send the issue to the jury. From the evidence presented, we conclude that

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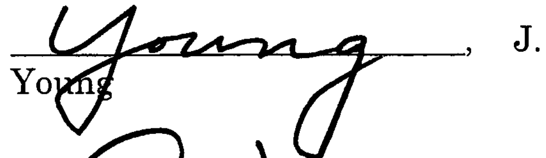
Richards Mfg. Col, Inc., 817 F.2d 1197, 1201-02 (5th Cir. 1987) (holding that a disfigurement award was improper where a hip replacement surgery was evidence of a disability, not disfigurement).

[20]First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990).

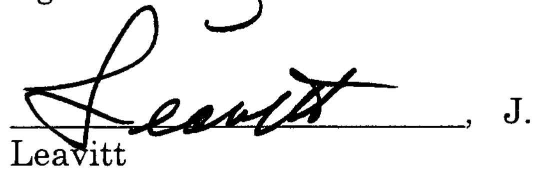
there was substantial evidence to support an award for disfigurement. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



Young, J.

Agosti, J.



Leavitt, J.

cc: Hon. Allan R. Earl, District Judge
Beckley, Singleton, Chtd./Las Vegas
Mainor Harris
Clark County Clerk