

983 So.2d 791, 33 Fla. L. Weekly D1656
(Cite as: 983 So.2d 791)

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District Court of Appeal of Florida,
Third District.

Sylvester LEE, individually and as Personal Representative of the Estate of Annie Pearl McCuller Lee, Appellant,
v.

OCEANS CASINO CRUISES, INC., and David Boyce, Appellees.

No. 3D06-1843.
June 25, 2008.

Background: Husband, individually and as personal representative of his wife's estate, filed action against driver and driver's employer, arising from accident in which driver struck couple's vehicle, killing wife and causing serious injuries to husband. Following jury verdict in favor of plaintiff, defendants filed motion for new trial. The Circuit Court, Miami-Dade County, [Richard Y. Feder, J.](#), granted motion on grounds that plaintiff's counsel improperly impeached defendants' expert witness. Husband appealed.

Holdings: On motion for rehearing, the District Court of Appeal, [Ramirez, J.](#), held that:

- (1) defendants failed to preserve for appellate review issue of whether plaintiff's counsel improperly impeached defense expert witness;
- (2) no fundamental error occurred with respect to improper impeachment of defendant's expert witness; and
- (3) unpreserved improper impeachment did not entitle defendants to new trial.

Reversed and remanded with instructions; rehearing denied.

West Headnotes

[1] Appeal and Error 30 977(3)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k976 New Trial or Rehearing

30k977 In General

30k977(3) k. Grant of New Trial in

General. [Most Cited Cases](#)

Appellate court reviews an order in which the trial court grants a motion for new trial based upon an abuse of discretion standard.

[2] Appeal and Error 30 946

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of Discretion. [Most](#)

[Cited Cases](#)

Trial court abuses its discretion when it grants a new trial in reliance on an error that is neither preserved nor fundamental.

[3] Appeal and Error 30 216(1)

30 Appeal and Error

30V Presentation and Reservation in Lower

Court of Grounds of Review

30V(B) Objections and Motions, and Rulings

Thereon

30k214 Instructions

30k216 Requests and Failure to Give

Instructions

30k216(1) k. In General. [Most](#)

[Cited Cases](#)

Appeal and Error 30 232(2)

30 Appeal and Error

30V Presentation and Reservation in Lower

Court of Grounds of Review

30V(B) Objections and Motions, and Rulings

Thereon

30k232 Scope and Effect of Objection

30k232(2) k. Objections to Evidence

and Witnesses. [Most Cited Cases](#)

Driver and his employer failed to preserve for appellate review issue of whether husband's counsel improperly impeached defense expert witness, in context of action commenced by husband, individually and as personal representative of his wife's estate, against driver and his employer, arising from accident in which driver struck couple's vehicle, killing wife and causing serious injuries to husband, as counsel for driver and employer did not object during cross-examination of expert or at any time thereafter on basis of improper impeachment, nor did counsel pursue a curative instruction or special jury instruction on issue of expert's improper impeachment, despite ample opportunity to do so.

[4] Appeal and Error 30 ↪203.4

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k202 Evidence and Witnesses

30k203.4 k. Impeachment. **Most Cited Cases**

No fundamental error occurred with respect to improper impeachment of expert witness for driver and his employer by husband's counsel, such as would warrant a new trial, in context of action commenced by husband, individually and as personal representative of his wife's estate, against driver and his employer, arising from accident in which driver struck couple's vehicle, killing wife and causing serious injuries to husband, as curative instruction, which counsel for driver and employer failed to request, could easily have cured any damage to fairness of trial.

[5] Appeal and Error 30 ↪181

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k181 k. Necessity of Objections in

General. **Most Cited Cases**

“Fundamental error” occurs where the error is so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in the system of justice justifies a new trial.

[6] New Trial 275 ↪31

275 New Trial

275II Grounds

275II(B) Misconduct of Parties, Counsel, or Witnesses

275k31 k. Necessity of Objection. **Most Cited Cases**

New trial as result of unpreserved improper impeachment of defense expert was improperly granted in personal injury action arising out of automobile accident, even though trial court believed that jury was deceived as to force and credibility of expert's testimony and influenced by considerations outside record; no evidence on record indicated that jury was deceived by questions regarding expert's employment with sheriff's office, trial judge unreasonably determined that the jury was deceived, and if an objection had been made, a curative instruction could have remedied any jury misimpression.

***793** **Gustavo Gutierrez**, Coconut Grove; **Kimberly L. Boldt**, for appellant.

Hinshaw & Culbertson and **James H. Wyman**, Fort Lauderdale, for appellees.

Before **COPE**, and **RAMIREZ, JJ.**, and **PALMER**, Associate Judge.

ON MOTION FOR REHEARING
RAMIREZ, J.

We deny the appellees' motion for rehearing or clarification, but we withdraw our previous opinion filed March 5, 2008, and substitute the following opinion in its place.

Sylvester Lee appeals the trial court's order

granting a new trial on liability on the grounds that Lee's counsel improperly impeached the appellees', Oceans Casino Cruises, Inc. and David Boyce expert witness. Because Oceans Casino and Boyce did not preserve for appellate review the issue of the expert's improper impeachment, we reverse the order granting a new trial on liability and remand the case for a trial on damages.

Annie Pearl McCuller Lee suffered fatal injuries, and her husband, Sylvester Lee, suffered serious injuries when David Boyce, an employee of Oceans Casino, struck the couple's vehicle. Sylvester Lee then sued Boyce and Oceans Casino, the owner of the vehicle Boyce drove at the time of the accident.

At trial, the defendants introduced the testimony of expert witness Rick Swope. On direct, Swope testified that he worked for the Broward County's Sheriff's Office, and that he had retired. During cross-examination, plaintiff's counsel asked Swope if he had been fired from the Broward County's Sheriff's Office to which Swope responded that he had not been fired, he had a perfectly clean record with that office, and that he continued to do work for the same office. Defense counsel did not object during Swope's cross-examination.

Plaintiff's counsel thereafter moved for a mistrial based upon personal comments which defendants' counsel made about plaintiff's counsel in front of the jury. The defendants opposed the motion for mistrial, and the trial court agreed to give a curative instruction based on defense counsel's improper comments.

Following Swope's testimony and at side bar, the trial court asked plaintiff's counsel whether he had a basis for the question regarding Swope's employment termination. Plaintiff's counsel explained that he had been advised that Swope had not retired from the Broward County's Sheriff's Office and that he was going to inquire further. Defense counsel did not comment during this discussion, and he did not raise any objection.

The trial court subsequently agreed not to give any special jury instruction based upon the improper comments defendants' counsel made about plaintiff's counsel. The trial court also mentioned that plaintiff's question to Swope about Swope's termination of employment may have antagonized some of the jurors and that he preferred to give a neutral instruction. Plaintiff's counsel preferred not to have a neutral instruction, and defense counsel raised no objection.

***794** The jury returned a verdict in plaintiff's favor. Defendants' counsel moved for a new trial, alleging for the first time that the improper impeachment of Swope prejudiced the case and warranted a new trial. At the hearing on the motion, plaintiff's counsel explained that he had received information that: the Broward County's Sheriff's Office had terminated Swope. Swope had sued the office to be reinstated, and the office had reinstated him. The trial court granted the motion for new trial on the grounds that the plaintiff's counsel improperly attempted to impeach the defendants' expert witness.

[1][2] We review an order in which the trial court grants a motion for new trial based upon an abuse of discretion standard. *Robinson v. Bucci*, 828 So.2d 478, 481 (Fla. 2d DCA 2002). The trial court abuses its discretion when it grants a new trial in reliance on an error that is neither preserved nor fundamental. *Conklin Shows, Inc. v. Llanes*, 733 So.2d 595 (Fla. 3d DCA 1999).

[3] Even if plaintiff's counsel improperly impeached defendants' expert witness, we believe a new trial is not warranted. In *KMart Corp. v. Hayes*, 707 So.2d 957, 957 (Fla. 3d DCA 1998), we stated that "a new trial cannot be granted on a ground that was not preserved by timely objection or motion during trial," and that "[g]ranting a new trial under circumstances where a party did not properly preserve the issue is an abuse of discretion." Defense counsel did not object during the cross-examination of the expert or at anytime thereafter on the basis of improper impeachment. In fact,

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defendants' counsel opposed plaintiff's motion for mistrial after the offensive cross-examination of the expert witness. Furthermore, defense counsel neither requested that the trial court strike the employment termination question and answer, nor did counsel say anything when the trial court sua sponte requested a basis for the employment termination question.

Additionally, defense counsel did not pursue a curative instruction or a special jury instruction on the issue of the expert's improper impeachment. Defense counsel had ample opportunity in which to do so. Defense counsel thus did not preserve for review any error.

[4][5] Furthermore, a new trial is not warranted on the basis of fundamental error. "Fundamental error occurs where the error is so extreme that it could not be corrected by an instruction if an objection had been lodged, and that it so damaged the fairness of the trial that the public's interest in our system of justice justifies a new trial." *Grau v. Branham*, 761 So.2d 375, 378 (Fla. 4th DCA 2000). A curative instruction could easily have cured any damage to the fairness of the trial.

[6] We also disagree with the argument that the verdict was against the manifest weight of the evidence because the trial court never found that the jury's verdict was against the manifest weight of the evidence. We recognize that the order granting a new trial is within the trial court's broad discretionary authority. See *Brown v. Estate of Stuckey*, 749 So.2d 490, 497-98 (Fla.1999). The trial court's comment that the jury was deceived as to the force and credibility of the expert's testimony and influenced by considerations outside of the record refers merely to the unpreserved improper impeachment. There is simply no evidence on the record to support the conclusion that the jury was deceived by the questions regarding Swope's employment with the Broward County's Sheriff's Office. We conclude that it was unreasonable for the trial judge to determine that the jury was deceived by the questions regarding whether Swope had been terminated, for

which there were *795 no objections, and if an objection had been made, any jury misimpression could have been easily remedied by a curative instruction.

The trial court's order granting a new trial basically encourages an attorney to sit silently during trial, await the outcome, and complain only if it is an unfavorable result. We therefore reverse the order granting a new trial and remand the case with instructions to reinstate the jury's verdict on liability, and proceed with a new trial on damages.

Reversed and remanded with instructions.

Fla.App. 3 Dist.,2008.

Lee v. Oceans Casino Cruises, Inc.

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