Case No. 79424

In the Supreme Court of Nevada

DESIRE EVANS-WAIAU, individually; and GUADALUPE PARRA-MENDEZ, individually,

Appellants,

vs.

BABYLYN TATE, individually,

Respondent.

APPEAL

from the Eight Judicial District Court, Clark County, Nevada
The Honorable MARY KAY HOLTHUS, District Judge
District Court Case No. A-16-736457-C

ANSWER TO PETITION FOR REVIEW

DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ADRIENNE R. BRANTLEY-LOMELI (SBN 14,486)
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

THOMAS E. WINNER (SBN 5168)
CAITLIN J. LORELLI (SBN 14,571)
WINNER BOOZE & ZARCONE
1117 S. Rancho Drive
Las Vegas, Nevada 89102
(702) 243-7000

Attorneys for Respondent

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons as described in NRAP 26.1(a) and must be disclosed:

1. Babylyn Tate is an individual.

2. Thomas E. Winner and Caitlin J. Lorelli of Winner Booze & Zarcone represented Babylyn Tate in the district Court.

3. Daniel F. Polsenberg, Joel D. Henriod, and Adrienne Brantley-Lomeli of Lewis Roca Rothgerber Christie LLP have served as Tate's appellate counsel.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 8th day of November, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel D. Henriod*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
3993 Howard Hughes Parkway,
Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Appellant

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ANSWER TO PETITION FOR REVIEW

This petition for review should be denied for several reasons. First, contrary to appellant-plaintiffs' contention, the order of affirmance does not conflict with any prior decision from this Court, the Court of Appeals, or the United States Supreme Court. NRAP 40B(a)(2). As the Court of Appeals correctly explained:

> [A]ppellate review under *Lioce* requires a motion for new trial in the first instance. . . . Without an order from the district court, we cannot engage in appellate review under *Lioce* because there are not findings of fact or conclusions of law to review and no way to determine whether the district court abused its discretion. . . . [U]nder *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. (Order of Affirmance, entered May 25, 2021 at 7-8, citing cases.)

No precedent from this Court holds otherwise or suggests a complaining party is at liberty to skirt the district court's post-trial assessment. Plaintiffs' discussion regarding the significance of contemporaneous objections is ineffective because they conflate necessity with sufficiency. Merely because objecting is important does not mean it is enough in this context. And, while plaintiffs complain they should have received "the benefit of plain error review" (Pet. 18-19), they never asked the Court of Appeals to review the district court's decision for plain error.

Second, the purportedly-improper closing argument was neither what plaintiffs claim it to be nor improper. Defense counsel did *not* "argue[]to the jury that Tate could never save enough money to pay the millions of dollars in damages Evans-Waiau asked the jury to award." (Pet. 3.) Defense counsel did not mention defendant Babylyn Tate or her circumstances, but rather referred to the "average family of four" and "most people in today's world." He never argued that a reasonable award should be withheld because defendant lacked the means to satisfy it. He merely gave perspective to the real-world value of the millions that plaintiffs so causally requested in general damages. As the economist Adam Smith explained, the value of money is determined not just by its purchasing power but also by the extent of labor required to earn it. Counsel's commentary was not inappropriate, and it certainly did not deny plaintiffs of their substantial rights. Moreover, plaintiffs' attempt to link the closing argument to a brief segment of defendant's testimony days earlier is unavailing because that testimony was remote in time, was admissible for other purposes especially after plaintiffs had opened the door, and defense counsel never referred back to it.

Third, even assuming the comment during closing argument could be deemed objectionable, the defense verdict is *not* indicia of prejudice. Plaintiffs take disturbing license with the record to contend the defense verdict was unjustifiable and conclude it "was solely caused by the improper ability to pay arguments[.]" (Pet. 3.) That's simply not true. The jury had a solid and persuasive basis to reject plaintiffs' allegation that defendant acted negligently—*i.e.,* with less care than the ordinarily prudent person would exhibit under the circumstances.

Importantly, the trial judge would have recognized immediately the disconnect between plaintiffs' characterization of the trial and the body of evidence, which is why they sidestepped any motion for new trial that would have enabled the judge to enter findings. Ironically, in this petition arguing that a trial court's post-trial evaluation of alleged attorney misconduct is superfluous, plaintiffs' mischaracterization of the record highlights why litigants cannot be permitted to bypass such findings.

I.

THE ORDER OF AFFIRMANCE DOES NOT CONFLICT WITH PRIOR PRECEDENTS

The order of affirmance is perfectly consistent with Nevada law.

A. Seeking a New Trial on Appeal for Attorney Misconduct Entails First Moving the District Court for a New Trial and Confronting the Judge's Findings

"When ruling on a motion for a new trial based on attorney misconduct, district courts must make express factual findings, applying the [*Lioce*] standards." *Lioce v. Cohen*, 124 Nev. 1, 7, 174 P.3d 970, 974 (2008). For objected-to and overruled conduct the district court "must evaluate the *evidence* and the *parties' and the attorneys' demeanor* to determine whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury." *Lioce*, 124 Nev. at 18, 174 P.3d at 981. Indeed, only such findings enable the reviewing court to assess whether a new trial based on misconduct is called for, as the appellate court is not in a position to evaluate questions of fact. *See id.* at 20, 174 P.3d at 982 (the district court must "make findings . . . in doing so, the court enables our review of its exercise of discretion).

The decision to grant or deny a motion for new trial based on attorney misconduct "rests within the sound discretion of the trial

court." *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011). Although this Court will consider the propriety of particular comments de novo, it "will give deference to the district court's factual findings and application of the standards to the facts." *Lioce*, 124 Nev. at 20, 174 P.3d at 982. A reviewing court therefore cannot fault the district court for abusing discretion where an appellant never asked the trial judge to exercise its discretion in the first place. *See Baker v. Dillon*, 389 F.2d 57, 58 (5th Cir. 1968) ("The necessary implication of this rule is that there can be no appellate review if the trial court was not given an opportunity to exercise its discretion on a motion for a new trial.")

Further, an appellate court is not particularly well-suited to make factual determinations. *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012). Review of attorney misconduct and its impact on the jury requires the district court to consider the facts of the case before it. *See BMW*, 127 Nev. at 132 n.4, 252 P.3d at 656 n.4; *see also 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."); *Wellons v. Valero Ref.-New Orleans, L.L.C.*, 616 S.W.3d 220,

232 (Tex. App. 2020) (noting that counsel's complaint must be raised in a motion for new trial); *Herrington v. Spell*, 692 So. 2d 93, 102 (Miss. 1997), *overruled on other grounds by Whittington v. Mason*, 905 So. 2d 1261 (Miss. 2005) (finding that if counsel is to later complain of abuse by the trial court, he must not only object, but make a motion for a new trial); *Daniel v. William R. Drach Co.*, 849 A.2d 1265, 1273 (Pa. 2004) (noting claim waived due to Appellants' failure to preserve it in a post-trial motion); *City of Bellevue v. Kravik*, 850 P.2d 559, 564 (Wash. App. 1993) (noting that to preserve an error relating to misconduct of counsel, a party should move for a new trial); *Vinson v. Linn-Mar Cmty. Sch. Dist.*, 360 N.W.2d 108, 121 (Iowa 1984) (noting counsel's statements were not raised in the trial court either by motion for mistrial or for new trial); *Lyle v. Johnson*, 126 So. 2d 266, 270 (Miss. 1961) (stating it is also the duty of counsel to object and preserve his objection, and promptly make a motion for a new trial); *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)).

Here, plaintiffs never sought a new trial below because they astutely anticipated the trial judge would have found that their substantial rights were not affected by the verdict that was amply supported by the evidence.

B. Consistent with its Disfavor of Forum Shopping, this Court Has Never Said Losing Parties Are Free to Evade Post-Trial Findings by the District Court

No other Nevada cases conflict with the commonsensical application of *Lioce v. Cohen* in the order of affirmance.

1. Plaintiffs Cite No Case in Which this Court Condoned Avoidance of Post-Trial Findings by the District Court

Plaintiffs maintain that Nevada law has affirmed the view that a timely objection is the only condition a party must satisfy to properly preserve the appeal based on attorney misconduct. (Pet. 4.) However, this is not the case. Indeed, most of Appellants' Nevada cases do not even concern attorney misconduct. *See Nevada State Bank v. Snowden*, 85 Nev. 19, 20, 449 P.2d 254, 255 (1969) (appealing witnesses parol evidence testimony); *Etcheverry v. State*, 107 Nev. 782, 784, 821 P.2d 350, 351 (1991) (alleging that the district court improperly instructed the jury on the issue of proximate cause); *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (appealing evidentiary rulings). Tellingly, in the cases that do concern attorney misconduct the

appellant had moved for a new trial prior to appeal.

Plaintiffs' Nevada cases fall into two categories: where the appellant failed to object at all, either orally or in a post-trial motion and where the appellant moved for a new trial. In plaintiffs' first set of cases, the parties never raised an objection at trial and never moved for a new trial. *Nevada State Bank v. Snowden* 85 Nev. at 20, 449 P.2d at 255; *Etcheverry v. State*, 107 Nev. at 784, 821 P.2d at 351; *Mclellan v. State*, 124 Nev. at 267, 182 P.3d at 109. The Court's concern in cases where an issue was never raised is ensuring a proper division of trial and appellate functions, maintaining judicial efficiency, and giving fair notice to other parties. *Matter of L.L.S.*, 137 Nev. Adv. Op. 22, 487 P.3d 791, 795 fn 1 (2021).

Plaintiffs then cite to various cases in which the parties raised an objection at trial and then moved for a new trial. *S. Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978); *see also Ringle v. Bruton*, 120 Nev. 82, 86 P.3d 1032 (2004) (appellant moved for new trial but argued a different theory in its motion for new trial that he did on appeal).[1] Put simply, none of the cases cited in the petition for review

[1] Plaintiffs also cite to *Pasgove v. State*, 98 Nev. 434, 435, 651 P.2d 100,

indicated that a motion for new trial is superfluous.

2. Plaintiffs Conflate Necessity with Sufficiency

This is not an either/or proposition. Contemporaneous objections are required "to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the objection"— to avoid the error if possible in the first place. *Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988). While that is necessary to preserve issues for appeal, it is insufficient to situate a losing party to seek a new trial on appeal based on attorney misconduct. The appellant also must request that *relief* from the trial court, which court is in the informed position to assess whether it is appropriate considering the wide array of circumstances. *See Lioce, supra*. Both are necessary.

C. Plaintiffs Never Sought Review for Plain Error

Plaintiffs complain they should have received "the benefit of plain error review." (Pet. 18-19.) But they never asked the Court of Appeals

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101 (1982) for the proposition that a timely objection is required. In *Pasgove* appellant failed to object during trial to the questioning and testimony of the victim. *Id*. Appellant subsequently moved the court for dismissal or mistrial. *Id*. The court denied the motion but admonished the jury. This Court found that appellants objection was untimely to preserve the issue for appeal. *Id*. This Court never stated that that objection alone would have been sufficient if it had been made.

to review the district court's decision for plain error, not even in their reply brief after respondent explained the significance of their failure to move for a new trial. Plaintiffs, therefore, have waived this argument. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018), *as amended on denial of reh'g* (Nov. 13, 2018) (new arguments may not be raised in the NRAP 40B petition for review).

II.

THIS CASE DOES NOT INVOLVE AN INABILITY-TO-PAY ARGUMENT

Even if the defense judgment were reviewed for plain error, it must be affirmed. Plaintiffs' appeal does not present the issue they claim. Appellants allege that defense counsel asked the jury not to award millions in damages because defendant lacked ability to pay it. That is false. Defense counsel merely reminded the jury about the real-world value of money.

A. Defense Counsel Never Encouraged the Jury to Award Less than the Evidence Might Justify

Plaintiffs contend that defense counsel's closing argument improperly referred to Tate's "ability to pay." This is incorrect. Rather, counsel's arguments reminded the jury that millions of dollars is a lot of money. It is well established that "trial counsel enjoys wide latitude in

arguing facts and drawing inferences from the evidence." *Jain v. McFarland*, 109 Nev. 465, 851 P.2d 450 (1993). And defense counsel did not exceed that latitude.

1. Reviewing Courts Construe Attorney Arguments Fairly, Not Cynically

In reviewing whether an attorney's remarks are misconduct, an appellate court should not lightly infer the statement has an improper meaning. *Williams v. Borg*, 139 F.3d 737, 744 (9th Cir. 1998) (stating that "a court should not lightly infer that an attorney intends a remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"); *see also State v. Felix R.,* 124 A.3d 871, 880 (Conn. 2015) (noting that an ambiguous statement by counsel is construed in favor of the party who made the statement). Where a comment is ambiguous, the reviewing court will give benefit of the doubt and infer the innocent or less-damaging meaning. *Id.* Alleged improper statements also must be considered in context. *Maestas v. State*, 128 Nev. 124, 147, 275 P.3d 74, 89 (2012); *Capanna v. Orth*, 134 Nev. 888, 890, 432 P.3d 726, 731 (2018).

In evaluating alleged attorney misconduct, words matter.

Ferguson v. Morton, 2013 PA Super 329, 84 A.3d 715, 724 (Pa. Super Ct. 2013) (holding that whether misconduct occurred "is determined by an examination of the remark made"). This Court has consistently taken that approach, declining to interpret comments cynically in a manner that would render ambiguous terms inappropriate where a permissible interpretation is plausible. *See e.g., Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017), *reh'g denied* (Sept. 28, 2017) (construing comments in a light most favorable to counsel's good faith); *Rish v. Simao*, 132 Nev. 189, 201, 368 P.3d 1203, 1212 (2016) ("While these instances might be construed to violate the low-impact defense pretrial order, none of them describe the accident itself...there is no clear violation, let alone misconduct").

2. Defense Counsel Did Not Refer to Defendant Tate or Her Circumstances

Here, defense counsel statements discussed "the value of the dollar outside the courtroom." (10A.App.02363.) Counsel discussed how long it would take a family to save $3,000,000, the amount Evans-Waiau had requested in *general* damages:

> The value of the dollar outside the courtroom is this, if the average family of four makes $50,000 a year, if the average family of four saves $50,000 a year makes

> $50,000 a year and let's pretend that family never had to pay a mortgage, never had to pay rent, never had to buy groceries, never ever to pay for a barber, never had to hail a cab, never went to the movies, never went to a restaurant, never paid a bill….it would save [sic] that family of four 20 years to save $1 million.

(10A.App.02363.) Appellants objected to these comments. In response, Tate's counsel explained that this argument did not go to Tate's ability to pay but rather illustrated the value of money outside the courtroom in a simple way (10A.App.2367), analogous to "per diem" arguments employed by plaintiffs' attorneys. (10A.App.02364.)

The district court sustained the objection as it related to the lack of evidentiary foundation for an average income and "statistics" but permitted limited examples of how long it would take a family to save money. (10A.App.02368.) The district court specifically ruled it was permissible to provide hypotheticals of how long it takes to save money. (10A.App.2368.) The district court explained the purpose of allowing the argument was to put into perspective the amount of money sought. *Id.*

During the closing argument, defense counsel never referred to Tate's ability, or lack thereof, to satisfy any judgment. And the PowerPoint defense counsel used during closing said "The Value of a Dollar" in large letters. (R.App.133). Even if the comments were

ambiguous, moreover, there is no reason to construe them cynically to impute anything other than the innocuous meaning defense counsel intended.

3. Counsel Illustrated the Value of a Million Dollars to the Average Person

It is not misconduct for counsel to refer generally to the value of the dollar. *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 105 P.3d 400, 407 (Wash. App. 2004). And it was entirely appropriate to illustrate the value of money by reference to the amount of the average person's labor necessary to acquire it. As Adam Smith ("The Father of Economics") recognized, that the value of anything is relative to the amount of effort necessary to obtain it:

> Labour, therefore, is the real measure of the exchangeable value of all commodities. . . . What is bought with money or with goods is purchased by labour, as much as what we acquire by the toil of our own body.

Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS BOOK 1 Ch. 5 (1776).

Nor it is improper to discuss the value of money relative to the average person. The value of money is also relative to the wealth of the person who possesses it. "[A] dollar lost to a poor person may be more

meaningful than a dollar-or even ten dollars-lost to a rich person . . . ." *Opinion of the Justices*, 624 So. 2d 107, 117 (Ala. 1993). Known as the marginal utility theory of value, the theory recognizes that "the value of an additional dollar to an individual declines as the number of dollars he owns increases." Sarah B. Lawsky, *On the Edge: Declining Marginal Utility and Tax Policy*, 95 Minn. L. Rev. 904, 952 n.13 (2011).

Other courts have found that value-of-a-dollar arguments are permissible. In *Cooper*, the plaintiff argued that the District violated the prohibition against "golden rule" arguments when it stated:

> And think about really what it boils down to is what's the value of a dollar. What do you have to go through to get your dollars? What do they mean to you when you have them? Think about what it means to you. The number that I want to give you for all of the damages in the case is half of a year of an average worker's pay. If you think that's fifteen thousand or twenty thousand, that's an appropriate number. That's a lot that you go through. If you had that amount of money, what would it mean to you? Would it be a lot of money to you? That's an issue for the jury to decide.

Cooper, 105 P.3d at 407. The court found that the statements were not an improper "golden rule" argument because the District was not appealing to the jury to put themselves in its position and then decide whether they would want to be found guilty of negligence. *Id*. Rather, it

was telling the jury to determine what amount of money would compensate plaintiff and what that money means to them. *Id.*

Here, defense counsel's point was that three million dollars is a lot of money.[2] It was perfectly appropriate to make that point. And that is especially true because the district court had charged the jury to "fix reasonable compensation for pain and suffering" and "exercise [their] authority with calm and reasonable judgment" that would be "justified in the light of common experience" and "every day common sense." (9A.App.2241.)

B. The Testimony from the Defendant Days Earlier Had Been Appropriate

Appellants further pretend that Tate impermissibly described her financial hardship. That is not true. Several days before closing argument, Tate mentioned only that she was the family's provider. (7A.App.01658.) The testimony was remote in time and counsel never referred back to it. Further, that testimony was fair to humanize Tate (to dispel any misimpression of wealth fostered by *plaintiff's* counsel),

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[2] The district court sustained Appellant's objection to the extent that defense counsel's hypothetical about the "average" household income had the feel of hard statistics that lacked an evidentiary foundation and ordered counsel to rephrase. (10A.App.02368.)

and to emphasize the significance of her attendance at trial every day,[3] which bore on her credibility.

There was never any mention of Tate's household income—at that time or, days later, during closing argument. Importantly, plaintiffs never objected to that testimony from Tate. (7A.App.1658-59.)

III.

SUBSTANTIAL EVIDENCE EXPLAINS THE DEFENSE VERDICT

"Plain error exists only when it is plain and clear that no other reasonable explanation for the verdict exists." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 319 P.3d 606 (2014).

A. Plaintiffs Fail to Confront the Evidence and Reasonable Inferences Unfavorable to Them

Substantial evidence is that evidence which a reasonable mind might accept as adequate to support a conclusion. *J.D. Constr. v. IBEX Int'l Grp.*, 126 Nev. 366, 380, 240 P.3d 1033, 1043 (2010). In determining whether substantial evidence support the findings, a court

[3] Here again, the rationale for having the district court rule on supposed misconduct in the first instance is clear. The judge and jury could observe that the appellants themselves only sporadically attended trial, while the defendant was present every day, a point about which defense counsel was free to gently remind the jury during summation.

must consider the body of evidence as a whole. *Nevada Emp. Sec. Dep't v. Holmes*, 112 Nev. 275, 280, 914 P.2d 611, 614 (1996)

Here, the jury rendered a defense verdict (10A.App.2392), indicating that the jurors found that defendant's conduct did not fall beneath the applicable standard of care. To demonstrate prejudice, Appellants claim there was no reasonable basis for the jury to return a defense verdict. They address only evidence in their favor, draw all inferences in their favor, distort the nature of Tate's comments regarding "fault" at the scene of the accident, and ignore the evidence that supports the verdict and the reasons the jury had to be skeptical of their allegations, and of their credibility as witnesses. Plaintiffs' certitude about the merits of their case also stands in stark contrast to the good sense they showed during trial when they forewent any Rule 50(a) motion for judgment as a matter of law on the element of liability, and when they chose not to object to the general defense verdict form (even after defense counsel cautioned that it would foreclose any argument from them post-trial about one of the defendants being fault-free).

B. The Jury Had a Reasonable Basis to Find that Plaintiff Failed to Prove Defendant Acted Negligently

Plaintiffs argue that the defense verdict reflects prejudice from the purported inappropriate arguments and contends the jury's verdict "was unreliable because it was rendered 'solely on the basis of passion and prejudice.'" (Pet. at 22). To the contrary, the jury's defense verdict was justified abundantly by the record.

A rear-end collision is not a strict-liability tort. Sometimes accidents happen. *Nehls v. Leonard*, 97 Nev. 325, 329, 630 P.2d 258, 261 (1981). It was plaintiffs' burden to prove that defendant "fail[ed] to do something, which a reasonably careful person would do . . . under circumstances similar to those shown by the evidence." (9A.App.2222.)

Appellant-plaintiff Evans-Waiau was driving while appellant-plaintiff Parra-Mendez was riding as a front-seat passenger. (*Id*. at 1315.) According to *co-plaintiff* Parra Mendez, Evans-Waiau ***"slammed on her brakes"*** under a green light at the intersection of Flamingo Boulevard and Linq Lane. (6A.App.1320.) Evans-Waiau said she did so in order to avoid hitting a pedestrian. (6A.App.1321.) But Parra-Mendez testified no pedestrian was near Evans-Waiau's car. (7A.App.1721-1722.)

Although Evans-Waiau alleges that she activated her right blinker to signal her intention to turn right at the intersection (6A.App.1321), Defendant Tate never saw a blinker illuminated because plaintiffs' vehicle had darkened aftermarket taillight covers. (7A.App.1644-45; 7A.App.1649; 7A.App.1656.)

Tate, who had been driving two cars behind plaintiffs, saw their vehicle only after a large van in between them "swerved" to the left. (7A.App.1644.) She immediately applied her brakes. (7A.App.1636.) She almost managed to stop completely but bumped plaintiffs' vehicle at low speed. (*Id.*) No air bags deployed. (7A.App.1645.)

Tate had been going the speed limit, with the flow of traffic under a green light, at a safe distance behind the traffic ahead. She said she was paying attention and was not on her phone. (7A.App.1654.) She was not running late for an engagement or otherwise in a hurry. (7A.App.1655.) Tate saw no blinker indicating an intent to turn. In other words, the jury simply believed Tate that she "wasn't travelling too close" (7A.App.1639), and that she did everything an ordinarily and prudent person would have done under the circumstances.

(7A.App.1658.)[4]

Further, as argued thoroughly in Tate's answering brief in the Court of Appeals, if the jurors had been concerned only about the amount of the verdict, they would have returned a small verdict.

C. Plaintiff Avoided any District Court Findings Because the Judge Was Very Familiar with All of the Reasons the Jury Found in Defendant's Favor

In assessing prejudice after trial a trial court views the context of the alleged misconduct relative to the body of evidence at trial. *State v. Mechler*, 157 Or. App. 161, 165, 969 P.2d 1043, 1045 (1998); *see also United States v. Denberg*, 212 F.3d 987, 992 (7th Cir. 2000) (noting the trial judge has firsthand exposure to the witnesses and the evidence as a whole, familiarity with the case and ability to gauge the likely impact in the context of the entire proceeding."); *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1310 (Fed. Cir. 2011) *quoting Gasperini v. Ctr. for Humans., Inc.*, 518 U.S. 415, 439, 116 S. Ct. 2211, 2225 (1996) ("[t]rial

[4] During her testimony, Tate appeared give contradictory testimony about the accident being both avoidable and unavoidable. (7A.App.1631.) Reading her testimony as a whole, it is clear that she acknowledged that it would be theoretically possible to avoid the accident if she were omnipotent, but never wavered that it was practically unavoidable as the events unfolded.

judges have the unique opportunity to consider the evidence in the living courtroom context, while appellate judges see only the cold paper record.").

Plaintiffs tellingly never moved for a new trial based on alleged errors. The judge who sat through three weeks of trial, heard the evidence, watched the witnesses, gauged the jurors' reactions to particular evidence and arguments, and, therefore, would be in the position to opine whether the evidence supported the verdict or any particular evidence or argument was prejudicial, was never allowed to make findings under *Lioce v. Cohen*. The trial judge would have recognized the disconnect between plaintiffs' mischaracterization of the trial and the body of evidence.

CONCLUSION

The court of appeals correctly affirmed the judgment. This petition for review provides no reason to prolong the appeal. It should be denied.

Dated this 8th day of November, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel Henriod*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

THOMAS E. WINNER (SBN 5168)
CAITLIN LORELLI (SBN 14,571)
WINNER BOOZE & ZARCONE
1117 South Rancho Drive
Las Vegas, Nevada 89102

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief exceeds the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 4,598 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 8th day of November, 2021.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Joel Henriod*
DANIEL F. POLSENBERG (SBN 2376)
JOEL D. HENRIOD (SBN 8492)
ADRIENNE BRANTLEY-LOMELI (SBN 14,486)
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
(702) 949-8200

Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify that on November 8, 2021, I submitted the foregoing "Answer to Petition for Review" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

DENNIS M. PRINCE (SBN 5092)
KEVIN T. STRONG (SBN 12,107)
PRINCE LAW GROUP
10801 W. Charleston Boulevard
Suite 560
Las Vegas, Nevada 89135
(702) 534-7600

Attorneys for Appellants

/s/ Jessie M. Helm
An Employee of Lewis Roca Rothgerber Christie LLP