

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BLANCA ESTHELA JIMENEZ, AN
INDIVIDUAL,
Appellant,
vs.
BLUE MARTINI LAS VEGAS, LLC,
D/B/A BLUE MARTINI,
Respondent.

No. 72539

BLANCA ESTHELA JIMENEZ, AN
INDIVIDUAL,
Appellant,
vs.
BLUE MARTINI LAS VEGAS, LLC,
D/B/A BLUE MARTINI,
Respondent.

No. 73953

FILED

JUL 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER VACATING POST-TRIAL ORDER AND REMANDING

Blanca Esthela Jimenez appeals from a judgment entered pursuant to a jury verdict in a tort action, from a post-trial order denying Jimenez's motion for a new trial, from an order granting attorney fees and costs, and from an order staying the execution of judgment pending appeal. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.¹

Appellant Jimenez fell down a small two-step-high stairway, injuring her wrist, knee, and ankle, while patronizing the Blue Martini nightclub.² Jimenez sued Blue Martini for her injuries. After a nine-day jury trial, the jury returned a defense verdict in favor of Blue Martini.

¹Although Judge Miley presided over the trial and post-trial motions, Senior Judge J. Charles Thompson, signed the judgment on the jury verdict.

²We do not recount the facts except as necessary to the disposition.

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Jimenez moved for a new trial, arguing that the verdict was not supported by substantial evidence, that Blue Martini's attorney committed misconduct by calling Jimenez a liar repeatedly in his closing argument, and that the district court committed several errors in pre-trial and trial rulings. Blue Martini opposed the motion, arguing that a new trial was not warranted. The district court denied Jimenez's motion for a new trial, finding that the jury's verdict was supported by substantial evidence, Blue Martini's attorney did not commit misconduct, and the district court did not err in its rulings. Thereafter, Blue Martini filed a motion for attorney fees and costs, which the district court granted. Jimenez filed a motion to stay the execution of judgment pending appeal and requested the district court waive any bond requirement. The district granted Jimenez's motion to stay the judgment execution but required Jimenez to post a \$50,000 bond.

On appeal, Jimenez asserts various errors. However, because the district court failed to properly analyze Jimenez's claims of attorney misconduct we need only address that contention, and we conclude a remand is necessary for the district court to make specific findings on the record regarding attorney misconduct, as required by the supreme court and this court's jurisprudence.³ See *Lioce v. Cohen*, 124 Nev. 1, 19-20, 174

³We note that Jimenez also contends a new trial is warranted due to the district court's interlocutory rulings admitting evidence that Jimenez had a prior back condition and knee injury, allowing Blue Martini to show its expert a silent video of Jimenez testifying, giving a comparative fault jury instruction, denying Jimenez leave to amend to seek punitive damages, admitting a witness' deposition testimony, and declining to sanction Blue Martini for failing to preserve certain surveillance video. However, we conclude Jimenez's arguments are unpersuasive, as the district court's rulings were proper. See NRS 48.025 ("All relevant evidence is admissible . . ."); NRS 50.285 (allowing an expert to base an opinion or

P.3d 970, 982 (2008); *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 813-14, 357 P.3d 387, 394 (Ct. App. 2015).

Jimenez argues that Blue Martini's counsel committed misconduct, which led to jury nullification, when he repeatedly accused Jimenez of lying on the stand and asked the jury whether they should reward a person who lies.

"Whether an attorney's comments are misconduct is a question of law" reviewed de novo; but we will defer "to the district court's factual findings and application of the [legal] standards to the facts." *Lioce*, 124 Nev. at 20, 174 P.3d at 982; see also NRCP 59(a)(2) (stating that misconduct may warrant a new trial). And, we review unobjected-to attorney misconduct for plain error, *Lioce*, 124 Nev. at 19, 174 P.3d at 982. "[D]etermining whether 'plain error' has occurred as a result of unobjected-

inference on facts "made known to the expert at the hearing"); NRCP 32(a)(3)(D) (stating that a party may introduce a deposition into evidence if the party cannot procure the witness by subpoena); *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. ___, ___, 31, 416 P.3d 249, 254-55 (2018) (affirming a district court's denial of a motion to amend a complaint for undue delay); *FGA, Inc. v. Giglio*, 128 Nev. 271, 283, 285, 278 P.3d 490, 498, 499 (2012) (holding that evidence of prior injury is admissible to show "a causal connection between the prior injury and the injury at issue," and that "[e]vidence of a party's possible intoxication may be probative of the issues of causation and comparative negligence"); *Bass-Davis v. Davis*, 122 Nev. 442, 447-48, 134 P.3d 103, 106-07 (2006) (addressing sanctions for spoliation). Finally, to the extent Jimenez challenges the verdict form, we deem that argument waived because Jimenez did not object to the verdict form below. See *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

to misconduct requires the court to closely examine the record, weigh the severity and persistence of the misconduct against the evidence presented, and assess what role, if any, the misconduct likely played in the jury's verdict." *Pentair Water Pool & Spa*, 131 Nev. at 817, 357 P.3d at 397. Under *Lioce*, a district court resolving a motion for a new trial based on unobjected-to attorney misconduct is required to make specific findings on the record during the oral proceedings and also in its written order, as to whether the misconduct amounts to plain error, and whether the party moving for a new trial has demonstrated that the misconduct rises to the level of irreparable and fundamental error. *Lioce*, 124 Nev. at 19-20, 174 P.3d at 982. When district court fails to provide reasoning for its decision such that this court cannot determine whether the district court abused its discretion in denying the motion for a new trial, we must remand for a decision on the motion based upon the standards set forth in *Lioce*. *See id.* at 24-25, 174 P.3d at 985.

Here, Jimenez's motion for a new trial detailed incidents of purported misconduct. But, in its order the district court denied Jimenez's motion for new trial without setting forth adequate specific findings under *Lioce's* plain error standards for evaluating attorney misconduct. The district court merely stated, briefly, that it found nothing in the record to indicate Blue Martini's counsel was acting inappropriately in its closing argument. Yet, the record includes numerous instances wherein Blue Martini's counsel accused Jimenez of lying. *C.f. id.* at 21-22, 174 P.3d at 983 (noting that "an attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases and may amount to prejudicial misconduct necessitating a new trial"); NRPC 3.4(e). Thus, these findings are deficient


under *Lioce* and we are unable to determine whether the district court abused its discretion. The district court must revisit Jimenez's NRCP 59(a)(2) motion for a new trial and, in so doing, make specific findings about the alleged attorney misconduct under the standards set forth in *Lioce*. As a result, we vacate the district court's denial of Jimenez's attorney misconduct based request for new trial, and remand this matter for further proceedings.

Accordingly we,

ORDER the post-trial order of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.⁴

 , C.J.

Silver

 , J.
Tao

 , J.
Gibbons

cc: Chief Judge, The Eighth Judicial District Court
Hon. Stefany Miley, District Judge
Hon. J. Charles Thompson, Senior Judge
Lansford W. Levitt, Settlement Judge
Law Office of Neal Hyman
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas
Eighth District Court Clerk

⁴We decline to resolve other issues raised in this appeal regarding the district court's denial of the motion for a new trial in light of this remand for additional findings.