IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

RING POWER CORPORATION,
a Florida Corporation,

Appellant,

v.

MELVIN ROSIER,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D10-5083

Opinion filed June 8, 2011.

An appeal from the Circuit Court for Wakulla County.
N. Sanders Sauls, Judge.

Thomas R. Ray, of Holbrook, Akel, Cold, Stiefel & Ray, P.A., Jacksonville, and Jerome Hoffman, of Holland & Knight, Tallahassee, for Appellant.

William D. Hall, Tallahassee, for Appellee.

WETHERELL, J.

Ring Power Corporation ("Ring Power") seeks review of the trial court's grant of a new trial in this negligence action. It contends that the trial court abused

its discretion in granting a new trial because the evidence at trial was conflicting and because no fundamental error occurred during defense counsel's closing argument. We agree and reverse.

Melvin Rosier sued Ring Power and others for negligence based upon the failure of the parking brake on a Caterpillar backhoe loader at the Wakulla County landfill. When the brake failed, the loader rolled forward and pinned Rosier against a brick wall. Rosier eventually had both legs amputated as a result of the accident. Rosier settled with Caterpillar and voluntarily dismissed Wakulla County, and the case proceeded to trial only against Ring Power. Rosier claimed that Ring Power had a duty to reasonably inspect and maintain the loader and its brake system pursuant to the Customer Service Agreement (CSA) between Ring Power and Wakulla County and that the accident was caused by Ring Power's breach of this duty.

Following a four-day trial, the jury returned a verdict in favor of Ring Power. Rosier timely moved for a new trial, arguing that the verdict was against the manifest weight of the evidence and that, contrary to a ruling of the trial court, Ring Power improperly argued in closing arguments that it had no liability based on exculpatory language in the CSA. The trial court granted the motion. This appeal follows.

In Brown v. Estate of Stuckey, 749 So. 2d 490 (Fla. 1999), the Florida

Supreme Court set forth a broad abuse of discretion standard for reviewing a trial court's order granting a motion for new trial:

> When reviewing the order granting a new trial, an appellate court must recognize the broad discretionary authority of the trial judge and apply the reasonableness test to determine whether the trial judge committed an abuse of discretion. If an appellate court determines that reasonable persons could differ as to the propriety of the action taken by the trial court, there can be no finding of an abuse of discretion. The fact that there may be substantial, competent evidence in the record to support the jury verdict does not necessarily demonstrate that the trial judge abused his or her discretion.

Id. at 497-98.

A trial judge may grant a new trial, in the absence of specific jury misconduct, when the judge becomes aware of a specific prejudicial legal error or when the judge finds that the jury's verdict is contrary to the manifest weight of the evidence. See Bulkmatic Transp. Co. v. Taylor, 860 So. 2d 436 (Fla. 1st DCA 2003). For the verdict to be against the manifest weight of the evidence so as to warrant a new trial, the evidence must be "clear and obvious, and not conflicting." Pena v. Vectour of Fla., Inc., 30 So. 3d 691, 692 (Fla. 1st DCA 2010) (quoting Campbell v. Griffith, 971 So. 2d 232, 235 (Fla. 2d DCA 2008)); see also Jordan v. Brown, 855 So. 2d 231, 233-34 (Fla. 1st DCA 2003) (reversing grant of new trial where issue of plaintiff's injury was highly controverted and, thus, the trial court's finding that there was uncontroverted evidence that plaintiff was injured was clearly erroneous); K-Mart Corp. v. Collins, 707 So. 2d 753, 755-56 (Fla. 2d DCA

1998) (reversing order granting new trial where findings in the order did not reveal the conflicting nature of the evidence presented at trial, but rather reflected that the trial judge was impermissibly acting as a seventh juror by merely disagreeing with the jury's determination of what weight to accord the evidence). The weight to be given conflicting evidence is within the province of the jury. See Pena, 30 So. 3d at 692; Jordan, 855 So. 2d at 234.

In the order granting new trial, the trial court focused on the "unrebutted" testimony of Rosier's expert that Ring Power did not competently inspect the loader because the inspector was unable to say how long the brake system would work after the inspection. This was not a sufficient basis to grant a new trial because the jury was free to reject this testimony. See Schmidt v. Van, 2011 WL 1449653 (Fla. 1st DCA Apr. 15, 2011) (reversing grant of new trial where the defense verdict was contrary to testimony of the plaintiff's expert because the jury was free to weigh and reject the expert's testimony, even if it was uncontradicted); see also Wald v. Grainger, 36 Fla. L. Weekly S211 (Fla. May 20, 2011) (noting that a jury can reject unrebutted expert testimony if there is conflicting lay testimony or other conflicting evidence). Our review of the record reveals substantial conflicting evidence concerning the reasonableness of the inspection performed by Ring Power.

At trial, Rosier presented expert testimony that the inspection of the loader was not performed competently because the inspector was unable to attest to how long the brake system would work after his inspection. Ring Power presented the testimony of the employee who inspected the loader and who acknowledged that the purpose of the inspection was to identify potential problems with the loader, but he also testified at length as to how he thoroughly inspected the loader's brake system in accordance with the directions in the loader's owner's manual and that he observed no problems with the brakes during his inspection. The expert's testimony that a competent inspection required Ring Power to essentially warrant the brake system for an additional 250 hours was in conflict with the CSA, which is silent on any such warranty obligations, and it was also in conflict with the inspector's common-sense testimony based on his 27 years of experience as a field technician that the life of the brake system depended on the use of the loader and other factors. Indeed, Rosier's expert acknowledged that a corrosive environment, such as at the landfill, would greatly diminish the life of the brakes. Moreover, other evidence was presented to support each party's position regarding the competency of the inspection, including conflicting testimony as to whether the brake pads were replaced after the accident and conflicting testimony as to whether there were problems with the loader's brake system after the inspection and before the accident. These conflicts in the evidence were for the jury to weigh and

resolve in determining whether Ring Power breached its duty under the CSA and, based upon the substantial conflicting evidence, the trial court abused its discretion in granting a new trial on the basis that the jury verdict in favor of Ring Power was contrary to the manifest weight of the evidence.

The trial court also abused its discretion in granting a new trial on the basis of defense counsel's unobjected-to references to the exculpatory language in the CSA in his closing argument. Because Rosier did not object to the argument or move for a mistrial, a motion for new trial can be granted only if the argument rises to the level of fundamental error. See Companioni v. City of Tampa, 51 So. 3d 452, 456 (Fla. 2010) (holding that a party must object to instances of attorney misconduct during trial and also move for mistrial if objection is sustained in order to preserve the issue for a motion for new trial); see also Cummins Ala., Inc. v. Allbritten, 548 So. 2d 258, 263 (Fla. 1st DCA 1989) (requiring objection and motion for mistrial to preserve issue for new trial motion). An unobjected-to closing argument amounts to fundamental error, requiring a new trial, when the argument 1) is improper; 2) is harmful; 3) is incurable; and 4) "so damaged the fairness of the trial that the public's interest in our system of justice requires a new trial." Murphy v. Int'l Robotic Sys., Inc., 766 So. 2d 1010, 1028-30 (Fla. 2000).

Applying the Murphy test, we determine that defense counsel's argument does not rise to the level of fundamental error because the argument was not

improper, harmful, incurable, or damaging. The CSA was a joint exhibit introduced by the parties, and Rosier did not request the redaction of any portion of the CSA. Thus, it was not improper for defense counsel to read from the CSA in his closing argument. Moreover, although the trial court had prohibited Ring Power from arguing that the exculpatory language in the CSA precluded a finding of negligence, it is clear from a review of defense counsel's closing argument that his reference to the exculpatory language was not inconsistent with the court's ruling. Counsel did not argue that anything in the CSA barred a finding of liability; he simply argued that the CSA did not require Ring Power to "predict the future" as suggested by the testimony of Rosier's expert. Viewed in this manner, the argument is nothing more than counsel offering an interpretation of the evidence that had been presented to the jury, which is proper closing argument. Accordingly, because Rosier did not meet the Murphy test and establish fundamental error, the trial court abused its discretion in granting a new trial based on the unobjected-to closing argument.

Based upon the foregoing, we reverse the order granting a new trial and remand with directions that the jury's verdict be reinstated and judgment be entered in favor of Ring Power.

REVERSED and REMANDED with directions.

DAVIS and LEWIS, JJ., CONCUR.