Case No. 71348

In the Supreme Court of Nevada

EMILIA GARCIA, Appellant, *vs.* ANDREA AWERBACH, Respondent.	Electronically Filed Mar 04 2019 11:05 a.m. Elizabeth A. Brown Clerk of Supreme Court

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable JERRY A. WEISE, II, District Judge
District Court Case No. A-11-637772-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent Andrea Awerbach is an individual. She has been represented in this litigation by Peter Mazzeo of Mazzeo Law, LLC and Daniel F. Polsenberg, Joel D. Henriod, and Abraham G. Smith at Lewis Roca Rothgerber Christie, LLP.

Dated this 25th day of February, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

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ROUTING STATEMENT

While the issues in this appeal are unremarkable, there is no published decision in the Nevada Supreme Court directly on point. The Supreme Court may retain this appeal under NRAP 17(a)(1).

ISSUES PRESENTED

1. Did the district court abuse its discretion by deciding to treat a defendant's response to a Rule 36 request for admission with less than conclusive effect, where the court instead could simply have granted the defendant leave to withdraw it altogether, and where the plaintiff never referred to the Rule 36 response during her case-in-chief or objected when the defendant testified contrary to it?

2. Did the district court abuse its discretion by modifying a discovery sanction that imposed a finding of permissive use where (1) the modification contemplated the defendant's need to defend against punitive damages, and (2) the court afforded the plaintiff multiple opportunities to ameliorate any prejudice that conceivably might have resulted from the timing of the modification?

STATEMENT OF THE CASE

This case involves a motor-vehicle accident in which plaintiff-appellant EMILIA GARCIA was struck by co-defendant JARED AWERBACH. Plaintiff sued Jared for negligence, along with his mother, co-defendant-respondent ANDREA AWERBACH, alleging that she permitted Jared to use her vehicle and should be jointly and severally liable.

Plaintiff appeals from a judgment in favor of Andrea upon the jury's verdict and finding that Andrea did not give Jared permission to use her vehicle.

STATEMENT OF THE FACTS AND PROCEEDINGS

Ironically, the opening brief that relies heavily on a canard that Andrea personally conspired to mislead the plaintiff during discovery itself omits all of the district court's rationale for the decisions that appellant criticizes. This lack of candor alone calls for affirmance.

A. Factual Background

The jury had overwhelming cause to find that Andrea did not permit Jared to drive her vehicle, either expressly or impliedly.[1]

[1] This evidence is relevant to the harmless-error analysis below.

1. Andrea Expressly Denied Permission on the Day of the Accident

Andrea testified that she did not give Jared permission to drive the car on the day of the accident. (23 App. 5727-28.) Earlier in the day, she had given him the keys only to bring her something from the car. (*Id*.) She did not recall specifically whether Jared returned the keys to her. (23 App. 5726.) Andrea learned that Jared had taken the car when the police officer called from the scene of the accident. (23 App. 5732.)

According to Jared himself, he asked her if he could borrow the car if his licensed girlfriend were to drive, and she expressly refused:

> Q: And on the day of the accident, your mom didn't actually tell you no, that you couldn't take that car isn't that correct?
>
> A: She did.
>
> Q: She did?
>
> A: Yes, sir.
>
> Q: I though[t] you said she was in the shower?
>
> A: She was.
>
> Q: Did you ask her?

> A: We asked. We had. I had asked her to take us to the location. She said no. I said, Can I take myself? She said no.
>
> Q: Okay.
>
> A: Can I take—the mother of my children take me and she said no.

(25 App. 6153-54.)

Even the notes from Andrea's insurer's claim file—the late-disclosed document at the center of Judge Allf's sanction order—reflect that Andrea did not know Jared was going to drive her car and that she "did not give him permission." (3 App. 564.)

2. Andrea Did Not Give Jared Implied Permission

The jury also weighed the substance and credibility of Andrea's detailed testimony regarding her history with Jared. Andrea had no illusions about her son's drug use and irresponsible behavior during this period in his life, which is why she worked vigilantly to keep him safe and out of trouble, including by hiding the keys to her car. (The entirety of her testimony is found at 23 App. 5722-43 and 24 App. 5838-5946.)

a. THIS CONSCIENTIOUS MOTHER WAS CAREFUL TO RESTRICT ACCESS TO HER CAR

Andrea was an extremely busy, single working mother (and grandmother). She was a mental health therapist who became a teacher. At the time, she worked for the Clark County School District as a primary autism teacher at an elementary school. (24 App. 5839-40.) To make ends meet, she also tutored students with individualized educational plans and children who were homebound because of surgeries or long-term illnesses. (*Id.*) She mentored other teachers. (*Id.*) She also went to church and Nar-Anon meetings, and was very active in the teacher's union. (*Id.* at 174.)

In addition to that physically and emotionally draining burden, she had to be a jailor at home. She did not allow Jared to use her car, except under specific and narrow circumstances. (23 App. 5733-35.) Not only was he unlicensed, she simply did not trust him because of his drug use and incidents of stealing. (*Id.* at 5733.) She frequently felt that she had to hide everything from her son:

> A. . . . I hid my keys. I hid my wallet. I hid my grade book. I hid bills. Anything that was central that I need to know where it was or there would be repercussions, I kind of had to know where everything was at all time.

(Id. at 5734.) At times she even slept with her keys and purse. (24 App. 5855.) When he previously had taken the car without permission, she called the police. (*Id*. at 5849.) She pleaded with his probation officer to refer him to a rehabilitation facility to no avail. (*Id*. at 5858-59.) She even dragged him to a rehabilitation facility herself but was told that he did not meet the criteria for in-patient services. (*Id*.) She considered evicting him but, out of compassion for her son and his children, let him stay. (23 App. 5733-34.)

Andrea never let Jared drive but on specific occasions let other licensed drivers, such as the mother of Jared's children, drive him. (24 App. 5855-56.)

b. ANDREA EXPLAINED THE PRIOR 2008 ACCIDENT

Andrea explained that Jared previously caused an accident when he took her car without permission:

> Q. . . . [W]hat were the circumstances concerning the accident that Jared was involved in in 2008?
>
> A. We were at my school. I was in my classroom. I was working. Jared was taking stuff to and from the car, taking stuff to the garbage. My classroom was on the back end. I gave him the keys to come back in. I kept at that time all of my keys—my classroom keys, my home keys, my mailbox key—on one ring.

> I was not in a position where I could wear a lanyard like many teachers do because I had students who were violent and would grab at that. So I kept all my keys on a ring. So when I gave him the keys to come back in the building, the car keys were on that.
>
> Q. When you asked Jared to get—in 2008, when you gave him the keys to go to your vehicle, did you give him permission to start the vehicle up and operate the vehicle?
>
> A. No.

(23 App. 5732-33.)

c. ANDREA ACKNOWLEDGED HER CONVERSATION WITH THE INSURANCE ADJUSTER

Finally, plaintiff's counsel confronted Andrea about the conversation he had with the insurance claim adjuster 15 days after the accident and the notes in that adjustor's file. (23 App. 5722-43.) She acknowledged the statements in the notes:

> Q. [Mr. Roberts] Okay. I'm going to draw your attention to the place where the representative recorded that you said, "She let Jared have the keys earlier that day to get something out of her car. She usually keeps the car keys on the mantel."
>
> Does that accurately record a statement that you made to your representative on that day?
>
> A. On—you're asking me if that reflects what's – the statement I made? Yes.

(23 App. 5727.) She acknowledged the statement in the notes that "OPAC has used her vehicle." (23 App. 5724.) She clarified, however, that the note was a paraphrase of the person taking the notes, and that she did not recall whether she had said "used" or "taken." (23 App. 5724-25.) And she pointed out the absence of an essential detail, that Jared had used the car in the past when he was practicing for a driving test and she was with him. (23 App. 5725.)

Regarding the adjustor's note that she "usually keeps keys on the mant[el]," Andrea doubted that she used the word "usually" because it wasn't true in general. (*Id*. at 5726.) But she related the daily habit that could explain why she might have said that she "usually" put the keys on the mantel:

> Q. [Mr. Mazzeo] . . . when you acknowledged that this statement here with the word "usually," what—what does that mean to you when you conveyed this statement to the person on January 17th? You seem like you qualified it with the word "usually." What does that mean to you?
>
> A. When I would come home—first of all, I want to explain. The mantel is not like a fireplace mantel. It's a kitchen mantel. We lived in an apartment. . . . If I had my keys in my hand and my books, and—if you've ever seen how much teachers carry, it's like a gym membership, how much we walk with. I may have put my books down, the keys down, and then if I

> left the room, if I went out, if I was in the kitchen, the keys were with me. If the keys were on the mantel, I was in the living room.

(Id. at 5739-40.)

Andrea readily conceded that her recollection of the call was not perfect, as she was distracted at the time and still puzzling over what had happened. The representative called her when she was working in her classroom. (23 App. 5738.) She recounted, "It was two weeks after the accident. I believe Jared was in jail. I was figuring out what happened" (*id*. at 5738:22), still "piecing information together" (*id*. at 5740). She did not know exactly where Jared had taken the keys from. (*Id*. at 5738.)

3. Andrea Never Wavered in Maintaining that She Did Not Give Jared Permission to Drive the Car

Throughout the opening brief, plaintiff obscures the distinction between Andrea herself and her first attorney. (*See* AOB at 4 ("Andrea furthered the concealment"), at 5 ("Andrea furthered the deception"), at 6 ("Andrea was actively concealing evidence"), etc.) That is misleading.

It is true that Andrea's first attorney admitted to permissive use in the answer to the initial complaint (1 App. 7) and in the response to the June 5, 2012 response to plaintiff's requests for admission ("Rule 36

response" or "the admission"). (1 App. 13.) In making those admissions, however, that attorney did not ask Andrea whether she had given Jared permission. (24 App. 5934-38, 5944.) Nor did she know that her attorney possessed a claim file and had redacted it before disclosure. Judge Allf acknowledged this in her sanctions order. (3 App. 645 ("Although the note was withheld by previous counsel . . .").)

Every time she has ever been asked in this case, Andrea has insisted that she did not give Jared permission to take the car. The first time she was asked, when completing answers to interrogatories on June 15, 2012—ten days after her attorney served the erroneous Rule 36 response—she swore that "Jared did not have permission to drive the vehicle." (24 App. 5936-37; 1 R. App. 111,115.) She maintained the same position in her first deposition on September 12, 2013 (1 App. 61-95) and in her second deposition on October 24, 2014 (1 App. 166 – 2 App. 391). She said the same repeatedly at trial. (*See above*.) And the jurors obviously believed her.

B. Procedural History

Plaintiff's opening brief withholds almost all of the procedural history that accounts for the district court's decisions that plaintiff criticizes.

1. Judge Weiss Modifies the Sanction to Protect Andrea's Ability to Defend Against Punitive Damages

Plaintiff fails to mention anywhere the entire basis for the district court's reason for modifying the sanction order.

a. Before Trial, the Court and Parties Discuss How Andrea Might Defend Against Punitive Damages, and the Merits of the Sanction Order

In the weeks before the district court announced its decision to modify the sanction on February 8, 2016, the judge had been wrestling with how the court's sanction of a finding of permissive use would impact Andrea's defense as to punitive damages. (2 R. App. 332, 345, 355, 349:23–351:6, 353:9–354:5.)

The issue came to a head on January 28, 2016, when the parties disputed the appropriate language for a stipulation to inform the jury why Andrea would not be contesting liability for compensatory damages at trial. (2 R. App. 357, 421.) Andrea's counsel requested that the jury

be informed that the "finding" of permissive use resulted from a discovery sanction and not from any assessment of the evidence, so that Andrea could still prove that she had not acted with conscious disregard. (*Id.* at 380-383.) Plaintiff's counsel insisted that the jury not be informed about the reason behind the determination of permissive use and contended that the finding *was* binding on the jury's determination of implied malice (*id.* at 383-85), and flippantly articulated the only argument that Andrea would have left:

> [MR. ROBERTS]: * * * So the finding of permissive use only establishes the first element, that an entrustment actually occurred. So their defense, both the negligent entrustment and the compensatory phase and the punitive damages, is it wasn't negligent for me to give Jared permission to use my vehicle. And if they want to try to argue that I—that I knew that he got high all the time, I knew he had a problem, I knew he didn't have a license to drive a car, but it wasn't negligent for me to entrust my vehicle to him despite the fact that he was unlicensed and had a prior accident causing property damage in my vehicle, well, then that's the argument they have left.

(*Id.* at 388:7.) Andrea's counsel agreed that such an argument would be ridiculous and that the court taking away her right to contest permissive use effectively precluded her from contesting implied malice at all:

> MR. MAZZEO: That's an argument that it's pointless to argue. That first element [permissive use] is the element that we—we would argue at trial. Since we can't argue the first element because of the finding of permissive use, what's the point? I mean, I don't want to offend the jury.

(*Id*. at 388:20.) And the district court took the matter under advisement:

> THE COURT: I get it, guys. *Let me think about it.* I will let you know.

(*Id*. at 389:1 (emphasis added).)

Plaintiff's counsel, attempting to kindle the court's ire against Andrea, then began arguing the merits of Judge Allf's original sanction order (*id*. at 389-392), going so far as to say that "*the sanction doesn't have to be fair*. It's a sanction because they did something wrong." (*Id*. at 390.) Andrea's counsel responded on the merits, since plaintiff's counsel "brought it up" (*id*. at 391:3), pointing out that the controversy arose from a few poor decisions made by Andrea's first attorney unbeknownst to Andrea, that no evidence had been lost, and that plaintiff's counsel had omitted from his motion for sanctions important language from the adjustor's notes that actually exonerated Andrea. (Id. at 391:12 - 392:8 (referring to the adjustor's description that Andrea

did not know that Jared was going to drive her vehicle (3 App. 564)).) The Court moved the discussion to the next topic at hand, again noting that he would continue to think about it:

> THE COURT: *Let me think about that*, guys. That's something that's not really in front of me as far as pleadings today, so . . .

(Id. at 393:22 (emphasis added).)

b. THE COURT MODIFIES THE SANCTIONS ORDER

On the first day of voir dire, the district court announced his decision on "how we're going to handle this issue of permissive use." (7 App. 1615.) The judge decided to modify the sanction, from an imposed finding of permissive use to a rebuttable presumption of permissive use, for a couple reasons:

First, Judge Wiese had seriously considered the impact on punitive damages the first time. Judge Allf had not considered the effect of the sanction on Andrea's ability to defend against punitive damages. She told Judge Wiese that she hadn't. (9 App. 2152-54.) Neither of her orders regarding the sanction address the potential impact on punitive damages. (3 App. 625, 3 App. 642.) The effect of the sanction on punitive damages was not discussed in the sanctions

briefing (*see, e.g.*, 2 App. 392) or during arguments (1 R. App. 20:20–38:21).

Second, Judge Wiese recognized that the impact of a definitive finding of permissive use on punitive damages—which could quadruple the judgment (*see* NRS 42.005(1))—was a serious concern that had to be evaluated. This was Judge Weise's major concern, as opposed to his relatively insignificant conversation with Judge Allf:

> THE COURT: . . . the only reason I called her is because I had a dilemma about what I was going to allow based on the finding that there was permissive use, I believe, on the liability issue at trial. I don't believe she had an intention or even thought about the fact that that finding would affect the punitive damages claim. Because of that I was in a dilemma, and I was looking for a way to try to resolve that issue.
>
> * * *
>
> So, I think by the modification that I did, it keeps—it keeps the discovery sanction in place. It's a different discovery sanction. I understand that. It keeps the discovery sanction in place as it relates to the liability issue. But it also gives the defendant, I believe, a fair opportunity to dispute the punitive damages as far as whether or not there was some reckless disregard or things like that, where she may not be able to dispute that with the finding in place as it was by Judge Allf's prior order.
>
> So I understand that Judge Allf shouldn't have influence over my decision, and I don't know that

> there was influence or not. [I] did talk to her. I told you I talked to her. I try to be up front with people about what I do and why I do it. But whether I talked to her or not, I think what I decided to do is a fair compromise that resolves the dilemma that I that based on her prior order.

(9 App. 2153-54.) And the judge reiterated in his formal "Order Modifying Prior Order of Judge Allf," that he reached his conclusion "regardless" of Judge Allf's recollection. (4 App. 947:2.)

2. The District Court Gives Plaintiff an Opportunity for Supplemental Briefing and Argument, and for Additional Discovery, as well as Time to Adjust

Mindful of the potential prejudice that the modification might pose to plaintiff, the district court accommodated every reasonable request they made. He allowed plaintiff to submit a brief to attempt to persuade him to reconsider. (4 App. 933.) He entertained lengthy arguments on the day he announced the decision (7 App. 1615-45, 1704-06), then again two days later (9 App. 2135-42, 2151-58), and then again two days after that (10 App. 2467-92).

The district court offered additional discovery. When plaintiff complained that they would have conducted additional discovery if they had they known earlier, the district court asked for specifics. (7 App. 1631:16 ("THE COURT: What do you need to do in order to be able to put

on the necessary evidence?").) First, plaintiff asked to depose the insurance adjustor again, in greater depth. (*Id*. at 1631-32.) The district court immediately ordered defense counsel to make the adjustor available for a second deposition by the end of the week and offered to take a day off from trial if necessary. (*Id*. at 1632-39.) Defense counsel sought to limit the scope of that deposition, but the Judge said "[plaintiff's counsel] can ask her anything that he thinks is going to lead to the discovery of admissible evidence," and declined to impose any time restriction. (7 App. 1705-06.) The next day, however, plaintiff waived her option to re-depose the adjustor. (10 App. 2473-74.)

Plaintiff also asked to depose Andrea again. (*Id*. at 2649.) The judge agreed and ordered Andrea to make herself available as soon as possible. (*Id*. at 2469.) Plaintiff elected not to go forward with that deposition either, as Andrea did not dispute that the notes in the claim file resulted from statements she had made to the adjustor. Plaintiff's counsel did not specify any other discovery that he needed; he instead reiterated that "fair is not the standard in this situation. This was a sanction." (*Id*.)

The court also gave plaintiff time to adjust. The judge announced his decision four days before opening statements (7 App. 1615; 10 App. 2464), eight days before the first witness was called (11 App. 2699), and *27 days* before Andrea Awerbach and Jared Awerbach took the stand. (24 App. 5803.)

3. The District Court Let Plaintiff Introduce the Admission as a Party Statement, Despite Grounds to Withdraw the Admission Altogether

Two days before opening statements, after the court had modified the sanction to a presumption of permissive misuse, plaintiff moved the court to preclude any defense on the issue of permissive use because of the Rule 36 response, which Andrea's first attorney had served. (9 App. 2138:8.)

Andrea's replacement counsel explained that she had never authorized those admissions, that they were completed and served without her knowledge. (*Id*. at 2140.) Substantively, it "doesn't accurately reflect the—what actually occurred in this case." (*Id*. at 2141.) Andrea subsequently "amended" the admission. (1 App. 164.) Andrea's counsel argued that this should suffice but also indicated that

he would make a formal motion to withdraw if the court so required. (9 App. 2140-41.)

The Rule 36 response was served almost four years before the trial, and 18 months even before plaintiff filed her motion for sanctions for a finding of permissive use (*see* 1 App. 13 *and* 2 App. 392), demonstrating that the parties had long been litigating over permissive use notwithstanding the admission. Andrea's counsel contended that Andrea had refuted the substance of the Rule 36 response in the answer to an interrogatory that Andrea herself gave 10 days later (9 App. 2140; R. App. 108, 111), and in the two depositions that plaintiff had since taken of Andrea (1 App. 61, 166), and in a "correction to her responses." (1 App. 164.)

The court understood that Andrea had never moved formally to withdraw the old Rule 36 response, so he struck a compromise: Without withdrawing the admission altogether, he effectively downgraded it to the status of an answer to interrogatory by withdrawing its conclusive effect but allowing plaintiff to introduce it to impeach Andrea. (9 App. 2152.) The court also allowed plaintiff to question Andrea about her statement to the adjuster—without dwelling on the insurance context of

it—that plaintiff believed was inconsistent with Andrea's other representations, leaving questions of weight and credibility for the jury to determine. (23 App. 5722-43.)

4. At Trial, Plaintiff Does Not Use the Rule 36 Response as Proof in Her Case or Object when Andrea Testifies Contrary to It

Plaintiff elected not to introduce it at all, however, during her case-in-chief. She did not mention it during her opening statement. (11 App. 2545-2600.) Even when plaintiff called Andrea to the stand during her case-in-chief, she did not mention the admission, despite Andrea's testimony that directly contradicted it. (23 App. 5722-43.)

Plaintiff chose instead to raise it for the first time after she rested her case-in-chief. (24 App. 5882, 5887-98.) Plaintiff also chose not to object to the opening statement of Andrea's counsel or to testimony that was contrary to the admission. During his opening statement, Andrea's counsel said that she would deny giving Jared permission to drive the vehicle. (11 App. 2629.) Plaintiff did not object. Then, plaintiff's counsel called Andrea during plaintiff's case-in-chief and adduced testimony from her that she did not give Jared permission to drive the car. (23 App. 5722-43.) Also during her testimony in plaintiff's case-in-

chief, Andrea denied giving permission in response to questions of her attorney on cross-examination. (23 App. 5731-36.) Plaintiff neither objected that this testimony was inconsistent with the admission nor even mentioned the admission before she rested.

Only after plaintiff rested (24 App. 5817:24), and Andrea took the stand again during her case-in-chief did plaintiff's counsel bring up the admission for the first time during cross-examination (*id.* at 5887).

5. Plaintiff Does Not Object to the Jury Instructions or Verdict Form that Submit the Question of Permissive Use to the Jury

Plaintiff's counsel did not object to Instruction No. 31, which informed that Andrea was rebuttably presumed to have given Jared permission to use her car, implying the jury was free to determine she had not. (*See* 4 App. 979, 24 App. 5980:14 – 5991:15.) Nor did plaintiff object to Instruction No. 32, which communicated that the jury was at liberty to determine that Andrea had not given Jared permission:

> An owner of a motor vehicle is liable for any damages proximately resulting from the negligence of an immediate family member in driving and operating the vehicle upon a highway with the owner's express or implied permission.
>
> As advised in these instructions, Defendant Jared Awerbach was negligent and caused the accident that give rise to this case. You must then ***determine***

> ***whether or not*** he was driving with the express or implied permission of Defendant Andrea Awerbach.
>
> ***If you find*** that Defendant Jared Awerbach did ***not have such permission***, then your verdict must be in favor of Defendant Andrea Awerbach.
>
> But if you find that such permission, express or implied, had been given, you must find Defendant Andrea Awerbach also liable.

(4 App. 980 (emphasis added); 24 App. 5980-91.) Nor did plaintiff object to the interrogatory in the verdict form charging the jury to answer whether Andrea gave Jared permission to drive the vehicle:

> 5. Did Defendant Andrea Awerbach give express or implied permission to Defendant Jared Awerbach to user her vehicle on January 2, 2011?
>
> YES _____ NO _____

(4 App. 999, 25 App. 6005:21 - 6008:21.)

6. The Jury Finds for Andrea

Weighing the evidence that Andrea's former attorney had admitted to permissive use and Andrea's own testimony at trial that she had not, the jury made the factual determination that Andrea had not given Jared permission to use her car. (4 App. 999:16.) The jury returned its verdict in Andrea's favor. (*Id.* at 998-1000.)

SUMMARY OF THE ARGUMENT

The district court did not err in its treatment of the Rule 36 response, much less abuse its discretion. First, the district court would have been justified in allowing Andrea to simply withdraw the response, thereby depriving plaintiff of any use of it whatsoever. The court actually favored plaintiff by merely relegating it to the status of an interrogatory response—i.e., still treating it as a party statement, but leaving it as a fact question for the jury. Second, plaintiff failed to introduce the Rule 36 response during her case-in-chief or object when Andrea testified contrary to it, both of which would be necessary for it to be deemed conclusive. Third, jurors cannot be criticized for disregarding jury instructions where the set of instructions as a whole, along with the verdict form, expressly authorized them to find as they did.

The district court also acted within its discretion[2] when it modified the interlocutory sanction order to account for the order's

[2] This Court reviews a district court's imposition of discovery sanctions for an abuse of discretion. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev., Adv. Op. 72, 380 P.3d 836, 840 (2016); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).

unforeseen impact on plaintiff's claim for punitive damages. The result was just. And plaintiff was not unduly prejudiced.

ARGUMENT

I.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS HANDLING OF THE RULE 36 RESPONSE

The district court's rulings regarding the Rule 36 response were entirely appropriate.

A. The Judge Reasonably Permitted Plaintiff to Use the Rule 36 Response as a Statement

The district court did not abuse its broad discretion by declining to give the Rule 36 response conclusive effect and instead permitting plaintiff to use it as a prior statement of a party opponent. *See Woods v. Label Inv. Corp.*, 107 Nev. 419, 425, 812 P.2d 1293, 1297-98 (1991) (how the district treats requests for admission at trial is within the discretion of the district court), *overruled on other grounds by Hanneman v. Downer*, 110 Nev. 167, 180 n.8, 871 P.2d 279, 287 n.8 (1994); *Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1341 (11th Cir 2000) ("The scope and effect of admissions . . . is a matter for determination by the

trial court, in the exercise of its broad discretion."). The decision was logical and within the range of options open to the court.[3]

1. The District Court Could Have Allowed Complete Withdrawal of the Rule 36 Response

The district court would have been justified in allowing Andrea to simply withdraw the admission altogether, which would have deprived plaintiff of using it at all. Because the operation of Rule 36 can be "draconian" and "unduly harsh" in its conclusive operation, trial courts have broad discretion to allow their withdrawal or amendment liberally[4]:

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[3] *U.S. v. Isaacs*, 593 F.3d 517, 525 (7th Cir. 2010) ("A district court abuses its discretion only when the Court of Appeals can say that the trial judge chose an option that was not within the range of permissible options"); *U.S. v. Tolai*, 728 F.3d 932, 937 (9th Cir. 2013) (district court abuses discretion if its application of the legal standard is illogical, implausible, or without support in inferences that may be drawn from the facts in the record).

[4] *Houston v. Houston*, 834 N.E.2d 297 (Mass. Ct. App. 2005) ("Because the Rule's effect in any given case may be unduly harsh, . . . the ability of the judge to exert an ameliorating influence is essential to avoid a result in which form triumphs over substance."); *DeBlanc v. Stancil*, 814 So. 2d 796, 801–02 (Miss. 2002) ("While Rule 36 is to be applied as written, it is not intended to be applied in Draconian fashion."); *see* 8B C.A. WRIGHT, A.R. MILLER, & R.L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2252, at 323 (3d ed. 2010) (with regard to Fed. R. Civ. P. 36, "technical considerations will not be allowed to prevail to the detriment of substantial justice").

> [T]he court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

NRCP 36(b). That discretion is particularly important considering the general policy favoring adjudication on the merits,[5] as well as the danger that "admissions" in response to Rule 36 requests for admission can lead to adjudication based on falsities.[6] There is no time limit, moreover, to request leave to withdraw a Rule 36 response. *See* NRCP 36(b).

The court had sound basis to allow complete withdrawal of the Rule 36 response. First, and most importantly, the response was simply not true. *See Fallini*, 386 P.3d at 626 (2016) (Rule 36 "seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice"); *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007). Andrea never permitted Jared to drive her vehicle that day,

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[5] *See generally Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (discussing public policy favoring adjudication on the merits).

[6] *See Estate of Adams ex rel. Adams v. Fallini*, 132 Nev., Adv. Op. 81, 386 P.3d 621, 626 (2016) (reliance on an admitted false fact constituted fraud on the court).

expressly or impliedly. (*See above*.) Second, the response was sent by Andrea's first attorney in error, without her input. (24 App. 5944.) Andrea herself consistently denied giving Jared permission—in her interrogatory response (R. App. 111, 115), in her answer to the amended complaint (1 App. 25:11, 29, 31:9), in both of her depositions (*id*. 66, 166), in her attempt to correct the Rule 36 response (*id* at 164), and at trial. Third, the parties had proceeded for years in the litigation as though permissive use were a disputed issue, notwithstanding the Rule 36 response. While plaintiff may contend that any question about the admission had been moot in light of the sanction imposing permissive use, the (December 2, 2014) motion for sanctions was filed almost *two-and-a-half years* after Andrea denied giving permission in her June 15, 2012 interrogatory response (2 App. 392; R. App. 111); almost two years after she served her answer to the amended complaint, in which she denied giving permission (1 App. 29; 2 App. 392); fifteen months after her first deposition (1 App. 61; 2 App. 392); and six weeks after she purported to correct the Rule 36 response (1 App. 64; 2 App. 392) and sat for her second deposition (1 App. 166). Plaintiff's counsel never even mentioned the Rule 36 response during either of Andrea's depositions.

(1 App. 61-95; 1 App. 116 to 2 App. 391.) Put simply, plaintiff had allowed Andrea to believe the Rule 36 response was not the final word on permissive use.

2. It Was Reasonable for the Court to Allow Plaintiff to Use the Rule 36 Response as a Party Statement

As the district court would have been within its discretion to allow formal withdrawal of the Rule 36 response, which would have precluded plaintiff from using it at all, the court was gracious to merely relegate it to the status of an interrogatory response. That approach is not uncommon. *See, e.g.*, *Dependahl v. Falstaff Brewing Corp.,* 491 F. Supp. 1188, 1194 (E.D. Mo. 1980) (where plaintiffs were fully aware throughout course of litigation that defendants denied substance of "admissions" and admissions went "to very heart of plaintiffs' claims,"… court would consider admissions "as evidence in case" but would not consider "matters included therein as conclusively established against defendants"), *aff'd in part, rev'd in part on other grounds*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968 (1981). The district court permitted plaintiff to introduce the Rule 36 response as a prior statement by Andrea so the jury could weigh the inconsistency and,

ultimately, Andrea's credibility. (9 App. 21522.) The court also allowed plaintiff to examine Andrea about the claims file. (23 App. 5722-43.)

While the district court did not articulate the rationale above expressly—declining to give the Rule 36 response preclusive or conclusive effect in lieu of inviting Andrea to move for leave to formally withdraw the response and then granting such request—it is appropriate to surmise that analysis from the discussion that did take place (9 App. 2135-42, 2150-51) and the surrounding events. *Imperial Credit v. Eighth Judicial Dist. Court*, 130 Nev. 558, 563, 331 P.3d 862, 866 (2014) ("the district court's discretionary power is subject only to the test of reasonableness, which requires a determination of whether there is logic and justification for the result"); 5 C.J.S. *Appeal and Error* § 908 (2019 update) ("An appellate court will generally make all reasonable presumptions to the effect that the discretionary powers of the trial court have been exercised properly, correctly, or without abuse."). Even if the district court was not thinking along these lines, however, "[t]his Court will affirm the order of the district court if it reached the correct result albeit for different reasons." *Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012).

B. Plaintiff Could Not Rely on the Harsh Technicality of Rule 36(b) While Invoking it Incorrectly at Trial

Because the operation of Rule 36 can be "draconian" and "unduly harsh" in its conclusive operation (*see above*), courts do not hesitate to curb that harsh effect whenever the procedure is abused[7] or parties attempting to rely on admissions fail to use them correctly within the rules of procedure and evidence. Here, whether inadvertently or for strategic reasons, plaintiff did not use the Rule 36 response at trial in the manner necessary for the Court to give it conclusive effect, nor even attempt to do so to preserve an issue for appeal.

1. Plaintiff Sat Silently on the Rule 36 Response During Her Case-in-Chief

Plaintiff did not take the action necessary for Andrea's admission to have a conclusive effect as substantive evidence—introducing it during her case-in-chief. "Admissions obtained may be offered into evidence, but their admissibility is subject to evidentiary principles." *Baughman v. Collins*, 740 A.2d 491, 495 (Conn. Ct. App. 1999). And "a party wishing to rely on admissions must place them in evidence during the *presentation of its case*. Failure to do so is tantamount to a waiver."

[7] *See e.g., Fallini*, 132 Nev., Adv. Op. 81, 386 P.3d at 626.

Farrands v. Melanson, 438 A.2d 910, 912 (Me. 1981) (emphasis added); *see also TransiLift Equip., Ltd. v. Cunningham*, 360 S.E.2d 183 (Va. 1987); *Avant Inc. v. Polaroid Corp.*, 441 F. Supp. 898, 900 (D. Mass. 1977), *aff'd*, 572 F.2d 889, 892 (1st Cir.), *cert. denied*, 439 U.S. 837 (1978). *See also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2264 (1970 & Supp. 1986).

Plaintiff chose not to admit or even refer to the Rule 36 response before she rested her case-in-chief, even though she called Andrea during her case-in-chief and actively elicited testimony regarding the issue of permissive use. (23 App. 5722-43.)

After resting her case-in-chief, it was too late for plaintiff to offer the Rule 36 response as affirmative evidence in support of her claims, even under the guise of rebuttal evidence. "Rebuttal evidence is that which explains, repels, contradicts, or disproves evidence introduced by a defendant during his case in chief." *Morrison v. Air Cal.*, 101 Nev. 233, 235-36, 699 P.2d 600, 602 (1985). "The general rule for determining whether certain rebuttal evidence is proper is 'whether it tends to counteract new matters by the adverse party.'" *Id.* (quoting *McGee v. Burlington N., Inc.*, 571 P.2d 784, 792 (Mont. 1977)). Here, Andrea's

direct examination during her case-in-chief (24 App. 5838-82) did not make the Rule 36 response any more relevant than it had already been during her previous testimony in plaintiff's case-in-chief (23 App. 5722-43) wherein she repeatedly denied giving Jared permission to use her vehicle (23 App. 5724-27).[8]

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[8] Plaintiff also never moved to reopen her case-in-chief to offer the Rule 36 response in support of claims, which would have been necessary to introduce it for that purpose after resting. *See* NRS 16.090(2), (3) ("When the jury has been sworn, the trial must proceed in the following order, unless the judge for special reasons otherwise directs . . . The plaintiff and defendant shall then each offer the evidence upon his or her part. [And then] the parties may then respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permits them to offer evidence upon their original case."); *Zasucha v. Allen*, 56 Nev. 339, 343, 51 P.2d 1029, 1030 (1935) (a party has no right to reopen its case after having rested, but on motion the court may permit the party to do so). The district court had discretion to grant any such request. *Hilton Hotels Corp. v. Butch Lewis Prod.*, 107 Nev. 226, 808 P.2d 919 (1991).

That was not an oversight by plaintiff. When plaintiff eventually raised the Rule 36 response during Andrea's case in chief, and Andrea's attorney formally moved to withdraw it under NRCP 36(b), plaintiff's experienced trial counsel persuaded the district court to deny withdrawal on the basis that it was too late do so because plaintiff had rested. In other words, plaintiff seemed to believe that the closing of her case-in-chief prevented Andrea from formally moving to amend her Rule 36 response. (24 App. 5893 (MR. ROBERTS: . . . It's too late now. We have already rested our case in chief. After we rest our case in chief, it's too late to seek relief from an admission that's binding and conclusive as a matter of law.)). Thus, it seems plaintiff deliberately chose to avoid taking the action that would have been necessary to introduce Andrea's admission into plaintiff's case.

2. Plaintiff Never Objected to Testimony that Was Contrary to the Rule 36 Response

Plaintiff never objected when Andrea testified in direct contradiction of the content of the requested admission—not even once to make a record for appeal .[9] (23 App. 5722-43.) "A party waives his right to rely on the conclusive effect of responses to requests for admissions when he permits the party who made the responses to testify at trial, without objection, contrary to his responses." *TransiLift Equipment, Ltd.*, 360 S.E.2d at 187; *see Larson v. Fazzino*, 582 A.2d 179, 181–82 (Conn. 1990) (requested admission would not be given conclusive effect where propounding party did not object during trial to testimony that "was directly opposite to the preclusive effect of the admissions that the plaintiff subsequently sought to have held against

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[9] Plaintiff's counsel also said nothing when Andrea's counsel said during opening statements that

> [Jared] took the car without her knowing it, without her permission. As a matter of fact, she had earlier in the day had him go out to the care to something from it, but did not give permission to use the car whatsoever. So there was certainly no implied or express permission for him to use the car on the day of the incident.

(11 App. 2629.) This, too, constituted waiver. *See Rish v. Simao*, 132 Nev. 189, 368 P.3d 1203, 1210 (2016) (failure to object during opening statement contributed to waiver).

the defendants"); *Farrands*, 438 A.2d at 912 (failure to introduce into evidence facts deemed admitted by unanswered requests for admissions tantamount to waiver); *S. Kemble Fischer Realty v. Board of Appeals*, 402 N.E.2d 100, 101-02 (Mass. App. Ct. 1980) (party who wishes to rely upon facts admitted in responses to request for admissions must introduce those facts into the record and bring them to attention of trial judge); *Foellmi v. Smith*, 112 N.W.2d 712, 719-20 (Wis. 1962) (party waived right to rely on facts deemed admitted because party did not ground objection on claim that contrary testimony was precluded by a late response to a notice to admit); 75 AM. JUR. 2D *Trial* § 338 (updated 2018) ("A party waives the right to rely upon an opponent's deemed admissions unless an objection is made to the introduction of evidence contrary to those admissions.").

Beyond electing not to object when Andrea contradicted the Rule 36 response, plaintiff's counsel himself elicited testimony from Andrea during plaintiff's case-in-chief that contradicted it:

> Q. [MR. ROBERTS:] And did you know that Jared was going to drive your vehicle that afternoon?
>
> A. No.

> Q. Had he asked you to drive your vehicle that afternoon?
>
> A. I don't remember if he asked me that afternoon. Had he asked me other times? Yes.
>
> Q. And you had let him drive at other times?
>
> A. No. No. Because he asked for something doesn't mean I agreed to it.
>
> * * *
>
> Q. I'm asking just this: In the past on a regular basis, had you given Jared permission to drive your car?
>
> A. Not on a regular basis.

(23 App. 5727-28.) That election waived any contention that plaintiff was entitled to use the Rule 36 response for preclusive or conclusive effect.

3. The Jurors Followed their Instructions, and Plaintiff Waived Any Argument that they Did Not

The jury was properly instructed that although Andrea was presumed to have given Jared permission to use her car on the day of the subject accident, the jury was free to determine that Andrea rebutted that presumption. (*See* 4 App. 979.) The jury was expressly at liberty to determine that Andrea had not given Jared permission:

> An owner of a motor vehicle is liable for any damages proximately resulting from the negligence of an immediate family member in driving and operating the vehicle upon a highway with the owner's express or implied permission.
>
> As advised in these instructions, Defendant Jared Awerbach was negligent and caused the accident that give rise to this case. You must then ***determine whether or not*** he was driving with the express or implied permission of Defendant Andrea Awerbach.
>
> ***If you find*** that Defendant Jared Awerbach did ***not have such permission***, then your verdict must be in favor of Defendant Andrea Awerbach.
>
> But if you find that such permission, express or implied, had been given, you must find Defendant Andrea Awerbach also liable.

(4 App. 980.) That factual determination was part of the jury's verdict:

> 5. Did Defendant Andrea Awerbach give express or implied permission to Defendant Jared Awerbach to use her vehicle on January 2, 2011?
>
> YES _____ NO _____

(4 App. 999.)

Plaintiff now suggests that a separate instruction "*required* the jury to find permissive use as a result of Andrea's Admission" (AOB at 20), alluding to grounds for a new trial for the jury's disregard of instructions under Rule 59(a)(5). The oblique reference to Rule 59 cannot justify overturning the jury's verdict fails for three reasons:

First, plaintiff does not actually advance this position as an issue on appeal. Plaintiff did not argue the point in her motion for new trial and does not make it one of her issues presented. (5 App. 1001-30; AOB at x.) She has waived it. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Second, plaintiff did not object to Instructions 31 and 32 or Interrogatory 5 on the verdict form, all making it clear that the jury was free to determine that Andrea had not permitted Jared to use her car. There was overwhelming evidence to support the jury's factual finding, and plaintiff's failure to object to these instructions and the verdict form defeats any argument for a new trial. *See* NRCP 51(c)(1) ("A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.").

Third, Instruction 14 did *not* require the jury to disregard the other instructions and find permissive use. That instruction does not actually state—much less make it clear to lay jurors—that it applies to responses provided by a party's former attorney: "You will regard as being conclusively proved all such matters of fact which were expressly

admitted *by the Defendant, Andrea Awerbach*, or which Defendant, Andrea Awerbach, failed to deny." (4 App. 962 (emphasis added).) Plaintiff did not object to this vague wording. And in any case, plaintiff never introduced in her case the admission that Instruction No. 14 even arguably requires the jury to deem conclusive. Plaintiff has forfeited any contention that the jury ignored that instruction.

II.

THE DISTRICT COURT HAD AUTHORITY AND GOOD REASON TO MODIFY THE PREVIOUS SANCTION ORDER

The district court acted within its discretion[10] when it modified the interlocutory sanction order to account for the order's unforeseen impact on plaintiff's claim for punitive damages. The result was just. And plaintiff was not genuinely prejudiced.

A. The District Court Had Authority to Modify the Sanction Ruling When Problematic Complexities Concerning Punitive Damages Became Apparent

The district court acted within its discretion when it modified the sanction order. *See AA Primo Builders, LLC v. Washington*, 126 Nev.

[10] This Court reviews a district court's imposition of discovery sanctions for an abuse of discretion. *See Mona v. Eighth Judicial Dist. Court*, 132 Nev. Adv. Op. 72, 380 P.3d 836, 840 (2016); *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).

578, 589, 245 P.3d 1190, 1197 (2010) (the district court's decision to grant a motion for reconsideration is reviewed for abuse of discretion).

1. The Court Had Authority to Modify the Pretrial Order Issued by the Previous Judge, even Sua Sponte*, Upon Due Consideration*

The district court's order modifying the sanction order was procedurally appropriate. The district court remains free to reconsider any interlocutory order prior to entry of final judgment. *See* NRCP 54; *Ins. Co. of the W. v. Gibson Tile Co.*, 122 Nev. 455, 466, 134 P.3d 698, 705 n. 4 (2006) (per Maupin, J., concurring) ("the district court is empowered to correct erroneous rulings at any time prior to the entry of final judgment"). "A court could not operate successfully under the requirement of infallibility in its interim rulings." *People v. Castello*, 77 Cal. Rptr. 2d 314, 319 (Cal. App. 1998). Trial judges also may reconsider a prior ruling *sua sponte*; they "need not be chained to erroneous rulings until a party urges reconsideration." *Martinez v. State*, 336 S.W.3d 338, 342 (Tex. App. 2010); *see Anderson v. Anderson*, 544 A.2d 501, 506 (Pa. Super. 1988); *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 196 P.3d 588, 596 (Utah 2008).

Trial judges may reconsider decisions of previous judges on the case, moreover, not just their own. *See Gibson Tile Co*., 122 Nev. at 466, 134 P.3d at 705 n. 4 ("I realize that the judge who tried the matter below inherited her predecessor's erroneous ruling on the indemnity claim. However, the district court is empowered to correct erroneous rulings . . ."); *In re Estate of Jones*, 287 P.3d 610 (Wash. App. 2012) ("where a case is transferred to a new judge at the same court, the transferee judge is not foreclosed from revisiting a ruling the previous judge made"). "Were it otherwise, a trial judge would have no authority to reconsider a prior ruling or correct a prior mistake but would have to memorialize the original ruling in a judgment in order for an appellate court to correct the problem." *Estate of Jones*, 287 P.3d at 610.

2. Judge Weise Did Not Need Permission from Judge Allf to Modify Pretrial Rulings in the Case

Judge Wiese did not require any request from, or permission of, the prior judge in the case to modify the sanction. Plaintiff's reliance on Rule 18(1) of the Nevada District Court Rules ("DCR") is misplaced. By their own terms, the default DCR do not apply where local rules of particular districts supplant them:

> These rules cover the practice and procedure in all actions in the district courts of all districts where no local rule covering the same subject has been approved by the supreme court. Local rules which are approved for a particular judicial district shall be applied in each instance whether they are the same as or inconsistent with these rules.

DCR 5. The applicable rule in the Eighth Judicial District is EDCR 7.10, which limits interference by judges "other than the assigned judge" to the case. Nothing precludes a subsequent judge rightfully assigned to the same case from reevaluating prior decisions as appropriate. *Gibson Tile Co.*, 122 Nev. at 466 n.4, 134 P.3d at 705 n.4. Indeed, that is the most sensible interpretation even of DCR 18(1). *See Rohlfing v. Second Judicial Dist. Court*, 106 Nev. 902, 906, 803 P.2d 659, 662 (1990) (DCR 18 does not preclude a subsequent judge in the same case from disagreeing with the prior judge and reversing course in that matter).[11]

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[11] Even if *State v. Babayan* applied in this case, it would not undermine Judge Wiese's modification of the sanctions order. The *Babayan* Court was addressing in dicta the impropriety of the second judge overruling a particular finding of fact and conclusion of law by the prior judge, as opposed to the ultimate remedy ordered. *State v. Babayan*, 106 Nev. 155, 164, 787 P.2d 805, 813 (1990) ("we observe that Judge Whitehead's order addressed only whether the District Attorney's Office was under the influence and control of civil attorneys"). The *Babayan* Court ultimately affirmed that aspect of the second judge's ruling (dismissal of

Plaintiff contends that "a successor district court may reconsider a previously decided issue only if 'substantially different evidence is subsequently introduced, or the decision is clearly erroneous'." (AOB at 21, quoting *Masonry & Tile Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941, P.2d 486, 489 (1997)). Yet, those limitations are "designed to conserve the court's resources by constraining litigants who would attempt to bring the same motion over and over. On the other hand, these same judicial resources would be wasted if the court could not, on its own motion, review and change its interim rulings." *Darling, Hall & Rae v. Kritt*, 89 Cal. Rptr. 2d 676, 682 (Cal. App. 1999), *as modified on denial of reh'g* (Oct. 26, 1999).

Thus, reconsideration may be appropriate "[a]lthough the facts and the law [are] unchanged [if] the judge [is] more familiar with the case by the time the second motion [is] heard, and [is] persuaded by the rationale of the newly cited authority." *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 218, 606 P.2d 1095, 1097 (1980). The district court may correct course:

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criminal indictments) that purportedly conflicted with the determination of the first judge. *Id.*

> . . . when (1) the matter is presented in a "different light" or under "different circumstances"; (2) there has been a change in the governing law; (3) a party offers new evidence; (4) "manifest injustice" will result if the court does not reconsider the prior ruling; (5) a court needs to correct its own errors; or (6) an issue was inadequately briefed when first contemplated by the court.

Wasatch Oil & Gas, LLC v. Reott, 263 P.3d 391, 396 (Utah Ct. App. 2011). The court need only exercise due consideration before modifying, amending, or revoking its prior orders. *Kritt*, 89 Cal. Rptr. 2d at 682.

3. The Court Was Correctly Concerned about Andrea's Right to Contest Fully Plaintiff's Claim for Punitive Damages

Judge Wiese amended the sanction order only after careful consideration. As trial approached and he heard Andrea's motion for summary judgment on punitive damages, the judge contemplated how a definitive finding of permissive use would devastate Andrea's ability to defend herself against plaintiff's allegation of implied malice (2 R. App. 421-433). Modification became appropriate for a couple reasons:

First, Judge Wiese was considering a particular implication of the sanction for the first time. Judge Allf had not considered the effect of the sanction on Andrea's ability to defend against punitive damages. She told Judge Wiese that she hadn't. (9 App. 2152-54.) Neither of her

orders regarding the sanction address the potential impact on punitive damages. (3 App. 625, 3 App. 642.) The effect of the sanction on punitive damages was not discussed in the sanctions briefing (*see, e.g.*, 2 App. 392, 3 App. 630) or during arguments (1 R. App. 20:20-38:21).

Second, Judge Wiese recognized that the impact of a definitive finding of permissive use on punitive damages—which could quadruple the judgment (*see* NRS 42.005(1))—had to be considered in its own right.[12] Punitive damages are qualitatively different from compensatory damages, going to punishment rather than compensation. They are thus quasi-criminal penalties. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (stating that punitive damages "serve the same purposes as criminal penalties"); *Austin v. Stokes-Craven Holding Corp.*, 691 S.E.2d 135, 150 (S.C. 2010) ("[P]unitive damages are quasi-criminal in nature."); *George Grubbs Enters., Inc. v. Bien*, 900 S.W.2d 337, 339 (Tex. 1995) ("In contrast to compensatory damages, exemplary damages rest on justifications similar to those for

[12] In the best tradition of the judiciary, judging includes "never failing, each time, to take at least one fresh look": to "see it fresh," "see it as it works," "see it clean," and "come back to make sure." KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 293, 510 (1960), quoted in David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 600 (2001).

criminal punishment."). And, because punitive damages impose punishment akin to criminal sanctions, there are "heightened due process considerations surrounding punitive damages awards" under the Fourteenth Amendment. *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1036 (C.D. Cal. 2009).[13] Thus, the showing of malice based on conscious disregard is an issue of constitutional dimension. *See generally, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

Even where a district court strikes an answer, the impact on punitive damages must be assessed carefully. "A plaintiff is never entitled to punitive damages as a matter of right, their allowance or

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[13] *See also Campbell*, 538 U.S. at 417 (basing the Court's decision on the fact that "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding[, which] increases our concerns over the imprecise manner in which punitive damages systems are administered"); *George Grubbs,* 900 S.W.2d at 339 ("Because exemplary damages resemble criminal punishment, they require appropriate substantive and procedural safeguards to minimize the risk of unjust punishment."); *Austin*, 691 S.E.2d at 150 ("Because punitive damages are quasi-criminal in nature, the process of assessing punitive damages is subject to the protections of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.").

denial rests entirely in the discretion of the trier of fact." *Nev. Cement Co. v. Lemler*, 89 Nev. 447, 451, 514 P.2d 1180, 1182 (1973); *Ramada Inns v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (1985). In the case of defaults, courts are particularly concerned that defendants be permitted to fully defend against punitive damages claims because such damages "are not favored in the law" to begin with. *Cf. Moldon v. Reid*, 558 N.E.2d 239, 244 (Ill. Ct. App. 1990) (defendant against whom ex parte judgment was entered was entitled to contest issue of damages, "particularly punitive damages"); *Nettles v. MacMillan Petroleum Corp.*, 37 S.E.2d 134, 135 (S.C. 1946) (reversible error in awarding punitive damages by default without aid of a jury).

The district court, therefore, had good reason to pause and evaluate whether a definitive finding of "permissive use" would be an appropriate sanction *as applied* in a trial where punitive damages were sought:

> As trial approached, defense counsel requested on several occasions that the Court allow Defendant the opportunity to tell the jury what she believed to be the "truth," about permissive use, even though there was a finding by the Court that "permissive use" was established as a matter of law. The Court was not inclined to disturb the prior findings and orders of Judge Allf, but the Court was faced with the dilemma

> that Judge Allf's prior Order not only established "permission" by Andrea Awerbach to Jared Awerbach, but it also essentially established an element of the Plaintiff's claim for punitive damages against Andrea Awerbach, without allowing Ms. Awerbach the opportunity to explain herself. This Court was not comfortable with such a finding, especially as it applied to the punitive damages claim.

(4 App. 946:16-25.)

Finally, Judge Weise had a right to consider the distinction between the actions of an attorney and the client in the context of discovery sanctions. *Compare Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93, 787 P.2d at 780 (discussing necessary consideration of "whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney"), *with Huckabay Properties, Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 208, 322 P.3d 429, 437 (2014) (failure of an attorney to adhere to a filing deadline is imputed to the client). Here, the discovery sanction had been issued—harshly—for the acts of Andrea's former counsel, not for anything Andrea had done. In other words, the actor who committed the sanctionable misconduct was no longer in the case. In light of Andrea's own innocence, her retention of new counsel, the lack of prejudice, and the specter of punitive damages, the district court acted within it discretion by modifying that sanction.

4. Judge Weiss's Conversation with Judge Allf was Harmless

This Court should not set aside a jury's verdict merely because a trial judge reached out for a quick conversation with the previous judge on the case. To begin with, plaintiff's contention defies common sense. Although Judge Allf recused herself because of perceived bias, that alleged bias was against one of the Jared's defense attorneys, not against plaintiff's counsel nor Andrea's counsel. (3 App. 650.) As the sanction order did not concern Jared, there is no reason to suppose that Judge Allf's comments were tainted by bias.

Even assuming the district court ought not to have asked judge Allf about her intention when issuing the sanction order, however, Judge Weise made clear that his decision would have been the same regardless of his brief conversation with Judge Allf:

> Regardless of whether or not this Court contacted Judge Allf or Not, and regardless of what her opinion or intention was, this Court believes that it is more "fair" to all involved parties, to modify Judge Allf's prior Order, and instead of "permissive use" being established as a matter of law, this Court will impose a Rebuttable Presumption that "permissive use" is established against Andrea Awerbach.

(4 App. 947:2.). Because Judge Weise arrived at his decision independently, there was no prejudice. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 844, 963 P.2d 465, 478–79 (1998) ("Judge Mosley did not rely on his conversation with Judge Thompson in deciding to [the motion]; Judge Mosley heard testimony from all parties on the issue and reviewed the transcript [of the earlier hearing]. Judge Mosley's independent review of the pleadings, affidavits, and testimony could have formed the basis of his decision"). The irregularity, if any, was harmless.

B. Plaintiff Suffered No Undue Prejudice

Plaintiff contends that she "was unquestionably prejudiced by the untimely and improper overturning of the permissive use sanction." (AOB at 26.) That's not so. Prejudice entails fundamental injustice in the proceeding or a deprivation of a party's substantial rights,[14] and

[14] NRCP 61 ("Unless justice requires otherwise, no error in admitting or excluding evidence—or any other error by the court or a party—is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."); *Goldman v. Nev. Comm'n on Judicial Discipline*, 108 Nev. 251, 290, 830 P.2d 107, 132 (1992) (genuine prejudice entails threat to the fundamental fairness of proceedings), *disapproved on other grounds by In re Fine*, 116 Nev.

calls for showing that but for the district court's error, a different result probably would have been reached. *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008). Here, plaintiff was not deprived of any fundamental right, and she incurred no actual prejudice by way of the district court rulings. In fact, plaintiff was given accommodation after accommodation to deal with the court's ruling, but plaintiff sat on her rights and did nothing. Plaintiff is not entitled to a new trial.

1. The Court Provided Due Process

This is not a circumstance of unfair surprise affecting a fundamental right. *Cf. Gordon v. Geiger*, 402 P.3d 671, 674–75 (Nev. 2017) (the district court's *sua sponte* order violated due process because it concerned the "fundamental right concerning child custody" and became "effective immediately following announcement at a hearing"). Plaintiff had no right to benefit from a sanction at all, much less the particular sanction of a definitive finding of permissive use (that, because it was false, was causing injustice to Andrea). There is no

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1001, 13 P.3d 400 (2000).

"substantial right" to avoid proving one's case on the merits and prevail by way of a sanction order.

Nor was plaintiff prejudiced merely because the district court modified a pretrial ruling during the early stage of trial. As the district court remains free to modify or correct interlocutory orders at any time before entry of final judgment (*Gibson Tile Co.*, 122 Nev. at 466 n.4, 134 P.3d at 705 n.4), such changes themselves do not constitute prejudice. *Martinez v. State*, 336 S.W.3d 338, 341–42 (Tex. App. 2010) ("a party predicts or relies on a trial court ruling at his or her peril").

The change, moreover, was relatively minor. The district court merely reduced the severity of the sanction, from a definitive finding to a rebuttable presumption, which still placed the burden of proof on Andrea to disprove permissive use. Ordinarily, such a strict punishment is reserved for cases when the sanctioned party has spoliated evidence. *See Bass-Davis v. Davis*, 122 Nev. 442, 449, 134 P.3d 103, 107 (2006) (rebuttable presumption appropriate in cases of willful *destruction* of evidence); *cf., Johnny Ribeiro Bldg., Inc.*, 106 Nev. at 93, 787 P.2d at 780 (discussing public policy favoring adjudication on the merits). Here, where the misconduct was a former attorney's

imprudent redaction of a file—and plaintiff eventually obtained it without redaction—even the modified sanction was severe.

2. Plaintiff Rejected the Court's Offer of Expedited Discovery to Ameliorate Any Prejudice and Never Requested Alternative Accommodations

Plaintiff also was not genuinely prejudiced by the timing.

First, she had plenty of notice and opportunity to be heard. The parties knew for more than a week before the district court announced its decision that it had been considering Andrea's request to somehow contest permissible use, having taken the issue under advisement at the conclusion of a hearing on January 28, 2016. (2 R. App. 430, 434). The judge informed the parties of the decision on the first day of *voir dire*, four days before opening statements when the decision might possibly begin to affect the trial. Then, after the court announced its decision, the judge allowed plaintiff an opportunity to dissuade him by accepting briefs and graciously entertaining repetitious oral argument. (*See above*.)

Second, the district court pressed plaintiff to specify what additional discovery or other accommodations she would require to ameliorate the inconvenience caused by the recency of the modification

order. The judge granted both of the requests that plaintiff made—to depose again the insurance adjuster *and* Andrea—only to see plaintiff's counsel eventually forgo those accommodations. (*See above*.)

Ultimately, there was no prejudice, which is why plaintiff specifies none in her opening brief. The jury was permitted to weigh the relevant notes from the claims file, and found them innocuous. Andrea's testimony was foreseeable: the simple truth that she told throughout the litigation. Plaintiff received a trial that was more than fair, as Andrea was forced to overcome a rebuttable presumption of permissive use. The jury simply believed Andrea.

CONCLUSION

For these reasons, this Court should affirm the judgment.

Dated this 25th day of February, 2019.

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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 complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 11,061 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 25th day of February, 2019.

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