IN THE SUPREME COURT OF THE STATE OF NEVADA

ALVARO LIZZARALDE, JR.,
Appellant,
vs.
AMERISTAR CASINOS, INC., A NEVADA CORPORATION, D/B/A THE RESERVE HOTEL & CASINO; AND CHRIS SCHMITZ, AN INDIVIDUAL,
Respondents.

No. 41498

FILED

JUN 13 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a final judgment on a jury verdict and an award of attorney fees and costs. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

DISCUSSION

Closing argument

This case presents a unique situation in that what is being challenged is not the district court's failure to grant a mistrial due to attorney misconduct, but rather the district court's ruling on an objection as to the use of deposition testimony during closing argument.

"[T]rial judges have wide discretion in how they wish to conduct a trial."[1] A district court's decision as to evidence "will only be

[1]Young v. Nevada Title Co., 103 Nev. 436, 441, 744 P.2d 902, 904 (1987); see also Hunter v. Kenney, 422 P.2d 623, 625 (N.M. 1967) ("[T]he trial court has wide discretion in controlling argument of counsel in addressing the jury and, absent a clear abuse of this discretion, it is not for us to interfere.").

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reversed if it is 'manifestly wrong.'"[2] Improper argument during closing is considered attorney misconduct.[3] A party claiming misconduct of the opposing counsel during closing argument must specifically object during the argument to preserve the issue for appellate review.[4] A new trial may be granted, based on misconduct of the prevailing party, pursuant to NRCP 59(a)(2).[5] This court established the standard for determining if a new trial is warranted based on misconduct by the prevailing party in Barrett v. Baird.[6] It does not require proof that the result would have been different without the misconduct.[7] However, to warrant reversal the "flavor of misconduct must sufficiently permeate an entire proceeding to

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[2]Schlotfeldt v. Charter Hosp. of Las Vegas, 112 Nev. 42, 46, 910 P.2d 271, 273 (1996) (quoting Daly v. State, 99 Nev. 564, 567, 665 P.2d 798, 801 (1983)).

[3]See SCR 173(5); see also Canterino v. The Mirage Casino-Hotel, 117 Nev. 19, 16 P.3d 415 (2001); Ringle v. Bruton, 120 Nev. 82, 86 P.3d 1032 (2004).

[4]Southern Pac. Transp. Co. v. Fitzgerald, 94 Nev. 241, 244, 577 P.2d 1234, 1235-36 (1978); but see Ringle v. Bruton, 120 Nev. 82, 86 P.3d 1032 (2004) (holding that egregious but unobjected-to misconduct will be considered on appeal only where the misconduct constitutes irreparable and fundamental error) (quoting DeJesus v. Flick, 116 Nev. 812, 817-19, 7 P.3d 459, 463-64 (2000)).

[5]"A new trial may be granted to all or any of the parties on all or part of the issues for any of the following grounds materially affecting the substantial rights of an aggrieved party."

[6]111 Nev. 1496, 908 P.2d 689 (1995).

[7]Barrett, 111 Nev. at 1515, 908 P.2d at 702.

provide conviction that the jury was influenced by passion and prejudice in reaching its verdict."[8]

The basic facts here are undisputed. Appellant Alvaro Lizzaralde Jr.'s deposition was not admitted into evidence; the portions read and objected to during closing were not used during respondents' impeachment of Lizzaralde; Lizzaralde timely objected to the alleged introduction of new evidence during closing; and Lizzaralde did not request a mistrial. The only disputed issue is the nature of the deposition sections objected to during closing. Lizzaralde characterizes those portions as new evidence, which may not be introduced by counsel during closing argument. Respondents counter that under NRCP 32(a)(2) an adverse party may use the deposition of a party for any purpose. Further, respondents argue that it was not new evidence, since there was already evidence before the jury about the issues contained in each portion of the deposition read during closing.

NRCP 32 governs the use of depositions in court proceedings. NRCP 32(a)(1-2) reads, in pertinent part, as follows:

> (a)**Use of Depositions**. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

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[8]Id. (quoting Kehr v. Smith Barney, Harris Upham & Co., Inc., 736 F.2d 1283, 1286 (9th Cir. 1984)).

> (1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Nevada Rules of Evidence, NRS Chapters 47-56.
>
> (2) The deposition of a party . . . may be used by an adverse party for any purpose.

In Nicklo v. Peter Pan Playskool,[9] this court held that the provisions of NRCP 32(a)(1-4) are meant to be read along with the introductory language of NRCP 32(a); the provisions of subsections 1-4 apply to the use of a deposition "so far as admissible under the rules of evidence."[10] Depositions used for impeachment purposes or to refresh the memory of the witness need not be admitted into evidence.[11] A deposition used for impeachment is subject to the strictures of NRS 50.135(2);[12] the deposition itself is inadmissible unless it meets the hearsay conditions of NRS 50.135(2)(a),[13] or unless "[t]he witness is afforded an opportunity to

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[9]97 Nev. 73, 624 P.2d 22 (1981).

[10]Niklo, at 76, 624 P.2d at 24 (noting that a "deposition is meant to be the equivalent of live testimony").

[11]Scott v. Smith, 73 Nev. 158, 161-62, 311 P.2d 731, 732-33 (1957) (finding that although not admitted into evidence, the costs for depositions used to impeach and refresh are allowable as discretionary "costs and necessary disbursements").

[12]See NRCP 32(b) ("objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying").

[13]NRS 50.135(2)(a) (referring to an exception from the hearsay rule, NRS 51.035(3)(b), for statements made by a party, offered against that

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explain or deny the statement and the opposite party is afforded an opportunity to interrogate him thereon."[14] Thus, we conclude that under NRCP 32, a deposition can only be used by the adverse party "for any purpose" so far as admissible under the rules of evidence. Additionally, this court has held in criminal cases that it is improper for counsel to state facts that are not in evidence.[15]

Here, there were four portions of Lizzaralde's deposition that were brought up for the first time during respondents' closing argument, portions that had not been previously introduced or used at trial. However, each of those four portions read during closing argument concerned issues that had already been explored at trial, either through testimony by Lizzaralde or by other witnesses. Those issues were whether or not Lizzaralde felt intoxicated the night of the incident; whether or not Lizzaralde had difficulty walking, maintaining balance, or following directions that night; whether or not Lizzaralde and his wife were arguing earlier that evening in the casino; and whether or not any of Ameristar's employees prevented Lizzaralde from leaving the premises that evening. Lizzaralde had testified about all these issues during the trial. In

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. . . *continued*
party, which are statements in which the party "has manifested his adoption or belief in its truth[.]").

[14]NRS 50.135(2)(b).

[15]See, e.g., Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987) (finding misconduct where prosecutor used testimony that was twice ruled inadmissible; but upholding conviction based on lack of objection and overwhelming evidence of guilt).

addition, there was testimony from other witnesses as to Lizzaralde's condition that night.

Therefore, although the deposition itself was never admitted, the portions read to the jury during closing referred to evidence that was already before the jury, and thus were not "new evidence." Lizzaralde's counsel had ample opportunity to address each issue presented and cross-examine the witnesses during that previous testimony, thus satisfying the admissibility strictures of NRS 50.135(2). We conclude that the district court was not manifestly wrong in permitting the reading of the previously unread portions of Lizzaralde's deposition during closing argument.

Attorney fees

An award of attorney fees lies within the trial court's discretion, and will not be overturned absent manifest abuse of discretion.[16] Where a district court exercises its discretion in clear disregard of the guiding legal principles, this action may constitute an abuse of discretion.[17] Attorney fees are only available when authorized by rule, statute or contract.[18] Failure by the district court to state a basis for

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[16]County of Clark v. Blanchard Constr. Co., 98 Nev. 488, 492, 653 P.2d 1217, 1220 (1982).

[17]Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 562-63, 598 P.2d 1147, 1149 (1979).

[18]Flamingo Realty v. Midwest Development, 110 Nev. 984, 991, 879 P.2d 69, 73 (1994).

the award of attorney fees is an arbitrary and capricious act, and is an abuse of discretion.[19]

Attorney fees were sought by respondents under NRS 18.010, in the amount of $19,254.00. Alternatively, respondents sought fees incurred since their offer of judgment, pursuant to NRCP 68 and NRS 17.115, in the amount of $8,464.00. The district court awarded fees in the amount of $19,254.00. The amount of the award reflected a calculation of fees back to the beginning of the case, not just back to the time of the offer of judgment. Therefore, we can deduce that the district court based the award of attorney fees on NRS 18.010, and not as to respondents' offer of judgment.

NRS 18.010(2) permits an award of attorney fees in two specified circumstances. An award of attorney fees under NRS 18.010(2)(a) requires the prevailing party to have received a money judgment.[20] Respondents here were not awarded a money judgment, so attorney fees could not be awarded under NRS 18.010(2)(a).

NRS 18.010(2)(b) allows the court to make an allowance for attorney fees to the prevailing party "when the court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." An award of attorney fees to the

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[19]Henry Prods., Inc. v. Tarmu, 114 Nev. 1017, 1020, 967 P.2d 444, 446 (1998) (citing Integrity Ins. Co. v. Martin, 105 Nev. 16, 19, 769 P.2d 69, 70 (1989).

[20]Smith v. Crown Financial Services, 111 Nev. 277, 280, 890 P.2d 769, 771 (1995); Singer v. Chase Manhattan Bank, 111 Nev. 289, 293, 890 P.2d 1305, 1307 (1995).

prevailing party under NRS 18.010(2)(b) is discretionary with the district court.[21] To support such an award, however, "there must be evidence in the record supporting the proposition that the complaint was brought without reasonable grounds or to harass the other party."[22]

Here, no findings were made as to the reasonableness of Lizzaralde's claims, or any purpose to harass. The absence of such findings, as well as the failure to state the statutory basis for the award, is itself an abuse of discretion.[23] Therefore, the district court's award of attorney fees here cannot stand, and we remand this matter for a hearing so that the district court can determine a statutory basis and consider the appropriate factors for such an award. Accordingly, we affirm the judgment of the district court, reverse its attorney fee award and remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.

Douglas, J.

Parraguirre, J.

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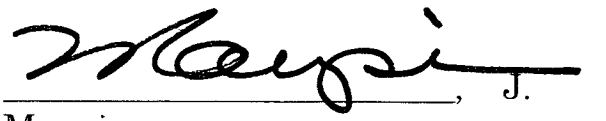
[21]Foley v. Morse & Mowbray, 109 Nev. 116, 124, 848 P.2d 519, 524 (1993).

[22]Chowdhry v. NLVH, Inc., 109 Nev. 478, 486, 851 P.2d 459, 464 (1993).

[23]Tarmu, 114 Nev. at 1020, 967 P.2d at 446; Chowdhry, 109 Nev. at 486, 851 P.2d at 464.

MAUPIN, J., concurring:

It was technically improper for defense counsel to read previously unused portions of plaintiff's deposition during final argument. I conclude, however, that this error was harmless.



Maupin

cc: Hon. Valorie Vega, District Judge
G. Dallas Horton & Associates
Pyatt Silvestri & Hanlon
Clark County Clerk