IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNY'S, INC., D/B/A
DENNY'S RESTAURANT #1539,

Appellant,

vs.

JANET LEWIS,

Respondent.

No. 35691

FILED

MAY 21 2001

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

ORDER OF AFFIRMANCE

This appeal arises from a slip-and-fall at a Denny's Restaurant in Carson City. Respondent Janet Lewis alleges that she slipped on scrambled eggs, twisted her ankle and severely injured her back. Following a trial, the jury found that Denny's was liable for the injury and awarded Lewis $1,115,281.00 in general damages, which was then reduced to $591,098.93 in accordance with the jury's finding that Denny's was only fifty-three percent at fault. Denny's now appeals from the district court's order of judgment, alleging several instances of trial error. We affirm the judgment of the district court.

Denny's first contends that the district court abused its discretion in precluding Dr. Allen Schnaser, a defense witness, from offering expert opinion testimony regarding the cause of Lewis's back injury. We disagree.

A district court may, within its sound discretion, disallow a witness from offering expert testimony when a party fails to comply with NRCP 26(b)'s disclosure requirement.[1] Here, the district court concluded that Denny's expert witness list provided insufficient notice of Denny's intent to solicit

[1]Murphy v. F.D.I.C., 106 Nev. 26, 29, 787 P.2d 370, 372 (1990) (citing Otis Elevator Co. v. Reid, 101 Nev. 515, 523, 706 P.2d 1378, 1383 (1985)).

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expert opinion testimony from Dr. Schnaser. We agree that Denny's disclosure was ambiguous and did not conform to the specific requirements set out in NRCP 26(b)(5). Accordingly, we conclude that the district court did not abuse its discretion in precluding Dr. Schnaser's expert opinion testimony.

We next turn to Denny's contention that Lewis's counsel made several statements during closing argument that were so improper and prejudicial as to warrant reversal. Specifically, Denny's maintains that Lewis's counsel improperly called Dr. H. Haydon Hill, a defense expert witness, a "hired gun." Second, Denny's argues that Lewis's counsel improperly characterized its economic expert, Dr. Thomas Cargill, as "not really qualified." Third, Denny's maintains that Lewis's counsel made an improper "golden rule" argument.

Two of these three allegedly prejudicial statements are easily disposed of. Denny's failed to object to Lewis's attorney's characterization of Dr. Cargill's qualifications and to the alleged "golden rule" argument. A party assigning error on appeal must preserve the issue by objecting at trial. A failure to object constitutes a waiver of the claim.[2] Accordingly, we decline to reach these issues.

As to Lewis's attorney's "hired gun" statement, we conclude that the district court cured this error at trial. Not only did Denny's counsel object to the comment, but the district court also struck the statement from the record, and Lewis's attorney apologized. We therefore conclude that

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[2]See Fick v. Fick, 109 Nev. 458, 462, 851 P.2d 445, 448 (1993).

Denny's contention that this statement constituted prejudicial error is without merit.

We also conclude that Lewis's attorney's statements did not constitute attorney misconduct warranting reversal under the plain error methodology we announced in DeJesus v. Flick.[3] In DeJesus, we held that "'"to warrant reversal on grounds of attorney misconduct, the 'flavor of misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'"'"[4] When the "inflammatory quality and sheer quantity" of attorney misconduct amounts to plain error, review is warranted, even in the absence of specific objections to the conduct during trial.[5]

In the instant matter, there is no evidence that the alleged misconduct had the effect of prejudicing the jury so as to render its verdict "objectively unreliable."[6] In addition, the alleged misconduct can hardly be said to have so permeated the entire proceeding to thereby "provide conviction" that the jury's verdict was untrustworthy. Accordingly, we conclude that Lewis's counsel's conduct did not amount to plain error and does not warrant reversal of the district court's judgment.

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

[4]Id. at ___, 7 P.3d at 462 (quoting Barrett v. Baird, 111 Nev. 1496, 1515, 908 P.2d 689, 702 (1995) (quoting Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984) (quoting Standard Oil of California v. Perkins, 347 F.2d 379, 388 (9th Cir. 1965)))).

[5]DeJesus, 116 Nev. at ___, 7 P.3d at 462.

[6]See Canterino v. The Mirage Casino-Hotel, 117 Nev. ___, ___, 16 P.3d 415, 421 (2001) (Agosti, J., concurring).

We have considered Denny's remaining assignments of error and conclude that they are without merit.

We hereby ORDER the judgment of the district court AFFIRMED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Rose

cc: Hon. Michael P. Gibbons, District Judge
Rands, South & Gardner
Day R. Williams
Gerald A. Madison
Carson City Clerk