IN THE SUPREME COURT OF THE STATE OF NEVADA

HARRAH'S LAUGHLIN, INC., A FOREIGN CORPORATION, Appellant, vs. ALICE SWANSON, INDIVIDUALLY, Respondent.	No. 56912
HARRAH'S LAUGHLIN, INC., A FOREIGN CORPORATION, Appellant, vs. ALICE SWANSON, INDIVIDUALLY, Respondent.	No. 57019

FILED

MAY 08 2014

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

ORDER GRANTING EN BANC RECONSIDERATION, VACATING PRIOR ORDER, AND REVERSING AND REMANDING THE DISTRICT COURT'S JUDGMENT

This is a petition for en banc reconsideration of an order affirming a district court judgment in a tort action, following a jury trial, and post-judgment orders denying a new trial and awarding attorney fees. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Pursuant to NRAP 40A(a), en banc reconsideration is appropriate "when (1) reconsideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) the proceeding involves a substantial precedential, constitutional or public policy issue." In the present case, the panel affirmed the district court's order without directly addressing whether the district court abused its discretion by allowing respondent Alice Swanson to refer to appellant Harrah's Laughlin, Inc.'s alleged building code violations in her closing argument, despite having granted a directed verdict to Harrah's on Swanson's negligence per se claim premised on the alleged building code violations.

Because affirming the district court's judgment is inconsistent with our caselaw, we grant en banc reconsideration to secure the uniformity of our decisions.

Factual and procedural history

Swanson was a guest at a hotel and casino property owned by Harrah's. While walking in Harrah's parking lot, Swanson tripped on a speed bump. She fell and injured her shoulder.

Swanson sued Harrah's for negligence and negligence per se. She argued that Harrah's speed bump violated building codes, as well as Harrah's duty of reasonable care, because the speed bump was too high. On Harrah's motion, the district court granted a directed verdict on Swanson's negligence per se claim. The district court reasoned that it would be "[in]appropriate to instruct [the jury] on negligence per se with a law that doesn't apply to the plaintiff that we have here." After the directed verdict, Harrah's made a motion to prevent Swanson from discussing building code violations in her closing argument. The district court denied Harrah's motion but recognized a continuing objection to any building code references in Swanson's closing argument. During her closing argument, Swanson made at least seven references to building code violations while arguing that Harrah's was negligent. The jury returned a verdict in Swanson's favor on her negligence claim.

Harrah's then moved for a judgment notwithstanding the verdict, or in the alternative, for a new trial. The district court denied Harrah's motion. Following the denial of Harrah's motion, Swanson made a motion to recover attorney fees and costs, which was granted. Harrah's appealed the jury's verdict, the district court's denial of its post-trial motion, and the order granting Swanson's motion for attorney fees and costs. A panel of this court affirmed the district court's orders. The panel

then denied Harrah's petition for rehearing. Harrah's now petitions for en banc reconsideration, challenging, among other holdings, the panel's determination that the district court's decision to allow Swanson to discuss alleged building code violations in closing argument did not warrant reversal.

The alleged building code violations were irrelevant to Swanson's negligence claim

The violation of a statute is only relevant to a party's negligence per se or negligence in limited circumstances. *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 207, 660 P.2d 1013, 1015 (1983). Those circumstances can occur when the statute's purpose is:

> (a) to protect a class of persons which includes the one whose interest is invaded, and
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> (b) to protect the particular interest which is invaded, and
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> (c) to protect that interest against the kind of harm which has resulted, and
>
> (d) to protect that interest against the particular hazard from which the harm results.

Id. (quoting Restatement (Second) of Torts § 286 (1965)). Thus, the violation of a statute can constitute negligence per se and "establish[ ] the duty and breach elements of negligence when the injured party is in the class of persons whom the statute is intended to protect and the injury is of the type against which the statute is intended to protect." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828, 221 P.3d 1276, 1283 (2009); *see also Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 440, 24 P.3d 219, 221 (2001) (holding that the violation of a building code provision can constitute negligence per se "if the plaintiff belongs to the

class of persons that the provision was intended to protect, and the injury suffered is of the type the provision was intended to prevent").

Swanson relies upon *Price v. Sinnott*, 85 Nev. 600, 605, 460 P.2d 837, 840 (1969), *aff'd sub nom. Price v. First National Bank of Nevada*, 90 Nev. 5, 517 P.2d 1006 (1974), to argue that a building code violation can be evidence of negligence even if it does not constitute negligence per se. However, this argument takes the *Price* court's statement that "[w]e prefer the rule that proof of a deviation from an administrative regulation is only evidence of negligence; not negligence *per se*" out of context. *Id.* In *Price*, the "violation of a rule promulgated by [an administrative board]" did not constitute negligence per se because this rule "lack[ed] the force and effect of a substantive legislative enactment." *Id.* at 604-05, 460 P.2d at 839-40. *Price* focused on the nature of the regulation and did not state that a violation of a statute could be evidence of negligence if the plaintiff was outside the class to be protected or the injury was not of the type to be protected against. Therefore, *Price* is consistent with Nevada caselaw which holds that a violation of a statute is only relevant to a defendant's negligence if the plaintiff is in the class of persons the statute protects and plaintiff's injury was of the type the statute protects against. *See, e.g., Vega*, 117 Nev. at 440, 24 P.3d at 221; *Sagebrush Ltd.*, 99 Nev. at 207-08, 660 P.2d at 1015.

Here, Swanson proffered evidence that Harrah's violated Chapter 11 of the International Building Code (IBC). At the time Swanson fell, Clark County had adopted the 2006 edition of the IBC as the

county's building code.[1] Clark County Code § 22.04.010 (2007). The 2006 edition of IBC Chapter 11 states that "[t]he provisions of this chapter shall control the design and construction of facilities for accessibility to physically disabled persons." Int'l Bldg. Code § 1101.1 (2006). Thus, the purpose of IBC Chapter 11 is to protect the ability of physically disabled persons to access buildings.

The district court granted Harrah's motion for a directed verdict on the issue of negligence per se because Swanson was not in the class of physically disabled persons whose access to buildings is protected by IBC Chapter 11. Therefore, Swanson could not present the alleged violation for the purpose of demonstrating negligence per se.

Because Swanson's injury was a physical harm caused by falling and not an impairment of her ability to access a building, it was not the type of injury against which IBC Chapter 11 protects. Because Swanson was not physically disabled, she was not in the class of people that IBC Chapter 11 protects. Therefore, the purported IBC Chapter 11 violation was not relevant to the issue of whether Harrah's breached a duty that it owed to Swanson. *Sagebrush Ltd.*, 99 Nev. at 207, 660 P.2d at 1015. As a result, Swanson could not present the alleged violation for the purpose of demonstrating Harrah's negligence.

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[1]Though the 2006 edition of the IBC was Clark County's building code at the time Swanson fell, Swanson proffered the 2000 edition of the IBC at trial. Because the relevant provision is substantively identical in the 2000 and 2006 editions of the IBC, the use of the 2000 edition at trial is immaterial to the present analysis. *Compare* Int'l Bldg. Code § 1104.1 (2006), *with* Int'l Bldg. Code § 1104.1 (2000).

The district court abused its discretion by allowing Swanson to discuss the alleged building code violations in closing argument

We review a district court's rulings about closing arguments for abuse of discretion. *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009). In reviewing the district court's exercise of its discretion, we recognize that "[d]uring closing argument, trial counsel enjoys wide latitude in arguing facts and drawing inferences from the evidence." *Jain v. McFarland*, 109 Nev. 465, 476, 851 P.2d 450, 457 (1993). However, "closing argument is limited to comments on facts in evidence that are relevant to the issues [that the jury is to resolve] and the fair inferences which can be drawn from those relevant facts." *Mason v. Gen. Motors Corp.*, 490 N.E.2d 437, 443 (Mass. 1986). Thus, in closing argument, a party may not discuss irrelevant facts or address issues that the jury is not to resolve. Since an alleged building code violation is not a "fact that is of consequence to the determination of" whether Harrah's breached the duty of reasonable care it owed to Swanson, the alleged violation is not relevant to Swanson's negligence claim. NRS 48.015. Because the district court authorized Swanson to discuss alleged building code violations after granting Harrah's motion for a directed verdict on the only claim for which the purported violations were relevant, it permitted Swanson to argue irrelevant facts to the jury. Thus, the district court abused its discretion.

The district court's error allowed Swanson to make arguments that resulted in an improper evaluation of Harrah's standard of care. Thus, this abuse of discretion affected Harrah's substantial rights and was not harmless error. Therefore, reversal is warranted. NRCP 61; *City of Elko v. Zillich*, 100 Nev. 366, 371, 683 P.2d 5, 8 (1984) (stating that "a

verdict will not be set aside unless it affects the substantial rights of the parties").[2]

Therefore, we

GRANT Harrah's petition for en banc reconsideration, VACATE our prior order in this matter, and ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Gibbons, C.J.

Pickering, J.

Hardesty, J.

Parraguirre, J.

Douglas, J.

Cherry, J.

Saitta, J.

cc: Hon. Douglas W. Herndon, District Judge
Craig A. Hoppe, Settlement Judge
Rands, South & Gardner/Henderson
Mario D. Valencia
Hammond & Hammond, LLP
Eighth District Court Clerk

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[2]Because the district court's abuse of discretion warrants a reversal of the judgment, we do not address the other issues raised by the parties.