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IN THE SUPREME COURT

OF THE STATE OF NEVADA

RALPHS GROCERY COMPANY, d/b/a FOOD 4 LESS; KROGER GROUP COOPERATIVE,

Appellants,

vs.

MARGARITA CELIS,

Respondent.

SUPREME COURT CASE NO.: 51027

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND STATEMENT OF RELEVANT FACTS

Plaintiff/Respondent MARGARITA CELIS (hereinafter "CELIS" or "Plaintiff") claims to have sustained debilitating left knee and lumbar spine injuries as the result of a slip and fall that occurred in Defendants/Appellants' Food 4 Less in North Las Vegas. The case was tried in September 2007, and Defendants/Appellants (hereinafter RALPHS) stipulated to partial liability and specifically reserved their rights to argue comparative fault and causation of injuries.

During closing, Plaintiff asked for over $13 million. The jury returned a verdict in favor of the Plaintiff in the amount of $155,000, and assessed 50 percent liability to CELIS. A judgment was entered in the amount of $93,387.50, including prejudgment interest. CELIS, the prevailing party, filed a motion for a new trial, and alleged that the jury's verdict was influenced by attorney misconduct during closing argument and that the jury ignored their instructions from the court. The court granted CELIS's motion without granting an *additur*, and this appeal resulted.

Pursuant to NRAP 28(c) the instant Reply Brief addresses only the new matters set forth in Respondent's Opposing Brief.

ARGUMENT

I. BECAUSE MISCONDUCT MUST BE ALLEGED SPECIFICALLY AGAINST THE PREVAILING PARTY PURSUANT TO NRCP 59(a)(2), CELIS'S RELIANCE ON THE *HALLMARK* PRECEDENT IS MISPLACED

As explained in the Opening Brief, CELIS was the prevailing party below and is, therefore, not entitled to assert misconduct by RALPHS as a basis for seeking a new trial. Although the court did allow a prevailing party to seek a new trial on the issue of damages in *Hallmark v. Eldridge*, 189 P.3d 646 (Nev. 2008), that precedent is not nearly as broad as CELIS contends. In *Hallmark*, plaintiff moved the court to review her claim of prejudice concerning an error in the admission of evidence (specifically, expert testimony) based upon whether the error substantially affected her rights. *Id.* at 654. Therefore, the grounds for seeking a new trial in *Hallmark* would have been NRCP 59(a)(7), "Error in law occurring at the trial and objected to by the party making the motion."

To the contrary here, CELIS's grounds for seeking a new trial are found in NRCP 59(a)(2), "Misconduct of the jury or prevailing party." It is this specific provision of the rule—not other precedent—which requires a finding that party committing misconduct prevailed at trial. Under

these circumstances, CELIS succeeded on the main issue in the matter and was the prevailing party. *See Pangborn v. National Advertising Company*, 93 Nev. 168, 561 P.2d 456 (1977). Regardless, CELIS seeks redress for alleged misconduct by the losing party.

Although granting a new trial based upon the prevailing party's misconduct does not require proof that the result of the trial would have been different absent counsel's misconduct, the flavor of the misconduct must sufficiently permeate an entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict in order for a new trial to be warranted. *Olson v. Richard*, 120 Nev. 240, 244, 89 P.3d 31, 34 (2004). As stated above, the defense did not prevail in this case. Additionally, the comments complained of in closing were subject to NEVADA JURY INSTRUCTION 1.03 that "statements, arguments, and opinions of counsel are not evidence in the case." Notwithstanding, the purported misconduct that Plaintiff/Respondent complains of did not permeate the entire proceeding. Overall, there is no evidence that the jury was influenced by passion and prejudice in reaching its verdict: the jury found for the plaintiff and awarded her the damages which were supported by the evidence.

II. DUE TO CELIS'S FAILURE TO PROVE THAT THE ALLEGED MISCONDUCT WAS SO EXTREME THAT THE OBJECTION AND ADMONISHMENT COULD NOT REMOVE THE MISCONDUCT'S EFFECT, THE GRANT OF A NEW TRIAL IS UNWARRANTED AND UNSUPPORTED

The allegedly improper comments have been cited *ad nauseam* in previous briefing, as have the timely objections to those comments. On the other hand, CELIS has failed to make any showing that the conduct was "extreme" and incurable by ordinary means. In order to support the grant of a new trial in spite of timely objections and admonishments at the time of trial, the trial court necessarily would have had to make a specific finding that the misconduct was "so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce v. Cohen*, 174 P.3d 970, 981 (2008).

Although persistent or repeated conduct may not be curable by objection and admonishment as easily as single instances of conduct, the great weight to be afforded in this situation by the court must follow a preliminary showing by the complaining party of the extremity of the conduct. Simply, CELIS failed to make such a showing in the briefing below or in the cursory hearing on that

motion. *See* VII APP. 1733-1735. Without that required showing of extremity, the conduct CELIS complains of is plainly not grounds for a new trial.

Interestingly, CELIS cites no page or line from the transcript of the trial proceedings where defense counsel uses the word "liar." Although counsel for RALPHS permissibly questioned the CELIS's credibility, he never called her a "liar." In fact, it was the Court and CELIS's own counsel who uttered the nefarious buzzword. *See* VII APP. 1575 at line 22; 1576 at 5. Although NRPC 3.4(e) instructs counsel against stating a *personal* opinion of a witness' credibility, surely the intent of the rule is not to tie the hands of an advocate in arguing the credibility of a party based on inconsistencies in the testimony compared to other evidence.

Similarly, CELIS has failed to make a showing that the remarks regarding the unavailability of prior records was so extreme that it was not cured by the ordinary remedy of objection and admonishment. Because the remarks of defense counsel regarding the unavailability of CELIS's prior medical records were cured by a timely objection, there was no prejudice to support the grant of a new trial.

Regardless, these instances of alleged misconduct were objected to and admonished by the court. The standard, according to *Lioce*, *supra*, is that the party moving for a new trial bears the burden of demonstrating that the misconduct was so extreme that the objection and admonishment could not remove the misconduct's effect. As applied to this case, there is no such evidence that the objection and admonishment could not remove the effect of the alleged misconduct. The fact that CELIS prevailed in this case is strong evidence that the objection and admonishment removed the effects, if any, of the defense putting CELIS's credibility at issue. Overall, these allegations are overblown so that CELIS can have another shot at trying to obtain a larger award in her poorly supported case.

III. CELIS FAILED TO MEET HER BURDEN OF DEMONSTRATING THAT THE VERDICT WOULD HAVE BEEN DIFFERENT ABSENT COUNSEL'S ARGUMENT REGARDING CONCURRENT CAUSES AS TO PARTIAL LIABILITY

Regarding the stipulation, comparative negligence was still at issue and the defense was allowed to argue that CELIS was partially to blame for the incident. From a legal standpoint, there can be more than one cause to an incident. See *Banks v. Sunrise Hospital*, 120 Nev. 822, 102 P.3d

52 (2004). In closing argument, counsel argued multiple concurring causes as is permitted under NEV. J.I. 4.05:

> Now, Ms. Celis wants you to believe that the only thing that caused her fall was that jelly on the floor. But the videotape that you'll see shows that isn't true. Clearly showed that she was walking unsteadily down the aisle, and she and her daughter collided, and then she fell straight down on her right knee and right hand. VII APP. 1572 at lines 16-21 (emphasis added).

The defense did not argue that the collision with her daughter was the sole cause of CELIS's fall. Rather, the defense argued that CELIS was not paying attention to where she was walking, which was *exemplified* by reference to the following facts in the record: CELIS exhibited an unsteady and wavering gait on the video, that she bumped into her daughter, and she fell. This argument was made while the jury was shown the video that was admitted into evidence. There was no contemporaneous objection from CELIS in reference to the above-cited argument.

Therefore, since this was un-objected to conduct, the Plaintiff bears the burden of having to show that the verdict would have been different absent the conduct. *Lioce*, 149 P.3d 916 (2006). This is a very substantial burden and in this case we have a verdict in CELIS' favor that awarded her *all* of her past medical specials and $70,000 in past and future pain and suffering. She was also found to be 50 percent at fault, which was well within the confines of the pretrial stipulation entered into by the parties.

The size of the award or portion of comparative negligence taken alone is not conclusive evidence that the verdict was the result of passion or prejudice; rather, the context in which that award is rendered must be analyzed to determine its validity. A jury cannot award future damages for medical procedures that are not certain to occur. Testimony at trial from CELIS herself and her treating physicians alike was that she is generally fearful of surgery and did not desire to undergo future surgery. *See* V APP. 1222 at line 21 - 1223 at line 3; IV APP. 995 at lines 3-8. As a result, it is entirely possible that the jury did not believe that CELIS would have any surgery in the future and correspondingly awarded her nothing for future medical care. Evidence in the record supports the jury in its finding in this regard. Overall, the alleged misconduct of arguing contributing causation did not result in a defense verdict, and therefore CELIS cannot make the substantial showing that the verdict would have been different if the defense had not argued for a defense verdict.

IV. CELIS DID NOT SUFFER PREJUDICE SUFFICIENT TO WARRANT THE GRANT OF A NEW TRIAL AS BOTH PARTIES WERE PREJUDICED BY IRREGULARITIES IN THE PROCEEDINGS DUE TO DR. SWARTZ'S EXCLUSION AT TRIAL

With regard to any irregularity brought about by would-be defense expert Dr. Swartz, CELIS seeks a second bite at the apple. The inclusion of this basis in seeking a new trial, despite the trial court's prior issuance of the harsh sanction of exclusion of the defense medical expert, is an attempt to escape operation of NRCP 59(a)(2) due to CELIS's status as the prevailing party. On the other hand, NRCP 59(a)(1), applicable to "irregularity in the proceedings," has no requirement that the irregularity be attributable to the prevailing party, unlike subsection (2). The alleged irregularity was *already* cured at trial by the granting of sanctions at CELIS's request. CELIS's continued protestations on this issue merely demonstrate the dire straits in which she finds herself in meeting her burden to prove that this or any other irregularity was so great that the court's sanction was inadequate in curing it.

In other words, CELIS seeks appellate review of the very sanctions *she* requested. Specifically, in her motion for sanctions Plaintiff requested "any penalty this court deems appropriate." VI APP. 1310 at line 21. As the record reveals, that request was granted and the sanction that the court deemed appropriate was exclusion of the only defense medical expert. Now, although she admits the district court was correct in making this ruling, CELIS complains that this action "prejudiced Plaintiff's ability to demonstrate Defendant's failure to accept liability through Dr. Swartz' testimony. The sanctions sought by Plaintiff was [sic] not to exclude Dr. Swartz." Respondent's Answering Brief at page 22, lines 17-20.

However, the findings by the district court were specifically that *both* sides were prejudiced by Dr. Swartz's actions: "He caused an unreasonable delay of this trial and—and I think prejudice basically to both sides." VI App. at 1401, lines 17-18. The perceived prejudice to CELIS was cured by the harsh sanction of exclusion, whereas there was no cure to prejudice inuring to the detriment of the defense. Yet, it is CELIS who continues to complain of prejudice on appeal. Certainly, CELIS has failed to make any showing that the requested sanctions were somehow inadequate or ill-fitted to cure any irregularities in the proceedings and the perceived harm to the prosecution. Because any

irregularity based on Dr. Swartz's actions was already cured by the harsh sanction of excluding expert testimony, CELIS did not suffer prejudice sufficient to support the grant of a new trial on these grounds.

CONCLUSION

In order to support the grant of a new trial in spite of timely objections and admonitions at the time of trial, the trial court necessarily would have had to make a specific finding that the misconduct was "so extreme that the objection and admonishment could not remove the misconduct's effect." *Lioce*, 174 P.3d at 981. Overall, the record is devoid of any substantial showing by CELIS or specific findings or conclusions by the court that CELIS met her burden to prove that the alleged misconduct was so extreme that the ordinary remedy of objection and admonishment did not remove the misconduct's effect. Similarly, CELIS failed to meet her substantial burden to show that the verdict would have been different absent the un-objected to conduct.

WHEREFORE, based on the foregoing reasoning, precedent and procedural rules, the trial court's order granting a new trial is unwarranted and should be reversed, allowing the jury's verdict to be reinstated accordingly.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008.

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CERTIFICATE OF ATTORNEY

I hereby certify that I have read this Reply Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED this 3rd day of December, 2008.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that, on the 3rd day of December, 2008 and pursuant to NRAP 25(1)(d), I deposited for mailing in the U. S. Mail a true and correct copy of the foregoing **Appellants' Reply Brief**, postage prepaid and addressed to:

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