

1 *Sauter*, 614 A.2d 1071, 1075 (N.J. App. Div. 1992) (stating that among the “[t]he
2 usual grounds for rescission” of a contract is intoxication); see, also, *Trump Taj*
3 *Mahal Assocs. V. Allen*, 2011 N.J. Super. Unpub. LEXIS 33, at **8-9 (N.J. App.
4 Div. Jan. 6, 2011) (“ ‘A contract should not be enforced where the mind of the
5 party was so disqualified by excessive and complete intoxication that he was, at the
6 time, mentally incapable of understanding the subject of the agreement, its nature,
7 and probable consequences.’ ” (quoting *Seminara v. Grisman*, 44 A.2d 492, 495
8 (N.J. Ch. 1945))). According, excessive intoxication is also a viable defense to
9 contracts arising between casinos and their patrons. See, *Hakimoglu v. Trump Taj*
10 *Mahal Assocs.*, 876 F. Supp. 625, 633 (D.N.J. 1994) (noting that “when a casino
11 comes to court to enforce a marker debt against a patron, it seeks to enforce a
12 contractual debt,” and “[i]n that case, the patron is entitled to raise all the common
13 law defenses to a contract, including that his capacity to contract was impaired by
14 voluntary intoxication”), *aff’d*, 70 F. 3d 291 (3d Cir. 1995); *Lomonaco v. Sands*
15 *Hotel Casino and Country Club*, 614 A.2d 634, 638 (N.J. Law Div. 1992) (holding
16 that “common law contract defenses of incapacity, duress, and unconscionability”
17 apply to the casino context and casino markers); see also, *Annitto v. Trump Marino*
18 *Hotel Casino*, 2006 N.J. Super. Unpub. LEXIS 1769, at **26-27 (N.J. App. Div.
19 July 25, 2006) (affirming intoxication as a basis for rescinding a contract to repay a
20 loan for gambling). However, “to avoid the contract the intoxication must have
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1 advanced to such a degree that the mental powers of reasoning and understanding
2 of the contracting party are so deficient that he cannot realize or appreciate the
3 nature and consequences of his act” *Semina*, 44 A.2d at 495.
4

5 In a nutshell, this abuse of discretion by the trial court, combined with its
6 instruction to the Jury that Mr. LaBarbera’s inability to speak English was not a
7 defense to the subject Markers, vitiated Mr. LaBarbera’s affirmative defenses of
8 “unilateral mistake” and “competency.”
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11 **G. Likewise, the trial court abused its discretion by instructing**
12 **the Jury that Mr. LaBarbera’s inability to speak English was**
13 **not a defense to the subject Markers given that Wynn refused**
14 **to produce Mr. Pariente to testify in this case, and he was the**
15 **only individual who translated anything for Mr. LaBarbera**
16 **when he was at Wynn.**

17 The trial court ultimately prevented Mr. LaBarbera from presenting or
18 painting a complete picture of his case to the Jury. He was invited to Wynn by
19 Alex Pariente specifically to gamble there; because he did not read, write or speak
20 English he relied entirely on Mr. Pariente’s translation of the Credit Application
21 and Markers he supposedly executed there; he was supplied copious amounts of
22 alcohol as well as the other accoutrements provided to gambling addicts or
23 ludomaniacs; and Mr. Pariente also granted him \$1,000,000 in credit or Markers on
24 which to gamble after he had already lost \$1,000,000 the day before (according to
25 Wynn); yet Wynn refused to produced Mr. Pariente for any testimony in the case
26 below including at trial; and Mr. LaBarbera was also not even allowed to elicit
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1 testimony as to “why” from Wynn’s witnesses at trial. Ergo, Mr. LaBarbera was
2 simply denied a fair trial because of all these abuses of discretion by the trial court
3 and, in particular here, explaining to the Jury that based on his intoxication and
4 inability to comprehend English, he was not competent if he did indeed execute the
5 Markers as alleged by Wynn. Mr. LaBarbera also was not allowed to defend
6 himself at trial from an individual that preyed upon his weaknesses including his
7 ludomania and inability to speak English, and from whom Wynn made certain Mr.
8 LaBarbera could not elicit any testimony by producing him in the first instance,
9 i.e., Alex Pariente.
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14 **H. The trial court abused its discretion in awarding Wynn**
15 **attorney’s fees, costs and prejudgment interest.**

16 Mr. LaBarbera does not quibble here with the quality of Wynn’s counsel
17 nor, in great particularity, to the amount of fees they claim to have incurred below
18 other than as set forth in his Oppositions to Wynn’s Motions in that regard below.
19 (AA, pp. 49-53.) Eighteen percent interest on gaming debts as claimed here by
20 Wynn, however, only further demonstrates its inequitable conduct against Mr.
21 LaBarbera as argued hereinabove. Indeed, and again, by waiting almost six years
22 to file a civil case against Mr. LaBarbera below, Wynn enriched itself unilaterally
23 and at his expense by more than \$1.5 million dollars, or for another 150% of the
24 total Marker value.
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1 This Court should therefore also reverse the trial court's award of attorney's
2 fees, costs and prejudgment interest to Wynn and against Mr. LaBarbera.
3

4 **IV. SUMMARY.**

5 The totality of all of these factors effectively prevented Mr. LaBarbera from
6 receiving a fair trial before the Jury below. Wrongfully inferring "criminal intent"
7 on his part, Wynn made certain that the Clark County District Attorney's Office
8 issued a bench warrant for his arrest for not paying the subject Markers, thereby
9 preventing him from attending his own trial. Compounding as much was the trial
10 court's refusal to allow Mr. LaBarbera's counsel to argue to the Jury why he was
11 not present at trial, as well as refusing Mr. LaBarbera's request or motion to testify
12 at trial from Italy *vis-à-vis* video conference and an interpreter. Correspondingly,
13 the Jury was instructed by the trial court not to consider Mr. LaBarbera's
14 intoxication, absolute inability to comprehend English, or gambling addiction in
15 arriving at its verdict against him, thus gutting his affirmative defenses of
16 "incompetence" and "unilateral mistake." The trial court only allowed the Jury to
17 consider the authenticity and genuineness of the subject Markers and then it
18 unfairly advantaged Wynn in that regard by allowing it to offer testimony from
19 four witnesses that it untimely disclosed to Mr. LaBarbera, and at the 11th hour in
20 the case below. Mr. LaBarbera simply did not receive any kind of fair trial below
21 because of Wynn's inequitable conduct against him as well as the trial judge's
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1 numerous abuses of discretion in favor of Wynn before and during trial below.

2
3 **V. CONCLUSION**

4 For these reasons, Mr. LaBarbera respectfully requests that this Court rule *de*
5 *novo* or as a matter of law in his favor and throw out the Judgment based on the
6 Jury's verdict against him in the amount of \$1 million dollars, as well as any other
7 awards of money to Wynn or, alternatively, remand this case to the District Court
8 with instructions for a new trial absent all of these abuses of discretion on the part
9 of the trial court.
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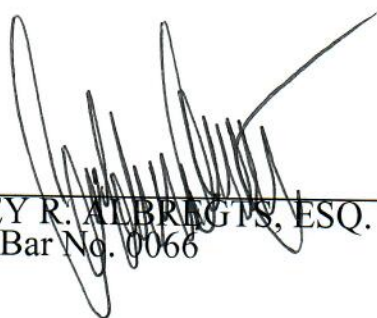
12 Respectfully submitted this 3 day of April, 2017.

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2 **AFFIRMATION**

3 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the
4 preceding document does not contain the social security number of any person.

5 Dated this ____ day of April, 2017.

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2 **CERTIFICATE OF COMPLIANCE**

3 I hereby certify that this brief complies with the formatting requirements of
4 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style
5 requirements of NRAP 32(a)(6) because this brief has been prepared in a
6 proportionally spaced typeface using Microsoft Word (2010) in 14-point font,
7 Times New Roman style. I further certify that this brief complies with the type-
8 volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief
9 exempted by NRAP 32(a)(7)(C), it contains 7,591 words.
10
11

12 Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the
13 best of my knowledge, information and belief, it is not frivolous or interposed for
14 any improper purpose. I further certify that this brief complies with all applicable
15 Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires
16 every assertion regarding matters in the record to be supported by a reference to
17 the page of the transcript or appendix where the matter relied on is to be found. I
18 understand that I may be subject to sanctions in the event that this brief is not in
19 conformity with the requirements of the Nevada Rules of Appellate Procedure.
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23 Dated this 3rd day of April, 2017.
24
25

26 
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3 **CERTIFICATE OF SERVICE**

4 I hereby certify that on April 3rd, 2017, I electronically filed the foregoing
5 brief with the Supreme Court of Nevada using the Court's electronic filing system.

6 I certify that all participants in this case are registered with the Court's
7 electronic filing system and that service will be accomplished by the Supreme
8 Court of Nevada's electronic filing system.

9
10 
11 An employee of Jeffrey R. Albregts, LLC

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2 **Docket No. 71276**

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4 In The
5 **SUPREME COURT**
6 For The
7 **STATE OF NEVADA**

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9 MARIO LABARBERA,

10 *Appellant*

11 v.

12 WYNN LAS VEGAS, LLC, D/B/A WYNN LAS VEGAS,

13
14 *Respondent*

15 -----
16 *Appeal from Judgment on Jury Verdict,*
17 *Eighth Judicial District Court, State of Nevada, County of Clark*
District Court Case No. A-14-695025-C – Hon. Ronald J. Israel

18
19 **APPELLANT LABARBERA'S OPENING BRIEF**

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2 **DISCLOSURE STATEMENT**

3 The undersigned counsel of record certifies that the following are persons
4 and entities as described in NRAP 26.1(a), and must be disclosed:

5 Mr. LaBarbera is an individual residing in Palermo, Italy. In the course of
6 the proceedings leading up to this appeal, he has been represented by Jeffrey R.
7 Albregts, Esq.
8

9 These representations are made in order that the Justices of the Supreme
10 Court or Judges of the Court of Appeals may evaluate possible disqualification or
11
12 refusal.

13 Dated this 3 day of April, 2017.

14
15 **JEFFREY R. ALBREGTS, LLC**

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JURISDICTIONAL STATEMENT

The District Court entered Judgment on the Jury's verdict on August 3, 2016, and Notice of Entry of that Judgment was served on August 10, 2016. Mr. LaBarbera filed his Notice of Appeal on September 9, 2016, and therefore his Notice of Appeal was timely here. See NRAP 4(a). Appellate jurisdiction over Mr. LaBarbera's appeal here from the judgment exists under NRAP 3(a)(b)(1).

ROUTING STATEMENT

This case involves important public policy issues regarding whether a casino can purposefully cause a bench warrant to be issued by the Clark County District Attorney's Office for the arrest of a patron for passing "bad checks," i.e., failing to pay Markers, when that casino admits such Markers are not actually checks at all in that they cannot be cashed, thereby depriving the patron of personally attending his own civil trial here for collection of the markers by the casino; and where NRS 604A.490(4) also requires "criminal intent" by the patron to establish his or her liability for criminal prosecution or civil liability for damages under NRS 41.620. See NRAP 17(a)(14).

STATEMENT OF THE ISSUES

1. Whether Wynn is equitably barred, or barred as a matter of law or on public policy grounds, from enforcing a Judgment based on this jury's verdict against Mr. LaBarbera for breach of contract because it purposefully caused a

1 bench warrant to be issued for his arrest by the Clark County District Attorney's
2 Office for passing bad checks knowing full well that, not only would he be unable
3 to attend his own trial here thereby requiring his counsel to present an "empty
4 chair" defense on his behalf, but the Markers are not actually "checks" because
5 they cannot be cashed or redeemed according to the testimony of Wynn's own
6 witnesses, i.e., Markers are only treated by Wynn as bad checks if they are not paid
7 as they cannot be negotiated for cash. Furthermore, NRS 604A.490(4) also
8 requires criminal intent on the part of the patron.
9

12 2. Whether the trial court abused its discretion in not allowing defense
13 counsel to argue to the Jury that Mr. LaBarbera was not present there for his own
14 trial because of the bench warrant issued for his arrest -- obtained by Wynn from
15 the Clark County District Attorney's Office for passing bad checks -- that would
16 have resulted in his arrest if he had entered this country to attend his own trial, and
17 the Markers are not actually checks because they cannot be cashed or redeemed
18 according to the testimony of Wynn's own witnesses at trial, and NRS
19 604A.490(4) also requires criminal intent on the part of Mr. LaBarbera.
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23 3. Whether the trial court abused its discretion by allowing Wynn to
24 offer at trial the testimony of four untimely disclosed witnesses regarding the
25 authenticity and genuineness of the subject Markers, the only issue the trial court
26 allowed the Jury to deliberate on below, thereby further prejudicing Mr.
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1 LaBarbera's right to a fair trial.
2

3 4. Whether the trial court abused its discretion by excluding evidence
4 from the Jury of Mr. LaBarbera's ludomania or gambling sickness and addiction as
5 certified in his home country of Italy, as well as instructing the jury that gambling
6 sickness or addiction is not a defense to gaming debts in Nevada, pursuant to NRS
7 463.368(6), given that Wynn used this statute as a "sword and a shield" against Mr.
8 LaBarbera contrary to sound public policy.
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11 5. Whether the trial court abused its discretion by excluding evidence
12 from the Jury of Mr. LaBarbera's intoxication while he gambled at Wynn and
13 executed the Markers presented to him there.
14

15 6. Whether the trial court abused its discretion by instructing the Jury
16 that Mr. LaBarbera's inability to speak English was not a defense to his execution
17 of the Markers in question given that Wynn refused to produce Mr. Pariente to
18 testify in this case and he was the only individual who translated anything for Mr.
19 LaBarbera when he was at Wynn.
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22 7. Whether the trial court abused its discretion in denying Mr.
23 LaBarbera's motion to allow him to testify at trial from Italy *vis-à-vis* video
24 conference and an interpreter.
25

26 8. Whether the trial court abused its discretion in awarding attorney's
27 fees, costs and prejudgment interest to Wynn, too.
28

STATEMENT OF CASE

Wynn filed its Complaint commencing the action below on January 24, 2014, but it did not bother to have the Summons issued for such service of process until April 7, 2014, ostensibly to avoid expiration of the six year statute of limitation on its contract claim against Mr. LaBarbera because the Markers in question were supposedly executed by him on April 3, 2008. (See Appellant's Appendix, hereinafter "AA," at pp. 2-7.) Mr. LaBarbera was served in Italy in July, 2014 (AA, p.27), and filed his Answer to the Complaint on September 16, 2014. (AA, pp. 9-16.) The next month, Wynn stipulated with Mr. LaBarbera to dismiss all of its claims against him other than its claim for Breach of Contract based on his Motion To Dismiss because of expiration of the applicable statute of limitations, and the trial court ordered as much on October 14, 2014, leaving for trial only Wynn's claim for Breach of Contract against Mr. LaBarbera. (AA, pp. 42-44.)

Wynn filed its Motion for Summary Judgment on November 9, 2015, and Mr. LaBarbera filed his Opposition to the same along with his Countermotion for Summary Judgment on December 18, 2015, and both of those motions for summary judgment were heard by the trial court and denied on January 21, 2016, but no included in AA. Wynn then filed three Motions In Limine on January 29, 2016, "In re: #1 Gambling Addiction; #2 Alleged Intoxication; and #3 Forgery."

1 (AA, pp. 45-160.) Mr. LaBarbera filed his Opposition to Wynn's three Motions in
2 Limine on February 19, 2016 (AA, pp. 171-195), and the trial court granted
3 Wynn's Motions in Limine #1 and #2 but denied its Motion in Limine #3 on
4 March 8, 2016, leaving for trial by Jury only the issue of the authenticity and
5 genuineness of the subject Markers. (AA, pp. 308-326.) Mr. LaBarbera filed his
6 Motion to Allow Testimony at Trial from Italy *vis-à-vis* video conference and an
7 interpreter on March 18, 2016, and the court denied the same on April 18, 2016.
8 (AA, pp. 261-69, and pp. 306-07, respectively.)
9

10 The trial of this case before a jury was conducted below by the Hon. Ronald
11 Israel over three days from June 13 to 15, 2016. (AA, pp. 373-773 and 817). The
12 Jury's verdict in favor of Wynn on its Breach of Contract claim against Mr.
13 LaBarbera in the principal amount of \$1,000,000 was returned Wednesday evening
14 on June 15, 2016. (AA, p. 816.) The trial court entered Judgment below on that
15 Jury Verdict on August 3, 2016, and Wynn accordingly filed Notice of Entry of
16 Judgment on Jury Verdict on August 10, 2016, and served the same by electronic
17 means the same day (allowing three additional days for purposes of Appeal here).
18 (AA, pp. 1013-16.) The trial court also granted Wynn's motion below for
19 attorney's fees, costs and prejudgment interest on September 28, 2016, in the total
20 amount of \$1,626,075.90, resulting in a total judgment entered below against Mr.
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1 LaBarbera in the amount of \$2,626,075.81.¹ (AA, pp. 1071-77.) No post trial
2 motions were filed below by either party.
3

4 Mr. LaBarbera filed his Notice of Appeal on the Court's Notice of Entry of
5 Judgment on the Jury Verdict on September 9, 2016. (AA, pp. 1062-63.)
6

7 **STATEMENT OF FACTS**

8 Mr. LaBarbera is a Sicilian in his 60's with a Bachelor's Degree in
9 Pharmacy (from Italy), has been married 40 years and owns his own company
10 (Bruni Farma Research). (AA, pp. 947-48.) Mr. LaBarbera also suffers from
11 "ludomania" or gambling addiction and pathology as certified in his home country
12 of Italy. (AA, pp. 45-70.) Mr. LaBarbera also does not read, write or speak
13 English whatsoever and, accordingly, required an interpreter at his deposition in
14 Rome, Italy, on June 11, 2015. (AA, pp. 129-60 and 921.)
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18 At the invitation of Alex Pariente, a Wynn "International Host" as well as its
19 Senior Vice President of Marketing at that time, Mr. LaBarbera took a brief
20 gambling trip to Wynn the first few days of April, 2008, and according to Wynn's
21 business records (admitted into evidence at trial below), lost \$2 million dollars
22 there over the course of two days. (AA, pp. 787-91, and 914-22.) According to
23 Wynn, Mr. LaBarbera transferred \$1 million dollars from his bank to its casino the
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26 ¹ The court awarded attorney's fees to Wynn in the amount of \$111,568.50, costs
27 in the amount of \$13,358.71, and prejudgment interest in the amount of
28 \$1,501,148.60, for a total of \$2,626,075.81, plus post judgment interest at the
contractual rate of 18% until paid in full, all of which Mr. LaBarbera opposed
below.

1 first day and, when he lost that playing roulette there, he signed up for another
2 \$1,070,000 in gambling credit or “Markers,” losing all of that as well while
3 playing roulette there the second day, too. (AA, p. 694.) Almost six years later,
4 Wynn then filed this case against Mr. LaBarbera in January, 2014, to collect those
5 allegedly outstanding Markers. (AA, pp. 2-6.) According to Mr. LaBarbera’s
6 deposition testimony, however, portions of which were admitted into evidence at
7 trial below, Mr. LaBarbera believes he only lost \$1 million dollars to Wynn on his
8 trip there the first week of April, 2008, and he emphatically disavowed as well his
9 signature on the Markers on which Judgment was entered on the Jury’s Verdict
10 against him below in the amount of \$1 million dollars. (AA, pp. 943-45.)

15 Although Wynn waited almost six years to file this civil case against Mr.
16 LaBarbera, shortly after his trip there it filed a Complaint with the Clark County
17 District Attorney’s Office against Mr. LaBarbera for “passing bad checks” that
18 resulted in a bench warrant being issued for his arrest here. (AA, pp. 269 and 711.)
19 In fact, Mr. LaBarbera testified in his deposition that he could no longer come to
20 the United States for fear of being arrested upon entry pursuant to that bench
21 warrant. (AA, p. 944.) Ergo, he did not and could not attend his own civil jury trial
22 below, nor would the trial court allow him to testify at that trial from Italy *vis-à-vis*
23 video conference and an interpreter. (AA, pp. 306-07.) All Mr. LaBarbera could
24 do in his defense at trial below was to have his counsel read certain portions of his
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1 deposition transcript into the Record and to the Jury. (AA, pp. 914-56.) In short,
2 the trial court below did not allow Mr. LaBarbera to defend himself personally
3 before the Jury, but rather his attorney was relegated to presenting an “empty
4 chair” defense to the Jury on behalf of Mr. LaBarbera. (AA, p. 545.)
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7 Correspondingly, Wynn refused to produce Alex Pariente for any testimony
8 below including at trial, although he was Mr. LaBarbera’s “host” and translated his
9 credit documents on which the subject Markers are based according to Mr.
10 LaBarbera’s un rebutted deposition testimony admitted at trial. (AA, pp. 921-23.)
11 The only witnesses offered by Wynn at trial that had any personal knowledge of
12 his execution of the subject Markers – and then only a scintilla of such personal
13 knowledge – were four witnesses indisputably disclosed untimely by Wynn and,
14 according to Judge Israel below, would have been excluded from testifying at trial
15 but for the trial being continued one month by him.² (AA, pp. 723-856.) These
16 decisions by Judge Israel below were critical to the impairment of Mr. LaBarbera’s
17 defense or right to a fair trial because the only issue he allowed the Jury to consider
18 or deliberate on was the authenticity and genuineness of the Markers allegedly
19 executed by Mr. LaBarbera. (AA, pp. 308-26.)
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25 ² Those witnesses were Wail Natei, Zuleima Shute, Scott Chang and Michael Gros.
26 Judge Israel ostensibly believed that Wynn’s offer to Mr. LaBarbera to allow him
27 to incur the additional cost of these witnesses being deposed just before the date to
28 which the trial had been continued cured any prejudice caused to him by their
untimely disclosure by Wynn, yet Judge Israel would not allow any similar
accommodation to Mr. LaBarbera to defend himself personally at trial from Italy
vis-à-vis an interpreter and video conference.

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2 Furthermore, in addition to these decisions by Judge Israel that critically
3 impaired Mr. LaBarbera's defense at trial below, Judge Israel also excluded any
4 evidence from the Jury of Mr. LaBarbera's intoxication when he allegedly
5 executed the Markers that he denied ever executing. (AA, p. 806.) Likewise, the
6 trial court below instructed the Jury that Mr. LaBarbera's inability to speak English
7 was not a defense to his execution of the subject Markers even though Wynn
8 refused to produce Mr. Pariente for testimony of any kind in this case. (AA, pp.
9 808-10.) Last but not least, the trial court also excluded any evidence below of
10 Mr. LaBarbera's ludomania or gambling addiction and sickness as certified in his
11 home country of Italy, pursuant to NRS 463.368(6), the very condition Mr.
12 Pariente intended to exploit in Mr. LaBarbera on behalf of Wynn. (AA, p. 807.)
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16 In summary, both Wynn and the trial court effectively prevented Mr.
17 LaBarbera from having any chance of defending himself in this case including at
18 trial before the Jury. Incredibly and quite significantly, two of Wynn's witnesses
19 (Sandra Mele and Barbara Conway) both admitted under oath at trial that the
20 subject Markers are and were not actually checks at all, yet Wynn filed a
21 Complaint with the Clark County District Attorney's Office for Mr. LaBarbera
22 passing "bad checks" for not paying the Markers he disputes in this case. (AA, p.
23 711.)
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2 Mr. LaBarbera was simply denied a fair trial before the Jury below by both
3 the trial court and Wynn. In the case of Wynn, it obtained a bench warrant for the
4 arrest of Mr. LaBarbera, *vis-à-vis* the Clark County District Attorney's Office, for
5 passing "bad checks" when its own witnesses testified that they are not actually
6 checks at all, rather they are "one way" debt instruments in favor of Wynn, and
7 Nevada law requires "criminal intent" in the first place. (AA, pp. 612-614, 621,
8 and 704-706.) Unclean hands and equitable estoppel are the politest way to refer
9 to such conduct by Wynn here, obtaining a bench warrant underhandedly or on
10 false pretenses of "criminal intent" is probably more accurate to describe it. In the
11 case of Judge Israel, he abused his discretion by:
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- 15 1. Preventing Mr. LaBarbera's counsel from arguing to the Jury that
16 Mr. LaBarbera was not personally present at trial because a bench
17 warrant had been issued for his arrest by the Clark County District
18 Attorney's Office;
- 19 2. Allowing Wynn to offer testimony to the Jury from witnesses it
20 had indisputably disclosed untimely to Mr. LaBarbera and for the
21 purpose of authenticating the genuineness of the Markers in question,
22 the only issue the trial court ultimately allowed the Jury to deliberate
23 on;
- 24 3. Excluding evidence of Mr. LaBarbera's ludomania or gambling
25 addiction and sickness from the Jury;
- 26 4. Excluding evidence from the Jury of Mr. LaBarbera's intoxication
27 when he supposedly executed the Markers;
- 28 5. Instructing the Jury that Mr. LaBarbera's inability to speak, read or
write English whatsoever was not a defense to his execution of the
credit instruments and/or Markers in question given that Mr. Pariente

1 translated them for him and Wynn refused to produce or offer Mr.
2 Pariente for purposes of testimony at any stage of the case below; and
3

4 6. Not allowing Mr. LaBarbera to testify at trial personally on his
5 own behalf from Italy *vis-à-vis* video conference and an interpreter.

6 Given these abuses of discretion on the part of Judge Israel, it was also an abuse of
7 (his) discretion to award Wynn attorney's fees, costs and prejudgment interest, too.

8 LEGAL ARGUMENTS

9 I. STANDARD OF REVIEW FOR A JURY VERDICT ON 10 APPEAL.

11 A jury's verdict is presumptively valid and the Supreme Court presumes that
12 a jury followed the instructions given to it by the District Court. *Western*
13 *Technologies v. All American Golf Center*, 139 P.3d 858, 122 Nev. 869 (2006).
14 See also, *Bryan v. Allen*, 96 Nev. 572, 613 P.2d 412 (1980) (jury verdict is
15 presumptively valid and absent showing of error in the record, Supreme Court will
16 not read error into general verdict); and *Eldorado Hotel, Inc. v. Brown*, 100 Nev.
17 622, 691 P.2d 436 (1984) (Supreme Court assumes on appeal that jury believes all
18 evidence favorable to prevailing party and drew from evidence all reasonable
19 inferences in his favor).
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24 Furthermore, where the record is as susceptible to one conclusion as another,
25 it will not be presumed that the District Court erred. See *Schwartz v. Estate of*
26 *Greenspun*, 110 Nev. 1042 at 1051, 881 P.2d 638 (1994) ("we will not reverse an
27 Order or Judgment unless error is affirmatively shown.") See also, *Franchise Tax*
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1 *Board of Calif. v. Hyatt*, 335 P.3d 125, (Nev. 2014) (“we review both the
2 admissibility of evidence and the propriety of jury instructions for an abuse of
3 discretion).
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6 **II. WYNN HAS UNCLEAN HANDS HERE AND IS ESTOPPED**
7 **FROM ENFORCING THE SUBJECT MARKERS AGAINST**
8 **MR. LABARBERA.**

9 **A. According to Wynn’s own witnesses at trial, the subject**
10 **Markers are not actually “checks” but “one way” debt**
11 **instruments in favor of Wynn, i.e., Markers cannot be**
12 **cashed by the patron or used for any purpose other than**
13 **gambling at Wynn, and Nevada law requires “criminal**
14 **intent” in any event in the first place.**

15 Under cross-examination at trial, Sandra Mele and Barbara Conway both testified
16 to as much on behalf of Wynn, as follows:

17 June 14, 2016 1:11 p.m. – Cross Examination of Sandra Mele (AA, pp. 612-14.)

18 By Mr. Albregts:

19 Q: Now I recollect you testified yesterday afternoon, if I wrote it down
20 correctly, that the markers are redeemed at the table or paid in full at the
21 cashier’s cage, is that correct?

22 A: Yes.

23 Q: And say Mr. LaBarbera, any patron sitting at the table gambling, and
24 they’re given \$50,000 in markers, \$100,000 in markers, whatever the case
25 may be and - or they sign markers and then they’re given chips, as I
26 understand, at the table?

27 A: That’s correct.

28 Q: Okay. And after say playing \$5,000 of the \$50,000 that they were given
in chips, they decide to go to the cashier’s, cash those chips out and leave the
casino with the cash. Can they do that?

A: No, they can’t.

Q: So the marker is not really a check then, is it?

MR. SEMENZA: OBJECTION, Your Honor. Calls for a legal conclusion.

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2 MR. ALBREGTS: I'm asking her lay opinion in her capacity at the Wynn in
charge of credit.

3 THE COURT: I'll allow it as her understanding, as the credit –

4 *A: Markers are issued for either table games or slot machines. They are*
5 *not issued to give your wife money to go shopping across the street. They*
6 *are not issued to buy a house. They are strictly for gaming purposes. So*
7 *when you sign that marker, it is a valid document*

8 Q: I understand your position on the marker, but you would agree that at
9 least to that extent it's not a check where you go to the grocery store you get
goods or services for writing a check. You can't walk out of the casino with
the cash, can you?

10 MR. SEMENZA: Same Objection, Your Honor. It goes to a legal conclusion.

11
12 THE COURT: I'll allow you to ask the question, can you walk out of the casino.

13 Q: Can you walk out of the casino with the cash from the chips?

14 A: No.

15 Q: I'm not trying to be argumentative, but it's an important point, Mrs.
16 Mele, and that is you testified yesterday, quote unquote, "A marker is a
countercheck like any other check, like a personal check that is issued at the
table while the patron gambles. Is that right?

17 A: *That's correct.*

18 Q: But unlike any other check, you can't leave the casino with the cash
from the chips.

19 A: *Correct.*

20 June 14, 2016 3:45 p.m. – Cross Examination of Barbara Conway (AA, p. 704.)

21
22 By Mr. Albregts:

23 Q: Now, Ms. Mele testified under oath before you were here today that when
24 the markers are given at the table, they are to be used exclusively for
gambling, meaning that you couldn't go to the cage, cash them out and walk
out of the casino, is that correct?

25 A: *That is normal protocol.*

26 Q: Is there anything done besides that when you say normal protocol?

27 A: *I mean if you gave \$1,000 to somebody and we didn't know that you gave*
28 *the \$1,000 chip to somebody and they walked up to cash it, we wouldn't*
know that.

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2 Q: Okay. Okay. But by and large, it's the casino's protocol, practice and
3 policy that you play the money at the casino. You're not allowed to walk
4 out with it.

5 A: *That's right. Not to use it at another establishment.*

6 Significantly, Sandra Mele at that time was the "Director of Credit and
7 Collections" for Wynn and Barbara Conway was its "Manager of Casino
8 Collections."

9 Both Ms. Mele and Ms. Conway testified that it was also the practice of
10 Wynn to refer outstanding gaming markers to the Clark County District Attorney's
11 Office for collection based on the patron "passing bad checks." (AA, pp. 611 and
12 620.) Although Ms. Mele did not recall if that was the case here regarding Mr.
13 LaBarbera (AA, pp. 611), Ms. Conway testified that Mr. LaBarbera's Markers
14 were indeed referred to the Clark County District Attorney's Office for collection,
15 resulting in the issuance of a bench warrant for his arrest. (AA, p. 620.) Mr.
16 LaBarbera's deposition testimony admitted at trial also corroborated as much.
17 (AA, p. 943.) In other words, Wynn knew full well that a bench warrant would be
18 issued for Mr. LaBarbera's arrest when it referred him to the Clark County District
19 Attorney's Office for not paying the subject Markers, in turn, preventing him from
20 attending his own trial to defend himself in the civil case it filed against him
21 below.

22 Furthermore, under Nevada law (adopted from the Uniform Commercial
23 Code), specifically NRS 104.3104(6) entitled "Negotiable Instrument:"
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2 “Check means a draft other than a documentary draft, payable on
3 demand and drawn on a bank, or a cashiers check or tellers check. An
4 instrument may be a check even though it is described on its face by
another term such as money order.”

5 *Id.* Correspondingly, no where in NRS 463.368 – which recognizes “credit
6 instruments” for gaming debt in Nevada – is the word “check” even used. More
7 importantly, no where in this statute (NRS 463.368) is the failure to pay a credit
8 instrument or gaming marker by a patron criminalized or recognized as a crime. In
9 fact, for purposes of “theft” in Nevada, “check means any check, draft or other
10 negotiable instrument of any kind” (NRS 205.0822), BUT “a customer is not
11 liable ... to criminal prosecution for a violation of Chapter 205 of NRS *unless* the
12 customer acted with *criminal* intent.” NRS 604A.490(4).³

13
14 In other words, by inferring “criminal intent” from unpaid Markers as it did
15 below with Mr. LaBarbera, Wynn leverages its collection efforts by filing
16 Complaints for passing bad checks with the Clark County District Attorney’s
17 Office to obtain bench warrants for the arrest of patrons, like Mr. LaBarbera
18 below. In turn, Wynn purposefully or intentionally prevented him from attending
19 his own civil trial for liability on those Markers, AND in a case Wynn waited to
20 file civilly against him for almost 6 years.
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27 ³ “A customer is also not civilly liable for damages pursuant to NRS 41.620 absent
28 criminal intent.”

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2 **B. As a consequence of its conduct in this case, Wynn**
3 **is estopped by the Doctrine of Unclean Hands from**
4 **benefitting from as much here.**

5 In Nevada the “unclean hands” doctrine generally “bars a party from
6 receiving equitable relief because of that party’s own inequitable conduct.” *Las*
7 *Vegas Fetish & Fantasy v. Ahern Rentals*, 182 P.3d 764, 766 (2008). “In
8 determining whether a party’s connection with an action is sufficiently offensive to
9 bar equitable relief, two factors must be considered: (1) the egregiousness of the
10 misconduct at issue, and (2) the seriousness of the harm caused by the
11 misconduct.” *Id.*, at 767.
12

13 While Nevada has only applied the “unclean hands” doctrine in equity, as
14 “the unclean hands maxim is one founded on public policy, public policy may
15 require its relaxation.” *Smith v. Smith*, 68 Nev. 10, 226 P.2d 279, 286 (1951).
16 Courts from seven other states have declared the doctrine of unclean hands
17 available in an action at law, including California, which recognized the doctrine in
18 common law (as well as equity) over fifty years ago. *Fibreboard Paper Products*
19 *Corp v. East Bay Union of Machinists, Local 1304, United Steelworkers of*
20 *America, AFL-CIO*, 39 Cal.Rptr. 64, 227 Cal.App. 1 Dist., 1964), holding “we are
21 satisfied that the equitable defense of unclean hands is available in this state as a
22 defense to a legal action.” Likewise, some federal courts have applied the doctrine
23 of unclean hands to legal remedies. *Big Lots Stores, Inc. v. Jaredco, Inc.*, 182 F.
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1 Supp. 2d 644, 652-53 (S.D. Ohio 2002); *Buchanan Home & Auto Supply Co. v.*
2 *Firestone Tire & Rubber Co.*, 544 F. Supp. 242, 244-45 (D.S.C. 1981).

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4 **C. Laches (and the six year statute of limitations) should also bar**
5 **Wynn's enforcement of the Judgment against Mr. LaBarbera**
6 **as a matter of law.**

7 Wynn filed the case below in January, 2014, knowing full well that the
8 statute of limitations expired on its contract claims on April 3, 2014. See NRS
9 11.190. Wynn did not even bother having the Summons issued until after that date
10 in April 2014, and then it didn't even serve Mr. LaBarbera until July, 2014. (AA,
11 pp. 17-29.) Such inequitable conduct by Wynn should, as a matter of law, bar
12 enforcement of its Judgment against Mr. LaBarbera on the basis of laches (if not
13 expiration of the statute of limitations itself) given expiration of the relevant time
14 periods from when Wynn filed its Complaint and when it finally served Mr.
15 LaBarbera with it. (Again, no Application or Order for extending time for service
16 of process was entered below.) See NRCP 4(i).

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20 "Laches is an equitable doctrine which may be invoked when delay by one
21 party works to the disadvantage of the other, causing a change of circumstances
22 which would make the granting of relief to the delaying party inequitable." *Miller*
23 *v. Burk*, 124 Nev. 56, 188 P.3d 1112 at 1125 (2008). See also, *Carson City v.*
24 *Price*, 113 Nev. 409, 412, 934 P.2d 1042 (1997) (quoting *Building & Constr.*
25 *Trades v. Public Works*, 108 Nev. 605, 610-11, 836 P.2d 633 (1992). To invoke
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1 laches, however, the party must show that the delay caused actual prejudice. See,
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3 *Besnilian v. Wilkinson*, 117 Nev. 519, 25 P.3d 187 (2001).

4 “A trial court may apply laches when the plaintiff unreasonably
5 and inexcusably delays bringing a legal claim and the delay
6 prejudices or injures the defendant in some material way. The
7 prejudice to the defendant may be either economic or
8 evidentiary. Economic prejudice to a defendant may include
9 liability for various damages or the loss of monetary investment
10 that a timelier lawsuit likely would have prevented. Evidentiary prejudice may include a defendant’s inability to
11 present a full and fair defense on the merits due to the loss of
12 records, the death of witnesses, or the adverse effect that the
13 passage of time has on witnesses’ memories of relevant events.
14 A trial court must balance, on the one hand, the length of the
15 delay in filing the suit and the plaintiff’s explanation for the
16 delay, against, on the other hand, the prejudice to the defendant
17 resulting from the delay. Thus, it involves a weighing of
18 equities and depends on the trial court’s evaluation of the
19 circumstances.” (Citations omitted.)

20 *Bristol Co., LP, v. Osman*, 190 P.3d 752 at 755 (Colo. App. 2007).

21 In the case of Mr. LaBarbera here, he suffered both economic and
22 evidentiary prejudice as a consequence of Wynn’s failure to file this civil case
23 against him for almost six years. Economically, by waiting almost six years to sue
24 Mr. LaBarbera civilly, Wynn capitalized on its excessive 18% interest rate due on
25 its Markers, resulting also in an award to it of prejudgment interest 150% greater
26 than the total amount of the Markers themselves. Evidentiary-wise, by waiting 6
27 years to sue Mr. LaBarbera, Wynn also could make sure that Mr. Pariente would
28 not be available for testimony in this case. As the trial record below reveals, Mr.

1 Pariente was terminated by Wynn and they executed a Confidential Agreement
2 regarding that termination. (AA, pp. 604-06.) This strategy employed by Wynn
3 below clearly prejudiced Mr. LaBarbera both economically and evidentiary-wise.
4 Accordingly, the doctrine of laches should bar Wynn from recovering anything
5 from Mr. LaBarbera on the subject Markers. *Id.*

8 **III. MR. LABARBERA DID NOT RECEIVE A FAIR TRIAL**
9 **BECAUSE OF THE TRIAL COURT'S ABUSES OF**
10 **DISCRETION IN THE PROCEEDINGS BELOW.**

11 **A. Introduction.**

12 Generally, a fair trial, as required by due process, is a trial resulting in a
13 verdict worthy of confidence. *Deck v. Jenkins*, 814 F.3rd 954 (9th Cir. 2016), citing
14 *Kyles v. Whitley*, 115 Sup. Ct. 1555 at 1556 (1995):

16 “The question is not whether the defendant would more likely
17 than not have received a different verdict with the evidence, but
18 whether in its absence he received a fair trial, understood as a
19 trial resulting in a verdict worthy of confidence. A reasonable
20 probability of a different result is accordingly shown when the
21 government’s evidentiary suppression undermines confidence
in the outcome of the trial.” (Citations omitted.)

22 *Id.* See also, *Haupt v. Dilliard*, 17 F. 3rd 285 (9th Cir. 1994) (right to fair trial is
23 basic requirement of due process and includes right to unbiased judge); and
24 *Mazzeo v. Gibbons*, 649 F. Supp 2nd 1182 (D. Nev. 2009) (fair trial or fair tribunal
25 is basic requirement of due process).

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2 Admittedly, these constructions of “fairness” in the context of due process
3 arise from criminal cases where liberty is at stake, not civil cases (like the one at
4 bar here) where only money is at stake. With that said, however, the principles of
5 “fairness” are the same when one of the parties, here a significant and locally well
6 entrenched economic actor not unlike the government, intentionally misuses the
7 law for its economic benefit, i.e., to enrich itself at the expense of the other party.
8 The cumulative effect of the trial court’s abuses of discretion below including at
9 trial cannot be emphasized here enough, i.e., Mr. LaBarbera was railroaded.
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12 **B. The trial court abused its discretion in not allowing**
13 **Mr. LaBarbera’s counsel to argue to the Jury below**
14 **that Mr. LaBarbera was not present at his own civil trial**
15 **because of the bench warrant.**

16 By not being able to argue to the Jury that Mr. LaBarbera was not present
17 for his own civil trial (before them) because of an outstanding criminal bench
18 warrant issued for his arrest for unpaid Markers, i.e., passing bad checks, the Jury
19 not only inferred (*inter alia*) that he did not care about the outcome at trial, but his
20 counsel also was prevented from arguing that Wynn employed as much to leverage
21 collection of the Markers from him. Likewise, Mr. LaBarbera’s counsel could not
22 argue to the Jury that Nevada law requires “criminal intent (for) criminal
23 prosecution (for) passing bad checks” in the first place, or that the Markers weren’t
24 really checks at all. Counsel for Mr. LaBarbera was relegated by the trial court to
25 presenting an “empty chair” defense to the Jury, relying solely on Mr. LaBarbera’s
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1 deposition testimony given in Rome, Italy, more than a year before then,
2 effectively allowing Wynn at trial to “drone” Mr. LaBarbera. Indeed, this abuse of
3 discretion coupled with the trial court’s abuse of discretion in not allowing Mr.
4 LaBarbera to testify at trial *vis-à-vis* video conference and an interpreter from Italy,
5 simply denied Mr. LaBarbera a fair trial, particularly given the other half a dozen
6 abuses of discretion committed by the trial court below.
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10 **C. The trial court abused its discretion by denying**
11 **Mr. LaBarbera’s Motion to allow him to testify at trial**
12 **from Italy *vis-à-vis* video conference and an interpreter.**

13 The trial court clearly had the legal authority to grant this relief to Mr.
14 LaBarbera below pursuant to NRCP 43(a):

15 “In every trial, the testimony of witnesses shall be taken orally
16 in open court unless otherwise provided by these rules or by
17 statute. The court may, for good cause shown and compelling
18 circumstances and upon appropriate safeguards, permit
19 presentation of testimony in open court by contemporaneous
20 transmission from a different location.”

21 Furthermore, “the court may also appoint an interpreter of its own selection” for
22 such purposes at trial. *Id.*

23 The trial court also had the statutory authority necessary to grant such relief
24 to Mr. LaBarbera below. See NRS 50.115(1). When “exigent or special
25 circumstances” exist such as those presented below, it was an abuse of discretion
26 for the trial court to now allow Mr. LaBarbera to testify at trial from Italy *vis-à-vis*
27 video conference and an interpreter. See *Barry v. Lindner*, 119 Nev. 666, at 667-
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1 68, 75 P.3d 388 (2003) (telephonic testimony is permissible at trial upon a showing
2 of “special circumstances”).
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4 In short, it was simply an abuse of discretion for the trial court not to
5 accommodate Mr. LaBarbera in this regard.
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7 **D. The trial court abused its discretion by allowing Wynn**
8 **to offer at trial the testimony of four untimely disclosed**
9 **witnesses regarding the authenticity and genuineness of**
10 **the subject Markers, the only issue the trial court allowed**
11 **the Jury to deliberate on below.**

12 Well after the Discovery Cutoff and less than a month before trial, Wynn
13 surreptitiously attempted to add four witnesses to its case *vis-à-vis* an untimely
14 supplemental disclosure pursuant to NRCP 16.1 and its Trial Memorandum. (AA,
15 pp. 161-64.) These witnesses were offered specifically for the purpose of
16 authenticating the genuineness of the subject Markers, the only issue that the trial
17 court allowed the Jury to adjudicate by denying Wynn’s Motion In Limine [#3].
18 (AA, pp. 168-206). Because of overflow on his trial calendar, Judge Israel
19 continued this trial below to the next stack and allowed Wynn to offer the
20 testimony of these four witnesses at trial because it also had agreed to allow Mr.
21 LaBarbera to incur the cost of deposing them shortly before then. Wynn also
22 untimely offered these four witnesses because its Motion In Limine [#3] was
23 denied by the trial court. (AA, pp. 168-70.)
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2 Be that as it may, this was still an abuse of discretion by the trial court and,
3 indeed, it even commented that, but for the trial below being “bumped” another 30
4 days, it would have denied the Wynn’s request to offer these four witnesses at trial.
5 (AA, pp. 379-85.) Furthermore, these four witnesses were the individuals who
6 supposedly countersigned the Markers signed by Mr. LaBarbera and on which he
7 emphatically denied his signature even appeared. In other words, there was simply
8 no excuse for Wynn not to have disclosed these witnesses in the first instance as
9 required by NRCPC 16.1. They were clearly referenced in the documentary
10 evidence it offered (and was admitted at trial), and they were therefore known to
11 Wynn from day one. The trial court simply accommodated Wynn with unfair
12 advantages every time it asked for them below.
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16 **E. The trial court abused its discretion by excluding evidence**
17 **from the Jury of Mr. LaBarbera’s ludomania or gambling**
18 **sickness and addiction pursuant to NRS 463.368(6).**

19 The clear benefit being provided to casinos in Nevada by this statute is
20 preventing unscrupulous gamblers from gambling on “house money” by incurring
21 gaming credit and/or markers that they then defend paying by arguing that they
22 have a gambling sickness or addiction. As a matter of public policy, it cannot be
23 said that this statute is also for the purpose of allowing casinos to take advantage of
24 ludomania or gambling addicts and their pathology. In other words, the Nevada
25 legislature never intended this statute to be both a “sword and shield” by which
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1 casinos could purposefully exploit gambling addicts or such pathology and, even if
2 so, public policy would presumably vitiate any such repugnant intent or purpose.
3 If not so, then this is tantamount to a law allowing tavern owners to cater with
4 impunity to alcoholics and/or those with DUI convictions. A line has to be drawn
5 somewhere in constructing such statutes and Wynn has crossed that line with Mr.
6 LaBarbera here, including in the proceedings and trial of the case below.
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10 In other words, Wynn has unclean hands here and should be equitably
11 estopped from using this statute as both a “sword and a shield” to cover its own
12 nefarious practices. Mr. LaBarbera was preyed upon by Wynn *vis-à-vis* Alex
13 Pariente, and Mr. LaBarbera’s unrebutted deposition testimony clearly evidences
14 as much. In fact, Mr. LaBarbera (with some profanity) told the Wynn’s attorney at
15 his deposition that “*You kill the gambler,*” meaning he does not have anything left
16 to even gamble another day. (AA, p. 919.) The doctrine of unclean hands “bars
17 relief to a party who has engaged in improper conduct in the matter in which that
18 party is seeking relief.” *Truck Ins. Exchange v. Palmer J. Swanson Co., Inc.*, 124
19 Nev. 629, 637-8, 189 P.3d 656 (2008). Furthermore, “equitable estoppel functions
20 to prevent the assertion of legal rights that in equity and good conscience should
21 not be available due to a party’s conduct.” *In re Harrison Living Trust*, 121 Nev.
22 217, 223, 112 P.3d 1058 (2005).

23 **F. The trial court abused its discretion by excluding evidence**
24 **from the Jury of Mr. LaBarbera’s intoxication while he gambled**
25 **at Wynn and supposedly executed the subject Markers.**

26 A valid, common law defense to a contract claim includes a party’s lack of
27 capacity to contract when that party is excessively intoxicated. See, *Feighner v.*
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