IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DESIRE EVANS-WAIAU, INDIVIDUALLY; AND GUADALUPE PARRA-MENDEZ, INDIVIDUALLY,
Appellants,
vs.
BABYLYN TATE, INDIVIDUALLY,
Respondent.

No. 79424-COA

FILED

MAY 25 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Desire Evans-Waiau and Guadalupe Parra-Mendez appeal a judgment in favor of Babylyn Tate, pursuant to a jury verdict, in a civil negligence case. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Evans-Waiau was driving near the Las Vegas Strip with Parra-Mendez, who rode in the passenger seat.[1] Evans-Waiau drove a 1998 Honda Accord with blacked-out taillights, which was owned by Evans-Waiau's fiancé, Jorge Parra-Meza.

While Evans-Waiau was allegedly waiting for pedestrians to cross the street at an intersection, Tate rear-ended Evans-Waiau's car. Tate was traveling at an unknown speed, but possibly as fast as 35 miles per hour. Neither cars' airbags deployed, nor did anyone report being injured. Both cars sustained minor damage and were drivable. Evans-Waiau asked Tate to remain with her until she could get police assistance. Dispatch

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[1]We do not recount the facts except as necessary for our disposition. We do not recount the facts except as necessary for our disposition. The parties jointly appeal so we refer to them collectively as Evans-Waiau unless we note otherwise.

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stated that it was policy not to send officers when no one is injured. Nevertheless, police eventually arrived about two hours after the collision.

Evans-Waiau claimed that she was stopped with her turn signal engaged waiting to make a turn. Tate reported that because of the cosmetic blackout feature covering the taillights she did not see brake lights or turn a signal illuminated on Evans-Waiau's vehicle, and apparently only saw her abruptly stop and, therefore, was unable to react in time to prevent the collision.

Shortly after the accident, Evans-Waiau developed pain in her neck and shoulder. An MRI showed bulging discs at the levels of C5-6 and C6-7. She sought chiropractic and pain management care. After receiving a nerve root block at the left C7 vertebrae, Evans-Waiau's symptoms temporarily subsided.

Evans-Waiau was subsequently riding in the front passenger seat of Parra-Meza's car, which he was driving, when they were rear-ended after coming to a complete stop at an intersection. This accident required Evans-Waiau to go to the ER for lumbar and cervical spine pain. Following the second accident, Evans-Waiau underwent a cervical fusion at C6-7.

Evans-Waiau filed a complaint in district court, alleging negligence and negligence per se against Tate, and eventually seeking three million dollars in aggregated damages. Tate timely answered, claiming that Evans-Waiau was comparatively negligent and could not prove her medical treatment was causally related to the first accident, specifically the surgery and other treatment she received following the nerve root block.

At trial, Evans-Waiau's physicians opined that the second accident was unrelated to her need for the cervical-fusion surgery; rather, it was due to the first accident involving Tate. They also opined that Evans-

Waiau would need extensive future medical care, including additional surgery, due to that accident. Her surgeon specifically opined that the second accident was not medically related to the C6-7 fusion. However, there was no comparative MRI performed on Evans-Waiau's cervical spine after the second accident.[2] Doctors performed x-rays to her cervical spine that showed no abnormalities.

Tate hired expert witnesses to examine Evans-Waiau's medical records and issue expert reports. These experts opined that Evans-Waiau's pain resulting from the first accident was a minor soft tissue strain and not consistent with any structural spinal injury because her injuries healed with conservative treatment, including chiropractic care and the nerve root block, and cervical spine x-rays showed no abnormalities. Tate's experts did not believe that Evans-Waiau's cervical surgery was necessary based on the medical records related to the first accident, and any medical care that Evans-Waiau received after the nerve root block was also unrelated. Defense experts attributed Evans-Waiau's cervical fusion surgery, any potential future surgery, and complaints of extreme pain to the second accident, as well as to Evans-Waiau's preexisting degenerative problems.

During Tate's closing arguments at trial, her counsel asked the jury to consider "[w]ho among us hasn't slammed on brakes? . . . Who hasn't been in the position of having a car in front of him, or her, slam on his brakes . . . ." This prompted a timely golden-rule objection from Evans-Waiau, which the district court sustained.

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[2]An MRI was performed on Evans-Waiau's lumbar spine, showing disc protrusions. However, none of Evans-Waiau's alleged damages seek relief from the injuries to the lumbar spine.

Tate went on to explain to the jury how long it would take "the average family of four [who] makes $50,000 a year" to save one to three million dollars, which were the pain and suffering and total damage figures being sought, respectively. Evans-Waiau again objected, claiming this was an impermissible ability-to-pay argument. The district court sustained the objection "to a point" but permitted Tate to give a limited example of a family making $50,000 a year to explain how long it would take them to save one to three million dollars. The jury ultimately returned a defense general verdict in favor of Tate. Evans-Waiau requested a general verdict form, so there were no special interrogatories requesting information from the jury regarding its verdict.

On appeal, Evans-Waiau alleges that (1) Tate's counsel committed attorney misconduct at trial warranting a new trial; and, that the district court abused its discretion by (2) declining to censor the audio of a video taken by Evans-Waiau's fiancé played at trial; (3) providing a negligence per se instruction for a statute requiring clearly-visible taillights because there was no evidence to support such an instruction; (4) allowing Tate's counsel to make attorney-driven and medical-buildup arguments without factual support, in violation of the order in liming;[3] and (5) allowing a defense medical expert to testify.

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[3]Tate's closing arguments as to Evans-Waiau's damages being attorney-driven were not properly preserved on appeal because Evans-Waiau did not timely object. The appellate court reviews a district court's ruling on a motion in liming for abuse of discretion. *Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005). "Whether a motion in liming preserves error depends on whether the error alleged is in compliance with or violation of the court's ruling on the motion." *BMW v. Roth*, 127 Nev. 122, 136, 252 P.3d 649, 659 (2011). If an opposing party violates an order in liming, then the complaining party on appeal must object at trial. *Id.* at

Whether Tate's counsel committed attorney misconduct warranting a new trial

Evans-Waiau argues that Tate's counsel engaged in attorney misconduct during closing argument. Evans-Waiau argues the misconduct warrants a new trial because counsel's comments included an improper ability-to-pay argument, a golden rule violation, and requested a jury nullification. Tate counters that her counsel was appropriately reminding the jury about the real-world value of money and did not commit golden rule violations or request a jury nullification. Tate further argues that even if the comments approached impropriety, Evans-Waiau failed to preserve this issue because she did not move for a new trial under NRCP 59(a)(1)(B). We agree with Tate that Evans-Waiau failed to preserve the issue by not moving for a new trial in the first instance.

Whether an attorney's comments are misconduct is a question of law subject to de novo review. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). However, the district court's factual findings, and how it applied the law to those facts, receive deference. *Id.*

In appeals requesting a new trial based on attorney misconduct, we engage in a "three-step analysis" derived from *Lioce* and its progeny. *Michaels v. Pentair Water Pool & Spa*, 131 Nev. 804, 815, 357 P.3d 387, 395 (Ct. App. 2015). *Lioce* delineates several legal review standards for claims of attorney misconduct seeking a new trial, depending upon whether the

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137, 252 P.3d at 659. Here, Evans-Waiau essentially argues that Tate violated the order on the motion in liming. In the order, the district court permitted Tate to make attorney-driven and medical-buildup arguments if supported in fact, and additionally provided that Evans-Waiau could object so that the district court could determine if the arguments were supported by evidence. Evans-Waiau failed to object when Tate made this argument. Therefore, we decline to address this issue.

issue was preserved and how the district court ruled on the issue. 124 Nev. at 17-19, 174 P.3d at 980-82.

First, we determine whether misconduct occurred. *Michaels*, 131 Nev. at 804, 357 P.3d at 395 (citing *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74-75, 319 P.3d 606, 611 (2014)). If there was misconduct, "the next step is to determine the proper" *Lioce* standard that applies. *Id.*; *see also Gunderson*, 130 Nev. at 74-75, 319 P.3d at 611; *Lioce*, 124 Nev. at 17-19, 174 P.3d at 980-82. Lastly, this court "determine[s] whether the district court abused its discretion in applying" the *Lioce* standards. *Michaels*, 131 Nev. at 815, 357 P.3d at 395; *Gunderson*, 130 Nev. at 74-75, 319 P.3d at 611; *see also Capanna v. Orth*, 134 Nev. 888, 891-92, 432 P.3d 726, 732 (2018) (reviewing first whether there was misconduct, second which *Lioce* standard applies, and lastly concluding whether or not the district court abused its discretion).

Our review of each step in the *Lioce* framework is predicated on the district court having first ruled on the attorney-misconduct issue in a motion for new trial. *See Lioce*, 124 Nev. at 14, 17, 174 P.3d at 978, 980 (outlining "the proper standards for granting or denying a new trial based on attorney misconduct" for "the district courts . . . to apply"). *Lioce* specifically requires this court to consider whether the district court abused its discretion "*in granting or denying the new trial motions* because of the misconduct." *Id.* at 14, 174 P.3d at 978 (emphasis added); *see* NRCP 59(a)(1)(B) (permitting a new trial based on "misconduct of the jury or prevailing party").

The *Lioce* court explained that "when *deciding a motion for a new trial* based on attorney misconduct," the district court "must make specific findings, *both on the record during oral proceedings and in its order*,

with regard to its application" of the *Lioce* framework. *Lioce,* 124 Nev. at 14, 19-20, 174 P.3d at 978, 982 (emphases added). The *Lioce* court reasoned that written findings were necessary to enable proper appellate review of the district court's "exercise of discretion in denying or granting a motion for a new trial." *Id.* at 20, 174 P.3d at 982.

Therefore, appellate review under *Lioce* requires a motion for new trial in the first instance. *See BMW*, 127 Nev. at 132 n.4, 252 P.3d at 656 n.4 (reversing the district court's order granting a plaintiff a new trial based on attorney misconduct where the plaintiff did not join co-plaintiff's post-trial motion for new trial alleging attorney misconduct, noting "that the district court did not make findings of fact or conclusions of law to justify a new trial" for the plaintiff); *Bato v. Pileggi*, Docket No. 68095 (Order of Affirmance, April 14, 2017) (holding that the failure to bring a motion for new trial in an attorney-misconduct appeal constitutes waiver (citing *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986)); *see generally Craig v. Harrah,* 65 Nev. 294, 306, 195 P.2d 688, 693 (1948) ("The reason of the long established rule for requiring . . . a motion for a new trial . . . [is] that the trial court may first have an opportunity to rectify an error."). Without an order from the district court, we cannot engage in appellate review under *Lioce* because there are no findings of fact or conclusions of law to review and no way to determine whether the district court abused its discretion. *See Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance."). Moreover, under *Lioce* and its progeny, an attorney-misconduct appeal has *always* been predicated on the losing party filing a motion for new trial in the first

instance.[4] Therefore, Evans-Waiau's attorney misconduct claims are waived.

Whether the district court abused its discretion in declining to censor the audio of a video taken by Parra-Meza

Evans-Waiau argues that a video of Parra-Meza using profane language was inadmissible hearsay, irrelevant, and unduly prejudicial and its entire audio should have been censored. Tate counters that this evidence was not hearsay and was relevant as to Parra-Meza's bias, opportunistic motives, and credibility since he testified at trial.

During Parra-Meza's testimony, he described Evans-Waiau's symptoms related to her injuries as he had observed them. Tate's counsel sought to use the video of Parra-Meza to impeach him for bias. The video depicted the damaged car along with Parra-Meza using profanities while he explained the damage. Parra-Meza pondered, in an angry manner, that someone had to pay for the damage. Evans-Waiau timely objected on hearsay, relevance, and undue prejudice grounds. The district court overruled the objection, noting it was not hearsay because it was relevant as to impeaching the witness for possible bias and motive and it was not unduly prejudicial. Evans-Waiau requested to have the entire audio censored from the video, which the district court declined because the

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[4]*See Lioce*, 124 Nev. at 19-20, 174 P.3d at 982; *see also, e.g., Pizarro-Ortega*, 133 Nev. 261, 261, 396 P.3d 783, 783 (2017) (reviewing attorney misconduct based on a motion for new trial); *Capanna*, 134 Nev. at 890-91, 432 P.3d at 731 (same); *Gunderson*, 130 Nev. at 74, 319 P.3d at 611 (same); *BMW*, 127 Nev. at 134, 252 P.3d at 657 (same); *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364-65, 212 P.3d 1068, 1078-79 (2009) (same); *Michaels*, 131 Nev. at 814-15, 357 P.3d at 395 (same).

portion where Parra-Meza talks about someone having to pay for the damage was the critical portion relevant to bias.

The district court's decision to admit or "exclude evidence [is reviewed] for abuse of discretion," and will not be disturbed "absent a showing of palpable abuse." *LVMPD v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013) (citation omitted). "The credibility of a witness" through impeachment evidence "may be attacked . . . ." NRS 50.075. Evidence that a witness is biased or has a motivational interest in the outcome of a case may be allowed, at the discretion of the district court, for impeachment purposes, *see Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (citations omitted), and will not be considered hearsay if not offered for the truth of the matter asserted, *see* NRS 51.035 ("Hearsay" is an out-of-court "statement offered in evidence to prove the truth of the matter asserted."); *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 362, 212 P.3d 1068, 1077 (2009) (explaining that an out-of-court statement offered to prove something other than the truth of the matter asserted is not hearsay).

Here, Parra-Meza testified, among other things, in support of Evans-Waiau's injury claims. As such, the video was appropriate for impeachment purposes of determining any possibility of bias. It was similarly not hearsay because it was not offered for the truth of the matter, that someone needed to pay for the damage, but to show possible bias in Parra-Meza's testimony regarding his support of Evans-Waiau. *See Lobato v. State*, 120 Nev. 512, 519, 96 P.3d 765, 770 (2004) (explaining that "extrinsic evidence relevant to prove a witness's motive to testify in a certain way, i.e., bias, interest, corruption or prejudice, is never collateral to the controversy and not subject to the limitations contained in NRS 50.085(3)");

Adams v. Mem'l Hermann, 973 F.3d 343, 351 (5th Cir. 2020) (upholding the use of extrinsic evidence to impeach a testifying witness for bias).

Although the profane language in the video could be viewed as offensive, and no redaction was requested, the district court noted it was not unduly prejudicial against Evans-Waiau because it was no surprise that Parra-Meza was frustrated about his car being hit and no juror would hold that against him. Admission of this impeachment evidence was a permissible discretionary call for the district court, which we generally do not disturb on appeal. *M.C. Multi-Fam. Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). Therefore, the district court did not abuse its discretion.[5]

Whether the district court abused its discretion in providing a negligence per se instruction for a statute requiring clearly visible taillights

Evans-Waiau argues that the district court erred in approving the defense's negligence per se jury instructions regarding Nevada's laws on the visibility of taillights, because there was no evidence to support these instructions. Tate counters that the jury instructions were proper because there was evidence to support her theory of the case: that Evans-Waiau was comparatively negligent by violating Nevada's taillights' laws. "A district court's decision to give or decline a proposed jury instruction is reviewed for an abuse of discretion or judicial error." *Atkinson v. MGM Grand Hotel,*

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[5]We additionally note that Evans-Waiau has not demonstrated how the alleged error changed the result of the proceedings. *See Khoury v. Seastrand*, 132 Nev. 520, 539, 377 P.3d 81, 94 (2016) ("To be reversible, an error must be prejudicial and not harmless. . . . To demonstrate that an error is not harmless, a party 'must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.'" (quoting *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010))); *cf.* NRCP 61 ("Harmless Error").

Inc., 120 Nev. 639, 642, 98 P.3d 678, 680 (2004). A party is entitled to jury instructions on all its theories of the case that are supported by the evidence and warranted by Nevada law. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134 Nev. 235, 238, 416 P.3d 249, 253 (2018). A defendant is entitled to any jury instruction that supports his or her theory of the case so long as there is evidence to support it, regardless of whether the evidence is weak, inconsistent, believable, or incredible. *Vega v. E. Courtyard Assocs.*, 117 Nev. 436, 441, 24 P.3d 219, 222 (2001) (citations omitted).

The two instructions at issue were based on NRS 484D.230(1)(b) ("A person shall not drive . . . any vehicle . . . if such vehicle . . . [i]s not equipped with lamps, reflectors, brakes, horn and other warning and signaling devices . . . required by the laws of this State . . . under the conditions and for the purposes provided in such laws."), and NRS 484D.115(1) ("[E]very motor vehicle . . . must be equipped with at least two tail lamps mounted on the rear, which, when lighted . . . emit a red light plainly visible from a distance of 500 feet to the rear . . . "). Thus, if an aftermarket feature distorts the taillight's brightness so that it cannot be seen at 500 feet, then the taillight is non-functioning, assuming such non-illumination can be proven. Therefore, use of aftermarket products that render taillights nonfunctional, for example, would not be in accord with these statutes.

In this case, the district court's decision to permit these jury instructions was supported by Nevada law and the testimony at trial. Tate argued that Evans-Waiau was comparatively negligent and that the negligence per se doctrine applied because of the blacked-out taillights, which caused her not to see Evans-Waiau's vehicle so she could timely react and avoid colliding with it. Tate testified at trial that she did not see Evans-

Waiau's taillights or turn-signal lights engaged; she said she only saw the car abruptly stop. Pictures of Parra-Meza's car were admitted at trial, which showed the rear damage to the car, along with the taillights, which appeared to be black in color. This is additional evidence that the taillights were not functioning in accordance with Nevada law.

On appeal, Evans-Waiau do not address the pictures admitted at trial, nor do they address Tate's testimony. Evans-Waiau largely relitigate the underlying facts that the district court relied upon in providing the negligence per se instructions. This court will not reweigh the evidence or witness credibility. *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (refusing to reweigh credibility determinations on appeal); *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (refusing to reweigh evidence on appeal). Tate's testimony, along with the pictures showing black taillights, is sufficient to support Tate's theory that Evans-Waiau was comparatively negligent by not maintaining taillights in accordance with Nevada law. Therefore, Tate's testimony supported these instructions, and the district court did not abuse its discretion in giving them to the jury.

Whether the district court abused its discretion by allowing a defense medical expert to testify that Evans-Waiau's medical treatment was either unnecessary or not related to the first accident

Evans-Waiau argues that the district court abused its discretion in permitting Dr. Schifini to testify as a defense expert because, when he testified, Dr. Schifini did not provide an alternative expert opinion as to causation, and his testimony failed to assist the jury. Tate counters that Dr. Schifini's testimony aided the jury in determining causation and damages.

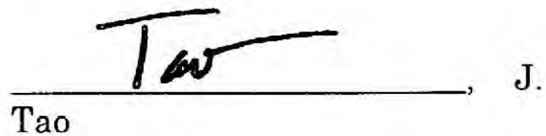
A district court's decision to allow expert testimony is reviewed for abuse of discretion. *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). At trial, Dr. Schifini testified to a reasonable degree of medical certainty that there was no evidence that Evans-Waiau sustained any noticeable injury from the first collision. He further testified that even if he gave Evans-Waiau "the benefit of the doubt[ ] that there was actually an injury," the medical care that Evans-Waiau received after her nerve root block was unnecessary. "To assist the trier of fact, medical expert testimony . . . must be made to a reasonable degree of medical probability." *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 529, 262 P.3d 360, 367 (2011) (internal quotation marks omitted); *see also* NRS 50.275. "[D]efense experts may offer opinions concerning causation that either contradict the plaintiff's expert or furnish reasonable alternative causes to that offered by the plaintiff." *Williams*, 127 Nev. at 530, 262 P.3d at 368; *see also FGA, Inc. v. Giglio*, 128 Nev. 271, 284, 278 P.3d 490, 498 (2012) (explaining that the defense expert must discuss "the plaintiff's causation theory in his [or her] analysis").

The district court did not abuse its discretion in permitting Dr. Schifini's testimony. As provided for in his expert report, Dr. Schifini, hired by Tate to review Evans-Waiau's medical records and depositions, opined on the issues of causation and damages. He testified at trial within the scope of his report and opined that not all of Evans-Waiau's medical treatment appeared reasonably related to the first accident based on her pain relief with chiropractic care and following the nerve root block. Therefore, Dr. Schifini's testimony aided the trier of fact in determining the nature and extent of those injuries causally related to the first accident, and

the district court did not abuse its discretion in allowing Dr. Schifini's testimony. Accordingly, we

ORDER the judgment of the district court AFFIRMED.[6]

_______________________, C.J.
Gibbons



_______________________, J.
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cc: Hon. Mary Kay Holthus, District Judge
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Eighth District Court Clerk

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[6]To the extent Evans-Waiau raises arguments we have not specifically addressed, we have considered them and find they are unpersuasive.