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RONALD A. LONGTIN, JR., CLERK

By: *[Signature]*
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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

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9 CASSIE L. RISING,

10 Plaintiff,

11 vs.

CASE NO: CV03-04388

DEPT. NO.: 10

12
13 ELISEO DAVID BAUTISTA; et al.,

14 Defendants.

15
16 **ORDER GRANTING NEW TRIAL AND ORDER FOR SANCTIONS**

17 On December 12, 2005, this matter went to trial in Department 9. The jury
18 returned a verdict in favor of Defendant. Plaintiff filed a Motion for New Trial arguing that
19 Defendant's counsel, Phillip Emerson, committed misconduct which warranted a new trial.
20 On February 2, 2006, Judge Perry entered an Order granting a new trial and ordered a
21 show cause hearing to determine if sanctions should be imposed upon Mr. Emerson and
22 Defendant. That hearing was conducted on April 4, 2006, by the Honorable Robert Perry,
23 who took the matter under submission. However, before an order was entered on the
24 issue of sanctions, Judge Perry recused himself. On April 13, 2006, pursuant to a Case
25 Assignment Notification, this Court accepted this matter. This Court held a second hearing
26 on the Order to Show Cause. Pursuant to that hearing, the issue of sanctions was stayed
27 pending the release of Lang v. Knippenburg, a case before the Nevada Supreme Court. In
28 Lang, Mr. Emerson, as counsel for defendant Knippenberg, delivered a closing argument

1 which was very similar, in pertinent part, to the closing argument made by Mr. Emerson in
2 the instant case. This Court stayed the current proceedings under the expectation that
3 Lang would offer guidance as to whether Mr. Emerson's conduct constituted misconduct,
4 and whether the granting of a new trial was warranted. On December 28, 2006, the
5 Nevada Supreme Court issued an opinion captioned Lioce v. Cohen, 122 Nev. Adv. Op. 115
6 (2006). Lioce consolidated Lang with three other cases which all dealt with similar issues
7 of improper conduct by Mr. Emerson during closing argument. The Lioce cases provided
8 the Nevada supreme Court "the opportunity to revise [Nevada's] attorney misconduct
9 jurisprudence." Id. at ___.

10 Lioce has given this Court sufficient direction to determine whether Mr. Emerson's
11 actions in this trial constituted misconduct, and whether Judge Perry's granting of a new
12 trial was warranted. This Court finds that, pursuant to Lioce, Mr. Emerson's actions
13 constituted sanctionable misconduct. This Court also finds that Judge Perry's decision to
14 order a new trial is adequately supported by findings of fact and is in accordance with the
15 standards of Lioce.

16 Statement of Relevant Facts

17 This case arose out of an automobile accident between Plaintiff and Defendant.
18 Plaintiff was injured and brought suit against Defendant. Plaintiff maintains that as a result
19 of the accident she has suffered life-changing injuries, particularly to her back and spine.
20 Liability was conceded by Defendant, leaving for Plaintiff to prove at trial only "the nature,
21 extent and duration of [Plaintiff's] injuries and that they were legally caused by
22 Defendant." (ORDER, Dept. 9, Dec. 21, 2005). Defendant's insurance company retained
23 Mr. Phillip Emerson, of the firm Emerson & Manke, PLLC, to defend the action. The trial
24 involved roughly two days of testimony. Just prior to the closing argument, Judge Perry
25 provided the parties' counsel with a copy of DeJesus v. Flick, 116 Nev. 812 (2000), a
26 leading Nevada case dealing with attorney trial misconduct. Judge Perry admonished
27 counsel to read the opinion and adhere to its guidelines during the closing argument. The
28 closing argument was then presented without incident or objection from either party. After

1 the jury was given the case but before a verdict was returned, Judge Perry questioned Mr.
2 Emerson - on the record - about certain statements made during closing argument which
3 Judge Perry considered to be outside the bounds of acceptable conduct. (Dec. 13,
4 2005, Trial Trans., p. 117). Mr. Emerson responded by denying any misconduct and
5 arguing that the closing argument he had given was in conformity with DeJesus. The
6 exchange ended when Judge Perry expressed his displeasure in Mr. Emerson and told him,
7 "If you're right, you're right. But we'll see what the State Bar thinks about that." (Dec. 13,
8 2005, Trial Trans., p. 118). The jury then returned a verdict for Defendant. Shortly after
9 the entry of the defense verdict, Judge Perry entered a Judgment, notwithstanding the
10 verdict, and awarded Plaintiff the sum of \$1.00 in nominal damages "with interest as
11 provided by law, along with taxable costs." (JUDGMENT, "JNOV", Dec. 21, 2005).

12 A week after the JNOV was entered, Plaintiff filed a Motion for a New Trial. Plaintiff
13 argued that Mr. Emerson's conduct throughout the trial was such egregious misconduct as
14 to permeate the jury's decision-making, rising to the level of reversible error. Judge Perry
15 agreed and in a well-reasoned order granted a new trial, stating that, in the opinion of the
16 Court "there is no other 'reasonable explanation' for a finding of zero damages except Mr.
17 Emerson's repeated misconduct and appeal to bias and prejudice." (Order Granting a New
18 Trial, p. 11). Defendant filed a Motion to Reconsider the Order Granting New Trial which
19 was denied. However, as the law regarding granting new trials has changed, re-
20 examination of Defendant's Motion for Reconsideration is appropriate.

21 Procedural Posture

22 This Court has been assigned and has accepted this matter upon Judge Perry's
23 recusal from the case. This Court, using Lioce as a guide, will examine anew the
24 allegations of misconduct for the purpose of determining whether sanctions should be
25 imposed. This Court will then re-examine Defendant's Motion for Reconsideration, in light
26 of Lioce, to determine whether a new trial is warranted.

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1 I. Misconduct And Sanctions

2 In light of the final disposition of Lioce, it is without question that Mr. Emerson's
3 conduct in this trial constituted misconduct. So far as this Court is concerned, there is
4 little, if any, relevant difference between the impermissive arguments made in the Lioce
5 cases and the case at bar. For purposes of establishing the extent and nature of Mr.
6 Emerson's misconduct, this Court adopts the "Introduction" section of Judge Perry's
7 February 2, 2006, "Order Granting New Trial and to Show Cause Why Sanctions Should Not
8 Be Imposed." That Order sets forth, verbatim, the relevant portions of Mr. Emerson's
9 closing argument which Judge Perry found to constitute misconduct. As stated above, Mr.
10 Emerson's closing argument in this case is cut from the same cloth as the impermissive
11 arguments from the Lioce cases. This Court disagrees with Defense counsel that the
12 closing argument in this case was "scaled back" from Mr. Emerson's previous closings
13 which Lioce found to be sanctionable. See Lioce, 122 Nev. Adv. Op. at 32. This Court
14 agrees with Judge Perry that Mr. Emerson improperly argued for jury nullification, argued
15 facts not in evidence, and offered personal opinions as to the causation of Plaintiff's
16 injuries. (See Feb 2, 2006, Order Granting New Trial, pp. 9-11). According to Lioce, these
17 impermissive arguments warranted sanctions. This Court finds that based on the
18 egregious misconduct of Mr. Emerson during the trial of this case, and the guidance of
19 Lioce, sanctions are warranted. The Court finds that sanctions are to be awarded against
20 Mr. Emerson, to be paid to Plaintiff, as follows: \$33,000.00 in reasonable attorney's fees,
21 and \$7,898.55 for costs including travel, lodging and local counsel.

22 II. Order Granting New Trial

23 Lioce v. Cohen is now the settled law with respect to granting new trials in light of
24 attorney misconduct. In that context, Lioce provides essentially two¹ different standards
25 for granting new trials: (1) cases where attorney misconduct was objected to during trial,
26

27 ¹ Although Lioce specifically discusses 4 separate standards, (1) "Objected-to and admonished misconduct," (2)
28 "Objected-to and unadmonished misconduct," (3) "Repeated or continued objected-to misconduct," and (4)
"Unobjected-to misconduct," for the purposes of this case, this Court simplifies the standards as objected-to, and
unobjected-to misconduct. Lioce, 122 Nev. Adv. Op. at 19-22. The instant case involves only unobjected-to
misconduct.

1 and (2) cases where no objection was made during trial but was moved for after a verdict
2 had been read. Id. at 19-22. The instant case involves application of the latter standard,
3 as no objection was made by Plaintiff during Mr. Emerson's closing argument.

4 *a. Applicable Law*

5 Generally, in order to preserve the issue for a motion for new trial, a party must
6 object to purportedly improper argument. Failure to do so will deem the issue waived.
7 Ringle v. Bruton, 120 Nev. 82, 95, 86 P.3d 1032, 1040 (2004). However, as re-stated in
8 Lioce, in cases of plain error the district courts may still review allegations of unobjected-to
9 misconduct. To show plain error, the complaining party must satisfy the court - "that no
10 other reasonable explanation for the verdict exists." Lioce, 122 Nev. Adv. Op. at 22
11 (quoting Ringle, 120 Nev. at 96). This standard addresses the rare circumstance where
12 attorney misconduct offsets the evidence adduced at trial in support of the verdict. Id.
13 Thus, in deciding whether Judge Perry erred in granting a new trial, this Court must
14 determine whether plain error exists, i.e., the case at bar is one where "attorney
15 misconduct amounted to irreparable and fundamental error." Id. "Irreparable and
16 fundamental error" is error that results in a substantial impairment of justice or denial of
17 fundamental rights such that, but for the misconduct, the verdict would have been
18 different. Id.

19 *b. Analysis*

20 It is clear upon review of Judge Perry's Order Granting a New Trial that he believed
21 plain error existed. The Order, while not applying the Lioce standard specifically, is explicit
22 that Judge Perry determined that but-for Mr. Emerson's misconduct, the jury would not
23 have returned a defense verdict. Indeed, the Order states that "the Court believes that
24 there is no other 'reasonable explanation' for a finding of zero damages except Mr.
25 Emerson's repeated misconduct and appeal to bias and prejudice." (Order Granting New
26 Trial, p.11). Thus, although Judge Perry did not have the guidance of Lioce in deciding the
27 merits of the Motion for New Trial, it is the opinion of this Court that he applied the
28 appropriate standard of "plain error." It is also the opinion of this Court that Judge Perry's

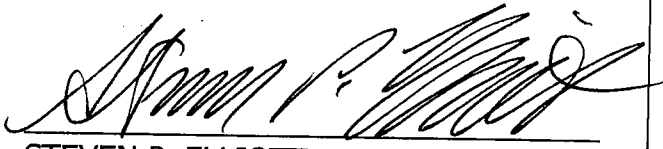
1 finding of plain error is sufficiently supported by a specific finding of fact. This Court will
2 not disturb Judge Perry's Order Granting a New Trial.

3 **NOW, THEREFORE, IT IS HEREBY ORDERED** that sanctions are imposed
4 against Mr. Emerson in the amount of \$40,898.55. These sanctions shall accrue interest,
5 from the date of this Order until paid, at the rate of interest for judgments as set forth in
6 NRS 17.130.

7 **IT IS FURTHER ORDERED** that Plaintiff is entitled to a new trial. The Parties shall
8 appear before the Judicial Assistant in Department 10 within twenty (20) days of the date
9 of this Order to set this matter for trial.

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DATED this 25 day of January, 2007.



STEVEN P. ELLIOTT
District Judge

1 **CERTIFICATE OF MAILING**

2 I hereby certify that I am an employee of the Second Judicial District Court of the
3 State of Nevada, in and for the County of Washoe and that on this date I deposited for
4 mailing a copy of the foregoing document addressed to:

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17 Kevin D. Rising, Esq.
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20 **DATED** this 25 day of January, 2007.

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22 HEIDI HOWDEN
23 Judicial Assistant
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