

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 77226-COA

**FILED**

OCT 31 2019

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*<sup>1</sup>

Blanca Jimenez appeals from a district court order denying a motion for a new trial in a tort action and an order awarding fees and costs. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

Jimenez sued Blue Martini nightclub for negligence, alleging she suffered injuries when she fell down a two-step staircase at Blue Martini.<sup>2</sup> During a nine day jury trial, Jimenez and Blue Martini presented conflicting evidence concerning the cause of Jimenez's injuries. For example, Jimenez called an expert who testified Blue Martini's steps were shorter than building codes required. Conversely, Blue Martini's building expert disputed Jimenez's expert's measurements, and testified that, in his opinion, the steps did not cause Jimenez's fall. Jimenez also called an expert who testified the lighting levels were below the required levels in an egress area. However, Blue Martini's lighting expert testified the building code referenced by Jimenez's experts was not applicable, because it was the lighting requirement for residential structures.

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<sup>1</sup>The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter.

<sup>2</sup>We do not recount the facts except as necessary to our disposition.

Likewise, Jimenez and Blue Martini presented conflicting evidence and expert testimony regarding both the extent and treatment of Jimenez's injuries. One of Jimenez's treating physicians testified a fall that causes injuries to a tibia and knee could "easily . . . hurt [Jimenez's] back." On the other hand, Blue Martini's orthopedic expert testified that after examining Jimenez and her medical records, he did not believe the fall injured her back. Further, Jimenez's knee and wrist doctor admitted to retroactively modifying Jimenez's medical records to show an initial complaint of back pain six months after her initial visit. After one of Jimenez's treating physicians testified of the treatment Jimenez needed and would require in the future, Blue Martini called a doctor who testified that the extent of treatment for Jimenez's knee injury was excessive.

During her testimony, Jimenez gave contradictory statements regarding her prior injury and her previous course of treatment. To discredit Jimenez's testimony, Blue Martini admitted into evidence the deposition of Aurora Alvarez, Jimenez's roommate. In her deposition, Alvarez testified that Jimenez had complained of back and knee pain prior to her fall at the Blue Martini.

During closing argument, Blue Martini's counsel emphasized the contradictory testimony of the experts who testified at trial, Jimenez's modified medical records, and inconsistencies in Jimenez's own testimony. Specifically, Blue Martini stated Jimenez's knee and wrist doctor had "fake[d]" medical records and Jimenez had lied about her prior injuries. After the jury returned a verdict in favor of Blue Martini, Jimenez moved for a new trial, arguing that the verdict was inconsistent with the evidence and that Blue Martini committed attorney misconduct. The district court denied the motion.

Subsequently, Jimenez appealed the verdict, the order denying Jimenez's motion for a new trial based on attorney misconduct, and the award of attorney fees and cost. This court considered Jimenez's initial appeal, and vacated and remanded the district court's order for failure to make specific findings under *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008). On remand, the district court found that, under the standards set forth in *Lioce*, Blue Martini did not commit attorney misconduct. Jimenez appealed the district court's findings again.

On appeal, Jimenez argues that the district court abused its discretion in denying her motion for new trial under NRCP 59 because Blue Martini's counsel committed attorney misconduct during closing arguments. Jimenez further argues the district court abused its discretion by awarding attorney fees and costs to Blue Martini.

As a starting point, Jimenez asserts a number of trial errors, such as the giving of an improper negligence per se instruction; the erroneous giving of a comparative fault instruction; and errors associated with the parties' opening statements. However, these alleged errors were either previously raised and resolved in Jimenez's prior appeal, or should have been raised in that prior appeal. Issues already raised and previously decided by this court become the "law of the case" and cannot be reargued. *Hsu v. Cty. of Clark*, 123 Nev. 625, 629-30, 173 P.3d 724, 728 (quoting *Wickliffe v. Sunrise Hosp.*, 104 Nev. 777, 780, 766 P.2d 1322, 1324 (1988)). Issues that were not raised but could and should have been raised in that prior appeal are now waived. For example, Jimenez again argues that the court erred in its "negligence per se" and "comparative fault" jury instructions and that these errors were compounded when the jury used the short verdict form instead of the long one. Jimenez's argument is not that

either instruction was wrongly phrased as a matter of law, but rather that the jury verdict form indicates that the jury did not accept those legal theories and therefore the instructions were unnecessary. But Jimenez raised this exact argument in his prior briefing and this court already considered and rejected all of Jimenez's arguments arising from the jury verdict form in footnote 3 of our prior order. *Jimenez v. Blue Martini Las Vegas, LLC*, Docket Nos. 72539 & 73953 (Order Vacating Post-Trial Order and Remanding, Ct. App., July 27, 2018).

Thus, the only district court actions that can be properly challenged in this appeal are any new district court determinations that took place following the prior remand or any issue that this court chose not to reach in the prior appeal, namely, the district court's resolution of the question of attorney misconduct and its award of attorney fees and costs following trial. Therefore, these are the only issues that can now be the proper subject of this appeal.

This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion, viewing the evidence and all inferences favorably to the party against whom the motion was made. *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 814, 357 P.3d 387, 395 (Ct. App. 2015). "Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party[']s counsel] committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014). An attorney commits misconduct when he or she "encourage[s] the jurors to look beyond the law and the relevant facts in deciding the case[ ] before them." *Lioce v. Cohen*, 124 Nev. 1, 6, 174 P.3d 970, 973 (2008).



To determine whether attorney misconduct warrants a new trial, this court must apply a three-step analysis. *Michaels*, 131 Nev. at 815, 357 P.3d at 395. We must first determine whether an attorney's comments constitute misconduct, which is a question of law reviewed de novo. *Id.* If there was misconduct, we must then decide which legal standard to apply to determine whether the misconduct warrants a new trial—a question resolved by determining whether the party alleging misconduct timely objected to it below. *Id.* Finally, we “must determine whether the district court abused its discretion in applying that standard.” *Id.*

If the party claiming misconduct did not object at trial, “the district court shall first conclude that the failure to object is critical and . . . treat the attorney misconduct issue as having been waived, unless plain error exists.” *Lioce*, 124 Nev. at 19, 174 P.3d at 982. Plain error exists only where misconduct occurred and “no other reasonable explanation for the verdict exists.” *Michaels*, 131 Nev. at 816, 357 P.3d at 396 (quoting *Lioce*, 124 Nev. at 19, 174 P.3d at 982).

Here, Jimenez failed to object to Blue Martini's closing argument below. Accordingly, the jury's verdict must stand unless Jimenez can demonstrate both that misconduct occurred and that misconduct is the only reasonable explanation for the verdict. We conclude that there would still be a reasonable explanation for the jury's verdict in favor of Blue Martini apart from any alleged misconduct. Thus, we conclude that plain error does not exist, and we uphold the district court's denial of Jimenez's motion for a new trial.

Next, we consider whether the district court abused its discretion by awarding fees and costs to Blue Martini. Jimenez argues that

the district court failed to consider the *Beattie* factors because Blue Martini's offer was not reasonable and Jimenez's rejection of the offer was reasonable. Blue Martini argues the district court fully considered the *Beattie* factors and the fees and costs were appropriate under *Brunzell*.

This court reviews the district court's decision regarding attorney fees for an abuse of discretion. *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 80, 319 P.3d 606, 615 (2014). When awarding attorney fees, the district court must consider the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 311 (1969). *Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005). When awarding attorney fees in the offer of judgment context under NRCP 68, the district court must consider the factors set forth in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), and *Brunzell*.

Here, before awarding attorney fees and costs in favor of Blue Martini, the district fully considered the factors set forth in *Beattie* and *Brunzell*. The district court found that while Jimenez filed and maintained her claim in good faith, her rejection of the offer of judgment was unreasonable. Prior to trial, Blue Martini offered several times the value of Jimenez's medical costs and claimed lost wages despite evidence of prior injury, comparative negligence, and the disputed causation of Jimenez's fall. Accordingly, we conclude the district court did not abuse its discretion by granting Blue Martini's motion for attorney fees and costs.

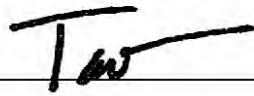
Lastly, we consider Jimenez's appeal of the supersedeas bond. Jimenez argues that the district court abused its discretion by failing to consider her financial circumstances and imposing an excessive bond. A district court may use its discretion to set a supersedeas bond that will permit full satisfaction of the judgment. *Nelson v. Heer*, 121 Nev. 832, 834-

35, 122 P.3d 1252, 1253 (2005). Thus, we conclude the district court did not abuse its discretion when it set the bond well below the judgment against Jimenez.

Based on the foregoing, we

Order the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

cc: Hon. Stefany Miley, District Judge  
Law Office of Neal Hyman  
Lewis Brisbois Bisgaard & Smith, LLP/Las Vegas  
Eighth District Court Clerk