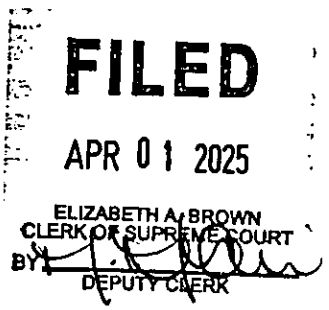
IN THE SUPREME COURT OF THE STATE OF NEVADA

JUDY PALEY, INDIVIDUALLY,
Appellant,
vs.
DESERT PALACE, LLC A DOMESTIC LIMITED LIABILITY COMPANY, D/B/A NOBU RESTAURANT,
Respondents.

No. 87977



ORDER OF AFFIRMANCE

This is an appeal from a judgment after a jury trial in a tort matter. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Appellant Judy Paley fell ill after eating at Nobu Restaurant in February of 2017. After receiving medical treatment, Paley sued respondent Desert Palace, LLC, d/b/a/ Nobu Restaurant (Nobu), asserting claims of negligence, negligence per se, strict product liability, and breach of warranty. After settlement efforts failed, the case proceeded through discovery and, ultimately, to a six-day jury trial. After trial, the jury returned a verdict of no liability for Nobu. The district court entered an order on that judgment awarding $0 in damages and dismissing the action with prejudice.

Paley appeals, arguing that Nobu spoliated evidence during discovery and committed attorney misconduct during trial. Paley asserts

that these errors adversely tainted the entire proceeding and, thus, that a new trial is warranted. We disagree and affirm.

Paley was not required to move for a new trial at the district court before seeking appellate relief

As a threshold matter, we address Nobu's argument that Paley was required to move in the district court for a new trial before seeking that remedy on appeal; she was not. Nevada law is clear on this point both in the appellate rules and in our case law. NRAP 3A(a) states that "[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order, *with or without first moving for a new trial.*" (Emphasis added.) And, as we explicitly ruled in *Rives v. Farris*, an appellant need not have moved for new trial below before requesting one as an appellate remedy.[1] 138 Nev. 138, 143, 506 P.3d 1064, 1069 (2022). We now turn to Paley's misconduct claims.

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[1]We have, however, noted that there are potential benefits from moving for a new trial prior to seeking appellate relief. As we have explained:

> while a party need not move for a new trial before pursuing an appeal, there are several practical benefits to doing so such as allowing a district court to correct alleged errors without pursuing potentially unnecessary appellate litigation or developing a better record for potential appellate review by allowing the district court to articulate its reasoning for its rulings and the parties to 'crystallize' their arguments.

Evans-Waiau v. Tate, 138 Nev. 423, 428 n.3, 511 P.3d 1022, 1027 n.3 (2022); *see also Rives*, 138 Nev. 142 n.3, 506 P.3d at 1069 n.3.

The district court did not err in giving an adverse inference jury instruction

Paley argues that the district court erred in giving an adverse inference jury instruction rather than a rebuttable presumption jury instruction. Paley contends that Nobu's failure to produce certain requested documents during discovery—the logs showing the storage temperatures of the foods Paley ordered—constitutes spoliation. We review a district court's decision to grant a jury instruction for an abuse of discretion. *See Bass-Davis v. Davis*, 122 Nev. 442, 447, 134 P.3d 103, 106 (2006). NRS 47.250(3) sets out a rebuttable presumption that evidence willfully suppressed would be adverse if produced. A district court may instruct the jury to make an adverse inference that negligently withheld evidence would be unfavorable to the withholding party, or to apply the rebuttable presumption under NRS 47.250(3) if the evidence was willfully withheld. *Id.* at 454-455, 134 P.3d at 111. We will affirm a district court's decision to give an adverse inference instruction if it "has examined the relevant facts, applied a proper standard of law, and, utilizing a demonstratively rational process, reached a conclusion that a reasonable judge could reach[.]" *Id.* at 447-48, 134 P.3d at 106.

In this case, the parties do not dispute that Nobu never produced the temperature logs despite Paley's document requests, her questioning during a deposition, and a finding by the district court that Nobu would have a duty to produce the temperature logs even if Paley had failed to request them. As a result, Paley requested a jury instruction that there was either a rebuttable presumption or a permissive adverse inference that the temperature logs would be unfavorable to Nobu if they were produced. The district court found that the failure to produce the

temperature logs was merely negligent, not willful and intentional. It therefore issued a permissive adverse inference jury instruction. The district court made its determination of negligence, rather than willfulness, after reviewing the record and the parties' trial briefs on the issue, and after entertaining oral arguments at a hearing on the jury instructions. This meets the *Bass-Davis* criteria of examining the facts, applying a proper standard, and reaching a reasonable conclusion via a demonstrated rational process. As such, we conclude that the district court did not err in issuing a permissive adverse inference jury instruction as opposed to a rebuttable presumption instruction.[2]

Any attorney misconduct was sufficiently remedied at trial

Paley alleges that Nobu's attorney committed misconduct at trial during closing arguments such that a new trial is warranted. We review de novo whether an attorney's statements at trial constitute misconduct, but we will defer to a district court's factual findings and application of the law as to the facts. *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). A new trial is warranted for misconduct that was objected to and admonished at trial if the movant establishes that the admonishment was insufficient to undo the effect of the misconduct. *Id.* at 17, 174 P.3d at 981.

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[2]We note that it was Paley who requested the adverse inference in the first place. Even if we were to hold that it was error for the trial court to grant the adverse inference, it would be invited error on Paley's part, and as such would not be a proper subject of review. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345-46 (1994).

As part of its defense theory, Nobu argued affirmative defenses of comparative fault and assumption of the risk due to a warning on the menu regarding the dangers of eating raw or undercooked fish. Nobu contended that the warning placed Paley on notice that she may get sick. On the final day of the trial, the district court ruled that Nobu's asserted affirmative defenses were inappropriate on the facts of this case. The district court instructed Nobu not to suggest any fault on Paley's part during closing arguments. Nonetheless, during closing arguments, Nobu's attorney twice referred to the warning on the menu and how it may have placed customers on notice about the dangers of consuming raw or uncooked fish. Paley objected both times. The district court took two remedial steps: verbally admonishing Nobu in a bench conference and issuing a jury instruction not to consider any fault or assumption of risk on Paley's part. Paley asserts that Nobu's references to a warning label on the menu were an attempt at jury nullification or, in the alternative, that they improperly violated one of the district court's rulings and impermissibly influenced the jury, and that in either case a new trial is needed.

We are not persuaded by Paley's suggestion of jury nullification here. Jury nullification is characterized by statements that encourage "a jury's knowing and deliberate *rejection of the evidence or refusal to apply the law* either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Id.* at 20, 174 P.3d at 982-83 (quoting *Jury Nullification*, Black's Law Dictionary (8th ed. 2004)) (emphasis added). Nobu's closing arguments here suggested legal defenses that the district court had ruled were beyond the scope of the trial.

However, assumption of risk and comparative fault are well-established concepts from tort law and the menu warning had been admitted as part of an exhibit offered by Paley herself. The statements were grounded in the trial record, and did not ask the jury to reject the evidence, refuse to apply the law, or send a message; rather, as the district court determined, the arguments were simply not appropriate on the facts of this case. We conclude that trial counsel's two references to defense theories in closing arguments are not enough to constitute jury nullification here.

In the alternative, Paley argues that Nobu's references to the menu warning in its closing argument violated the district court's ruling. Given the objections and admonishments at trial, Paley must establish that the alleged misconduct in the closing arguments was so egregious that the admonishment could not remove its effect. *Id.* at 17, 174 P.3d at 981.

Even assuming that the references to the menu warning were misconduct—and the trial judge opined that they were not—they were not so egregious that the admonishment and jury instructions could not remove any adverse effect. When we have found the effect of admonished misconduct so serious as to require a new trial, the magnitude of the effect comes from the repetition of the misconduct throughout trial. *See, e.g., Id.* at 19, 174 P.3d at 981 ("[T]he district court shall give great weight to the fact that single instances of improper conduct that could have been cured by objection and admonishment might not be curable when that improper conduct is repeated or persistent."); *cf. Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 76-77, 319 P.3d 606, 613 (2014) (holding that although a single instance of improper personal opinion argument was misconduct because it violated RPC 3.4(e), its effect was not serious enough to require a new trial

under the "effect could not have been removed" standard). Here, there was no "repeated or persistent" misconduct such that the effect could not have been alleviated by the district court's admonishment and jury instructions. Therefore, we decline to reverse for a new trial on these grounds.

Having concluded that the district court properly issued an adverse inference jury instruction and that any misconduct was sufficiently addressed at trial, we

ORDER the judgment of the district court AFFIRMED.

Pickering, J.
Pickering

Cadish, J.
Cadish

Lee, J.
Lee

cc: Hon. Timothy C. Williams, District Judge
Persi J. Mishel, Settlement Judge
Christian Morris Trial Attorneys
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Eighth District Court Clerk